



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Not Reportable

Case no: CA & R 62/2024

In the matter between:

JOHN ROSS CROSSBERY HENDERSON

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Henderson v The State* (Case no CA & R 62/2024) (05 March 2025)

Coram: Tyuthuza AJ

Heard: 19 February 2025

Delivered: 05 March 2025

JUDGMENT- BAIL APPEAL

Tyuthuza AJ

INTRODUCTION

[1] This is an appeal against the dismissal of the appellant's application to be released on bail, pending trial by the Magistrate Kimberley on 18 December 2024.

[2] It is common cause that the applicant launched his second bail application based on alleged new facts in November 2024, after his first bail application was dismissed in October 2024. The applicant was represented at both bail hearings.

[3] The appellant, a 38 year old male person is facing charges of: Count 1, Premeditated Murder, in that on or about 31 July 2024 at or near New Park in the District of Frances Baard, he unlawfully and intentionally killed one Jason Afrique. Count 2, Attempted Murder, in that on or about 31 July 2024, at or near New Park in the District of Frances Baard, he unlawfully and intentionally attempted to kill one Micayla Cheri Afrique by firing a shot at her. The appellant was arrested on 20 September 2024 and remains in custody.

FIRST BAIL APPLICATION:

[4] At the commencement of the first bail application on 26 September 2024, there was a dispute as to whether the bail application had to be adjudicated in terms of section 60(11)(a) or (b) of the Criminal Procedure Act 51 of 1977 ("the Act"). The court *a quo* eventually adjudicated the matter in terms of the provisions of section 60(11)(a) of the Act since it involved an offence referred to in Schedule 6 of the Act. Accordingly, there was a duty on the appellant to adduce evidence which would satisfy the court that "exceptional circumstances" exist which in the interests of justice permit his release.

[5] In the first bail application launched on 26 September 2024, the appellant adduced evidence by way of an affidavit regarding his personal circumstances. The averments contained in the affidavit are the following:

- 5.1. He is 38 years old.
- 5.2. He is residing in Rhodesdene Kimberley and has been at the same address for about four years.
- 5.3. He is not married.
- 5.4. He has four children aged 19, 13, 8 and 3 years.
- 5.5. He is self-employed and owns a guarding company.

- 5.6. His highest level of education is grade 12.
- 5.7. He is in good health besides having high blood pressure.
- 5.8. He has qualifications in advanced weapons training, crowd management, a national certificate in policing, PSIRA grade A, security management and physical and weapon training.
- 5.9. He has movable assets to the value of approximately R2 000 000.00 (two million rand), furniture and household goods of approximately R700 000.00 (seven hundred thousand rand).
- 5.10. He is charged with the crime of murder and attempted murder and intends to plead not guilty to the charges. He has been informed of the charges against him but has been advised that he does not have to deal with the merits.
- 5.11. He has no previous convictions.
- 5.12. He has no pending cases.
- 5.13. Should he be kept in custody he will not be able to make the necessary payments to statutory bodies, namely the bargaining council, PSIRA, Medical Scheme for Security Guards, and the UIF Compensation Commissioner.
- 5.14. He has to make payments to SARS and should he not make the necessary payments, it would render his company tax non-compliant. This would affect his family and children who are financially dependent on him.
- 5.15. He has 134 employees who are dependent on him for a salary on a monthly basis.
- 5.16. He would not be able to pay his maintenance timeously, as he is the only one providing for his children.
- 5.17. Should he be further incarcerated, invoicing or payment cannot be made without his digital devices.
- 5.18. His passport has been handed to the police.
- 5.19. He will not interfere with witnesses and would look for alternative accommodation if it is so ordered.
- 5.20. He is able to post bail in the amount of R 5000.00

[6] During this application, the learned Magistrate enquired from the appellant's counsel what the "exceptional circumstances" were, in light of the fact that it was not apparent in the applicant's affidavit? Counsel for the applicant responded as follows:

"Your worship, we are requesting that the information that was requested to take into consideration were I read into record, that the accused person has, his statutory obligations.

The number of families that he is responsible for. The prejudice that he would suffer should he be further incarcerated. Those are exceptional circumstances that we would like to refer to and want the court to take into consideration for the bail application."

[7] The state opposed the bail application and presented the *viva voce* evidence of the investigating officer, Mr Sebegilwe. From his evidence, it appeared that:

- 7.1. the state believes it has a strong case against the applicant. The police when attending to the crime scene, found 10 cartridges around the vehicle and a cell phone laying next to the vehicle on the passenger's side. Fingerprints were collected from the cell phone and they were positively identified as the applicant's fingerprints. As a result, the applicant was linked to the crime scene.
- 7.2. The cell phone found on the scene was reported stolen on 1 August 2024 by the applicant at the Kimberley Police Station. According to the applicant's statement, he lost the cell phone on 31 July 2024 at 22:00 at an Engen Garage in Schmidtsdrift Road, Kimberley.
- 7.3. He testified that he attended to the Engen Garage to investigate further and check the video footage. According to the video footage, the applicant arrived at the said Engen Garage on 31 July 2024 at 22:26, after dropping someone off at by the street opposite the Engen garage. Inside the garage, the applicant walked around and did not buy anything, he left the store and drove away.
- 7.4. He testified that it is his view that the applicant opened the case to stage the theft of his cell phone at the Engen Garage after realising that his cell phone was lost at the crime scene.
- 7.5. He further testified that he believed that the applicant's life was in danger, as members of the community had signed a petition, wherein they opposed the granting of bail.
- 7.6. He testified that he interviewed the victim (Ms Micalya Afrique) to enquire how she would feel if the applicant was granted bail, she deposed to an affidavit in opposition of bail. In her affidavit, she stated that it is clear to her that the applicant did everything in his power not to be detected and would continue to do so. The firearm used to injure her and kill her husband has not been traced, and the applicant would be the only person with access thereto. The applicant is able to and would at any stage come back to kill her as she is the only witness in this matter. She has suffered severe psychological trauma and has since had severe panic attacks and seen a

psychologist. She has been hiding since the incident and lives in constant fear of being attacked again.

- 7.7. He further testified that the investigation into the matter has not been finalised, that there is a possible suspect that they are still tracing and that he is still awaiting the blood results.
- 7.8. He furthermore testified that the accused had been involved in another crime, a business robbery case, where firearms were also used and stood trial in Galeshewe Court. The matter was removed from the court roll but is still with the DPP for a decision on whether the matter will continue on the transcripts or it will start afresh in light of the fact that the presiding magistrate passed away.

Findings of the court a quo – first bail application:

[8] The court *a quo*, after hearing the evidence presented on behalf of the applicant and the state, found that upon evaluating the strength of the state's evidence, the state has a *prima facie* case against the applicant. The evidence which linked the applicant to the offence was found on the crime scene, next to the deceased vehicle and the evidence was positively identified as the applicant's. The learned magistrate also found that the state witness was a good witness and a reliable source of information, whilst the applicant did not take the court into his confidence and chose to remain silent on the merits of the case and failed to provide any exceptional circumstances in his affidavit.

[9] That court considered section 60(4) of the Act¹, it found that the applicant will stand trial as he has fixed employment, a fixed address and family ties in Kimberley. There was

¹ Section 60(4) of the Criminal Procedure Act provides as follows:

The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

- (a). Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;
- (b). where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
- (c). where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- (d). where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or
- (e). where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

thus no evidence that he would evade trial. In a further analysis of the considerations under section 60(4), that court found that if the applicant were to be released on bail, he would endanger the safety of the public or any person or will commit another schedule 1 offence. The court considered the following evidence: the identity of the witness is known to the applicant, the applicant is aware of the savaged vehicle's whereabouts and its registration, the applicant is aware of where the surviving victim resides and the name of the witnesses. It is against this backdrop that the court found that it would not be in the interests of justice to release him on bail.

[10] It was further found that the applicant failed to discharge the onus and to prove that there were exceptional circumstances which existed and that it was in the interests of justice to release him. The bail application was refused.

SECOND BAIL APPLICATION:

[11] On 28 November 2024, the applicant launched his second bail application based on new evidence. According to the notice of application for bail, the applicant sought to present new evidence in relation to the circumstances at the scene of the crime when the applicant visited the scene.

[12] During this bail application, the applicant adduced *viva voca* evidence in support of his application on new facts. The evidence presented also consisted of a crime scene sketch plan drawn by the applicant, a media statement by the South African Police Service in relation to the approximate time when the incident occurred and evidence by his father, Mr Ross Kirby Henderson.

[13] The applicant testified that he went to the crime scene as he heard on the radio that there was an incident in Black Street, New Park. That he is a director of a security company, and whilst on duty on 31 July 2024, the radio call came in as he was patrolling the New Park area. Whilst driving down Black Street, he saw an ER 24 ambulance and decided to stop because there were a couple of vehicles at the scene. He testified that the area was not cordoned off and police were not stopping people from going onto the crime scene. He got out of the vehicle and moved towards the crime scene, he saw people on the scene including a police officer whom he used to work with in the police and other police officers. He had a discussion with the owner of Hardcore Security, who was also on the scene. He

later testified that the owner of Hardcore Security was Mr Shaun Daniels, the father to the second complainant.

[14] He testified that there were things laying around the scene, including hotdog containers which lay close to the bakkie and a Coke Can. He eventually left the scene to continue with his patrols. He testified that he did not know what happened to the deceased's vehicle and whether it had cameras installed in it.

[15] Under cross examination, he testified that he submitted an affidavit in pursuance of his first bail application and confirmed that the content thereof was correct and that he was not unduly influenced. He further confirmed that he did not wish to deal with the merits of his case at the first bail application and was waiting for an opportunity to present his case. He further testified that he could not recall what time he received the message on the radio regarding the incident or how long he had been at the scene.

[16] Mr Ross Kirby Henderson, the appellant's father, testified that he received information that his son's cellphone was found on the scene of a murder, approximately three days after the incident happened. On 22 September 2024, it came to his attention that the Toyota Hi-Lux vehicle, in which the deceased was shot, had been taken in for repairs, as it was handed back to the deceased's wife by the police. On the 23rd of September 2024, he was informed that the vehicle was at PC Struwig Panelbeaters. He attended at the said panel beaters and found the vehicle there, already repaired. He took pictures of the vehicle's exterior, which pictures he handed to the appellant's advocate during the first bail application. On 28 October 2024, he was informed that the vehicle was handed to the deceased's wife on 17 August 2024.

[17] He testified that whilst the windscreen of the vehicle was not damaged, the passenger and driver's side window were both shattered. There were damages that indicated that the shots were fired from inside the vehicle. He testified that this was new information, as there was no evidence regarding the damages to the vehicle in the first application.

[18] He further testified that he was refused the job card for the repairs and further refused access to the vehicle as per the instructions from the police. He testified that the

police disposed of the vehicle two weeks after the incident and that action deprived the person who is charged of his right to have the vehicle inspected and was a contravention of the South African Police Service National Instruction 8 of 2017.

[19] He testified that on 28 October 2024, he received information that a police official, Donna Palm, allegedly picked up the impunged cellphone on the scene and had access to the information thereon whilst she had no expertise or authority to gain access to the cellphone. He also received information on 28 October 2024, that the vehicle was fitted with dash cameras.

[20] Under cross examination, he refused to divulge details of his alleged informant and maintained that he did not want to place his or her life in danger. He only stated that the person is an employee of PC Struwig Panelbeaters and that his or her identity of his would be revealed at trial.

[21] He also testified that the deceased wife's family sold their business and relocated to Cape Town.

[22] The state presented the evidence of Ms Lotter vide an affidavit. According to her affidavit deposed to on 17 December 2024, she is employed as a warrant officer in the Northern Cape Provincial Organised Crime Investigation Unit. She has 38 years of experience in the South African Police Service. She was assigned this matter during October 2024 and is fully informed about the status of the investigation and the evidence against the applicant.

[23] She further attested that the facts in the affidavit are within her personal knowledge. On 28 October 2024, the matter was postponed due to the applicant having indicated that he intended to apply for bail on new facts. The presentation of the new facts was done on 28 November 2024. In response to these new facts, she attests that: The applicant was not on the scene as purported in his testimony and was only there earlier to commit the crime on the night in question. None of the state witnesses saw the applicant on the scene or had any conversation with him. The crime scene was cordoned off and secured by police officials. No shots had been fired from inside the vehicle. The police statement, the time stipulated in the initial bail application correspond. There was no time discrepancy. The vehicle was released to the complainant and has since been repaired. That these repairs

took place after SAPS did the necessary and required assessments and investigations on the vehicle. That there were no dashcams in the vehicle. That the testimony of Mr Henderson was inaccurate. The applicant's firearm which was taken from him upon the arrest has been sent for ballistic analysis. It is not true that the applicant was ill-advised by his previous legal representative in the first bail application. It is so since the said legal practitioner is seasoned with past experience as a prosecutor and district court manager. Sergeant Donna Palm was not on the scene of the crime and at no point had access to the applicant's phone. Nothing in the affidavit or the testimonies of the applicant's case were new facts.

[24] The applicant did not object to the state's request to adduce its evidence by way of an affidavit.

Findings of the court a quo – second bail application:

[25] In his judgment on the bail application on new facts, the learned magistrate found that the applicant's evidence fails to explain how his cellular phone ended up on the scene, next to the vehicle. On his own evidence, he was about 17 meters away from the vehicle. He further found that the applicant failed to challenge the evidence of the investigating officer regarding the loss of his cellphone an hour and half later. The court found that the argument raised by the applicant regarding the timeline being obscured and destroying the state's *prima facie* evidence did not hold any water and the court could not find that the evidence now adduced changes the position as it was from the first application. The court dealt with the evidence from Mr Ross Kirby Henderson regarding the presence of dashcams in the vehicle and found that the investigating officer who had access to the contents of the docket, and statements of the Local Criminal Record Centre officials who inspected the vehicle, indicated that the vehicle was not fitted with dashcams. The court weighed up the evidence of the investigating officer against the evidence of Mr Henderson and found that albeit both evidence being hearsay, the evidence of Ms Lotter was more reliable as it could be substantiated by confirmation of another police officer from whom she gained the information from studying the docket. The court found that the evidence regarding the dashcam in the vehicle was hearsay evidence that could not be proven and the court could not attach weight thereto.

[26] The court found that the applicant could not provide it with a time of his visitation of the crime scene and the probabilities were that the scene was already inspected by the police officials and that the items the applicant saw there might have been blown there by the wind or other means. The court further found that there was a contradiction between the evidence from the applicant and that of the state regarding the presence of Donna Palm at the scene and her having found the cellphone, the court found that the applicant failed to confirm this evidence having had the onus to prove this matter. The court accepted the state's version on a balance of probabilities that Donna Palm was not on the crime scene and did not handle the cellphone on the day in question as alleged. The court found the fact that the vehicle was returned to the owner and the fact that the applicant was deprived of having his own experts examine the vehicle, were facts that were raised and canvassed in the first bail application and therefore not new facts. The court found that it is clear that the evidence presented before the court did not constitute new facts that would prompt it to take into consideration for the purposes of determining whether the appellant should be granted bail or whether he has succeeded to prove existence of exceptional circumstances. Resultantly, the appellant's second bail application was dismissed.

Grounds of appeal

[27] The applicant launched this appeal against the second bail judgment. According to the notice to appeal dated 19 December 2024, the appellant brings this appeal on eleven grounds. These grounds are that the Magistrate erred and/or misdirected himself in the following:

- 27.1. *by finding that the appellant had not introduced new facts in the bail application;*
- 27.2. *by finding that the respondent has a prima facie case against the appellant;*
- 27.3. *by finding that the appellant had failed to present a prima facie case that would lead to his acquittal;*
- 27.4. *by finding that there are no discrepancies in the respondent's case regarding the picking up of the cell phone and the established timeline on the scene;*
- 27.5. *in not finding that the timeline of events do not support the finding of the cell phone at 20h30 on 31 July 2024 on the crime scene;*
- 27.6. *although the Court correctly found that the Plan (Exhibit K) and the Key (Exhibit L) were new facts, no finding was made regarding the presence of the appellant on the scene and what he testified about;*

- 27.7. *in finding that the appellant gave no evidence how his cell phone ended up on the crime scene;*
- 27.8. *by finding that the Media Statement (Exhibit J) were not new facts, and that the timeline in Exhibit J further contradicts the respondent's timeline as to when the cell phone was picked up;*
- 27.9. *by accepting the affidavit of WA Lotter in that there were no cameras in the cab of the bakkie. Her affidavit is based on hearsay, and that the evidence of Ross Kirby Henderson, who testified in court under oath based on hearsay regarding the cameras was rejected;*
- 27.10. *by finding that the appellant failed to present exceptional circumstances before Court that entitled the appellant to be granted bail;*
- 27.11. *The cell phone of the appellant that was found at the crime scene, is all the evidence that the respondent has that links the appellant to the crime. That it has failed to find that the cell phone could not have been picked up at 20h30 on 31 July 2024. The incident happened at 20h30. The deceased's wife called her father. He arrived at 20h43 and was the first person on the scene. The police was only contacted afterwards.*

[28] On 17 January 2025, the appellant filed supplementary grounds of appeal wherein further grounds of appeal were raised, that the court *a quo* erred and/or misdirected itself in the following: -

- 28.1. *In not finding that the evidence that the complainant in count 2 has left Kimberley and has relocated to Cape Town, was a new fact.*
- 28.2. *In finding that the closest timeline that the court could find is that the complainant in the second count and her husband (the deceased) had left from where they had visited her parental home at about 20h10 that evening. That she then phoned her father at 20h40 to inform him about the incident.*
- 28.3. *For not making a finding whether the court would allow the Appellant's request that his evidence regarding his visit to the crime scene would be allowed as new evidence.*
- 28.4. *To expect that the appellant should have submitted a confirmatory affidavit as well.*
- 28.5. *By not discussing the evidence of the witness RK Henderson and give reasons why it was rejected.*

- 28.6. *By not discussing the provisions of Section 60(4) of the Criminal Procedure Act 51 of 1977, in particular, Section 60(4)(a) and (c).*
- 28.7. *By not finding that the way the police dealt with the "bakkie", an important Exhibit, created exceptional circumstances in that:*
 - 28.7.1. *the Exhibit was handed back to the deceased's wife;*
 - 28.7.2. *the appellant was not contacted with regard to the police's intention to release the Exhibit from the SAP13.*
 - 28.7.3. *after the Exhibit was released and taken to the panel beater, the police issued an instruction that access to the Exhibit be denied.*
 - 28.7.4. *no finding was made regarding the opposition received from the panel beaters and no comments made regarding Exhibit 'O', the letter from Taylor Inc and the evidence by RK Henderson in this regard.*
- 28.8. *In not finding that the further evidence by the Appellant was not new evidence:*
 - 28.8.1. *the fact that Donna Palm was at the crime scene and picked up the cellphone;*
 - 28.8.2. *the fact that there was a dashcam in the bakkie;*
 - 28.8.3. *the fact that shots were fired from the inside of the bakkie and that more than 10 shots were fired on the scene.*
- 28.9. *That the decision by the Honourable Court in denying bail was wrong.*

[29] During the hearing of the bail appeal Mr. Robertson for the appellant, conceded that not all the grounds raised in the notice of appeal constituted new facts and that some of the grounds raised in the supplementary notice of appeal were a duplication.

[30] He highlighted the facts which are relevant for purposes of these proceedings as the following: the evidence regarding the dash camera in the bakkie; the evidence in relation to the shots that were fired from inside the bakkie and that more than ten shots were fired on the scene; the evidence that the complainant in count 2 has left Kimberley and has relocated to Cape Town; the evidence that the vehicle, an important exhibit was released, repaired and handed back to the deceased wife; the evidence that access to the vehicle was denied; and the fact that the media statement (Exhibit J), the time therein and the contradiction with the state's timeline as to when the cellphone was picked up.

[31] At the outset of the hearing, counsel for the respondent Adv Barnard submitted that the appeal was an attack on the findings of the second bail application based on new facts

and was not an attack on the court *a quo*'s findings in the first refusal of bail, in light thereof, the findings in the first application ought to stand.

BRIEF STATEMENT OF THE LAW

[32] The appellant stands charged with offences which fall within the ambit of Schedule 6 of the Act, and thus section 60(11) (a) of the Act is applicable.

[33] Section 60(11)(a) of the Act provides as follows:

*"Notwithstanding any provision of this Act, where an accused is charged with an offence-referred to in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, **adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.**"*

[34] The onus, therefore, is borne by the appellant to establish, on a balance of probabilities that exceptional circumstances exist which in the interests of justice permit his release from detention.²

[35] Regarding the meaning and interpretation of "exceptional circumstances" in the context of section 60(11)(a) of the Act, the court, in *S v Petersen* 2008 (2) SACR 355 (C), observed as follows:

"[55] On the meaning and interpretation of 'exceptional circumstances' in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration.

² *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* [1999] ZACC 8 (3 June 1999); 1999 (2) SACR 51 (CC); *S v Rudolph* 2010 (1) SACR 262 (SCA) para 9; *S v Ehrlich* 2003 (1) SACR 43 (SCA) para 1; see also *S v Scott-Crossley* 2007 (2) SACR 470 (SCA) para 4.

[56] *In the context of s 60(11)(a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for a certain measure of flexibility in the judicial approach to the question. In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all the applicable legal criteria.*” (footnotes omitted).

[36] In *S v Scott-Crossley* 2007 (2) SACR 470 (SCA), the Court concluded that the appellant's personal circumstances were “commonplace and not out of the ordinary” and none of them constituted exceptional circumstances. It was this finding that inevitably led to the conclusion that the appellant had not discharged the *onus* put upon him by s 60(11) of the Act. Albeit in the context of bail pending appeal, it has been held, that even prospects of success did not in itself amount to exceptional circumstances as envisaged by the Act – thus the Court has to consider all relevant factors and determine whether individually or cumulatively they constituted exceptional circumstances which would justify the appellant's release.³ Dismissing the argument that the term “exceptional circumstances” was somewhat vague, Kriegler J, writing for the unanimous Court observed as follows: “... I am not persuaded that there is any validity in the complaint raised in argument that the term 'exceptional circumstances' is so vague that an applicant for bail does not know what it is that has to be established. An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant, or anything else that is particularly cogent. ...”⁴

[37] Bail appeals to this Court are dealt with in accordance with section 65 of the Act. In terms of section 65(4) of the Act: “*The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.*”

³ *S v Scott-Crossley* 2007 (2) SACR 470 (SCA) para 7; see also *S v Mathebula* 2010 (1) SACR 55 (SCA) para 15.

⁴ *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* (supra) fn 2, para 75.

[38] In *S v Barber* 1979 (4) SA 218 (D)⁵, Hefer J stated in regard to the court of appeal's power to interfere with the court a quo's findings as follows:

"It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly."

This approach was endorsed in various subsequent cases.⁶ However, in *S v Porthen and Others* 2004 (2) SACR 242 (C)⁷, Binns-Ward AJ expressed the view that interference on appeal was not confined to misdirection in the exercise of discretion in the narrow sense. The court hearing the appeal should be at liberty to undertake its own analysis of the evidence in considering whether the appellant has discharged the onus resting upon him or her in terms of s 60(11) (a) of the Act.⁸

[39] In *Director of Public Prosecutions, Limpopo v Molope and Another*⁹, the Supreme Court of Appeal held that, as a court of appeal, its "*function is not to seek to discover reasons adverse to the conclusions of the trial judge . . . It is true that no judgment is perfect and all-embracing, but it does not necessarily follow that, because certain aspects were not mentioned in the judgment, they were not considered. . . .*"¹⁰

[40] It was held in *Chewe v The State*¹¹, "this appeal is advanced against the refusal of bail by the court having heard the initial and subsequent [bail on new facts] application. *The task of this court is merely to ascertain whether the court of first instance exercised its mind*

⁵ at 220E-F.

⁶ *S v Nqumashe* 2001 (2) SACR 310 (NC) para 20 ; *S v Branco* 2002 (1) SACR 531 (W) at 533 i ; and *S v Porthen and Others* 2004 (2) SACR 242 (C) paras 3 – 7.

⁷ para 16

⁸ See also *S v Petersen* 2008 (2) SACR 355 (C) para 62.

⁹ 2020 (2) SACR 343 (SCA) para 55.

¹⁰ See also *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A) at 678 ('Principle 12').

¹¹ (unreported case A702/2015 GDP-26/10/2015) para 21; see also *Hamesi v S* (BA18/2023) [2023] ZALMPPHC 100 (25 October 2023) para 6.

*judicially and correctly. In this regard I am enjoined to follow the approach laid down by the court in S v Barber. . . .*¹²

[41] As alluded to above, the appellant brought his second bail application based on 'new facts'. In *S v Mpofana*¹³ the court explained the approach to be taken in applications for bail based on new facts as follows: *"In considering an application for bail allegedly brought on the strength of new facts, the court's approach is to consider whether there are, in the first instance, new facts and, if there are, reconsider the bail application on such new facts, against the background of the old facts."*

[42] In *S v Yanta*¹⁴ the court stated as follows:

"The CPA does not prescribe or define what constitutes new facts and there is no prescribed procedure for renewed bail applications, but it appears with reference to case law, that certain general principles have been identified as relevant, when a court is faced with an application for an accused's release on bail based on new facts. These can be summarised as:

Whether the facts came to light after the bail was refused. Such facts can include circumstances which have changed since the first bail application was brought, such as the period that an accused had been incarcerated;

Whether the facts are 'sufficiently different in character' from the facts presented at the earlier unsuccessful bail application, in the sense that it should not simply be a 'reshuffling of old evidence';

Whether the alleged new fact(s) are relevant in the sense that, if received by the court, it would per se, or together with other facts already before the court from the initial bail application, assist the court to consider the release of an accused afresh;

A court hearing an application based on alleged new facts must determine, with reference to the evidence previously presented in the unsuccessful bail application, whether such facts are indeed new. In S v Mpofana 1998 (1) SACR 40 (Tk) at 44 G-45A Mbenenge AJ (as he then was) explained that — "whilst the new application is not merely an extension of the initial one, the court which entertains the new application should come to a conclusion after considering whether, viewed in the light of the facts that were placed before court in the initial application, there are new facts warranting the granting of the bail application"; and

¹² *Supra* (Footnote omitted).

¹³ 1998 (1) SACR 40 at 44G–I.

¹⁴ (CC44/2021) [2023] ZAWCHC 23 (1 March 2023); 2023 (2) SACR 387 (WCC) para 15.

Where evidence was known and available to a bail applicant, but not presented by him at the time of his earlier application, such evidence can generally not be relied upon, for purposes of a renewed bail application, as 'new facts'. In this regard it was explained in S v Le Roux en andere 1995 (2) SACR 613 (W) at 622 that, in the absence of such a rule, there could be an abuse of process leading to unnecessary and repeated bail applications, and that an accused should not be permitted to seek bail on several successive occasions by relying on the piecemeal presentation of evidence."

[43] In *S v Petersen*¹⁵ the court further set out that in determining a bail application on new facts, the court must be satisfied that the facts are indeed new and secondly, that they are relevant for purposes of the new bail application. They must not constitute "simply a reshuffling of old evidence or an embroidering upon it".

[44] In the matter of *S v Mathebula* 2010 (1) SACR 55 (SCA), the Supreme Court of Appeal remarked as follows: "But a State case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge. . . ."¹⁶

Application of the law to the appeal:

[45] As alluded to above, during its submissions counsel for the appellant highlighted the alleged new facts which are relevant for purposes of these proceedings. I will deal with these.

[46] An alleged new fact was that more than ten shots were fired during the incident and that these shots were fired from inside the vehicle. This evidence was presented at the second bail hearing by Mr. Ross Kirby Henderson, which evidence was disputed by the State. According to Mr. Henderson, until 23 September 2024, he was unaware of where the vehicle had been taken to and found out then that it was taken for repairs. He attended at the panel beaters and found that the vehicle had indeed been repaired, he took pictures of the vehicle's exterior and handed the pictures to the appellant's legal representative

¹⁵ 2008 (2) SACR 355 (C) para 57.

¹⁶ Para 12.

during the first bail application. He indicated that the fact that he was informed about shots being fired from inside the cabin of the vehicle was new information in that there was initially no indication of the damages done to the vehicle at the first bail application. He indicated that he was later provided with pictures of the inside of the vehicle, where it shows that the panels were removed.

[47] Whilst it might be so that the evidence regarding the shots fired from inside the cabin of the vehicle might be new evidence, which was not presented at the first bail application, in deciding whether this evidence is a new fact, I also need to consider the relevance of this information for purposes of the bail hearing. The appellant was aware that the vehicle was fixed and released at the first hearing and this issue was canvassed extensively during those proceedings. The fact that the appellant has now been informed that shots were fired from the inside of the vehicle is not relevant for these bail proceedings and is evidence that must be canvassed at trial.

[48] In relation to the evidence regarding the dashcam, Mr. Henderson testified that this information only came to his attention on 28 October 2024, after the first bail application and that it was information which he obtained from someone who was employed at the panel beaters. He, however, did not disclose whom this person was. This evidence was not corroborated. He testified that he did not see the dashcams upon his inspection of the vehicle.

[49] The evidence of Ms. Lotter was presented by the State, she is the investigating officer with access to the docket and the statements of the officials who inspected the vehicle and confirmed that the vehicle was not fitted with dashcams. Despite the fact that this evidence was adduced by affidavit, I cannot find that the court *a quo* erred in finding that the evidence of the investigating officer who had access to the contents of the dockets, statements of the Local Criminal Record Centre Officials who were on the scene and inspected the vehicle, is more reliable as it can be substantiated by confirmation of another police officer. At this stage, the existence of the dash cams is only hearsay evidence which the appellant could not verify at the hearing. Mr. Henderson himself stated that he did not see any dash cams and did not take any photos of the vehicle inside. In the circumstances, he is not able to verify the information which he obtained.

[50] The evidence that the vehicle, an important exhibit was released, repaired and handed back to the deceased's wife was also advanced as a new fact which the court should consider. During the first application, the investigating officer testified that the vehicle was released and handed back to the surviving victim. The investigating officer also confirmed that the vehicle was fixed. It was submitted that the return of the vehicle to the deceased's wife is an exceptional circumstance, which the court should take into consideration. That it is so since the appellant did not get a chance to inspect the vehicle and is prejudiced as a result thereof. The investigating officer confirmed that the ballistic experts did the investigations on the vehicle. This evidence was not new and as alluded to above, was dealt with in the first application.

[51] Another alleged new fact raised was the fact that the appellant's father was refused access to the vehicle. He testified that they were intending on obtaining a private, independent investigator to have a look at the vehicle. The state confirmed that investigations were done on the vehicle and that such information is available from its experts, thus the fact that the appellant's father was refused access to the vehicle is not relevant for purposes of the bail application. I do not regard this evidence as a new fact that is relevant for purposes of the second bail application.

[52] The evidence of a media statement by the South African Police Service exhibit J, regarding the approximate time the incident occurred was a new fact. According to exhibit J, the incident occurred at 21:00, the appellant submits that it would have been impossible for the cellphone to have been picked up at 20:30 and this shows that the appellant will be acquitted at the end of the trial. The evidence regarding the cellphone was traversed in the first bail application. At no stage then did the appellant inform the court that he was at the scene or challenge the evidence led regarding the time it was picked or the evidence led regarding him staging the loss of his phone. The appellant revealed in the second bail application that he was at the scene. On his own version there was a probability that his cell phone would have been found on the scene. The intricacies around how, when and by whom it was found is an issue to be traversed at the trial and not relevant for the bail proceedings.

[53] The appellant also presented evidence that the family of the deceased's wife sold the business and relocated to Cape Town. It was submitted on behalf of the appellant that the fact that the said family left Kimberley meant that there was no immediate threat on the

body or the person of the complainant, and further that there could be no influence or intimidation of the witnesses. In the first application, the appellant undertook not to interfere with any witnesses, not to communicate with any witnesses and that he would not interfere with any further investigations. It became apparent after the first hearing that the complainant is currently the only witness. The fact that the appellant is aware of her whereabouts, the sale of their family business and their relocation to Cape Town is concerning. This new fact should be considered within the confines of section 60(4) of the Act.

[54] During the appeal hearing, the appellant referred me to a recent judgment of this Division, to wit: *Ferris v Khumalo and Another*¹⁷ (*Ferris*), wherein the Court dealt with certain factors to which the Magistrate should have attached sufficient weight to and as a result, held that the Magistrate misdirected himself and that it was in the interests of justice that the appellant be admitted to bail. Counsel for the respondent submitted that the *Ferris* matter is distinguishable from this matter, correctly so in my view.

[55] I find that this matter is distinguishable from the *Ferris* matter in the following respects:

55.1 The appellant is a 38-year-old businessman, whilst Mr. Ferris is a 67-year-old pensioner.

55.2 The appellant is in good health condition whilst the court notes that Mr. Ferris is an aging man who is discomforted by a shoulder and head injury sustained during the fracas and requires medical attention.

55.3 The appellant alleges that he attended to the scene because of a call on the radio, whilst in the *Ferris* matter, it was found that he was summoned to the scene by his daughter who was seemingly "in distress and in mortal danger."

55.4 The murder weapon used in this matter has still not been found, whereas the firearm used in *Ferris* was confiscated.

¹⁷ (CA&R 6/2025) [2025] ZANHC 14 (7 February 2025).

[56] In my view, the purpose of the appellant's second application for bail on alleged new facts was to correct an application which was not properly conducted in the first place, and further, to embroider upon the old evidence which was already presented and dealt with in the first application. Furthermore, the evidence presented at the second bail hearing was available to the appellant at the time of the previous application, but was not revealed, seemingly on incorrect advice to the appellant.

Whether the provisions of section 60(4) of the Act were considered:

[57] Section 35 of the Constitution of the Republic of South Africa provides protection for the rights of arrested, detained and accused persons. In terms of s 35(1)(f) of the Constitution, every arrested person has the right to be released from detention, subject to reasonable conditions, if the interests of justice so permit.

[58] Section 35 (1)(f) of the Constitution should be read with the provisions of s 60(1)(a) of the Act which provides that an accused person shall be entitled to be released on bail at any stage of proceedings prior to conviction, if the Court is satisfied that the interests of justice so permit.

[59] Whether or not the state has a *prima facie* case against the appellant is a subject to be tested during the trial. The impact of such *prima facie* evidence in a bail application should be seen to be minimized by lack of evidence that the appellant will contravene the provisions of section 60(4) of the Act.¹⁸

[60] In terms of Section 60(4) of the Act, the interests of justice do not permit the release of an accused person if one or more of the following grounds are, *inter alia* found to exist: (a) where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence; or (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or (c) where there is the likelihood that the accused, if he

¹⁸ See *Zwakala v S* (CA & R 10/23) [2023] ZANHC 20 (14 April 2023) para 85.

or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

[61] The court *a quo* made no finding as to whether the appellant, if he were released on bail, would endanger the safety of the public or any person, or would commit a Schedule 1 offence or whether he would attempt to influence or intimidate witnesses or to attempt or destroy evidence.

[62] Section 60(4)(a) must be read with section 60(5). The latter expressly stipulates as follows:

"in considering whether the grounds in subsection (4) (a) have been established, the court may, where applicable, take into account the following factors, namely- (a) the degree of violence towards others implicit in the charge against the accused; (b) any threat of violence which the accused may have made to a person against whom the offence in question was allegedly committed or any other person; (c) any resentment the accused is alleged to harbour against a person against whom the offence in question was allegedly committed or any other person; (d) any disposition to violence on the part of the accused, as is evident from his or her past conduct; (e) any disposition of the accused to commit- (i) offences referred to in Schedule 1; (ii) an offence against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998; or (iii) an offence referred to in- (aa) section 17 (1) (a) of the Domestic Violence Act, 1998; (bb) section 18 (1) (a) of the Protection from Harassment Act, 2011; or (cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, as is evident from his or her past conduct; (f) the prevalence of a particular type of offence; (g) any evidence that the accused previously committed an offence- (i) referred to in Schedule 1; (ii) against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998; or (iii) referred to in- (aa) section 17 (1) (a) of the Domestic Violence Act, 1998; (bb) section 18 (1) (a) of the Protection from Harassment Act, 2011; or (cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, while released on bail or placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998; or (h) any other factor which in the opinion of the court should be taken into account."

[63] A firearm was used in the commission of the offence. According to the evidence led in the court *a quo*, the attack on the deceased and the victim was extremely violent, ten shots or more were fired. The deceased suffered serious injuries to his head, upper body,

left arm and right hand. The deceased and his wife were enroute to their home and were shot in their driveway. Furthermore, evidence was led to the effect that the accused was previously involved in a business robbery where firearms were used. On his arrest, on 20 September 2024, the appellant was found with a firearm in his possession. The firearm used in the commission of this offence has still not been found. Recent media reports show that these types of offences where firearms are used have become prevalent in our community.

[64] The victim, Ms. Afrique, has deposed to an affidavit wherein she has expressed a fear that the accused is the only person with access to the firearm that was used and is able to, at any stage, come back to kill her. She lives in constant fear of being attacked again and has since gone into hiding. It is thus not surprising that the victim and her family have relocated to Cape Town and have sold their family business.

[65] Section 60(4)(c) must also be read with section 60(7). The latter expressly stipulates as follows:

"In considering whether the ground in subsection (4) (c) has been established, the court may, where applicable, take into account the following factors, namely-(a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her; (b) whether the witnesses have already made statements and agreed to testify; (c) whether the investigation against the accused has already been completed; (d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated; (e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be; (f) whether the accused has access to evidentiary material which is to be presented at his or her trial; (g) the ease with which evidentiary material could be concealed or destroyed; or (h) any other factor which in the opinion of the court should be taken into account."

[66] According to the evidence, the identity of the witness is known to the appellant and his father. The appellant and his father are aware of the witness and her family's whereabouts. They know the identity of the witness's father, who was the first person at the crime scene and is most likely to be called as a witness in the trial. The appellant's father testified that he is still busy with investigations and that he would get to the bottom of it. He further cast aspersions on the investigating officer and his commanding officer Colonel Bruwers. He confirmed that they had the details of the owner of the vehicle and that he is obtaining information from a person who is connected to the police. According to the

appellant's evidence, he was previously employed as a police officer for 9 years. He therefore he has police training. The appellant also knows people within the police and is aware of the processes in relation to investigations and the collection of evidence. Furthermore, the investigations are still ongoing, and a suspect is still at large. It appears from the evidence on record that the appellant's family is known in the community and his father has been involved in the legal fraternity for more than 50 years. He evidently has influence in the community and could interfere with the investigations, he has taken upon himself to "get to the bottom of this."

[67] Despite the appellant's undertaking not to interfere with any witnesses and not to communicate with any witnesses and not to interfere with any further investigations. I am not persuaded that the appellant will not attempt to influence or intimidate witnesses or to conceal or destroy evidence if he is released on bail. Moreover, I am not persuaded that the fears alluded to can be dealt with by way of stringent bail conditions.

[68] In terms of Section 60(9) of the Act, the court must also weigh the interests of justice against the right of the accused to his personal freedom and in particular the prejudice he is likely to suffer if he were to be detained in custody, taking into account, where applicable, the following factors; namely- the period for which the accused has already been in custody since his arrest; the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail; the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; any financial loss which the accused may suffer owing to his or her detention; any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; the state of health of the accused; or any other factor which in the opinion of the court should be taken into account.

CONCLUSION

[69] Having considered all the evidence before me, the submissions made in the appeal hearing and having considered the relevant case law, I am satisfied that the accused has not discharged the onus that rests upon him, as required by s 60(11)(a) of the Act.

[70] In the premise, I find that the accused failed to set out exceptional circumstances which warrant his release in the interests of justice. I find that the appellant's personal circumstances do not outweigh the interest of justice considerations.

[71] Consequently, the appeal stands to be dismissed.

ORDER

1. The appellant's appeal against the order by the court *a quo* refusing his application for bail on new facts is dismissed.



T TYUTHUZA
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

APPEARANCES:

On behalf of the Appellant:

Mr MH Robertson

On the instruction of:

Taylor Inc.

On behalf of the Respondent:

Adv TE Barnard

On the instruction of:

Office of the Director of Public Prosecutions