



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: A87/2025

In the matter between:

CHUMANI THYULU

First Appellant

BONGO VULA

Second Appellant

and

THE STATE

Respondent

Coram: **JONKER AJ**

Heard: 2 September 2025

Delivered: Electronically on 2 September 2025

JUDGMENT

JONKER AJ:

Introduction

[1] This appeal is against the magistrate's refusal of bail to two young men charged with serious violent crimes. The young appellants, aged 21 and 22 respectively, were arrested on 22 February 2025 and face charges of robbery with aggravating circumstances (count 1), unlawful possession of a firearm (count 2), and, in respect of the first appellant, unlawful possession of 13 rounds of ammunition (count 3).

[2] Following their arrest, the appellants applied for bail before the magistrate's court, Khayelitsha. On 19 March 2025, the learned magistrate refused the application, finding that the appellants had failed to discharge their burden under section 60(11)(a) of the Criminal Procedure Act 51 of 1977 ("the Act"). Specifically, the magistrate held that they had not established the exceptional circumstances required for bail in a schedule 6 matter.

[3] The legislative framework is clear and uncompromising: section 60(11)(a) mandates that where an accused faces a schedule 6 offence, bail shall not be granted unless the accused adduces evidence satisfying the court that exceptional circumstances exist which, in the interests of justice, permit release.

The appellants case

[4] The appellants placed their personal and other relevant circumstances before the court by means of an affidavit. The affidavits of the appellants mention their personal circumstances: they are 21 and 22 years of age respectively, both without previous convictions or pending cases. The first appellant is employed, and the second appellant is a student. They assert they have fixed addresses, are in relationships, and contribute to family support. Both appellants are young adults without criminal records or pending charges.

[5] They submit that their continued detention will prejudice their employment and studies, that prison conditions are harsh and overcrowded, and that they are not flight risks. They deny ownership or possession of the firearms allegedly found and maintain that they were attacked by members of the community before their arrest. They also dispute that they will be identified by the community members, pointing out

that no identity parade was conducted and that the arrest took place in an overpopulated area where the alleged offence occurred.

[6] They argue further that the case against them is weak, relying on the single evidence of the complainant in the robbery. They stress that there is no risk of interference with witnesses, most of whom are police officers, and that no strong opposition has come from the community regarding their release. Most significantly, the appellants fundamentally challenge the State's case. They deny any involvement in the alleged robbery and dispute ownership of the recovered firearms. They question the reliability of the identification evidence, noting the absence of a formal identity parade and the chaotic circumstances of their arrest in a densely populated area.

[7] Counsel for the appellants submitted that the magistrate misdirected himself by failing to place sufficient emphasis on the appellants age, their impressionable nature, and the fact that this was their first encounter with the law, while also underestimating the weakness of the state's case, as no stolen goods or firearms were found in their possession. Counsel further submitted that strict bail conditions could be imposed to mitigate any concerns, thereby ensuring that the interests of justice are upheld.

The state's case

[8] In response to the aforesaid affidavits filed on behalf of the appellants before the magistrate, the state presented an affidavit deposed to by the investigating officer on the basis of the seriousness of the charges, the alleged use of firearms, and the danger posed to the community. The complainant was robbed at gunpoint and positively identified the appellants. Two firearms were recovered in circumstances linking them to the appellants, though a third firearm remains missing. This missing firearm presents an ongoing threat to community safety and suggests that there is a possibility of evidence being destroyed and/or concealed.

[9] The magistrate in the court a quo correctly, so the state submits, dismissed their application, finding that the appellants had failed to discharge the onus under

section 60(11)(a). The magistrate emphasised the danger to the community, the seemingly easy access to firearms by the appellants, the possession by the appellants of firearms and the risk that evidence may be destroyed or concealed. The state submitted that the Magistrate was correct in the determination of the circumstances and even more so to deny bail.

Applicable Legal Principles

[10] Section 60(11)(a) of the Act provides that in respect of schedule 6 offences, bail shall not be granted unless the accused adduces evidence which satisfies the court that exceptional circumstances exist which, in the interests of justice, permit their release.

[11] In addition, because this matter comes before this Court as an appeal, section 65(4) of the Act is applicable. It provides:

“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.”

(My underlining)

[12] The powers of the appeal court are limited, and the court must be persuaded that the magistrate wrongly exercised his discretion. Even if the appeal court shares a different view, it cannot substitute its own view for that of the magistrate as that would be tantamount to an unfair interference with the magistrate’s discretion. The overriding consideration is whether the magistrate exercised his or her discretion wrongly.

[13] In *Barber*¹, Hefer J held:

¹ *S v Barber* 1979 (4) SA 218 (D) at 220 E – H.

“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.”

[14] The abovementioned approach has been approved in a number of decisions. In *Porthen*², Bins-Ward J held that:

“It is clear that the Appeal Court undertook its own analysis of the evidence and came to its own conclusion that the appellants had not discharged the onus on them in terms of s 60(11)(a) of the CPA”.

[15] The Magistrate must have misdirected himself in some material manner in relation to either fact or law and, in event of this being established, the appeal court can consider whether bail ought to have been refused or granted. In the absence hereof, the appeal must fail.

[16] It follows that the function of this Court is not to reconsider the bail application afresh, but to determine whether the magistrate’s refusal of bail was wrong. Only if that is established may this Court interfere.

[17] It is settled law that the concept of exceptional circumstances is not defined, however, in *S v H*³, it was observed that:

“Exceptional circumstances must be circumstances which are not found in the ordinary bail application but pertain peculiarly ... to an accused person’s specific application. What a court is called upon to do is examine all the

²*S v Porthen & others* 2004 (2) SACR 242 (C).

³ *S v H* 1999 (2) SACR 72 (W) at 77 E-F.

relevant considerations... as a whole, in deciding whether an accused person has established, something out of the ordinary or unusual which entitles him relief under section 60(11)."

[18] The courts have consistently held, and so the respondent argued, that circumstances such as youth, absence of prior convictions, employment, fixed residence, or family responsibilities are ordinary in nature and do not, without more, constitute exceptional circumstances.

[19] Exceptional circumstances must be circumstances which are not found in the ordinary bail application but pertain peculiarly to an accused person's specific application. What a court is called upon to do is to examine all the relevant considerations as a whole in deciding whether an accused has established something out of the ordinary or unusual which entitles him to a relief under section 60(11)(a) of CPA.

[20] In *Peterson*⁴ an attempt to define exceptional circumstances was made in the following words:

"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."

Evaluation

[21] The appellants are young, with clean criminal records. Their employment and studies would indeed suffer prejudice through continued incarceration. These are relevant factors, but they are not unusual in bail applications and cannot, without more, be elevated to "exceptional circumstances".

⁴ *S v Peterson* 2008 (2) SACR 355 (C) Para 55

[22] The charges are grave. Robbery with aggravating circumstances, particularly with firearms, remains one of the most serious crimes confronting the courts. The presence of multiple firearms, in the vicinity of the appellants, and the recovery of ammunition intensifies the seriousness. The magistrate correctly noted that a third firearm remains unaccounted for, and a risk remains that it can be disposed of or tampered with.

[23] The appellants also seek to rely on the alleged weakness of the state's case, pointing to disputed identification and the absence of an identity parade as an exceptional circumstance. While the merits of the state's evidence will ultimately be tested at trial, at this stage, the complainant maintains that the one appellant called him by name before the robbery, his version that the appellants robbed him with firearms, together with the recovery of firearms in close proximity to where the appellants were arrested, cannot be regarded as insubstantial. The existence of disputed evidence does not in itself amount to exceptional circumstances.

[24] While the magistrate incorrectly determined that the accused had actual possession of the firearm rather than mere proximity to it, this factual error does not constitute a material misdirection that would undermine the judgment. The legal distinction between physical possession and immediate proximity, though technically significant, is not determinative in the present circumstances. This error represents a minor factual inaccuracy that neither materially impacts the overall assessment of the evidence nor compromises the soundness of the magistrate's reasoning.

[25] The appellants themselves concede in their warning statements that they were together at the relevant time and location of the incident, which is consistent with the complainant's version of events. The discovery by the two arresting officers of firearms, in close proximity to where the appellants were apprehended, provides corroboration for the complainant's account as an eyewitness. This evidence, viewed cumulatively, supports the complainant's testimony regarding the circumstances of the alleged robbery involving the appellants and the presence of firearms at the scene.

[26] The appellants contend that they are not flight risks and could be subjected to strict bail conditions. While such measures may, in certain cases, reduce the risk of flight, they do not displace the statutory threshold set by section 60(11)(a). In matters involving schedule 6 offences, appellants must establish the existence of exceptional circumstances, and cannot rely solely on the absence of risk factors or on personal hardship. On the contrary, as the state argued, the appellants are young and without strong ties binding them to remain and stand trial. They present a potential threat to the complainant and to members of the community, and there is a real risk of witness intimidation. Their release would undermine public confidence in the administration of justice.

[27] The magistrate's decision reflects a proper understanding of both the legal requirements and the competing interests at stake. The magistrate's emphasis on community safety, the gravity of the charges, and the adequacy of the evidence demonstrates sound reasoning. While this Court is not insensitive to the personal hardships faced by the appellants, the law requires that their individual circumstances be weighed against broader societal interests especially in matters involving alleged armed violence.

Conclusion

[28] The appellants have failed to demonstrate exceptional circumstances which, in the interests of justice, permit their release on bail. The magistrate cannot be faulted. Their appeal accordingly cannot succeed.

Order

[29] The appeal is dismissed and bail is refused.

E JONKER
ACTING JUDGE OF THE HIGH COURT

Appearances:

For Appellants: Adv A Paries

For Respondent: Adv H van As