



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

Case No: A248/2025
Blue Downs Magistrates' Court Case No: BD1/173/2025

In the appeal between:

SISA TSHANGA TSHANGA

Appellant

and

THE STATE

Respondent

Hearing: 19 November 2025

Judgment: 19 November 2025

Summary: Bail appeal. When section 60(11) evidential burden applies.

ORDER

1. The appellant's appeal against the refusal of bail is dismissed.

JUDGMENT

Handed down by email to the parties on 19 November 2025

KANTOR, AJ:

1. The appellant is charged with murder, unlawful possession of a firearm and unlawful possession of ammunition.
2. He applied for bail in the Blue Downs Magistrates' Court. The application was dismissed on 24 April 2025.
3. He appeals against that decision to this court.
4. The murder charge is what is material to this bail appeal.

Whether section 60(11) is implicated

5. Much of the argument centred on whether the charge of murder resulted in the evidentiary burden on the appellant provided for in section 60(11) of the Criminal Procedure Act 51 of 1977 (the CPA).

6. Mr Van der Berg, who appeared for the appellant, argued that it did not. Mr Snyman, who appeared for the State, argued that it did.

7. In my view the answer to this issue is very simple.

8. The charge sheet in respect of the murder charge reads as follows:

"AND THAT the provision of Section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997, are applicable to the aforesaid charge in that the charge of Murder is listed in Part I of Schedule 2, more particularly in paragraph (d) under Murder, to wit that the Murder was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy."
[emphasis in the charge sheet]

9. The reference to section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA) is to a sub-section of the statutory provision in respect of **"Discretionary minimum sentences for certain serious offences"**. Section 51(1) reads as follows:

"Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life."

10. Part I of Schedule 2 includes the following:

"Murder, when— ...
(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy."

11. This is what was referred to in the extract from the charge sheet quoted above.

12. The same wording from Part I of Schedule 2 quoted above also appears in Schedule 6 of the CPA, which sets out the offences which attract the evidentiary burden in

section 60(11) of the CPA, the applicable portion of which provides in identical terms:

“Murder, when— ...

(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.”

13. Mr Van der Berg argued that section 60(11) did not apply because of the wording in the charge sheet, relying on S v Botha 2002 (1) SACR 222 (DCA) at paragraph 16, quoted as follows in his heads of argument with his translation and emphasis:

“[subsection 60(11)] is worded clearly and unambiguously and is susceptible to only one interpretation. That is that **the formulation of the charge in the indictment**, if necessary supplemented by a written confirmation [by the DPP] in terms of s 60(11)(A), *is decisive of the question whether an accused must discharge the onus ... in order to attain his release on bail.*”

14. Mr Van der Berg’s argument, further, was that:

“... save for an oblique reference to common purpose *in the context of advising appellant of applicable minimum sentencing provisions*, there were no allegations in the charge sheet which pointed to the application of Schedule 6.”

15. The ‘oblique reference’ to which Mr Van der Berg referred is the following wording in the charge sheet quoted above: “the Murder was committed by a person, group of persons or syndicate acting in the execution or furtherance of a **common purpose or conspiracy**.”
16. It is correct that this was mentioned in the charge sheet with specific reference to section 51(1) and Part 1 of Schedule 2 of the CLAA.
17. However, section 60(11) of the CPA provides as follows:

“Notwithstanding any provision of this Act, where an accused is charged with an offence

(a) 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; [my underlining]

18. This means that what is required for the implication of section 60(11) is for the accused to be charged with an offence '*referred to in Schedule for 6*'. It does not require a reference to Schedule 6 itself.
19. I have already shown that:
 - 19.1. The applicable wording of Part I of Schedule 2 of the CLAA and Schedule 6 of the CPA is in identical terms, namely "Murder, when- ... (d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy."; and that
 - 19.2. This wording appears in the charge sheet: "the Murder was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy."
20. Accordingly, the accused was charged with an offence '*referred to in Schedule for 6*' as required by section 60(11).
21. I am therefore of the view that section 60(11) is implicated and the bail appeal is to be considered in that paradigm.
22. I might add that the wording of the charge sheet left all concerned – the Magistrate, the Prosecutor and the appellant's counsel – under no illusion that a Schedule 6 offence was involved and that section 60(11) was implicated.

The statutory provisions in respect of bail relevant to this appeal

23. Section 35(1)(f) of the Constitution Act of 1996 provides as follows:

“Everyone who is arrested for allegedly committing an offence has the right ... (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.”

24. As mentioned, section 60(11) of the CPA provides as follows:—

“Notwithstanding any provision of this Act, where an accused is charged with an offence —

(a) 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;

25. In S v Dlamini & Others 1999 (2) SACR 51 (CC) the Constitutional Court held as follows at paragraph 79 in regard to the above statutory provisions:

“Section 60(11)(a) therefore does not create an onus where nothing of the kind existed before. It describes how it is to be discharged, and adds to its weight. As in the case of reliance on any other right in the Bill of Rights, if accused persons wish to rely on the provisions of s 35(1)(f), they must bring themselves within its ambit ... The court must be satisfied that ‘the interests of justice permit’ the release from detention ...”

26. In my view, this means that bail is only to be granted if the appellant satisfies the court that it is in the interests of justice for bail to be granted.

27. Section 60(4) and (5) of the CPA provide as follows:

“(4) 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.
 - (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; or
- (5) In considering whether the ground in subsection (4)(a) has 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;
 - ...
 - (h) any other factor which in the opinion of the court should be taken into account.”

The statutory provisions in respect of an appeal against the refusal of bail

28. Insofar as an appeal against the decision to refuse bail is concerned:

28.1. Section 65(4) of the CPA provides as follows:

“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;”

28.2. In order for an appeal court to interfere with the court a quo’s decision in a bail application, it must be satisfied that the value judgment and discretion to grant or refuse bail was exercised wrongly. In S v Barber 1979 (4) SA 218 (D) it was held as follows at 220 (see also Panayiotou v S (CA&R 06/2015) [2015] ZAECHGHC 73 (28 July 2015) at paragraph 27):

“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 wrongfully. 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 that 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.”

The material before the court a quo and evaluation

29. The following was amongst the material before the court a quo:

29.1. The appellant had previously been convicted of murder in 2016.

29.2. He has a pending Schedule 6 charge of Robbery Aggravating and Possession of Firearm originating from Franschhoek.

29.3. The incident in relation to the charge in the instant matter, on the State's version, concerns a murder co-ordinated between the appellant and others. In my view, such conduct indicates a person who would have no compunction against intimidating (or even killing) witnesses.

29.4. In his affidavit opposing bail, the investigating officer recorded that "*The fire arm, motor vehicle and other suspects is still outstanding in this matter which is crucial to the successful investigation in this criminal matter. Being granted bail, the [appellant] is most likely to communicate with the outstanding suspects to conceal and or destroy crucial evidence.*"

29.5. In his affidavit opposing bail, the investigating officer also recorded that "*The [appellant] was pointed out on the scene by a crucial witness, thus the identity of the witness is known to the [appellant], placing the life of the witness in danger if the [appellant] is granted bail.*"

30. The charge of an orchestrated brazen murder in daylight outside a police station could not be more at odds with, and is an anathema to, the *safety of the public, public order and public peace*, as contemplated in section 60(4)(a) and (e) of the CPA.

31. There is no obligation on the part of an applicant for bail to challenge the strength of the State's case. However, if he/she choose to do so, then the burden of proof is on the applicant for bail to show that there is a real likelihood of acquittal at trial, which requires 'convincing evidence' (*Panayiotou v S* (CA&R 06/2015) [2015])

ZAECGHC 73 (28 July 2015) at paragraph 56 and 57). In my view, this burden of proof has not been satisfied in this matter taking into account the following:

- 31.1. The appellant was on the scene at all material times when the murder was committed.
- 31.2. Upon arrival of the deceased at the police station, he pointed out the appellant *"as someone who should be watched by the driver"*.
- 31.3. The investigating officer recorded in his affidavit opposing bail that after the deceased went into the police station, the appellant *"... moved to the back of the parking area where the [appellant] is seen communicating with a White Renault that was parked in the main road, Brackenfell Boulevard"*. When the deceased exited the police station he was shot dead and the *"... unknown gunman is then seen running and jumping into the same vehicle that the [appellant] was in communication with earlier."* After the shooting, *"The "shooter" ran to the adjacent street, Brackenfell Boulevard, got into a white Renault and sped off."*
- 31.4. He had been on his cell phone during the incident and *"When confronted by the Traffic officer, the applicant is seen to attempt to damage his phone by throwing the floor [phone?] on the ground."* The two cell-phones which the appellant had in his possession were confiscated but he only provided the password to one of them.

- 31.5. He claimed that he had spoken with his girlfriend and provided proof of that in the form of a screenshot from her cell-phone. In my view, it is what was not provided that is of much more moment, namely a screen-shot from his cell-phone or some other form of record of cell phone activity to show that he did not speak to anyone else. I say this because, that he may have spoken with his girlfriend at the time, does not mean that he did not speak with someone else.
- 31.6. The appellant's reason for being at the police station is that he wished to have his CV certified by the police to take it to Shoprite: that begs numerous questions, such as why the CV was not provided, who he had arranged this with at Shoprite, why he was speaking with the persons in the white Renault, the identity of his cousin who was allegedly bringing the CVs, why he did not phone his cousin if he was not yet there but he phoned his girlfriend.
- 31.7. A factual aspect which I consider to be material and in the appellant's favour is that he did not leave after the shooting and stood and watched until told to move away. That aspect, together with what is raised by the appellant does not, however, in my view, establish that *"there is a real likelihood of acquittal at trial, which requires 'convincing evidence'" (Panayiotou)* and does not displace the various factors against the appellant considered above.
32. The appellant says he does not have any family outside of South Africa, a passport and the means or inclination to leave the country. That is in his favour.

33. The appellant has four dependants. That is also in his favour. However, it is watered down somewhat by the superficial manner in which this is stated ("*I am not married and have 4 dependents.*") and the paucity (in fact, absence) of information in regard thereto, such as that none of them are identified, what their ages are, whether they are family, the quality of his relationship with them, where they live and what he in fact provides.
34. It was argued that the appellant is self-employed, running a small car-wash business employing three others. This, however, was not in his affidavit and is therefore not evidence before this court or the court *a quo*.
35. There are some red flags when it comes to the appellant's residential address: In his affidavit in his application for bail, he recorded that he resides at an written out in handwriting when the affidavit was otherwise typed out. He had provided various different versions to the police as to where he resides, according to the investigating officer's affidavit. The appellant's girlfriend deposed to an affidavit in which she stated that they had been in a relationship for a year, but she did not know his address.
36. The appellant is not married.
37. On balance, in my view the factors in section 60(4)(a), (c), (d) and (e) have been established and the appellant has not satisfied "...the court that exceptional circumstances exist which in the interests of justice permit his or her release." As required by section 60(11). Although not considered by the court *a quo*, I also think that on the facts the risk of

flight cannot be discounted, but for the purposes of this judgment I need not comment further thereon.

Conclusion

38. In my view:

38.1. The refusal of bail by the court a quo cannot be regarded as wrong. On the contrary, I agree with the conclusion of the court a quo.

38.2. There is accordingly no room for interfering with the decision of the court a quo to refuse bail.

38.3. The appeal against the refusal of bail should be dismissed.

Order

39. The following order is granted in this appeal:

1. The appellant's appeal against the refusal of bail is dismissed.



A Kantor
Acting Judge of the High Court

Legal representatives:

For the appellant: Adv John van den Berg

Instructed by: Slabber, Levendal & Associates

For the respondent: Adv Leon Snyman