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

CASE NO: A279/25

In the matter between:

JODY JURY

APPELLANT

and

THE STATE

RESPONDENT

Coram: Acting Judge Gxashe

Heard: 02 February 2026

Delivered electronically on: 10 February 2026

Summary: Bail – Appeal against refusal of bail- factors to be taken into account- exceptional circumstances- section 60(11)(a) of the Criminal Procedure Act 51 of 1977- onus on the Applicant- to prove exceptional circumstances- section 60(2) and (3) of the Criminal Procedure Act finds no application - section 60(14) access

to a police docket in bail proceedings guarantees a right to a fair trial- section 60(9) of the Criminal Procedure Act-balancing between the accused right to his personal freedom and interests of the society-Appeal dismissed.

ORDER

Appeal dismissed.

JUDGMENT DELIVERED ELECTRONICALLY

GXASHE, AJ

Introduction

[1] This is an appeal against a judgment of the Magistrates' Court in Athlone which dismissed the Appellant's application to be released on bail. The Appellant was arrested with two others on charges of murder and attempted murder which fall under the category of Schedule 6 offences. On 09 July 2025, he brought a bail application before a bail court at the Magistrates' Court which was opposed by the State. His application was dismissed, hence this appeal. The appeal is opposed by the State.

The Appellant's case

[2] In support of his application, the Appellant deposed to an affidavit and stated as follows: he is a 26-year-old male, and a citizen of South Africa. He ordinarily resides at 2[...] H[...] Street, Beacon Valley, Mitchells Plain, with his parents. The said address has been his permanent residence for the past 20 years. His alternative address is 2[...] H[...]2 Street, Beacon Valley, Mitchells Plain. The Appellant is not married, and is in a

love relationship with Ashlin Henry. He attended school until grade 12 but he did not pass the grade. Before his arrest, he was employed at Turrim International as a digital printer and CSC cutter, earning R2 200.00 per week. He is blessed with 4 minor children who are between 4 to 2 years old, and is paying maintenance to their mothers weekly. He is also a sole provider for his chronically ill father who suffers from cardiac complications and his mother who was diagnosed with blood pressure and was released from hospital two weeks before he brought the bail application. He also provides for his two nieces who are 7 and 14 years old, respectively. He has no previous convictions, will plead not guilty, and elected to exercise his right to remain silent. The Appellant averred that there is no evidence nor any likelihood that he will threaten witnesses. He is not a flight risk and has no intention of absconding. In fact, he learnt from his mother that the police were looking for him. After that he handed himself over to the Manenberg Police Station. He does not possess any travelling documents and has good emotional and family ties in Mitchells Plain. He does not own any fixed property outside the country. He is not wealthy and has no financial means or documents to travel abroad. The Appellant further averred that the above establishes that his release on bail will not offend or cause harm to society or the integrity of the justice system in its broadest sense. According to him, the interests of justice warrant his release on bail.

[3] At the close of the Appellants case the State submitted an affidavit deposed to by Mr Craig Keating, the investigating officer. In his affidavit, he stated that on 06 June 2025, approximately at 06h15, Manenberg police were called out to a murder scene at the corner of Turfhall Road. On arrival at the scene, they found the body of the deceased who was in the same gang with the accused inside a car on the driver's side with multiple gunshot wounds. The police left the crime scene and followed leads to solve the case. Later, on the same day, at about 16h30, they were called out again to another crime scene at the corner of Sneeuweg Road, Heideveld and Buffelshoek Street, where a young man (the deceased in this matter) was shot and killed few meters away from his residence. On arrival at the scene, they found a body of the deceased with multiple gunshot wounds and 7 x 9 mm cartridges on the spot where the deceased was. They

also consulted with several witnesses who identified the Appellant, his co-accused, and two outstanding accomplices as the culprits. They also found a video footage which depicted the faces of the Appellant and his co-accused, and the roles they played during the commission of these offences. The footage depicts the Appellant and his friends sitting in a corner smoking oka pipe. At some point, the Appellant and his co-accused passed in a greyish silver Honda. The Appellant was the driver, accused 2 was seated behind him, and the front passenger seat was occupied by one of the accomplices who were not yet arrested. They made hand gestures towards the deceased and pointed them in anger. Thereafter, they drove to the back yard in a nearby park in Sneeuweg Road and entered house number 1[...] B[...] Road; the house of the half-brother of one of the accomplices where the Terrible Westsiders gang members used to hang out.

[4] Immediately thereafter, accused 1 came from the back yard to the tuck-shop a couple of meters away from the deceased. He was on the lookout to see what the deceased and his friends were doing. He then pretended as if he wanted to buy something, when he realised that the deceased and his friends were looking at him. He then left and went to accused 2 and the Appellant, but the witnesses could not hear their conversation. Accused 2 and the Appellant went in the direction where the deceased and his friends were seated. When they came closer to the deceased and his friends they split up. Accused 2 went to the nearby tuckshop, where accused 1 was earlier. He looked up and down to ensure that the coast was clear and thereafter directed the Appellant to shoot. The Appellant was wearing a black hoodie and he held the bottom part of it to hide his identity and walked past the deceased and his friends.

[5] The Appellant took out a firearm from his hoodie top pocket and fired one shot in the direction of the deceased's friend, but he missed. He then turned the firearm to the deceased and fired multiple shots at him. The deceased stood up and tried to take the firearm from him and another gun shot went off. The Appellant ran to accused 2 who directed him to run towards the passage to Heideveld Train Station. The Appellant took

the route as directed by accused 2 and was captured by cyclops CCTV cameras running down Bloukrans Road, Heideveld.

[6] An identification parade was not conducted because the State witnesses knew who the culprits were. Even though the Appellant is residing in Mitchells Plain, he is known to the area because he visited house number 1[...] B[...] Road with his brother-in-law. According to the investigating officer, this was an ultimate revenge for the killing which took place earlier in the morning, and the deceased in that incident was the member of the Westsiders gang to which the Appellant and others are affiliated.

[7] The investigating officer further stated that the release of the Appellant will endanger the safety of the community and the witnesses, as they reside in the same area and are known to him. There is a likelihood that the Appellant will evade trial because this case attracts long-term imprisonment. Moreover, the Appellant and his co-accused are gangsters who move around from one place to the next and that will make it difficult for the police to trace him. The investigating officer averred further that the Appellant and his co-accused would undermine the proper functioning of the criminal justice system including the bail system and have already shown that nothing deters them from committing offences. They committed these offences in broad daylight, in full view of the community. Above all, the State has a strong case against them. In the end, the investigating officer was of the view that the interests of justice do not permit the release of the Appellant from detention. On 22 July 2025, the magistrate dismissed the application. He found that the accused failed to prove that exceptional circumstances exist, which in the interests of justice warrant his release.

Grounds for appeal

[8] The Appellant's grounds of appeal can be summarised as follows:

- (a) That the magistrate erred in holding that no exceptional circumstances exist, which in the interests of justice warrant his release on bail, as there was no

evidence presented indicating a likelihood that he will evade standing the trial; would interfere with the State witnesses or evidence; that he would commit Schedule 1 offences or endanger the public and/or disturb public peace and security.

- (b) That the magistrate erred in failing to attach sufficient weight to his personal circumstances, particularly his age, the fact that he is supporting his four minor children and nieces and his parents who are chronically ill. He is also employed and that his continued incarceration would impact his employment.
- (c) That the magistrate failed to consider that he is a first-time offender and had surrendered himself to the police after he became aware that they were looking for him. According to him, the court should have found that cumulatively, his personal circumstances illustrated exceptional circumstances, which in the interests of justice warrant his release on bail.
- (d) That the magistrate erred in not finding that there is no evidence to support the allegations that he is a member of the Terrible West Siders.
- (e) The magistrate erred in not applying the provisions of section 60(2)(c) of the Criminal Procedure Act 51 of 1977 ("the Act") in that she failed to direct that the CCTV footage that allegedly depicts the Appellant be produced.
- (f) That the magistrate erred in not applying the provisions of section 60(3) of the Act to the evidence of the investigating officer who failed to disclose what the witnesses would testify.
- (g) That the magistrate misdirected herself in failing to consider granting bail with appropriate bail conditions and/or considering the provisions of section 62(f) of the Act.

The law and analysis

[9] Section 65 of the Act guarantees accused persons an opportunity to appeal against decisions of lower courts refusing to release such accused persons on bail, and it regulates the parameters on which such an appeal may be brought before a superior court. Section 65(4) of the Act provides that:

‘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.’

[10] It is established law that appeal courts have limited powers to interfere with the decisions of lower courts and/or courts of first instance, and the standard and/or level of interference open to an appeal court in a particular case depends on the nature of discretion exercised by the lower court. An appeal court is thus enjoined to first ‘ascertain whether the discretion exercised by the lower court was a discretion in the true sense [narrow sense] or whether it was a discretion in the loose sense [wide sense].’¹ The lower court, in the present appeal, exercised a discretion in the wide sense when it considered whether to grant or refuse bail to the Appellant. Therefore, while appropriate deference must be afforded to the lower court, this Court is entitled and duty bound to consider all the material that was presented before the lower court to determine whether that court reached a correct or wrong decision when it refused to grant bail to the Appellant. Put simply, this Court is in a position to evaluate the material that was before the lower court and reach a decision as to whether the lower court exercised its discretion correctly or wrongly. If it is satisfied that the decision of the lower court was wrong, as argued by the Appellant, it is entitled to give the decision it thinks should have been given by the lower court.²

Was the State obliged to provide the Appellant with the video footage?

[11] The Appellant had qualms with the State’s failure to make available the footage it intends to use against him during the trial. It was argued on his behalf that the State bears a duty to provide sufficient factual detail to enable the court to assess whether the interests of justice permit his release.

¹ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) para 83.

² *S v Porthen and Others* 2004 (2) SACR 242 (C).

[12] Section 60(14) of the Act provides as follows:

‘Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the prosecutor otherwise directs: Provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for purposes of his or her trial.’

[13] The court in *Mafe v S* (A/49/22) [2022] ZAWCHC 108 at paras 69 and 71 held that:

‘In my view, there is no reason why the right to be properly informed of the charge with sufficient detail to answer it cannot extend to a bail application, irrespective of its schedule. It is in that sense that the extremes of section 60(14) of the CPA can be mitigated and justified. Currently it seems that a bail applicant facing serious allegations is blind folded in darkness but expected to hit the target. Even those accused of serious crimes must see and feel justice to be manifestly done.’

‘The State is required to put all the necessary and relevant substantial facts before the court for the purposes of upholding the right of a bail applicant to be apprised of the case which he faces, in the bail application. This will enhance the impartiality of the courts and their independence in exercising their judicial functions. It also adds to the flavor of bail proceedings being *sui generis*.’

[14] The Constitution prioritises the right to a fair trial and it is the court’s duty to ensure that fairness is applied in bail applications as well. This will ensure that the administration of justice is not compromised and will enhance and give effect to the accused’s right to a fair hearing. It is so that the State did not furnish the Appellant with a video footage, but it was clearly stated by the investigating officer in his affidavit that it

depicts what happened on the scene and is supported by the evidence of the State witnesses. It also became clear that the State will not rely solely on the footage but also on the direct evidence it has at its disposal. The video footage forms part of a police docket. The Act does not have any provision which requires the State to make available to the accused the contents thereof for the purposes of bail applications. However, that does not preclude the accused from bringing an application before the court for an order that he be furnished with that part of the evidence. As an independent arbiter, the court has a discretion to balance the need for confidentiality in criminal investigations against the accused's right to a fair hearing.

[15] Section 60(3) of the Act provides as follows:

'If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information be placed before the court.'

The peremptory provision in section 60(3) is triggered when the court is of the opinion that it does not have reliable or sufficient information or evidence to reach a decision on the bail application. In this matter, the court had the State's uncontroverted evidence, and the Appellant's case at its disposal. The State alleged that the video footage supports the evidence of the State witnesses who were at the scene during the commission of the offences. The Appellant exercised his right to remain silent and elected not to test the State's case. In the circumstances, I could not find any reason why the court would have required any other evidence because what was placed before it was sufficient to reach a decision.

[16] Having said that, there is no indication on the record that the Appellant and/or his attorney applied to the court to invoke the provisions of section 60(3) during the bail hearing. The Appellant's attorney glossed over the State's failure to make available the footage in arguments and there was no application made for the court to exercise its

discretion. I thus find solace in Lekhuleni J's words in *Mafe v S* supra, when he remarked at para 126 as follows:

'In my view, the appellant cannot cry foul belatedly that he was not furnished with these documents, when he did not request the relevant information from the State. The Supreme Court of Appeal noted in *S v Mathebula* 2010 (1) SACR 55 (SCA), para 12, that the State is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence...I agree with the views by Mr Menigo that the bail court and the State could not exercise their discretion in terms of section 60(3) and 60(4) of the CPA in a vacuum. In my view, it was incumbent upon the defence to have requested this information before the hearing of this matter.'

[17] Section 60(2)(c) of the Act provides as follows:

'In bail proceedings the court may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused as the case may be, that evidence be adduced.'

This subsection gives a discretion to the court to order the parties to lead evidence in respect of matters that are in dispute. In this matter, no disputes were raised during the bail hearing and the Appellant did not test the State's evidence either. The Appellant needed to go further and prove that the State's case is so lacking in detail that a court hearing a bail application cannot express a *prima facie* view as to its strength or weakness.³ These sentiments were echoed in *S v Mathebula* where the court said that:

'But a state's case supposed in advance to be frail may nevertheless sustain proof beyond 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: *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) (2002 (2) SA 680; [2002] 2 All SA 577) at 230*h*, 232*c*;

³ *S v Kock* 2003 (2) SACR 5 (SCA).

S v Viljoen 2002 (2) SACR 550 (SCA) ([2002] 4 All SA 10) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters he was involved only on the periphery or perhaps not at all. But the State is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see *Shabalala and Others v Attorney-General, Transvaal, and Another* 1995 (2) SACR 761 (CC) (1996 (1) SA 725; 1995 (12) BCLR 1593). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the State to rebut his evidence to that effect: *S v Viljoen* at 561f - g.⁴

In this case as well, there was no need for the State to rebut the Appellant's evidence because the State's case was never tested. The State had clearly demonstrated that it has a strong case against the Appellant.

Did the Appellant prove the existence of exceptional circumstances?

[18] 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.'

[19] Section 60(11)(a) places the burden on the Appellant to adduce evidence and prove to the satisfaction of the court the existence of exceptional circumstances of such nature as to permit his or her release on bail. The court must also be satisfied that the release of the accused is in the interests of justice.⁵

⁴ *S v Mathebula* 2010 (1) SACR 55 (SCA) para 12.

⁵ *S v Petersen* 2008 (2) SACR 355 (C).

[20] Exceptional circumstances are not defined by the Act. However, 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. These 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. In the context of section 60(11)(a), the exceptionality of the circumstances must be such that it would be in the interests of justice to order the release of the accused. This may of course mean different things to different people. Therefore, allowance should be made for a certain measure of flexibility of the judicial approach to the question.⁶ In essence, a court tasked with applying section 60(11)(a) is exercising a value judgment, taking into account all the relevant facts and circumstances, and with reference to all the applicable criteria.⁷

[21] It is noteworthy that the Appellant relied on the affidavit to persuade the court that there are exceptional circumstances, which in the interests of justice warrant his release from detention. He did not lead any other evidence except for the affidavits deposed to by his father and the mothers of his children to prove the allegations he made. He did not deal much with the State allegations, save for denying that he killed the deceased. The court in *S v Mathebula* held that:

‘In the present instance the appellant’s tilt at the State case was blunted in several respects: first, he founded the attempt upon affidavit evidence not open to test by cross-examination and, therefore, less persuasive: cf *S v Pienaar* 1992 (1) SACR 178 (W) at 180h; second, both the denial of complicity and the alibi defence rested solely on his say-so with neither witnesses nor objective probabilities to strengthen them. The vulnerability of unsupported alibi defences is notorious, depending, as it does, so much upon the court’s assessment of the truth of the accused testimony.’⁸

⁶ *S v Mohammed* 1999 (2) SACR 507 (C).

⁷ *S v H* 1999 (1) SACR 72 (W).

⁸ *S v Mathebula* 2010 (1) SACR 55 (SCA) para 11.

[22] Furthermore, in *Killian v S* 2021 ZAWCHC 100 para 13 the court said:

'Bail applications are sui generis. To an extent they are inquisitorial and, in general, there is no prescribed form for introducing evidence at them. But in cases where s 60(11) applies and there is consequently a true onus on the applicant to prove facts establishing exceptional circumstances, an applicant would be well advised to give oral evidence in support of his application for bail. This seems to me to follow, because-differing from the position in which the Plascon Evans rule is applied, the discharge of the onus is a central consideration in s 60(11) applications. If the facts are to be determined on paper, the state's version must be accepted where there is a conflict, unless the version appears improbable....Applying the approach I have just described, as I believe it was bound to do in the circumstances, the court a quo was obliged - if it chose not to exercise its power of its accord to require oral evidence - to accept the police evidence on the point.'

The interests of justice

[23] Bail applications are regulated by section 60 of the Act. Section 60(4)(a) to (e) provides that 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 or any 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;
- (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 and or destroy evidence;
- (d) where there is the likelihood that the accused, if he 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.

[24] Likelihood is probability or substantial or real possibility that a risk will materialise. This clearly indicates that the State does not have to prove that the accused will evade his trial, but a probability that he might evade his trial.

[25] The State's opposition is premised on the fact that after the commission of these offences the Appellant was led by his co-accused to run towards Heideveld Train Station. In addition, the police visited his address on two occasions, and his mother did not know his whereabouts. These allegations remain uncontroverted and negate the Appellant's case that he is not a flight risk. They suggest a likelihood that he will evade his trial should he be released on bail, especially now that he knows these offences attract minimum sentences of life imprisonment each. The nature and gravity of the punishment which is likely to be imposed is one of the factors the court must consider in determining whether there is a likelihood that the accused will attempt to evade his or her trial.⁹ That could be an incentive for him to evade his trial if he is released from detention.

[26] It is still not clear to the court where the Appellant was after the commission of these offences and few days thereafter. I am alive to the fact that the Appellant has a right to remain silent. In this case, however, he exercised his right to his detriment because he had a duty to satisfy the court that there are exceptional circumstances, which in the interests of justice warrant his release. In his affidavit, he regurgitated the provisions of section 60(4)(a) to (e) of the Act and that is not enough, he needed to go further and exclude any likelihood which could cause the interests of justice not to warrant his release from detention, especially if there are serious allegations levelled against him.

⁹ Section 60(6)(f) of the Act.

[27] It is common cause that the Appellant handed himself to the police after he became aware that they were looking for him. Of course, this shows that he co-operated with the police and that might have contributed to the speedy finalisation of any outstanding investigations that needed to be conducted. In his affidavit, however, he did not deal with his whereabouts during and after the commission of these offences and did not account for anything except his personal circumstances. His change of heart does not guarantee that he will stand trial because the allegations made by the State remain unchallenged.

[28] Section 60(4)(c) of the Act provides that the interests of justice do not permit the accused's release from detention 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 and/or destroy evidence. The court may, where applicable, take into account the fact that:

- (a) the accused is familiar with the identity of the witnesses and with the evidence which they may bring;
- (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 various witnesses and the extent to which they could be influenced or intimidated.¹⁰

[29] It was intimated by the investigating officer that the Appellant and the State witnesses are known to each other. The witnesses have already made statements hence the investigating officer was able to indicate in his evidence that the video footage supports their evidence. The State might not have disclosed them to the Appellant but the fact that the Appellant and the State witnesses are known to each other remains uncontroverted. The likelihood that Appellant might intimidate the State witnesses stems from that and even bail conditions will not prevent this from happening considering the seriousness of the offences he is facing and the gravity of the

¹⁰ Section 60(7) of the Act.

sentences to be imposed should he be convicted of these offences. It must be borne in mind that non-disclosure of the State witnesses or the video footage does not provide the Appellant with an avenue to be released from detention. In recent years, we have seen witnesses being killed or forced to go on a witness protection because of threats made against their lives and families. Several cases remain unresolved because witnesses are killed daily. It is therefore imperative for the State to protect witnesses because disclosure can compromise and jeopardise their safety.

[30] The State further averred that the Appellant is a member of the terrible Westsiders gang, but he bears no mark to confirm this. Counsel for the Appellant stressed that it cannot be acceptable for the State to conclude that the Appellant is a gang member because he does not have insignia like his co-accused. This might be so, but the State allegations are premised on the fact that the offences were committed shortly after the killing of a member of the Westsiders gang. These allegations were not disputed, and the court had no other evidence to the contrary. In dealing with this, the magistrate referred to the case of *Ngcobo and others v S* (A207/23) [2023] ZAWCHC 272 at para 16 where the court held that:

‘In the prevailing climate in the country, and especially in the Western Cape where communities are tired and in distress because of violent crime, it is incumbent upon the courts of law to guard and maintain the rule of law. Courts have an obligation to ensure that the criminal justice system remain[s] a beacon of hope for communities in distress. In response to the iron-fist of syndicates and gangs involved in serious violent crime where life is cheap and is sacrificed at the altar of greed on the snap of the finger by a gang leader, courts cannot be found wavering and irresolute.’

[31] These are indeed the conditions the Western Cape community has to contend with on a daily basis. The facts of this case demonstrate what happens when a member of a rival gang member is killed. On the same day, two lives were lost and gang violence does not end. Therefore, I agree with the court a quo that the release of the Appellant

will disturb public order and for his safety as well, the interests of justice demand that he be kept in detention.

[32] The Appellant's counsel further argued that the magistrate misdirected herself in failing to consider granting bail with appropriate bail conditions and/or considering the provisions of section 62(f) of the Act.

[33] Section 62(f) provides as follows:

'Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail which provides that the accused shall be placed under the supervision of a probation officer or a correctional official.'

[34] In oral arguments, however, counsel could not take this point any further and he ultimately abandoned this ground and conceded that section 62(f) is not applicable in the present appeal.

[35] I have noted with concern that the court a quo did not apply the provisions of section 60(9) of the Act. In its judgment, the court glossed over the Appellants' personal circumstances and did not 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.

[36] Section 60(9) provides as follows:

'In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely-

- (a) the period for which the accused has already been in custody since his or her arrest;
- (b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
- (c) 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 delay;
- (d) any financial loss which the accused may suffer owing to his detention;
- (e) any impediment to the preparation of the accused defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
- (f) the state of health of the accused;
- (g) any other factor which in the opinion of the court should be taken into account.'

[37] In *Mafe v S* supra para 72 the court referred, with approval, to *S v Smith and Another* 1969 (4) SA 175 (N), where the following observations laid down in *S v Essack* 1965 (2) SA 161 (D) were reaffirmed:

'In dealing with an application of this nature, it is necessary to strike a balance, as far as that can be done, between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice. I refer, in acknowledgement of those words, to the judgment of Diedmont, J., in the case of *S v Mhlawi and Others* 1963 (3) SA 795 (C) at p.796. The presumption of innocence operates in favour of the applicant even where it is said that there is a strong *prima facie* case against him, but if there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the Court would be fully justified in refusing to allow him bail.'

The appellant's personal circumstances were placed on record through an affidavit. The only attachments which could be considered by the court a quo are the affidavits from his father and the mothers of his children confirming that he was supporting his parents and children before his arrest. The contract and the letter attached from his employer indicate that the Appellant is an active member of Turrim Brands and that should he be released from detention he will continue working for the same company. However, the purpose of bail is to secure the Appellant's attendance until the trial is finalised. These

factors are outweighed by the likelihood that should he be released from detention he will evade his trial. If the Appellant's release from detention will undermine the proper functioning of the criminal justice system, the bail the court is bound to deny bail. To my mind, the evidence the Appellant adduced fell short of what is required in terms of section 60(11)(a) of the Act and cannot be accepted as exceptional circumstances which in the interests of justice warrants his release.

[38] In the end, I am of the view that his release from detention will undermine the objectives and proper functioning of the criminal justice system because the offences in question were committed in broad daylight and in the presence of the community members. The State has a strong case against the Appellant, and it remains uncontroverted. There is also the likelihood that if he is released on bail, he will evade his trial and that is based on the evidence which touches the Appellant personally because after he committed these offences he ran away.

[39] I therefore could not find any reason why I should interfere with the magistrate's decision. The court a quo did not err in finding that the Appellant did not discharge the onus to establish exceptional circumstances.

Order

[40] For these reasons I make the following order:

- (a) The appeal is dismissed.

N GXASHE
Acting Judge of the High Court

Appearances

Appellant : Adv. Filton

Respondent : Adv. Rambarun