IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A85/2026

In the matter between:

ISAK KATZEN Appellant

and

THE STATE Respondent

Neutral citation: *State v Kapzen* (Case no A85/2026) [2026] ZAWCHC … (12 June 2026)

Coram: GXASHE AJ

Heard: 3 June 2026

Delivered electronically: 11 June 2026 **Summary: Criminal procedure-bail application-section 60 11 (a) of the act- onus on the appellant- interests of justice- exceptional circumstances- warranting the accused release on bail-**

section 60 (9) balancing- interests of justice against the accused right to his personal freedom.

ORDER

The applicant's application to be released on bail is hereby dismissed.

JUDGMENT

GXASHE AJ

Introduction

[1] This is an appeal against the judgment of the Blue Downs Magistrate's Court which dismissed the appellant's application to be granted bail pending the finalisation of his trial. He is arraigned for murder, conspiracy to commit murder, and possession of a firearm in contravention of section 3 of the Firearms Control Act 60 of 2000.

[1] It is common cause that the appellant is charged with an offence listed in schedule 6 of the Criminal Procedure Act 51 of 1977 (the "CPA"). The court is thus required to order that the appellant be detained in custody until he is dealt with in accordance with the law, unless the appellant having been given a reasonable opportunity to do, adduces evidence which satisfies the court that exceptional

circumstances exist which in the interest of justice permit his release on bail. During the application for bail, the appellant testified under oath, but was not cross-examined by the State. The State opposed the application on the strength of an affidavit deposed to by Sergeant Simphiwe Tubeni, who is the investigating officer in this matter.

Factual matrix

[2] The appellant testified under oath that he is an adult male who was born on 27 April 1977. His highest standard of education is standard 6, and he is currently unemployed. He is single and blessed with three children and two grandchildren. One of his children is 16 years old and is still attending school. Before his arrest, he was residing at 2[...] G[...] Street, Wesbank, at his girlfriend's place. He regards this address as his permanent place of residence, and his entire family resides in the Western Cape. He was the owner of two pick-up trucks valued at R40 000 which he had used to gather metal, but they were both stolen. He sells metals at a scrapyard for a living and manages to make a minimal income of R500.00 per day.

[3] Furthermore, the appellant stated that he is the sole provider of his family, bearing full financial responsibility for his unemployed sisters as well. He has a short intestine and has been living with this condition for thirty years. As a result, he used to get injections, and vitamin tablets every month from Pick n Pay pharmacy. Without treatment, his intestines will shrink. Moreover, he was diagnosed with high blood pressure but could not tell if he is still suffering from this condition, save to say that he was taking small pills to manage it.

[4] According to the appellant, after his arrest he was detained at Blue Downs Police Station. He fell ill in detention and an ambulance was summoned.

Although he was never treated or consulted by a doctor, he was informed that there was nothing wrong with him and was returned to detention. The appellant indicated further that he understands the charges against him and will plead not guilty. He thus elected to exercise his right to remain silent and did not disclose the basis of his defence during this application.

[5] The investigating officer's affidavit was read on record by the public prosecutor. In his affidavit, he clearly stated that he was opposing the accused's release from detention. He confirmed in evidence that the appellant resides at 2[...] G[...] Street, Wesbank. He has no previous convictions or outstanding warrants. The investigating officer stated further that according to the information he received from a witness the appellant and his friends Jason Willemse, Damien and Hardley were standing by the fire at Gelvandale Street, Wesbank on the evening of 18 June 2024, at approximately 06:30. An argument ensued between them and subsequently Damien punched the appellant on his face. Thereafter, the appellant swore and said to Damien "you will see what I will do to you." At that time, Damien was walking down the street to his friend Valentino Jansen, the deceased, in this matter.

[6] Later that evening, the deceased joined the appellant, Jansen and Hardly had stood with them by the fire. At some point the deceased walked away and left the appellant and his friends there. The appellant remarked 'die nommer kan change' and asked his friends to accompany him. Thereafter, the appellant and his friends travelled in a maroon sedan (the appellant's vehicle) and drove in the Stellenbosch Arterial's direction. While en route the appellant conversed with an unknown person on the phone, to inform him that he was on the way to pick him up. The appellant also instructed the unknown person to find a second person. Ultimately,

the appellant went to Uitsig Ravensmead area and picked up two coloured males, Alias Aya and Alias Aggies. On the way back to Wesbank, Alias Aya said to the appellant 'Hulle gaan nou sien wat dalla ons'. That is when the witness realised that it is the same person the appellant was speaking to earlier.

[7] On arrival in Wesbank, the appellant and his companions searched for Damien and Valentino and when they could not find them, they went to 6[...] S[...] Street, WesBank, where Valentino's mother resides. They called Valentino and in response he said 'Julle moenie kom kak maak hier nie dalla wat jy wil' as he was approaching them. At that point, the appellant grabbed a black firearm from Aya but failed because Aya resisted. Instead, Aya fired two shots at Valentino and struck him on his upper body. After that, they travelled on the maroon sedan and drove back in the direction of Uitsig.

[8] On the way, Aya said to the appellant "Miskien is daai jong dood" and the appellant replied "Ons sal more op die foon hoor". Eventually, the appellant dropped Aya off and consumed alcohol the whole night.

[9] It also transpired from the investigating officer's affidavit that the appellant is well known in Wesbank and is close to all the State witnesses. Accordingly, the investigating officer stated that if the appellant could be released on bail, he would pose danger to the witnesses because they all stay in the same area. He stated further that the appellant planned the offence well and organised people to kill the deceased. By saying 'julle gaan nou sien wat dalla ons', it shows that the appellant arranged the killing with his gang members from Uitsig.

[10] According to the investigating officer the appellant also used his vehicle during the commission of this offence, which demonstrates that he did not care if he was seen by community members. The investigating officer also stated that the appellant is a danger to the community because at the time of the commission of these offences, he was still looking for Damien, the deceased's friend, and could still get him killed if released on bail. In addition, the investigating officer asserted that the appellant would make sure that the outstanding suspects evade arrest should he released from detention.

[11] Considering the likelihood that the accused might evade justice, the investigating officer is of the view that the State has a strong case against the appellant and that would be an incentive for him not to stand his trial. He also considered that the appellant's life is in danger as indicated by him when he was recording his warning statement. He apparently told the investigating officer that there is R50 000.00 on his head.

The judgment of the bail court

[12] In her judgment, the magistrate correctly pointed out that the application fell within the prescripts of schedule 6 offences. She appreciated that the appellant testified under oath but was not cross-examined by the State. She then pointed out that the CPA does not define exceptional circumstances and there is no list that defines the phrase either. The magistrate understood that there is nothing which indicates that the appellant's personal circumstances can never be exceptional. She then said in some instances, circumstances evaluated together with the State's evidence can be regarded as exceptional circumstances. She proceeded and considered the appellant's personal circumstances including the fact that he has no previous convictions and had been suffering from an illness for 30 years.

[13] The magistrate pointed out further that in bail applications the court is not concerned about the appellant's guilt, but only the fact that he is linked to these offences which shows that the State has a prima facie case against him. She then dissected the test as two-legged, being whether exceptional circumstances exist, and whether the interests of justice permit the appellant to be released from detention.

[14] Furthermore, the magistrate found that the appellant is facing a charge of premeditated murder, and an innocent life was lost. She went further and stated that if convicted he could be sentenced to life imprisonment. Ultimately, she found that the factors placed before her by the State weighed more heavily than the appellant's personal circumstances. thus found that the appellant's release on bail would not only undermine the objectives of the bail system but the confidence of the public in the criminal justice system.

Grounds of appeal

[15] I will summarise the grounds of appeal as follows:

(a) The magistrate erred in finding that the appellant is a flight risk, is a danger to the safety of the public, and will undermine the proper functioning of the criminal justice system, thus denying him his right to liberty; and

(b) The magistrate misdirected herself by not considering the appellant's personal circumstances as compelling, namely that he has a fixed address, has no previous convictions or outstanding warrants and had co-operated with the police upon arrest. Further, the appellant has been incarcerated in

an overpopulated prison since June 2024 and is diagnosed with a medical condition.

Principal submissions by the parties

[16] In arguments, Advocate Paries, for the appellant, submitted that the magistrate misdirected herself when she found that there are no exceptional circumstances in the appellant's undisputed evidence, even though he has a fixed address, stable employment, and dependent minor children and grandchildren. According to counsel, the fact that the appellant handed himself to the police shows that he is not a flight risk. Counsel then referred to the following passage from the magistrate's judgment: "I only want prima facie evidence in front of me". According to him, these words constitute punitive reasoning inconsistent with *S v Branco* and section 35(1)*(f)* of the constitution.[1]

[17] Counsel further submitted that the magistrate gave minimal effect and disregarded the presumption of innocence because despite alleging that bail is not a trial, she engaged in a mini synopsis, evaluating the merits and drawing adverse inferences from the disputed facts. According to him, the magistrate rejected the appellant's version and made credibility findings against him based on the investigating officer's affidavit that was not tested in cross examination. He is of the view that reliance on the affidavit of the investigating officer without oral evidence prejudiced the appellant and constitutes a clear misdirection.

[18] Moreover, counsel is of the view that the state's concession that the appellant was not the shooter, combined with the evidence that there are suspects

[1] *S v Branco* 2002 (1) SACR 531 (W).

who are not yet arrested weakens the State's case unless a factual position of premeditation may be proven with the shooter or co-perpetrator. Counsel also lamented the magistrate for not applying the provisions of section 60(9) of the CPA and /or considering granting bail with bail conditions. In this regard, he referred the court to *Rhode v S*,[2] and to *Lifman v Director of Public Prosecution Western Cape*,[3] and submitted that in both cases the accused were charged with murder and were granted bail.

[19] Advocate Smith on the other hand argued that the appeal court can intervene in determining whether bail should be refused or granted if the bail court misdirected itself. She then submitted that the State has a strong case against the appellant because the witness was in the appellant's vehicle, and he witnessed the shooting. The appellant, according to her, had an opportunity to tell the court his version but he elected to remain silent.

[20] As far as the appellant's personal circumstances are concerned, counsel was of the view that they were nothing out of the ordinary. According to her that is apparent from the fact that the appellant's minor child who was sixteen (16) years old is now a major. In addition, there is no evidence that the sisters were unable to survive for the last two years without the appellant's assistance.

[21] Counsel for the State also disagreed with the defence's referral to the *Rhode* and *Lifman* cases and submitted that the argument is not fair and implies that the accused who is charged with murder cases should always be granted bail.

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[2] *S v Rohde* 2020 (1) SACR 329 (SCA).
[3] *Lifman v Director of Public Prosecutions, Western Cape* 2024 (1) SACR 188 (WCC).

[22] Counsel for the State further submitted that given the circumstances of the evidence levelled against the appellant, and the potential lengthy term of imprisonment he faces, shows a likelihood that he would not stand his trial. Accordingly, she submitted that the magistrate correctly evaluated the circumstances of the appellant, because he did not show the existence of exceptional circumstances.

Discussion

[23] This appeal is brought to this court in terms of section 65(4) of the CPA, which 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.'

[24] This bail application is regulated by section 60(11)*(a)* of the CPA, which 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.'

[26] The correct approach to the decision of bail is that the court will always grant bail where possible, and will lean in favour of, and not against, the liberty of the subject, provided that it is clear that the interests of justice will not be prejudiced thereby. [4]

[4] *S v Smith and Another* 1969 (4) SA 175 (N) at 177E-178B.

[27] What is required is that the court should consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify the accused's release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of a schedule 6 offence.[5]

[28] In *S v Porthen and others,*[6] the court held that:

> 'On the issue of the existence of 'extraordinary circumstances' within the meaning of s 60(11)*(a)* of the CPA, there is a 'formal *onus*' of proof on the applicant for bail. The ordinary equitable test of the interests of justice determined according to the exemplary list of considerations set out in s 60(4) - (9) of the Act has to be applied differently… a court making the determination whether or not that *onus* of proof has been discharged exercises a discretionary power in the wide sense of discretion. The appellate Court is, in terms of s 65(4) of the CPA, enjoined to interfere with the lower court's decision of a bail application if it is satisfied that the lower court's *decision* was wrong.
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> Accordingly, in a case like the present where the magistrate has refused bail because he found that the appellants had not discharged the *onus* on them in terms of s 60(11)*(a)* of the CPA, if this Court on appeal, on *its* assessment of the evidence, comes to the conclusion that the applicants for bail did discharge the burden of proof, it must follow (i) that the lower court's decision was 'wrong' within the meaning of s 65(4) and (ii) that this Court on appeal can substitute its own decision in the matter.'

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[5] *S v Bruintjies* [2003] ZASCA 4; 2003 (2) SACR 575 para 6.
[6] *S v Porthen and Others* 2004 (2) SACR 242 (C)

[25] It is therefore clear that when considering the refusal of bail and determining whether the magistrate was wrong in doing so, the appeal court is required to balance the accused's personal liberty, pending the outcome of his trial, against the interests of society.[7]

[26] In this matter, the appellant's personal circumstances were placed on record *viva voce*, and his testimony is clear and remains uncontroverted. As such, the defence counsel's argument that the magistrate did not adequately consider the financial prejudice suffered by the appellant, in particular the fact that his entire source of income has ceased due to his incarceration, is not correct. In her judgment, the magistrate referred to *Ali v S,*[8]where the court held that 'financial loss is an inevitable consequence of the incarceration of any gainfully employed person. In the present case, the evidence does not go so far as to prove that, straitened as their circumstances may be, the appellant's dependents will starve if he is not released to fend for them'. The magistrate then proceeded to take into consideration the personal circumstances of the appellant including the financial responsibility he had towards his children and sisters. In the end, she said the following:

> 'I have considered these personal circumstances that you set out in your testimony, and if the court evaluates everything that you placed on record during your testimony, all of them are normal circumstances. There is nothing exceptional about them. Your medical condition was also brought as problematic (*sic*) if you are incarcerated. However, there I want to agree with the state, there are facilities available as well as medical attention. Your medical problem is not of that sort that normal medical attention will not address the problem. So, if the court looks back individually evaluated, I cannot find anything exceptional in your application. However, the act is clear that it does not stop there. The

[7] *Conradie v S* (A248/2020) [2020] ZAWCHC 177 (11 December 2020) para 19-20.
[8] *S v Ali* 2011 (1) SACR 34 (ECP).

court must go further, and in terms of section 60(9) of the criminal procedure act evaluate your application together with what the state put in front of me, and then also see whether cumulatively evaluated anything can be regarded as exceptional circumstances'.

[27] Accordingly, the court then proceeded to consider whether the interests of justice permit the release of the appellant from detention. 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, any particular person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;
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> (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
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> (c) where the 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.

[28] It is clear from the record that the appellant has no previous convictions. However, the evidence of the investigating officer showed that the witness's statement indicates that the appellant was intending to kill Damien as well, the person he was in conflict with before the deceased joined them by the fire. He then expressed that there is a likelihood that should the appellant be released from detention, he might look for and kill Damien because he had intended to do so when he fetched his accomplices. This likelihood impacts on subsection (4)*(a)* of the CPA and even though this is not factual, it is sufficient because the CPA does not require proof of factual issues, but a likelihood that if released from detention the appellant might endanger the safety of the public or of a particular person.

[29] It is also evident that the appellant is charged with murder, and the State relies on common purpose. Undoubtedly, the magistrate was correct when she stated that if convicted the appellant might be sentenced to life imprisonment. The record reflects that the appellant did not disclose the basis of his defence, save to indicate that he would plead not guilty. Considering what was placed on record on behalf of the State, it can be said that the State has a strong case against the appellant and, knowing that the prescribed minimum sentence on conviction is life imprisonment, that might be an incentive for him to evade trial. The fact that he has family ties in the Western Cape does not circumvent the likelihood of evading trial if measured against the severity of the sentence he will face should he be convicted.

[30] This was the rationale of the court in *S v Panayiotou,*[9] where the court said the following:

> 'Accordingly, the magistrate was quite correct to consider as one of the factors in determining whether exceptional circumstances exist, the fact that the prosecution has a reasonably strong case. That factor, of course, is also relevant in the overall assessment of whether the appellant poses a flight risk and whether there is a real likelihood that he will evade his trial. In her judgment the magistrate noted that the likely consequence of a conviction was that the appellant would face potential life imprisonment, given the nature of the offence. This she found would serve as an inducement to evade trial. In so finding the magistrate did not misdirect herself in any manner.'[10]

[31] I must mention at this stage that during arguments, the defence counsel attacked the State's evidence and stated that it will encounter difficulties to prove common purpose. Counsel's argument is premised on the fact that the appellant is the only person arraigned for the commission of these offences and allegations are that he is not the one who pulled the trigger. Without pre-empting the finding of the trial court, I am of the view that this argument is flawed because this issue was settled and in criminal proceedings the accused may be convicted on common purpose even if he is the only one indicted on the charge if evidence shows that he acted in common purpose with others. So, the fact that the appellant is the only one facing these charges does not affect the strength of the State's case, at least at this stage.

[32] Section 60(4)*(c)* of the CPA refers to the likelihood that if the accused was released on bail, he will attempt to influence or intimidate witnesses or conceal and/ or destroy evidence. The State's evidence that the appellant is friends with the

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[9] *Panayiotou v S* (CA&R 06/2015) [2015] ZAECGHC 73 (28 July 2015).

State witnesses and resides in the same vicinity as them remains uncontroverted. This aspect does not deal with the merits of the case but is one of the factors the court must consider when determining whether there are exceptional circumstances which in the interests of justice warrants the appellant's release on bail. I acknowledge that the State opposed this application by way of an affidavit, but surely the defence was furnished with the contents thereof before the appellant's testimony. That should have given the appellant an opportunity to dispute the allegations, but nowhere in his evidence did he do so. So, the likelihood alleged cannot be excluded, especially if the witnesses are his friends. He might not intimidate them but there is a likelihood that he would attempt to influence them should he be released on bail.

[33] When drafting this piece of legislation, the legislature was careful and ensured that the accused's right to be presumed innocent during bail applications is not undermined. That is evident from the use of the word likelihood in section 60(4)*(a)* to *(e)* of the CPA, which means a probability that such risk will materialise.

[34] Section 35(3)(*h*) of the Constitution provides that every person has a right to a fair trial, which includes the right to be presumed innocent during criminal proceedings. It is trite that the rights in the Bill of Rights, including the right to be presumed innocent, can only be limited by law of general application as envisaged in section 36 of the Constitution. The presumption of innocence, specified as a fair trial right in subsection 35(3)(*h*), is traditionally viewed as the ballast of fairness in criminal justice proceedings (see Currie I and De Waal J: *The Bill of Rights Handbook* (2005) at 745). It is a fundamental right which plays a pivotal role in our criminal justice system. It is, however, not absolute, but its value and weight

will differ according to a variety of factors and circumstances against which it is pitted on the scales.[11] It 'is a hallowed principle lying at the very heart of criminal law'.[12]

[35] It can be gleaned from the record that the magistrate exhibited knowledge of the above principle because in her judgment she found that the State has a prima facie case against the appellant, while emphasising that the courts in bail applications do not determine the guilt of the accused. This illustrates that she did not deny bail on punitive grounds as alleged by the defence's counsel. It further shows how selective the defence's counsel was in his arguments because to come to that conclusion he relied on the following words: 'I only want prima facie evidence in front of me'. From the judgment, the complete paragraph reads as follows: 'I only want prima facie evidence in front of me, and that I have already found is in front of me, which means that an innocent person in a brutal manner lost his life. It is an offence which has a very high prevalence in this community'. In my view, the magistrate was entitled to take these factors into account when determining whether the grounds in section 60(4)*(a)* and *(e)* have been established.[13] Clearly, the choice of words might be unfortunate, however, on careful reading of this paragraph it becomes clear that the magistrate was considering the seriousness and the prevalence of this offence. Regardless, the magistrate did not only rely on this paragraph to dismiss the application but took into account the evidence in totality including the provisions of section 60(9) of the CPA.

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[11] *S v Coetzee* [1997] ZACC 2; 1997 (3) SA 527 (CC) para 122.
[12] *R v Oakes* [1986] 1 SCR 103 para 29.
[13] See Sections 60(5)*(f)* and 60(8A)*(a)* of the CPA.

[36] With regards to the reference made to *Rhode* and *Lifman,* and arguments thereto, it is my view that the courts in those cases took into account various factors to reach the conclusion that the interests of justice permit the accused release from detention. The submissions made by the defence counsel in this regard are unjustified, and fundamentally in conflict with the precedent and the law. If they could be adopted, the criminal justice system would be put into disrepute, and the objectives of bail legislation would be undermined. It suffices to say strict bail conditions will not adequately mitigate the risks highlighted in the court's judgement. As a result, I will thus not deal with the distinguishable factors between these cases because the only similarity the defence counsel highlighted is the fact that the accused in both cases were charged with murder and that is untenable. The principle that each case must be decided in accordance with its own merits is trite and it suffices to say that the defence argument is flawed and cannot stand.

[37] Section 60(9) of the CPA provides that 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 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:

> (a) the period for which the accused has already been in custody since his or her arrest;
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> (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's 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.

[38] Again, I do not agree with the defence counsel that the magistrate erred in not weighing the interests of justice against the appellant's right to his personal freedom. As illustrated above, the magistrate took all relevant factors into account before she arrived at the conclusion that there are no exceptional circumstances which in the interests of justice warrant the appellant's release on bail.

[39] In the result, having considered all the evidence and the arguments of the parties, the appellant has not succeeded in demonstrating that the decision of the bail court was wrong.

[40] Therefore, the appeal is dismissed.

N. GXASHE

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellant:	Advocate Paries
Instructed by:	M THOMAS Attorneys
Counsel for the Respondent	Advocate Smith