



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

Appeal No: A 86 / 2026

In the matter between:

QONDA TYALI

APPELLANT

and

**DIRECTOR OF PUBLIC PROSECUTIONS,
WESTERN CAPE**

RESPONDENT

Coram: Christians, AJ
Heard: 8 September 2026
Delivered: 16 September 2026

JUDGMENT

CHRISTIANS, AJ

Introduction

1. The Appellant was arrested on 15 February 2024 and subsequently charged with, *inter alia*, robbery with aggravated circumstances, an

offence contemplated in Schedule 6 of the Criminal Procedure Act 51 of 1977 (the CPA). The aggravating circumstances, as appear from the charge sheet, concern the use by the accused or any co-perpetrators or participants of a firearm. In addition, the State alleges in the charge sheet that the offence was committed in furtherance of a common purpose.

2. In terms of s 60(11)(a) of the CPA, an accused who is charged with an offence contemplated in Schedule 6 must 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.
3. At the outset, I consider it necessary to address the submission, made on behalf of the Appellant, that the absence of evidence by the State to establish one or more of the factors contemplated in ss 60(4) to 60(9) of the CPA, *per se* constitutes exceptional circumstances.
4. The factors enumerated in ss 60(4) to 60(9) constitute the ordinary considerations against which an application for bail falls to be assessed. They describe the conventional grounds — that the accused may endanger the safety of the public or a particular person, may evade his trial, may attempt to influence or intimidate witnesses or to conceal or destroy evidence, may undermine or jeopardise the objectives or the proper functioning of the criminal justice system, or

that his release may disturb the public order or undermine the public peace or security — each of which, if established, will ordinarily militate against release. It does not follow, however, that the absence of those grounds is decisive where the accused stands charged with an offence listed in Schedule 6. In such a case s 60(11)(a) imposes a distinct and more onerous burden: the accused bears the onus of adducing evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his release. *Ex hypothesi*, circumstances that are present in every ordinary bail application cannot be exceptional. To hold otherwise would be to collapse the enquiry under s 60(11)(a) into the ordinary enquiry under s 60(4), and to render the Legislature’s deliberate elevation of the threshold devoid of content. The absence of the s 60(4) grounds is therefore a necessary but not a sufficient condition for release under s 60(11)(a). An accused who establishes no more than that he will stand his trial, will not interfere with the investigation and poses no danger to the public has demonstrated only that his case is unremarkable. Something further is required — something peculiar to his own position which distinguishes it from that of the ordinary applicant awaiting trial on a Schedule 6 charge.

5. The Constitutional Court’s characterisation of s 60(11)(a), articulated when the provision was first placed under constitutional scrutiny, warrants restatement:

“[61] The subsection says that for those awaiting trial on the offences listed in sch 6, the ordinary equitable test of the interests of

justice determined according to the exemplary list of considerations set out in sub-ss (4) to (9) has to be applied differently. Under sub-s (11)(a) the lawgiver makes it quite plain that a formal onus rests on a detainee to “satisfy the court”. Furthermore, unlike other applicants for bail, such detainees cannot put relevant factors before the court informally, nor can they rely on information produced by the prosecution; they actually have to adduce evidence. In addition, the evaluation of such cases has the predetermined starting point that continued detention is the norm. Finally, and crucially, such applicants for bail have to satisfy the court that “exceptional circumstances” exist.”¹

6. Against that introduction, I turn to consider the Appellant’s bail applications and whether they were wrongly refused.

The first bail application

7. On 21 November 2024 the Appellant applied for bail, accepting that the onus rested on him to show that exceptional circumstances existed which in the interests of justice permit his release on bail. Save for setting out his personal circumstances, the Appellant presented no evidence at his bail application and expressly elected not to address the merits of the charges against him.
8. The prosecutor led the evidence of the investigating officer, who provided the following details about the offence in question:

- 8.1. There was a robbery at a shop in Main Road, Claremont. According to the complainant, two males entered the shop and asked him if he sold phones. Upon his confirmation, a third male entered the shop, wielding a firearm, and the three proceeded to grab various items without the complainant's consent. The investigating officer confirmed that he had viewed video footage of the robbery and briefly explained the contents of the footage.
 - 8.2. Approximately 15 minutes after the robbery, a vehicle was apprehended. The vehicle had six occupants, including the Appellant. The stolen items and a firearm were found in the vehicle. Five of the occupants were arrested immediately, and one ran away. Though there are gaps in the transcription, it is apparent that the sixth suspect was ultimately apprehended, and all six have since been charged.
9. With specific reference to the Appellant, the investigating officer testified the following:
 - 9.1. At the time of arrest, the Appellant stated that he was a Bolt driver and had driven to Claremont to collect a private client.
 - 9.2. The Appellant had one prior conviction related to a traffic offence.
 - 9.3. The Appellant had one pending charge of rape against him, in respect of which he had been released on bail.

10. In light of the above, the Magistrate concluded that (a) the Appellant had not shown exceptional circumstances to justify his release from custody and (b) the State had established a *prima facie* case against the Appellant. Bail was, accordingly, refused.
11. The Appellant did not appeal the above decision.

The second bail application

12. However, on 30 September 2025, the Appellant brought an application, before a different Magistrate, for leave to apply for bail on new facts. The new facts alleged by the Appellant were the following:
 - 12.1. The State's investigation was concluded and, according to the available evidence, there is no prospect that the State will prove his guilt on the basis of the doctrine of common purpose;
 - 12.2. As the eldest brother, he was required to attend a cultural ceremony for his younger sister in the Eastern Cape in December 2025; and
 - 12.3. The charge of rape against him had been withdrawn.
13. After hearing initial argument on 9 and 11 December 2025, the Magistrate concluded that the first ground did not raise any new facts but that the latter two did. The Magistrate accordingly granted the

Appellant leave to apply for bail on new facts. However, notwithstanding that the first ground did not constitute new facts, the Magistrate accepted and applied the principle that the new application had to be decided based on a conspectus of all the facts – both old and new. Thus, the Magistrate ultimately took into account all the issues, including those raised as part of the first ground.

14. This Magistrate, too, concluded that (a) the Appellant had not shown exceptional circumstances to justify his release from custody and (b) the State had established a *prima facie* case against the Appellant. Bail was, again, refused.

15. The Appellant appeals that decision.

The Appeal

16. The test on appeal against the decision of the court *a quo* is set forth in s 65(4) of the CPA 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.”

17. In *Porthen*², Binns-Ward AJ (as he then was), described the nature of an appeal court’s power in bail applications as follows:

“[14] 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 ss 60(4)-(9) of the Act has to be applied differently... In my view, a court making the determination whether or not that onus of proof has been discharged exercises a discretionary power in the wide of 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.”

[Emphasis added]

18. The Appellant’s appeal largely focused on the alleged weakness of the State’s case against him and the need for him to attend the cultural ceremony to be held for his sister. I deal with the latter first.

The cultural ceremony

19. In his affidavit dated 30 September 2025, the Appellant stated that the ceremony was scheduled to take place in December 2025. However, at the continuation of the bail application on 21 January 2026, the Appellant’s legal representative indicated that the ceremony did not go ahead and was scheduled to proceed in February 2026. While the argument is persisted with in the appeal, no facts have been presented to indicate that the matter had not, as at the date of hearing, become moot.

20. In the judgment dated 19 February 2026, the Magistrate dealt with this issue by noting that the ceremony was to be held in the Eastern Cape and that no indication was provided as to its duration. The Magistrate further noted that the trial was set down for 24 and 26 March 2026 and ultimately concluded that, though important to the Appellant, the fact of the cultural ceremony does not, on its own, establish exceptional circumstances. In reaching this conclusion, the Magistrate considered that the Appellant's circumstances were akin to, *inter alia*, an accused who wished to attend a parent's funeral. In doing so, I find that the Magistrate exercised her discretion judiciously and did not clearly misdirect herself in concluding that the need or desire to attend the cultural ceremony did not constitute an exceptional circumstance.
21. Turning then, to the contention that the State's case against the Appellant is weak.

The strength of the State's case

22. The first point to note at this juncture is that, as correctly found by the Magistrate, the contended weakness of the State's case is not a new fact.
23. As was recently stated in *Abdi*:³

"[19] A court dealing with a bail appeal based on "new facts", typically in terms of s 65(2) or s 60(11) of the Criminal Procedure Act 51 of 1977 must primarily determine whether the

circumstances have genuinely changed since the initial bail refusal and whether those changes warrant a different decision.

[20] New facts in these circumstances are not meant to cure defects in a previous application, but to place before the court facts that arose only afterwards.”

24. The Appellant has attempted to dress up the evidence the State has since furnished to him as ‘new facts’ to support his contention that the State’s case against him is weak. It was only in response to the State’s evidence, that the Appellant elected to give his version. But his version was already known to him when his first bail application was brought.
25. Indeed, in these proceedings, much reliance was placed on an apparent concession by the investigating officer at the initial bail application that the State’s case against him is weak. For illustrative purposes, I reproduce the transcription of the relevant exchange between the Appellant’s then legal representative and the investigating officer below:

Defence: I will also put it to you that you have got a very weak case against [the Appellant]

IO: According to how ...[indistinct]

Defence: I will not dispute it.

IO: I will not dispute it.

26. Based on the above, I have two difficulties with the proposition made on behalf of the Appellant:

26.1. First, there is an interruption in the transcription between the submission put to the investigating officer and the apparent concession. It is, therefore, possible that the concession related to a different submission. I find it particularly curious that the Appellant's legal representative at the time did not so much as mention the apparent concession in his address before the first Magistrate. Surely, if the concession was made, it would have been front and centre of the motivation for the Appellant's release on bail.

26.2. Second, the proposition demonstrates that the perceived weakness of the State's case is not new. However, the Appellant made the decision not to place any evidence before the Magistrate, as required by s 60(11)(a) of the CPA. His decision to lead evidence only after the State showed its hand does not meet the threshold of establishing new facts.

27. For these reasons, the second Magistrate correctly found that, if the Appellant was aggrieved by the first Magistrate's refusal of his bail application, his remedy was an appeal against that decision.

28. I also cannot fault the second Magistrate's observation that a concession by the investigating officer is not determinative of

whether the State has a *prima facie* case against the accused. S 60(11)(a) requires an accused, who relies on the weakness of the State's case against him to establish exceptional circumstances, to adduce sufficient evidence to prove, on a balance of probabilities, that he will be acquitted. The Appellant manifestly failed to do so at his first bail application.

29. As was the case in *Abdi*, the Appellant has now sought to do no more than to repeat and expand upon the submissions made on his behalf at the first bail hearing. He is not entitled to have a second bite at the cherry in this manner.⁴ Thus, having found that the Appellant's attendance at the cultural ceremony to be held for his sister does not constitute exceptional circumstances, that should be the end of the enquiry. I nevertheless deal briefly with the Appellant's contention that the State's case against him is so weak as to constitute an exceptional circumstance.
30. In the main, the Appellant contends that the State will be unable to prove that he was at the scene of the crime or that his version as to why he was in the vehicle is not reasonably possibly true.
31. As to the first, while it may be so that there is no evidence that the Appellant was in the shop during the robbery, it is common cause that he was in the so-called 'getaway vehicle' and that the stolen goods and one firearm were found in the said vehicle. Thus, the State need not prove that each of the accused were actively

participating in the robbery if it can prove that one or more of the accused were waiting for the others in or around the vehicle.

32. The further difficulty with the Appellant's contention is that the evidence in his bail application was presented by way of affidavit and, *ex facie* the attachments thereto, it is clear that his reliance on the State's evidence (or apparent absence thereof) is selective.
33. For example, the Appellant attempts to make much of the fact that the complainant's statement indicates that three of the robbers were armed, and that only one firearm was found in the vehicle and another was found in a field hours later. The Appellant, however, ignores the evidence that one of the accused had run away and was found later that same day. This immediately presents a possible explanation for why only one firearm was found inside the vehicle.
34. In addition, the arresting officer's statement also indicated that, when the vehicle was being pursued, the driver attempted to evade the police. The Appellant's affidavit is silent on this part of the State's evidence. He is also silent about the fact that the State had procured tracking records for the vehicle.
35. In short, the Appellant's contention that the State's case against him is weak does not account for all of the available evidence.
36. Of course, this does not prove the Appellant's guilt. That is not what is required at the bail stage. But the Appellant's failure to address

those parts of the evidence means that he has not discharged the onus placed upon him by s 60(11)(a).

37. Put differently, the Appellant's selective treatment of the evidence is material because, to meet the onus resting on him to establish exceptional circumstances, he is required to prove on a balance of probability that he *will* be acquitted of the charge.⁵

38. The shortcoming brought about by the Appellant's selective treatment of the available evidence is exacerbated by his election to proceed by way of affidavit. Gamble J recently reaffirmed the risk that a bail applicant takes if he elects to proceed by way of affidavit thus:⁶

"It has repeatedly been said that an accused who elects to go by way of affidavit rather than presenting viva voce evidence in a bail application runs a distinct risk. Recently, in Killian (where the accused was charged with murder which resorted under Schedule 6 to the CPA), Binns-Ward J observed, in my respectful view correctly, that, in choosing to attempt to discharge that onus on affidavit, an accused person runs the risk of not resolving disputed allegations which might arise in the process."

39. Moreover, the best evidence the Appellant could have presented was evidence from the passenger he says he intended to collect on the day in question. The Appellant states baldly that he needs to be released from custody in order to follow up on that evidence. I find the contention entirely unconvincing. It would have been to most

obvious solution in the world for the Appellant to provide the person's contact details to his attorneys and to instruct them to contact this potentially critical witness in his defence. His failure to do so leaves a significant gap in his version.

Conclusion and Order

40. In all the circumstances, I am not satisfied that either of the Magistrates' decisions was wrong in concluding that the State has a *prima facie* case against the Appellant. The Appellant has, accordingly, not adduced sufficient evidence to demonstrate exceptional circumstances which in the interests of justice permit his release.

41. In the result, I make the following order:

The appeal by the Appellant against the refusal of bail in the Wynberg Regional Court is dismissed.

AG CHRISTIANS
ACTING JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Mr Lingani
(heads of argument prepared by Mr Mtshembla)

For defendant: Mr Hough
State Prosecutor

¹ *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC) – see also the discussion of s 60(11)(a) more generally at paras 63 to 65.

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

³ *Abdi v S* (A16/2026) [2026] ZAGPJHC 640 (3 March 2026).

⁴ *Abdi* para 24

⁵ *S v Botha* 2002 (1) SACR 222 (SCA) at 230h, 232c; *S v Viljoen* 2002 (2) SACR 550 (SCA) at 556c.

⁶ *Kara and Others v S* (A 218/22; F563/2022) [2022] ZAWCHC 258; 2023 (2) SACR 171 (WCC) (1 December 2022) para 9.