IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: CC45/13

In the matter between:

THE STATE

v

CACILE MATSHOBA

SIYABONGA BRANDY

THEMBINKOSI SPEELMAN

THULANI HAAS

JUDGMENT

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1. The four accused appeared before me for an enquiry pursuant to the provisions of section 49G of the Correctional Supervision Act, No. 111 of 1998 ("CSA")

2. Each of them were arrested on 23 June 2012 and have been "remand detainees" within the meaning envisaged by that term in the CSA at St Alban's, Medium A, Correctional Centre since 26 June 2012.

3. The recently enacted provisions of section 49G of the CSA obliges the head of the remand detention facility or correctional centre, as the case may be, to refer to "the court concerned" in the manner set out in the section all remand detainees whose period of detention exceeds two years from the detainee's initial date of admission into of the facility or centre, in order "to determine the further detention of such (detainee) or (his) release under conditions appropriate to the case".

4. Although the accused have not yet served two years awaiting trial in terms of article 4.3 of the Justice, Crime Prevention and Security ("JCPS") Protocol on the procedure to be followed in applying the provisions of the section 49G of the CSA (being the directives envisaged by section 49G(5)), the head of the correctional centre is expected to

forward to the clerk of the court his request for the court to consider the further detention of awaiting trial prisoners once the period of detention exceeds 21 months from the initial date of admission already and it is on this basis that the head of the Correctional Centre, St Alban's Medium A, has requested this court to consider the further detention or release of the accused as may be appropriate to the circumstances.

5. The Protocol provides that in considering the further detention of the remand detainee, the "normal principles and requirements relating to bail", as set out in the CPA apply, but no basis for the consideration is set out in the enabling provision. Subsection 5 defers to the directives (which purpose is served by the Protocol) but only in regard to the *procedures* to be followed by the relevant role players whenever it is necessary to bring the proposed application.

6. In S v Sheyi, an unreported judgment of the Bhisho High Court in case number CC4/2011, which I delivered on 6 August 2013 shortly after the implementation date of the provisions of section 49G, I had occasion to interpret the provisions of the section. I held that it was neither the object nor the effect of the then newly proclaimed amendment that the court reconsidering the continued incarceration of the awaiting trial prison was

required to hold a bail hearing proper such as is envisaged by section 60 of the CPA. On the contrary I opined as follows:

> 'In my view all that is required is to take note that the detained person has passed a certain threshold, one which puts him into a category of persons the Department of Correctional Services should be particularly mindful of. This no doubt acts as a bulwark (and as an oversight function) against the rights of an incarcerated person being infringed without lawful cause or him being subjected to arbitrary detention. It ensures that upon reflection there remains good reason for his continued incarceration. Whilst I have no doubt that considerations such as an inordinate delay in prosecution, the loss or absence of vital evidence or witnesses (or other convincing grounds such as will evolve in practice which threaten to condemn an incarcerated detainee to an open ended and unreasonably protracted incarceration) may provide a sound reason for a court to release an accused who has hitherto been detained pending a trial, I am not persuaded that the amendment requires the court to revisit the issue as if it were a bail hearing.'

7. Although my judgment was written before the Protocol was agreed upon, I remain of the view that I am not required to hold a bail hearing. Neither in my opinion can the Protocol bind a presiding officer in any event concerning the interpretation referred to therein that the reconsideration hearing should take the form of a bail enquiry and that normal bail

principles are to be applied in the process. Whilst there may be an overlap with the usual factors which are required to be taken into account in bail determinations, the enquiry in this instance is in my view sui generis. The focus is on the lapse of time which may erode an accused's person's right to have his trial begin and conclude without unreasonable delay as well as the prison's unique problem of overcrowding in prison. The enquiry is also generally concerned with any factor which will have an impact on the interests of justice as this critical consideration must always be kept in mind when weighed against the interests of a remand detainee.

8. Ms Coertzen on behalf of the accused prepared affidavits for each accused which merely set out their personal circumstances. Whilst they each suggest a willingness to be released on bail, none of the accused strongly contend that there are valid reasons why their continued incarceration pending the trial, which is to be heard on 10 – 21 November 2014, should not be ordered. Each of the accused previously unsuccessfully applied for bail in the Magistrate's Court before and it was not suggested in the case of any one of them that there have been any change of circumstances concerning them which would have entitled them to approach the court which declined them bail in the first instance

(no doubt because their release was considered likely to prejudice the ends of justice) on the basis of new facts.

9. Ms Coertzen further conceded on behalf of all of the accused that there had not been an unreasonable delay in the trial, certainly not on the basis envisaged in section 342A of the Criminal Procedure Act, No. 51 of 1977, warranting an investigation by this court into the circumstances or an interference with the pace of the prosecution.

10. It appeared to be accepted that the postponement of the trial this week, which I might add is the first appearance in this court, was not due to the fault of the state. On the contrary it is common cause that it is the result of "unforeseen systemic reasons" due to the fourth roll being cancelled. Whilst I accept that neither are any of the accused responsible for the delay, this is not a factor which per se operates to exclude their further incarceration pending the trial which will be heard in the next eight months.

11. In advancing reasons in support of the continued detention of the accused, Mr Canary, who appeared for the State, correctly pointed to the fact that the accused face serious charges involving violence and that, if they are convicted on count 2, may face life imprisonment. This in itself is a

serious factor militating against the release of any of them on bail pending their trial.

12. Whilst I have taken into account all the considerations placed before me there does not appear to me to be any good reason why the accused should not remain in custody pending their trial.

13. In the result the matter is postponed for trial to the agreed date : 10 – 21 November 2014, with all the accused to remain in custody pending the trial. Separate orders will issue in respect of each accused in terms of section 49G of the Correctional Supervision Act, No. 111 of 1998 that their continued detention is so ordered.

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B HARTLE

JUDGE OF THE HIGH COURT

HEARD: 26 MARCH 2014

DATE OF JUDGMENT : 27 March 2013

Appearances:

For the state : Mr Canary, Director of Public Prosecutions, Port Elizabeth.

For the accused : Ms Coertzen, Legal Aid Board, Port Elizabeth.