IN THE HIGH COURT OF SOUTH AFRICA
{EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH}

Case No. 27/26/18

In the matter between:

NHLANHLA BAVISA Applicant

And

THE STATE Respondent

JUDGMENT (BAIL APPEAL)

TONI AJ

Introduction

[1] In this matter the appellant, Nhlanhla Bavisa, launched an appeal against the refusal by the Magistrate for the District of Port Elizabeth to grant him bail. The appellant was arrested by members of the South African Police Service (SAPS) on 27 December 2017 and was charged with two counts of extortion. He has been in custody henceforth and has approached this court by way of an appeal after he was refused bail by the learned Magistrate on 29 May 2018.

[2] The grounds of appeal advanced by the appellant are that the learned Magistrate erred in:

"2.1 *Postponing the matter in terms of section 50 (6 (i) and not ordering the State to produce sufficient rebuttal evidence and ignore the appellant's evidence in terms of section 60 (11).*

2.2 Accepting evidence by the State that the appellant has a string of criminal records and ignored the appellant's submission that he cannot

be linked to any criminal or previous conviction when there is no evidence that a fingerprint expert has done comparison from his fingerprints. No fingerprint statement or name.

2.3 Accepting that the appellant has pending cases against him when the State has failed to prove any pending cases against him.

2.4 Accepting that the appellant is a flight risk when his address was not verified and no attempt was made by the State to verify same and no evidence by the State of a warrant against him.

2.5 Ignoring the fact that the appellant was arrested at the police station and being there on his own free will."

[3] Whilst the above grounds of appeal may not have been couched in any clinical fashion this does not, however, divest this Court of its inherent power to adjudicate the matter and determine the issue before it. In so doing I have taken the view that the appellant is a layperson who was not legally represented during the bail application proceedings and in launching this appeal.

[4] During the bail application proceedings the appellant was not represented. He first appeared before the Court on 3 January 2018 and was represented by Advocate Matoto. On the said date the state recorded its opposition to the granting of bail and requested postponement of the matter to 10 January 2018 for the appellant's profiles and finger prints (SAP 69). The

matter was accordingly postponed to the said date which was referred to as the provisional date by the State.

[5] On 10 January 2018 the appellant further appeared before court and the State sought further postponement of the matter to 18 January 2018, once again for the appellant's profiles, SAP 69's and verification of the appellant's address. On 18 January 2018 the appellant appeared before the Magistrate's court once again and on this date he was further remanded to 24 January 2018. The matter kept on being remanded and further remanded to the following dates, namely; 9 May 2018, 16 April 2018, 17 April 2018, 24 April 2018, 28 April 2018, 2 May 2018, 9 May 2018, 14 May 2018, 21 May 2018 and 29 May 2018 when the application for bail was refused. Even after the refusal of bail the appellant was kept on being remanded in custody and at the hearing of this matter it was intimated by the State that the matter is now ready for trial and has been postponed to some date in October 2018.

[6] More displeasing in a constitutional democracy that South Africa is today is that in all the above instances the appellant was remanded in custody and various reasons were given by the state for seeking postponement. These reasons and their adverse effect on the appellant's constitutional right to be released on bail will be dealt with later in this Judgment. It is, however, worth mentioning that the fact that the appellant has been languishing in police detention since his arrest is beyond comprehension. It is in defiance of logic and is irrational, capricious and gratuitously oppressive.

[7] The appellant has been in police custody for precisely the same reason that was advanced on 3 January 2018 since 27 December 2017. Effectively the applicant has been in detention without trial for more than seven months.

Issue to be determined

[8] The crisp issue falling to be determined by this Court is whether in denying the appellant bail the learned Magistrate misdirected himself or not. Put differently the issue is whether the appellant's continued detention without

trial is in the interest of justice. For proper determination of this crisp issue the Court will have recourse to the Constitution of the Republic of South Africa, “the Constitution”, as well as the pertinent provisions of the Criminal Procedure Act relating to the accused right to be released on bail.

[9] In determining the above issue the court is enjoined to consider all factors that weigh heavily in favour of the appellant as against those that weigh heavily in favour of the State and put those factors in a judicial scale before coming to a conclusion as to whether it is in the interest of justice that the appellant remains in custody pending the finalisation of his trial or is released on bail.

Facts

[10] It is common cause that the appellant was arrested on 27 December 2017 and was charged with two counts of extortion. The state alleged that he attempted to extort R50 000.00 and R40 000.00, respectively, from two retail stores located in Port Elizabeth by informing them that they had to pay a fine for flouting the law and employing their staff without properly registering them for UIF and other infractions.

[11] Having been arrested, the appellant was formally charged at Humewood police station where he was detained. The circumstances leading to his arrest are in dispute with the state alleging that the appellant was arrested by members of the SAPS after a tip off from one of his victims. The appellant on the other side contended that he presented himself at Humewood police station for the

purpose of signing a Memorandum of Understanding (MOU) with one of his potential clients after concluding an agreement with him for the provision of certain labour related services.

[12] The appellant averred that on the day in question he approached two retail stores in Port Elizabeth for the purpose of marketing his services and

having agreed with the owner of the first store to sign an MOU, he proceeded to the next store where he also agreed with the store manager to sign an MOU as a prelude to their agreement. The appellant suggested that this MOU be signed and commissioned at Humewood police station and whilst on their way thereto they saw a marked police vehicle which was also on its way to Humewood police station. He sought a hike from the driver of the said police vehicle. At Humewood police station he went to the crime office for the purpose of drafting and printing the MOU and was arrested when one of the Captains on duty came in with another man who is apparently an employee at the clothing store he earlier visited and claimed that he (the applicant) had extorted him.

[13] However, it was later conceded by the police official who testified for the State during the bail application hearing that the appellant was indeed arrested at Humewood police station.

[14] Despite having been arrested on 27 December 2017, the appellant was only brought before Court on 3 January 2018. It is not explicit from police evidence why was he brought before Court only on 3 January 2018 as this date is beyond the requisite 48 hours upon which an accused must be brought before court. Absent a reasonable explanation from the police for his detention beyond 48 hours as contemplated in section 50 (c) (i) of the Criminal Procedure Act[1], the appellant's detention was unlawful. Section 50 provides:

> "50 (1) (a) Any person …
>
> (b) Any person …
>
> (c) Subject to paragraph (d), if such an arrested person is not released
>
> by reason that-

[1] Act 51 0f 1977

(i) no charge is to be brought against him or her; or

(ii) bail is not granted to him or her in terms of section 59
or 59 A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.

(d) if the period of 48 hours expires-

(i) outside ordinary court hours or on a day which is not
an ordinary court day, the accused shall be brought
before a lower court not later than the end of the first
court day;

Inordinate remands and reasons therefor

[15] On 3 January 2018 the matter was remanded to 10 January 2018 at the instance of the State which sought to obtain the appellant's profiles and SAP 69's. On 10 July it was further postponed to 18 January 2017, precisely for the same reason and also for the verification of the appellant's address. Despite the fact that the appellant intimated on 3 July 2018 that he intended applying for bail, no bail proceedings were set in motion. Instead on 18 January 2018 he was further remanded in custody to 24 January 2018, presumably to afford his Counsel to consult with him. No further reason could be gleaned from the record for this postponement.

[16] It escapes one's reasoning and defies simple logic why the matter could be postponed simply for the purpose of consultation as the appellant's Counsel already appeared for the appellant as far back as 3 January 2018.

The reason advanced for this postponement is simply inconceivable and may be easily perceived by a rights sensitive mind as a delaying tactic to prolong the appellant's further detention without trial. It is insensitive to the appellant's right to be released on bail as envisaged in section 50 referred to above and is inconsistent with the provisions of Constitution.

[17] The above displeasure notwithstanding, the matter came before Court on 24 January 2018 and was further postponed to 26 January 2018, this time for bail arrangements to be made for the appellant at Court 27. On 26 January 2018 the matter was further adjourned to 9 February 2018, this time for consultation once again and possible plea. One would only assume that when the matter is postponed for plea everything else has been done to ripen the matter for trial and the matter was trial ready.

[18] Quite disturbingly though, the matter was further adjourned on 9 February to 16 April 2018 for further investigation. It is unfathomable why the matter could be postponed for a plea on 24 January 2018 when investigations were still incomplete. Further incomprehensible is the reason why investigations would be incomplete almost six months after the appellant was arrested and detained. If I understand the facts of this case correctly, the appellant was arrested right at the scene of crime for a simple case of extortion where the two alleged victims were easily available. It was a straight arrest where one of the alleged victims was at the police station at the time the applicant was arrested.

[19] Be that as it may an earlier entry on the record of 16 April 2018 indicates that the matter was further postponed to 28 May 2018 for further investigation again. A further entry afterwards indicates, indistinct though it may be, that the State sought further postponement for the purpose of obtaining a section 205 statement. Further scribbling in this entry is completely blurred and indecipherable. For whatever it is worth, the matter was further postponed to 17 April 2018. It us not apparent from the record why bail application could not be made on the said date as the matter was previously postponed for bail application arrangements.

[20] On 17 April 2018 the appellant appeared in person and it could only be assumed that his legal representative withdrew. On this date the State further sought postponement of the matter for the appellant's profiles, SAP 69's and verification of address. This is precisely the same reason for the remand of the matter on 3 January 2018. No explanation was proffered by the State and no enquiry was conducted by the learned Magistrate why these could not be obtained since 3 January 2018.

[21] Apparent from the record is that this postponement irked the appellant's ire as the record reflects his jeer that "*Not new case. Info should be available*". This did not seem to bother the State as it was steadfast that it "*will oppose the applicant's release on bail and will arrange with the Investigating Officer*". This did not seem to have disturbed the learned Magistrate either, once again, as he simply acquiesced and remanded the appellant in custody. At this stage the learned Magistrate at least had the tenacity to mark the remand "*Preferent FINAL*", for whatever it is worth. The learned Magistrate further endorsed for "FBA & I/O which can safely be assumed that the remand was for bail application and the Investigating Officer.

[22] Bizarrely and contrary to the learned Magistrate's endorsement that the postponement on 17 April 2018 was final, it appears from the record that the bail application could not proceed even on this date on a flippant excuse this time that the Investigating Officer was not in court and even though his colleague was available to proceed, there was no Magistrate to entertain the bail application.

[23] What is discernible from the above conduct is either that no proper arrangements were made for entertaining the bail application or there was no resolve on the part of the court *a quo* to entertain the bail application. Consequently, the appellant was further remanded in custody to 2 May 2018 for "*PREFERENT BAIL APPLICATION*". It was also endorsed by the learned Magistrate that the case will proceed as early as possible.

[24] This remand was allowed despite the applicant's reasonable objection to further remand.

[25] On 2 May 2018 the bail application hearing proceeded and the state sought further postponement. The matter was further postponed to 9 May 2018 on the grounds that the appellant disputed his previous convictions and the Investigating Officer was not before court. The State also came up with some allegations that the appellant was out on parole and, therefore, sought to confirm the appellant's parole conditions from Daveyton police station. The appellant correctly objected to a further postponement on the grounds that the State was supposed to be ready with this information since January 2018. The appellant also decried the fact that the Investigating Officer was not before court as he knew that the application would proceed on that date. Such objection notwithstanding, the appellant was further remanded in custody for the verification of his alleged parole conditions and for the investigating officer to be in court.

[26] On 9 May 2018 the appellant was further remanded in custody to 14 May 2018. It is not clear from the record why this matter was postponed on 9 May 2018. On 14 May 2018 the State further sought postponement for the appellant to furnish the investigating officer with fresh fingerprints to confirm the applicant's previous convictions. Once again the appellant objected to the postponement on the grounds that his right to be released on bail is an urgent matter. Nonetheless the matter was postponed to 21 May 2018.

[27] On 21 May 2018 the bail application could not proceed as the state sought another postponement for the appellant's fingerprints which were still outstanding. The State also sought the appellant to explain himself relative to the allegations of his previous convictions. There was also a new dimension relating to the appellant having been brought to court by prison warders. Having been offered an opportunity to explain himself by the court the appellant explained what transpired. Apparently the appellant was arrested on a warrant by prison warders on an allegation that his fingerprints resemble those of someone who was on parole and breached parole conditions.

Bail proceedings

[28] During the bail application hearing on 2 May 2018 the States alleged that even though the appellant was charged with a Schedule 1 offence of extortion, the offence falls under Schedule 5 because of the appellant's previous convictions. The appellant, therefore, bore the onus to satisfy the Court of the existence of exceptional circumstances that would entitle him to be released on bail, so contended the State. It was the state's contention that the appellant "*had previous convictions relating to the current offence and also quite a substantial number of previous convictions"*. The State further contended that the appellant was released on parole and his parole and will only expire in 2020.

[29] The appellant adduced evidence in his bail application by reading an affidavit he prepared for that purpose. The appellant's testimony is that he was born in Boksburg, South Africa, and has resided in South Africa for all his life, has never left the borders of South Africa and does not intend doing so in any foreseeable future. He further stated that he does not have any passport or any form of travel document that could entitle him to leave the country. He presently resides at 14699, Marikana Location, Boysen Park, Port Elizabeth. His family and friends permanently reside in the Republic. He owns movable and immovable assets in South Africa which are valued at approximately R1.6 million.

[30] He is an Accountant by Profession, holding a degree of Bachelor of Accounting Science and is busy studying for a degree of Baccalaureus Legum (LLB) with the University of South Africa. He earns approximately R264 000.00 per annum from his professional occupation.

[31] In relation to the offence with which he is charged, he denied the allegations levelled against him and was content that the state will not be able to present objective facts to substantiate such allegations. Putting his version of the events of 27 December 2018, he stated that on the day in question he

visited Small Medium Enterprises around Greenacres for the purpose of marketing his accounting services. He approached the owner of a butchery who became interested in his services and after some discussion he informed the owner that before he could commence with his services, they had to sign a Memorandum of Understanding (MOU) which had to be commissioned at Humewood police station, “the Police Station”. They agreed to meet at the police station but because he had a few other places to visit, he left.

[32] In relation to Count 2, he stated that he visited a certain clothing shop for the same purpose as stated above and met with the manager who, after telephonically contacting the owner, was also interested in his services. He informed the manager that they had to sign and commission an MOU at the police station to which the manager agreed. On their way to the police station, he saw a marked police motor vehicle and having sought a lift from its driver, they left for the police station.

[33] At the police station, he went to the crime office, he took out his laptop for the purpose of drafting and printing the MOU and whilst still busy doing so, one of the Captains on duty came in with another man, ostensibly an employee of the clothing shop he earlier visited. This man claimed that he extorted him. He was then arrested and detained at the police holding cells.

[34] The appellant contended that he will stand trial and as additional facts he further contended that he was not disposed to interfering with state witness as he did not know their identity. He further stated that he held no grudges against anyone and that he is not disposed to violence. The foregoing supports his contention that he is not a flight risk, he continued, adding that he went to the police station on his own accord. He has no knowledge of any evidentiary material which may exists in relation to the allegations against him which, if it exists, is in the possession of the police. He therefore undertook not to interfere with police investigations or any witnesses.

[35] Concluding his evidence the appellant stated that his continued detention is prejudicial to him and is of no benefit to the State. His release on bail will

not disturb public order or undermine the proper functioning of the criminal justice system, so he further contended. Should he be released on bail, he will comply with his bail conditions and could raise the bail amount of R500.00.

[36] In its opposition to the granting of bail, the state placed its reliance on an affidavit deposed to by one Warrant Officer Greyling, "Greyling", which was read into the record. Greyling is a member of the South African Police Service and is stationed at Humewood police station. In the said affidavit Greyling stated that the appellant visited businesses where he identified himself as Department of Labour official and questioned business owners relative to whether their employees had the requisite papers to be employed and demanded money if the paper work was not in order and in the event that there were outstanding payments in return for not reporting these irregularities to the department of labour. He was then paid R10 000.00 in respect of CAS no. 455/12/2017 after the owner could not afford the R50 000.00 he allegedly demanded. He was further paid on demand R10 000.00 in respect of CAS no. 532/10/2017. He was apprehended on his way out of the shop, Greyling stated.

[37] Greyling further stated that according to Constable Meyer, the investigating officer in that case, the appellant is currently out on parole on a charge of extortion. He stated that there is documentation from the Local Criminal Record Centre (LCRC) which indicates that the appellant was released on parole on 5 May 2016 which parole will expire on 6 June 2020. According to Greyling the appellant's profiles indicate that the he has pending cases in respect of Brakpan CAS no, 127 09/17 and that constable Meyer is in possession of a warrant of arrest issued on Benoni CAS no. 263/08/2017. A certain Sergeant Naicker confirmed that the appellant's real names is Pressbe Linda Nemakazi and not Nhlanhla Bavisa, Greyling's evidence continued. He further stated that the appellant has numerous cases of fraud, theft, extortion, as evidenced by SAP 69's. His address had not been confirmed but the appellant is not employed by the department of labour. The

warrant of arrest issued is in respect of his failure to attend court. Greyling concluded by stating that he believed that the appellant is a flight risk

[38] The State also stated that the appellant was convicted of the following offences: theft on 23 January 1995, robbery on 1 March 2010, fraud on 18 October 2011 with appropriate sentences and was released on parole on 5 May 2016. The State handed in profiles which allegedly indicted that the appellant was, in fact, Linda Nhlanhla Pressbe. On the other profile he appeared as Bavisa Nemakazi, the State contended. The State then sought postponement for the investigating officer and the appellant was remanded in custody to 9 May 2018.

[39] The appellant strongly denied the previous convictions and that he is the person referred to as Pressbe Linda Nemakazi or any other name. The matter did not proceed on the 9th and 14th May 2018 as explained above. On 21 May 2018 the State intimated that the fingerprints would not be available from Pretoria. On the even date constable Meyer, "Meyer" testified as to how the appellant was arrested, regurgitating what Geldenhuis had already stated.

[40] According to Meyer he received a photo which is in a National Identification System from the investigating officer in Benoni which he compared with the appellant's previous convictions and confirmed that it is the same person. Meyer further stated that he took the appellant's fingerprints to Mount Road LCRC where he was told to make an application to Pretoria for comparison of the applicant's fingerprints from the SAP 69's to the fingerprints he obtained on SAP 192. He confirmed that he picked it up from the appellant's profiles that the appellant was released on parole from 5 May 2016 to 6 June 2020 and that the appellant was convicted of seven counts of fraud.

[41] Meyer conceded during cross examination that he did not have information regarding the comparison and verification of fingerprints as this is done in Pretoria, through the LCRC in Mount Road. Similarly no verification of death of Pressbe Linda Nemakazi, "Namakazi", was done with the

departments of labour and home affairs yet despite the fact that a death certificate of this person was found when the appellant was arrested. Meyer testified that for such verification to be done, it required section 205 forms to be completed which had not been done yet because the case docket went to court.

[42] Meyer could not explain why such information could not be readily available. It is inconceivable that information for such a simple process of comparison and verification could not be available in May 2018 as Mount Road LCRC offices are in Port Elizabeth where the offence was committed. It should not have been a difficult process at all to obtain such information and make it available during the bail application proceedings. Both the departments of labour and home affairs also have local offices from which the name and death of Nemakazi could have been verified.

[43] This case had been postponed on numerous occasions from 3 January 2018 for further investigation and other reasons and it could not have been difficult for the investigating officer to obtain the case docket for that purpose. The appellant also submitted that it would not have been so difficult for the investigating officer to investigate all outstanding issues against him as he abandoned his bail application when the matter was transferred to court 27 on 24 January 2018 and was postponed to 16 April 2018. It is unfair that the section 205 forms were still in the case docket and not served at the time that the bail application was heard in May 2018.

[44] The appellant denied that the previous records relating to Nemakazi were his and put this in issue when he cross examined Meyer. Meyer could not logically link such previous records to the appellant for want of comparison of fingerprints and verification of Nemakazi's death certificate. The above is more apparent from page 66 of the record when the following question were posed to Meyer by the applicant:

"Applicant : I just want to know from you, since you have this information that Pressbe Linda Nemakazi is deceased do you want this Court to believe that the records that you have they (sic) are actually my records?
Meyer : I do not know that for a fact Your Worship.
Applicant : Okay do you have information of that?
Meyer : I have information about it yes Your Worship.
Applicant : And you never followed that information?
Meyer : No Your Worship.

[45] The only possible link that Meyer could establish was through comparing the appellant's alleged previous criminal records, which the appellant denied, with a photo he received from the investigating officer in Benoni. It also transpired during cross examination that Meyer never bothered verifying the appellant's residential address.

[46] In addition to the appellant's alleged previous criminal record, the State also opposed bail on the ground that the accused is a flight risk.

Bail Appeal

[47] Having been refused bail by the court *a quo* the applicant launched this appeal.

[48] In refusing to grant bail the learned Magistrate found that:

(a) The appellant did not discharge the onus to prove that it was in the interest of justice that he be released on bail and the learned Magistrate accepted the evidence of the State that the appellant had previous convictions, that he had an outstanding case in Benoni and was on parole.

(b) The appellant is a flight risk since he has an outstanding case in Benoni where a warrant for his arrest has been issued and for this

reason, the learned Magistrate opined that there is a likelihood that he will not stand trial if released.

(c) The State also had a strong case against the appellant.

Argument

[48] During his argument the appellant maintained his denial of the pending criminal cases against him, his previous convictions and that he was released on parole. He argued strongly that his continued detention is in violation of his constitutional rights and bemoaned delays in hearing his bail application and concomitant postponements of his case as "*justice delayed, justice denied.* These delays violated his right to a speedy bail and fair trial. He also submitted that the State had failed to provide the court with all relevant information for proper adjudication of his bail application when it had ample opportunity to do so.

[49] He also refuted submission by the State that he is a flight risk and submitted that the learned Magistrate erred in accepting this as he had no passport or any form of travel document, he is a South African citizen and had never travelled abroad and had a fixed residential address which the investigating officer failed to verify. The appellant submitted that he had immovable property which together with his movables was valued at R1.6 million. He further submitted that he had three children who were wholly dependent on him for their maintenance and support and his continued detention was prejudicial to him and his minor children.

[50] In her argument, Ms Landman placed reliance in opposing the granting of bail on the applicant's previous convictions, pending cases and the fact that the applicant was released on parole for a similar offence. Ms Landman further argued that the applicant was a flight risk and will not attend his trial if he were to be released on bail. However, Ms Landman was constrained to explain the reasons why it took so long for the police to finalise their investigation and why the matter has not found its way through to court for

trial. To this she could only say that the matter is now ready for trial and has been allocated a date in October 2018. She could not take the matter further when she was asked whether there was effective balancing of the applicant's right to bail and the state right to investigate in the process.

Discussion

[51] Section 65 (4) of the Supreme Court Act provides that a Court hearing an appeal against the refusal to release an applicant on bail will not set aside the decision of the magistrate unless such Court is satisfied that the decision was wrong. The proper approach to be followed is set out in *S v Barber* as follows:

> "It is well-known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because it would be an unfair interference with the magistrate's exercise of discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail but exercised that discretion wrongly . . ."[2]

[52] The position of a bail applicant who is accused of having committed an offence mentioned in Schedule 5 is governed by the provisions of section 6 (11) of the Act. Section 6 (11) provides:

> **"**60 (11) Where an accused is charged with an offence referred to -

[2] 1979. (4) SA 218 (D)

> (a) in Schedule 5, 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 reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of Justice permit his or her release;"

[53] The term, "exceptional circumstances", is not properly defined in the Act. In *S v Schietenkat 1999 (2) SACR 51 (CC)*[3], the Constitutional Court held that, *"the* inclusion of the requirement "exceptional circumstances" in Section 60 (11)
(a) limits the right enshrined in Section 35 (1) (f) of the Constitution, it is a limitation which is reasonable and justifiable in terms of the Constitution in current circumstances.

[54] In *S v Jonas 1998 (2) SACR 673 at (687 e-j*) Horn AJ held that "exceptional circumstances" is established when an accused is able to adduce acceptable evidence that the case against him is non-existent or subject to serious doubt. The learned Judge further said:

> "The term 'exceptional circumstances' is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused's absence is one that springs to mind. A terminal illness may be another. It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with a commission of a Schedule 6 offence when everything points to the fact that he could not have committed the offence e.g he has a cast - iron alibi, this would likewise constitute an exceptional circumstance.''.

[55] The standard of proof required from the appellant to establish the existence of "exceptional circumstance" is on a balance of probabilities. See

[3] At paragraph 77

S v Rudolph 2010 (1) SACR 262 (SCA) at 266 f-g. Once "exceptional circumstances" have been established by a bail applicant the enquiry must focus on the balance between the interests of the State as set out in Section 60 (4) of the Act on the one hand, and the appellant's interest in his personal freedom as set out in Section 60 (9) of the Act, on the other hand. Section 60 (4) provides:

> "(4) The interests of justice do not permit the release from detention of an accused
> Where one or more of the following grounds are established; (a) where there is a likelihood that the accused, if he or she is released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence, or (b) where there is a likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or, (c) where there is a 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 likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system, (e) where in exceptional circumstances there is a likelihood that the release of the accused will disturb the public order or undermine the public peace or security".

[56]. Section 60 (9) provides:

> "(a) In considering the question in subsection 4 the court shall decide the matter by weighing the interest of justice against the rights 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; (b) the period for which the accused has already been in custody since his or her arrest; (c) the reason for the delay in the disposal or conclusion of the trial and any fault on part of the accused with regard to such delay. (d) 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; (e) the state of health of the accused; (f) any other factor which in the opinion of the court should be taken into account".

[57] The issue in *casu* is whether the learned Magistrate misdirected himself in refusing the appellant bail and whether it is in the interest of justice that the appellant be released on bail.

[58] The summation of the learned Magistrate's refusal to release the appellant on bail pivots only on three factors; namely, that, (a) the applicant has previous convictions, (b) that he is a flight risk, and (c) that the state's case against him is strong. It does not seem to me that the learned Magistrate ever bothered balancing the interest of the applicant and those of the State or did he even bother considering the personal circumstances of the applicant in order to ascertain whether there are exceptional circumstances or not. In my view that is a misdirection.

[59] Whilst in some cases previous convictions can be of a serious nature, I do not agree that previous convictions alone could be used by the court to punish an accused and deny him bail. This, in my view, is in keeping with a long held legal principle that refusal to grant bail to an accused should not be used as some form of anticipatory punishment.

[60]. In considering whether it is in the interest of justice that the appellant be released on bail the court *a quo* should have balanced the interest of the appellant and those of the State. In *S v Hudson 1996 (1) SACR 431 (W),* Flemming DJP held:

> "Considering the granting of bail involves, as is well known, a balancing of the interest of justice against the wishes of the accused. But this is, of course, not accurate. Those interests are not fully in opposition. It is also to the public good and part of public policy that a person should enjoy freedom of movement, of occupation, of association, e.t.c…"

[61] In *S v Stanfield 1997 (1) SACR 221 (C)* it was held that the court *a quo* had lost sight of the fact that denial of bail would be in the interest of justice only if one of the factors set out in section 60 (4) was probable. Where the facts in sections 60(4) and 60(9) of the CPA are relied upon in a bail application they are relevant and cannot be ignored.

[62] The learned Magistrate should have also taken into consideration the factors set out in section 60 (9) and more particularly the period the applicant has spent in detention pending his trial.

[63] In relation to the learned Magistrate's finding that the appellant is a flight risk, no proper and acceptable evidence was placed before court to make that finding. That finding is based on the assumption that because the state has alleged that the applicant has a warrant of arrest against him he might evade justice. The court *a quo* had lost sight of the fact that the appellant has a fixed address in the Republic and has no means to fly abroad. The appellant testified passionately about the impossibility of him escaping from the country and such evidence was not challenged by the State. The appellant further testified that he has valuable immovable property and such submission had not been challenged. The failure of the investigating officer to verify his residential address cannot be faulted on the applicant.

[64]. Similarly the reliance by the State on the strength of its case could not have been considered in isolation. In *S v Van Wyk 2005 (1) SACR 41 (SCA)* at paragraph (6), it was held that "*the duty of the court in a bail application is to assess the prima facie strength of the state case against the bail applicant as opposed to making a provisional finding on the guilt or otherwise of such an applicant. Bail proceedings are not to be viewed as a full dress rehearsal for trial. The making of credibility findings of witnesses on the merits of the case against the accused is left to the trial*

court which is better placed to assess such witnesses. (See ***S v Van Wyk 2005 (1) SACR 41*** *(SCA) at par [6])".*

Conclusion

[65] I am not convinced that it is not in the interest of justice that the applicant be released on bail. The delaying tactics employed by the State in its investigation coupled with unreasonable postponements point to one undesirable consequence; namely, that of violating the appellant's constitutional right to be released on bail. In allowing these postponements, the court *a quo* was not sensitive enough to the constitutional rights of the appellant. The court *a quo* failed to make rational balancing of the appellant's right to bail and the state's right to investigate. In *Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 819 G – 820 A,* the court held:

> "it is now constitutionally required that there should be a rational balancing of the applicant's right to bail and the state's right to investigate. There must be a lawful cause before detention for the purpose of investigation
> can frustrate the accused right not to be detained.

Order

[66] In the result I grant the following order:

1. The decision of the court below refusing bail to the applicant is set aside and is substituted with the following:

   "Bail is granted to the appellant in the amount of R5000-00 on condition that upon payment of the bail amount by the applicant, he:

   (a) shall report at Humewood police station, Port Elizabeth once a week;

(b) shall surrender his passport or any travel document, if he has any, to the investigating officer, constable Meyer, as soon as he is released;

(c) shall not directly or indirectly interfere with State witnesses;

(d) shall attend trial in the Magistrate's court for the District of Port Elizabeth and shall remain in attendance until his case is finalized.

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H. S. TONI
ACTING JUDGE OF THE HIGH COURT

Appearances

Appellant	:	In Person Port Elizabeth
For the state	:	Advocate Landman Instructed by State Attorney Port Elizabeth
HEARD ON	:	21 September 2018
DELIVERED ON	:	2 October 2018