Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO A736/2003.

In the matter between:

GRANT PORTHEN	First Appellant
N JACOBS	Second Appellant
C DOGEN	Third Appellant
A MOHAMED	Fourth Appellant
P JORDAAN	Fifth Appellant
C SCULLARD	Sixth Appellant

and

THE STATE	Respondent

JUDGMENT DATED THIS 21st DAY OF AUGUST 2003

BINNS-WARD AJ:

[1] This is an appeal by the six appellants against the decision of a regional magistrate refusing their applications

to be released on bail pending their trial on a charge of armed robbery. Immediately after hearing argument, I made an order, without reasons, upholding the appeal of the first appellant, Grant Porthen. Bail was fixed for him in the sum of R2000, subject to certain conditions. I reserved judgment in respect of the other appellants. In this judgment I determine the appeals of the second to sixth appellants and also furnish the reasons for my determination of the first appellant's appeal.

[2] The appellants' bail applications were heard together in the regional court. The applications were subject to s 60(11)(a) of the Criminal Procedure Act No. 51 of 1977 ('the CPA'), which provides:

'Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(a) 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;'

[3] The appeal to this court was in terms of s 65 of the CPA. In terms of s 65(4) of the CPA this court is not entitled to set aside the decision against which the appeal is brought unless it is satisfied that '*the decision was wrong*.' Section 65(4) of the CPA provides:

'*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.*' (my underlining)

[4] In *S v Barber* 1979 (4) SA 218 (D) at 220 E-H, Hefer J (as he then was) remarked as follows in the context of deciding an appeal in terms of s 65(4) of the CPA:

> *'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 for bail. 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 that would be an unfair interference with the magistrate's exercise of his 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 exercised that discretion wrongly.'*

After a brief reference to the magistrate's reasoning, the learned Judge concluded '*without saying that the magistrate's view was actually the correct one, I have not been persuaded to decide that it is the wrong one. Accordingly I am of the view that this appeal cannot succeed. It is dismissed.'*

[5] The test as set out in *S v Barber*, supra, has been followed in a number of subsequent cases. See e.g. *S*

v Branco 2002 (1) SACR 531 (W) at 533 I; S *v Nqumashe* 2001 (2) SACR 310 (NC) at paragraph [20] and S *v H* 1999 (1) SACR 72 (W), being some of the more recent instances.

[6] The dictum in *Barber's* case, supra, is quoted in Du Toit *et al*, *Commentary on the Criminal Procedure Act*, (Juta)(loose-leaf service 29, 2003) in illustration of the ambit and effect of the provisions of s 65(4) of the Act.

[7] There can, with respect, be no quarrel with the correctness of the observations of Hefer J as a general proposition (cf. *S v Dlamini, S v Dlaldla and Others, S v Joubert, S v Schietekat) 1999 (4) SA 623 (CC)*, *1999 (2) SACR 51 (CC)*, *1999 (7) BCLR 771* at paragraph [25], footnote 45). The argument advanced by the State before me in this appeal made me realise, however, that their actual import requires closer scrutiny, particularly in the context of bail

applications governed by the provisions of s 60(11)(a) of the CPA.

[8] When considering the extent of an appellate court's power to interfere with a decision of a lower court entailing the exercise by the lower court of a discretion, it is necessary to know whether the discretion in issue is one in the narrow or wide sense of the term. The distinction between 'wide' and 'narrow' (or strict) discretion has been explained in a number of comparatively recent judgments of the Supreme Court of Appeal and the late Appellate Division. See *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) SA 791 (A)* at 800C-J, *Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A)* at 360D-362G (and the authority cited there) and *Hix Networking Technologies v System Publishers (Pty) Ltd and Another 1997 (1) SA 391 (A)* at 402B-C.

[9] Where the lower court has exercised a discretion in the wide rather than the narrow sense the court of appeal 'is entitled to substitute its view for that of the court which heard the matter and is not precluded from interfering unless it concludes that the lower court has not exercised a judicial discretion'. See *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd and Others 2003 (3) SA 268 (W)* at para [26], pp. 277-8. Accordingly, where the court *a quo*, exercises a discretion in the wide sense, it does 'not have a free hand to do whatever it wishes to do and a court of appeal is not hamstrung by the traditional grounds of whether the court exercised its discretion capriciously or upon a wrong principle, or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons'. See *Ndlovu v NGGPBP; Bekker and Another v Jika 2003 (1) 113 (SCA)* at para [18], p.124.

[10] Mr *Wolmerans*, who appeared for the State at the hearing of the appeal, relied on the provisions of s

65(4) of the CPA in argument in a manner which suggested that he contended that this court's power to interfere with the magistrate's decision was limited in the sense of an appellate court's power to intervene where a discretion in the narrow sense had been exercised by the court *a quo*. Mr *Wolmerans*' submission in respect of the effect of s 65(4) of the CPA was closely analogous to the argument advanced by the respondents' counsel in *Knox Darcy*, supra, on the power of an appellate court to interfere on appeal with a lower court's refusal to grant an interim interdict. E.M. Grosskopf JA described that argument thus (at 360E-F):

On behalf of the respondents it was argued that a Court of first instance always has a discretion to refuse an interim interdict, even if the requisites have been established. Consequently, so it was contended, an Appeal Court would only be entitled to interfere if it came to the conclusion that the lower Court had not exercised a judicial discretion. The issue is not, it was said, whether the lower Court had arrived at the correct decision, but whether it had exercised its discretion properly. The Appeal Court is not entitled to

interfere because in its opinion it would have come to a different conclusion. This would be substituting its discretion for that of the Court a quo'. (my underlining- the underlining is intended to facilitate comparison with the provisions of s 65(4) of the CPA, quoted in paragraph [3], above, and the dicta in Barber, quoted in paragraph [4])

The Appellate Division did not accept the argument because it appeared to be premised on a failure by counsel to appreciate that the lower court's discretionary power to grant or refuse an interdict entailed the exercise of a discretion in the wide, rather than the strict, or narrow sense of the term.

[11] Accordingly, as a point of departure it is necessary to determine whether the basis upon which Mr *Wolmarans* sought to circumscribe the nature of this court's power in the adjudication of the appeal is well founded. Before embarking on that determination I should, however, say that even when a discretion in the wider sense is exercised by the court *a quo*, an appellate court will give due deference and

appropriate weight to the fact that the court or tribunal of first instance is vested with a discretion and will eschew any inclination to substitute its own decision unless it is persuaded that the determination of the court or tribunal of first instance was wrong. That is the principle expressed unambiguously in the *dicta* from *Barber's* case, quoted above.

[12] In determining whether or not a bail applicant has established the existence of '*extraordinary circumstances*' within the meaning of s 60(11)(a) of the CPA, the court has to make a decision on the facts judged within the context of the particular case. Facts which might be sufficient in one case, might not be enough to warrant the grant of the bail application in the peculiar context of another matter. In *S v Botha en 'n Ander 2002 (1) SACR 222 (SCA)*, at paragraph [19], p.230, Vivier ADCJ described the exercise required of the court as entailing the making of a '*value judgment*' as to whether the proven circumstances are of such a nature as to be '*exceptional*'.

[13] The term '*value judgment*' (*Afr.* 'waarde-oordeel') is an expression which does fit comfortably with the concept of judicial discretion in the narrow sense of the term. The expression '*value judgment*' is, for example, often used in the civil context to describe the court's powers to determine an appropriate sum of general, as distinct from special damages. The *onus* in such a case is on the claimant to show that damages have been suffered. The *quantum* of general damages is however not amenable to empirical proof, unlike special damages where the *quantum* has to be proved. The fixing of the *quantum* of general damages constitutes the exercise of a discretion in the narrow sense. In the context of criminal law, sentencing in general entails the exercise of judicial discretion in the narrow sense. Sentencing plainly entails the making of a value judgment as to what punishment is appropriate in the relevant circumstances. In my view, however, the concept of a '*value judgment*' goes not so much to the question of whether the power entailed

in its making is discretionary in the wide or narrow sense of the word, but rather to emphasise the flexibility that is available in the exercise of the power (cf. *S v Dlamini*, supra, at paragraph [75]). I offer the following illustration of the point I seek to articulate. Whether or not to grant an interdict entails the exercise of a discretionary judicial power. It is a power, the exercise of which generally entails weighing a number of countervailing considerations and interests, ultimately requiring the making of a value judgment. As confirmed in the passage in *Knox D'Arcy* cited above, that incidence of the exercise does not, however, result in the inherent exercise of judicial discretion in that context being a discretion in the narrow sense.

[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. See *S v Dlamini*, supra, at paragraph [61]. 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.

[15] Accordingly, in a case like the present where the magistrate 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 *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 decision was *'wrong'* within the meaning of s 65(4) and (ii) that this court can substitute its own decision in the matter.

[16] Insofar as the quoted dictum in *S v Barber,* supra, might be amenable to be construed to suggest that the appellate court's power to intervene in terms of s 65(4) of the CPA is strictly confined, in the sense of permitting interference only if the magistrate has misdirected him or herself in the exercise of his or her discretion in the narrow sense, I consider that it would be incorrect to put such a construction on the sub-section; certainly in respect of appeals arising from bail applications made in terms of s 60(11)(a) of the CPA. I am fortified in this conclusion by the manner in which the Supreme Court of Appeal dealt with the bail appeal in *Botha's* case, supra. See paragraphs [21]-[27] of the judgment. It is clear that the Appeal Court undertook its own analysis of the evidence and came to its own conclusion that the appellants had not discharged the *onus* on them in terms of s 60(11)(a) of the CPA. (The fact that the appeal in *Botha's* case was an appeal from a decision of a bail application by the

High Court as the court of first instance does not affect the principle in issue.)

[17] Without in any way detracting from the courts' duty to respect and give effect to the clear legislative policy inherent in the provisions of s 60(11)(a) of the CPA (viz. that save in exceptional circumstances it is in the public interest that persons charged with the class of particularly serious offences listed in Schedule 6 to the CPA should forfeit their personal freedom pending the determination of their guilt or innocence – see *S v Dlamini*, supra, at paragraphs [15] and [66]-[68]), it is still necessary to be mindful that a bail appeal, including one affected by the provisions of s 60(11)(a), goes to the question of deprivation of personal liberty. In my view, that consideration is a further factor confirming that s 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal court's competence to decide that the lower court's decision to refuse bail was

'wrong'. See s 39(2) of the Constitution (Act No. 108 of 1996).

[18] Having established the basis upon which this court will exercise its appellate authority in terms of s 65 of the CPA, it is time to move on to the facts.

[19] On 17 April 2003, shortly before midday, the complainant was held up by three men outside his business premises in Woodstock and robbed of R20 000,00 in cash and his Nokia cellular telephone. Certain other items were also taken from him. The complainant had just returned from drawing the cash at a branch of First National Bank.

[20] The person who had dropped off the complainant at the business premises just before the robbery witnessed the events. This witness saw the three robbers make off in a green Hyundai motor vehicle, driven by a fourth person. Circumstances would

indicate that the latter person was an accomplice to the robbery.

[21] The green Hyundai was followed and it was seen that it was driven as if to go on the N1 freeway out of the city. The vehicle was not kept under constant observation and its exact movements after it took a route towards the N1 are not certain on the evidence. Shortly afterwards, however, a green Hyundai was observed on the Koeberg Road by a police officer from the Milnerton Police Station. Courts in the Cape Town area are entitled to take judicial notice that the Koeberg Road is accessible from the N1 outward bound from the city. The vehicle had four occupants. It was travelling towards Milnerton. A check on its registration plate particulars showed that they were false.

[22] The police officer followed the Hyundai and noticed that a Toyota Corolla vehicle appeared to join up with and follow the Hyundai. It was common cause that the

occupants of the Toyota vehicle were appellants 1 and 4. The police officer tailed the vehicles to the Formula One Hotel in Milnerton. He saw the occupants of the vehicles leave them and enter the hotel. He followed the occupants of the vehicles into the hotel.

[23] On entering the hotel the police officer found two men in the reception foyer and saw four others mounting the stairs from the reception area to the upper floors. He requested the two men in the reception area (it was common cause that these were appellants 1 and 4) to wait there. They complied with the instruction. The police officer called on the four who were proceeding up the stairs to stop. Two of them complied with the request, while the other two did not.

[24] The police officer accompanied the two who had stopped on the stairs back to the reception area. There he made enquiries of the hotel management and

was told that the persons (I assume by this must have been meant at least the four men assembled in the reception area) had booked two rooms. The manager of the hotel then took the policeman to the two rooms in respect of which reservations had been made.

[25] Nothing of interest was found in the first room. Two men were found in the second room. According to the investigating officer, who was reliant on a statement by the arresting detail in this respect, the two men found in the room were appellants 2 and 5, whereas according to the defence evidence, it was appellants 2 and 3. In my view little turns on this conflict for present purposes.

[26] In the second room was also found a First National Bank bag, inside which was the complainant's identity document. Other items connected with the robbery were also found in the room: a bank deposit book with the name of the complainant's business written on it, an amount of R250 in small change consistent with the

drawings the complainant had made from the bank and the complainant's cellular telephone. These articles were found under the mattress of a bed in the second room.

[27] A second cellular telephone was also found. According to the evidence, that was found on appellant number 5. The cellular telephone had been stolen earlier in Claremont.

[28] The police noticed that the hotel room window was open. On the ground beneath the hotel room window were found two 9mm pistols and the keys of the green Hyundai motor vehicle.

[29] All six appellants were arrested. It was subsequently determined that the green Hyundai motor vehicle had been stolen in a hijacking robbery in Athlone in March.

[30] An identity parade was later held in respect of the hijacking case, but none of the appellants was positively identified as having been involved.

[31] It is also relevant to mention that appellants 4 and 5 were on remand out of custody on bail at the time on a charge of armed robbery which is still pending in the Goodwood magistrates' court. There was evidence that the remand magistrate who granted bail in that case had expressed an opinion that the State's case against the accused appeared to be a weak one. The regional court was informed that appellant 4 had previously faced other charges, but these had been withdrawn.

[32] The investigating officer, who was the only witness who gave evidence on behalf of the State at the bail hearing in the court *a quo*, testified that there was still at that stage a considerable amount of investigative work to be done in the case.

[33] All six of the appellants gave evidence. As their evidence would have it, they each appear to have been the most unfortunate victims of adverse coincidence.

[34] The first appellant testified that on the day in question he had decided to meet with a girlfriend at the Cape Technikon and to go with her to the Formula One Hotel in furtherance of an amorous relationship which he said he was discreetly, if not secretly, conducting with the girl. He apparently arranged for the fourth appellant to accompany him on the expedition, the idea being that the fourth appellant would also 'pick up' a girl at the Cape Technikon to take to a room at the Formula One Hotel.

[35] Appellants 1 and 4 proceeded on their expedition in a vehicle belonging to the fourth appellant's family. They proceeded to the Cape Technikon (which is not far from the scene of the armed robbery) but were unable to find the girls. According to the appellants' evidence they then decided to proceed to the hotel to

reserve two rooms, after which they intended to return to the Technikon to collect the girls. It was while they were at the hotel that the police arrived and they were arrested on suspicion of involvement in the armed robbery. The first appellant denied that he or the fourth appellant were in any way involved in the robbery.

[36] Nothing was found on the first appellant by the police to objectively connect him with the commission of the offence. He was not carrying a weapon and no items possibly connected with the robbery were found on him.

[37] Appellant number 2 testified that he did work on a temporary basis as a tiler, employed by his cousin. At the time of his arrest, he was living in Athlone at the house of his girlfriend's aunt. He had been living there for approximately eight months at the time of his arrest. He was one of the two men found in one of the hotel rooms by the police.

[38] The second appellant explained his presence at the hotel by saying he had gone there to meet with (another) girlfriend by the name of Jacqueline Dreyer, who reportedly lived at Storms River, Manenberg. He explained his presence in the room on the third floor when the police arrived on the basis that he had gone there to use the toilet. In other words he did not suggest that he was in the room because he had reserved it for his own use. He said that he had also gone up to the third floor where he been found to look to see if Jacqueline Dreyer was there because, as he put it, they were accustomed to using the room on the third floor. According to his evidence he had just finished using the toilet in the room when he was confronted by two police officers. He explained that he had obtained a lift to the hotel from his friend (the same person earlier described as his cousin, Shahied Paulse). He had been dropped off on the road outside the hotel. He knew nothing about the green Hyundai.

He first saw it when it was shown to him in the parking lot after his arrest.

[39] The third appellant explained that he was a drug dealer. He had come to the hotel to conduct a drug sale transaction, which had previously been arranged with an anonymous person, whom, he said, he would recognise by the description given of the sweater that person would be wearing. He had travelled to the hotel in the vehicle of another client. He had also been dropped off at the hotel. He denied having got there in the green Hyundai.

[40] According to the third appellant's evidence, after arrival at the hotel, he had gone looking for his client on the upper (accommodation) levels of the hotel building. He had not found his client on the first or second floors and had then gone up to the third floor. He was at the door of the room in which the second appellant was found by the police when the police confronted him and took him into the room. His

explanation for the fact that no drugs had been found on him by the police was that he had left them hidden under some pot plants in the hotel reception area. He did not point the drugs out to the police to explain that his presence at the hotel was unrelated to the robbery-related incriminating evidence that the police did find.

[41] Appellant number 4's evidence explaining his presence at the hotel essentially coincided with that of appellant number 1. The fourth appellant testified that he was employed by his father. He said that when he and the first appellant decided to go to the hotel for 'a nice time' he telephoned his friend, the fifth appellant, and invited him to join them at the Formula One Hotel. When appellant number 4 was searched he was found to be carrying a weapon (his own) and just under R2 500,00 in cash. The money was in a First National Bank bag. His explanation for carrying such a large sum of cash was that his father had given him the money to purchase 40 bags of cement to be

ordered from Penny Pinchers in Montagu Gardens. The cement was to be delivered to a building contract site at Atlantic Beach. The fourth appellant's father was not called to confirm this evidence. When he was taxed on when he was meant to have purchased the cement the fourth appellant indicated that he was supposed to do so on the day of his arrest, but that it had not been that important and could wait for the next day. The next day was Good Friday.

[42] The fifth appellant is not only a friend of appellant number 4, but also his co-accused in the armed robbery case pending in Goodwood. He worked as a transport subcontractor. He said that he was at the hotel to book a room for the Easter weekend. He had planned this as a surprise for his wife. His evidence was that at the time of the police's arrival at the hotel he was on the stairs on his way to an upper level to find a toilet. He said there were no public toilets in the reception area. Appellant number 5's explanation for his presence at the hotel did not correspond with

the evidence of the fourth appellant as to how appellant number 5 had been invited to join him and appellant number 1 for 'a nice time'. Under cross-examination, however, appellant number 5 merged the two versions by saying that he had gone to the hotel both because appellant number 4 had telephoned him and because he was giving his wife a surprise. Appellant number 5 said that he had arrived at the hotel in a taxi, (which I find somewhat strange for someone independently employed as a driver).

[43] Appellant number 6 explained that he had also come to the hotel to meet a lady friend, Rosslyn Kampher. His arrangements were quite unconnected with any of the other appellants, but like the other appellants his lady friend, however, was not present at the hotel. Ms Kampher, like the other appellants' lady friends, was not called to confirm the alleged arrangement. The sixth appellant said that he was dropped at the hotel by a friend known only as Alton. Alton was not called to confirm this evidence. The sixth appellant

would appear to deny that he had come to the hotel in the green Hyundai. Appellant number 6 testified that he was employed by Dimension Data at River Park, Mowbray, but did not go to work on Thursday 17 April 2003.

[44] Apart from appellant number 5, who had a previous conviction for unlawful possession of a firearm, all the appellants had clean criminal records. I have already referred above to the pending case against appellants 4 and 5.

[45] Mr *Boswell*, who appeared for all the appellants, emphasised that the evidence against the appellants in the robbery case was disputed and in any event only circumstantial. He stressed that the State would face great difficulty in linking the six appellants individually with an incident in which the direct evidence suggested the involvement of only four perpetrators.

[46] There is undoubted cogency in Mr *Boswell's* submissions in this respect. As I have observed, however, the evidence was the investigation was still at an early stage. The investigating officer was not asked in cross-examination as to the nature of further investigation work that required still to be carried out.

[47] The circumstantial evidence indicates very strongly that the perpetrators of the robbery, or their accomplices had driven from the scene to the Formula One Hotel. The time interval between the occurrence of the robbery and the arrest of the appellants at the hotel was short. The finding of articles related to the robbery at the hotel suggests that the perpetrators of the robbery, or their accomplices must have proceeded more or less directly from the robbery scene to the hotel.

[48] The police evidence suggests that it is likely that appellants 2, 3, 5 and 6 were the four persons in the green Hyundai when it arrived at the Formula One

Hotel under police observation. The fact that appellants 2, 3, 5 and 6 called no evidence to support their testimony as to how they arrived at the hotel tends to support the suggestion that they were in the Hyundai.

[49] The explanations given by all six of the appellants for their presence at the hotel were far from convincing. They had all independently planned to spend time there with their various lady friends, or in appellant number 5's case, his wife, none of whom was present, and none of whom was called by them to lead credence to their stories.

[50] The explanations given by appellants 2, 3 and 5 for being the upper levels, be it on the third floor, or on the stairway of the hotel were improbable.

[51] Appellant number 4 was found in possession of a firearm and a substantial sum of cash. His explanation for carrying the cash, when he intended to effect the

alleged arrangement to purchase cement only on the following day, was unconvincing. He did not call his father to corroborate the explanation. Moreover, the investigating officer testified under cross-examination that the fourth appellant had previously offered no verifiable explanation for his possession of the large sum of money. I have no reason to doubt the investigating officer's word on the subject. Indeed the investigating officer's evidence was given in a manner which suggested that he was able to show a notable degree of objectivity in the matter. The fourth appellant linked himself to appellant number 5, who was in turn circumstantially linked to the room in the hotel in which some of the complainant's property was found, and below the window of which the keys to the green Hyundai were found.

[52] I do not consider the fact that the direct evidence might suggest that only four perpetrators were directly involved in the carrying out of the robbery of particular weight in the overall circumstances of the

case. The involvement of decoys and backups in such cases is notorious. Whether or not this was the case here is a matter of supposition. I have no idea what picture might eventuate from the completed investigation. Suffice it to say that the nature of the evidence placed before the court *a quo* supports rather than excludes the notion of a wider involvement in the commission of the armed robbery than that only by the four direct perpetrators.

[53] The green Hyundai was not under observation throughout the relevant period and on the basis of the apparent link between its occupants and the occupants of the Toyota, it is not idle to postulate an involvement in some or other capacity in the robbery by all six appellants. The finding of the large sum of money on appellant number 4 in the circumstances discussed above detracts from the notion that the postulate of the involvement of all six should be discounted as being too fanciful.

[54] In the context described, the State's case against Appellants 2, 3, 5 and 6 appears to me, subject to the limitations of the evidence, *prima facie* to be reasonably strong.

[55] The position of appellants 1 and 4 is different because their link to the green Hyundai and to the two hotel rooms is more tenuous. That said, as I have observed, it does not follow that the State's case against them could at an early stage of investigation be regarded as lacking in any substance.

[56] I have not been persuaded that the magistrate was wrong in holding that appellants 2 – 6 failed to discharge the *onus* on them to prove the existence of exceptional circumstances justifying the grant of bail to them as being in the interests of justice.

[57] I do, however, consider that appellant number 1 did succeed in discharging the *onus*.

[58] The evidence showed that appellant number 1 was a young man with a clean record from a stable and protective family background. Acknowledging the basis for suspecting that he may have been complicitous in the robbery, for the reasons already mentioned, the State nevertheless correctly conceded that its case against him was the most tenuous. In my view, the issue which tipped the balance in appellant number 1's favour in respect of deciding that he had discharged the *onus* of proving exceptional circumstances was the evidence of the investigating officer that appellant number 1 was not regarded as a flight risk, that he was not considered likely to interfere with State witnesses, or the further investigation of the case and the further concession that there was no reason to regard the release of appellant number 1 on bail as likely to constitute a threat to the public. Accordingly, I consider that the magistrate's decision that appellant number 1 had not discharged the *onus* on him was wrong. It was for

that reason that I upheld the first appellant's appeal and determined bail conditions for him.

[59] There were two aspects of the bail hearing which cannot be allowed to go overlooked.

[60] Firstly, the magistrate and the prosecutor acquiesced in the request by the appellants' legal representatives that the investigating officer, who obviously was a State witness, should testify first. I consider that it was undesirable that they should have done so. The legislative scheme of s 60(11)(a) of the CPA indicates that it is for the applicants in cases affected by the provisions to put their case forward first and for the State to answer it. An applicant for bail in a case subject to s 60(11)(a) obtains a potential and unintended advantage if the bail hearing is conducted in an order at odds with the plain legislative intention. In the present case nothing really turned on it in the end, but magistrates and prosecutors should be careful to ensure that the legislature's intent is not subverted

by allowing s 60(11)(a) bail applications to proceed in a way incongruent with the relevant provisions of the Act.

[61] Secondly, the magistrate presiding at the bail hearing omitted to inform the appellants of the fact that their testimony before him might be used against them at their trial. The magistrate therefore failed to discharge the duty on him in terms of s 60(11B)(c) of the CPA. The probable effect of this failure is to render the appellants' evidence at bail hearing inadmissible against them at their trial. Magistrates should take care to adhere properly to the provisions of the CPA at bail hearings. One can only hope that the magistrate's failure to do so in this case ultimately will not adversely affect the proper administration of criminal justice in the principal case.

[62] It remains only to make the necessary order dismissing the appeal by appellants 2, 3, 4, 5 and 6.

A.G. BINNS-WARD