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

Case Number: A 121/10

In the matter between:

LINGHUM SOLOMONS Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 23 MARCH 2010

OLIVIER AJ

1. The appellant is 41 years of age. He was arrested on 22 January 2010. The State alleges that he was found with 50 – 60 000 mandrax tablets and one kilogram of heroin. He faces, together with his co-accused – one Jacobs, a charge of contravening section 5(b), read with sections 1, 13, 17 to 25 and 64 of the Drugs and Drug Trafficking Act, no 140 of 1992, that is that they were dealing in drugs.

2. His application for bail was heard on 12 February 2010 by magistrate Majala sitting in the Goodwood Magistrate's Court. The State opposed the application. The grounds of opposition included, *inter alia*, concern that the Appellant was a flight risk, the allegation that he has a propensity to commit this type of offence, and the

seriousness of the offence. I am mindful of the fact that the prosecutor in his opening remarks predicated the opposition on the single fact the it was a schedule 6 case, the appellant having being arrested whilst on bail for a schedule 5 offence. It is clear, however, that the opposition went wider and included the above three broad grounds.

3. After evidence had been led judgment was given on 12 February 2010 in terms of which bail was refused.

4. The matter was dealt with as a schedule 6 offence as it was common cause that the appellant, whilst he was released on bail in respect of an offence referred to in schedule 5, committed the current offence which is also referred to in schedule 5. Mr van der Berg, who appeared for the appellant at the hearing and who appeared in the appeal, conceded that the matter was appropriately dealt with in these terms. Mr de Jongh, who appeared for the respondent, shared this view.

5. Section 60(11)(a) of the Criminal Procedure Act 51 of 1977 provides that:

> *"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –*
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> *(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"'*

6. The approach to a bail application governed by the provisions of section 60(11(a) was dealt with by the Constitutional Court in S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat[1] where Kriegler J held as follows at paragraph [64]

> *"However, section 60(11)(a) does more than restate the ordinary principles of bail. It states that where an accused is charged with a Schedule 6 offence, the exercise to be undertaken by the judicial officer in determining whether bail should be granted is not the ordinary exercise established by sections 60(4) – (9) (and required by section 35(1)(f)[2] in which the interest of the accused in liberty are weighed against the factors that would suggest that bail be refused in the interest of society. Section 60(11)(a) contemplates an exercise in which the balance between the liberty interests of the accused and the interest of society in denying the accused bail will be resolved in favour of the denial of bail unless "exceptional circumstances" are shown by the accused to exist. This exercise is one which departs from the constitutional standards set by section 35(1)(f). Its effect is to add weight to the scales against the liberty interest of the accused and to render bail more difficult to obtain than it would have been if the ordinary constitutional test of the 'interest of justice' were to be applied."*

[1] 1999 (4) SA 623 (CC), 1999 (2) SACR 51 (CC)
[2] Of the Constitution of the Republic of South Africa Act, 108 of 1996

7. The issue for determination before the learned Magistrate was whether or not there were exceptional circumstances present which in the interests of justice permitted the appellant's release on bail.

8. In S v Botha en 'n Ander[3] it was said that:

> *"In terms of both section 60(11)(a) and (b) there is a formal onus on the accused who brings bail application, to adduce evidence that convince the court. The difference in the two sub-paragraphs lies in the requirements that a Schedule 6 accused must adduce evidence which convinces the court that 'exceptional circumstances' exists which permit his or her release, while a schedule 5 accused must only adduce evidence which convince the court that the interest of justice permits his or her release."*

9. In terms of section 60(11)(a) of the Criminal Procedure Act, the appellant was thus burdened to satisfy the court, on a balance of probabilities, that exceptional circumstances exists which in the interests of justice will permit his release. Kriegler J formulated the position as follows in Dlamini[4]

> *"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 ss (4) to (9) has to be applied differently. Under ss (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*

[3] 2002 (2) SA 680 (SCA)
[4] At paragraph [61]

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. All of this, so it was submitted, rendered the subsection an effective bar to persons charged with Sch 6 offences being released on bail, and consequently infringed their constitutional right to a just evaluation of their claim for release from custody pending trial."

10. As to what exactly '*exceptional circumstances*' are, Horn AJ in S v Jonas[5] held:

> *"The term 'exceptional circumstances' is not defined. There can be as many circumstances which are exceptional as the term in essence implies. 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 because, eg he has a cast-iron alibi, this would likewise constitute an exceptional circumstance."*

11. The Constitutional Court held in Dlamini *et al, supra*, that exceptional circumstances do not have to be over and above, and different from, the factors listed in section 60(4) – (9).[6] In S v

[5] 1998 (2) SACR 677 (SEC) at 678e-g
[6] At paragraph 76

Bruintjies,[7] Shongwe AJA (as he then was) said the following about the term exceptional circumstances:

> *"What is exceptional cannot be defined in isolation from the relevant facts, save to say that the Legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the Legislature has attached to the commission of a Schedule 6 offence."*

12. In S v Josephs[8] Binns-Ward AJ (as he then was) referred to the following passage from S v Jonas[9]

> *'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 thing 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 the commission of a Schedule 6 offence when everything points to the fact that he could not have committed the offence because, eg he has a cast iron alibi, this would likewise constitute an exceptional circumstance.'*

13. In S v Botha en 'n Ander[10] Vivier AJA (as he then was) dealt with exceptional circumstances as follows:[11]

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[7] 2003 (2) SACR 575 (SCA) at 577
[8] 2001 (1) SACR 659 (C)
[9] 1998 (2) SACR 677 (SE) at 678e – i
[10] 2002 (1) SACR 222 (SCA)
[11] At paragraph [19]

"Artikel 60(11)(a) meld nie die aard van die vereiste 'buitengewone omstandighede' nie. Dit word nie vereis dat 'buitengewone omstandighede' verskillend van aard, of anderssoortig moet wees as die omstandighede wat in subarts (4) - (9) genoem word nie. Gewoonlik, maar nie noodwendig nie, sal dit omstandighede wees wat daarop gemik is om die onwaarskynlikheid van die gebeure genoem in art 60(4)(a) - (e) te bewys. Met betrekking tot daardie gebeure, of andersins, moet die aangevoerde omstandighede, in die konteks van die besondere saak, van so 'n aard wees dat dit as buitengewoon aangemerk kan word (S v Vanqa 2000 (2) SASV 371 (Tk) op 376b - d). Dit is vir die hof om in elke saak in die besondere omstandighede van daardie saak 'n waarde-oordeel te vel of die bewese omstandighede van so 'n aard is dat dit as buitengewoon aangemerk kan word. In die Dlamini - saak het Kriegler R die volgende omtrent die vereiste van 'buitengewone omstandighede' gesê (paras 75 en 76):

'An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant or anything else that is particularly cogent. . . . I do not agree that, because of the wide variety of 'ordinary circumstances' enumerated in ss (4) - (9), it is virtually impossible to imagine what would constitute "exceptional circumstances" and that the prospects of their existing are negligible. In requiring that the circumstances proved be exceptional, the subsection does not say they must be circumstances above and beyond and generically different from those enumerated. Under the subsection, for instance, an accused charged with a Schedule 6 offence could establish the requirement by proving that there are exceptional circumstances relating to his or her emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case.'"

14. Comrie J, in S v Mohammed[12] pointed out[13] that what Conradie J had stated at 724e and 725c about the meaning of exceptional circumstances was no longer good law. After an analysis of various dictionary meanings Comrie J continued as follows

> *"What appears from these definitions in my opinion is that 'exceptional' ('buitengewoon') was two shades or degrees of meaning. The primary meaning is simply: Unusual or different. The secondary meaning is: markedly unusual or specially different (as eg in a musician blessed with exceptional talent). I do not think it necessary in the context of s 60(11)(a), to plump for one degree of meaning in preference to the other. The phrase 'exceptional circumstances' does not stand alone: the Schedule 6 applicant has to adduce evidence which satisfies the court that such circumstances exist which in the interests of justice permit his or her release'. The proven circumstances have to be weighed in the interests of justice. So the true enquiry, it seems to me, is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the applicant's release. And 'sufficiently' will vary from case to case. It may be that this approach adds to the element of judicial discretion which is already inherently present in s 60(11)(a). If so, that is no bad thing in my view. As Kriegler J observed in Dlamini at [74]:*
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> > *'Section 60(11)(a) does not contain an outright ban on bail in relation to certain offences, but leaves the particular circumstances of each case to be considered by the presiding officer. The ability to consider the circumstances of each case affords flexibility that diminishes the overall Impact of the provision. What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers*

[12] 1999 (2) SA 507 (C)
[13] At 514D

have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted.'"

15. I pause to point out in this regard that the Supreme Court of Appeal held in S v Viljoen[14] that proof that an accused will probably be found not guilty may well constitute "*special circumstances.*"[15]

16. I pause to point out that though Mr van der Berg sought to submit that, in principle, the appellant and his co-accused should have been dealt with similarly, and that the appellant should also have been granted bailed as was his co-accused, the similarity between them ends when one considers that the co-accused's position falls under schedule 5, whilst the appellant's position falls under schedule 6. [16]

17. The appellant's grounds of appeal are threefold:

(a) That the magistrate erred in failing to consider the cumulative effect of such circumstances cumulatively constituted exceptional circumstances which in the interests of justice permits his release;

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[14] 2002 (2) SACR 550 (SCA) at par [15]

[15] The court cited S v Mohammed 1999 (2) SACR 507 (C), S v Yanta 2000 (1) SACR 237 (Tk) at 247b - c; S v Josephs 2001 (1) SACR 659 (C) at 667a – g; S v Siwela 1999 (2) SACR 685 (W) at 704d; S v Botha en 'n Ander 2002 (1) SACR 222 (SCA) in para [21]

[16] Kriegler J, in Dlamini, *supra*, held as follows at par [60] "*The difference between the two subsections, threfore, lies in the requirement that an accused on a Sch 6 charge must adduce evidence to satisfy a court that 'exceptional circumstances' exist which permit his or her release. An accused on a Sch 5 charge, while obliged to adduce evidence, need only satisfy the court that 'the interests of justice' permit his or her release. The main thrust of the objection to s 60(11) was directed at the requirement of 'exceptional circumstances' in s 60(11)(a).*"

(b) That the magistrate erred in overemphasising the strength of the State case;

(c) That the magistrate misdirected himself in failing altogether to consider whether bail coupled with appropriate conditions might permit the appellant's release.

18. The appeal is brought in terms of section 65 of the Criminal Procedure Act. Section 65(4) provides as follows:

> *"The court or Judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong, in which event the court or Judge shall give the decision which, in its opinion, the lower court should have given."*

19. In S v Porthen and Others[17] Binns-Ward AJ (as he then was) analysed the basis upon which this court should exercise its appellate authority in terms of section 65 of the Criminal Procedure Act, came to the following conclusion at para [14], [15] and [17]

> *[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*

[17] 2004 (2) SACR 242 (C)

according to the exemplary list of considerations set out in s 60(4) – (9) of the Act has to be applied differently. See S v Dlamini (supra in para [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's decision was 'wrong' within the meaning of s 65(4) and (ii) that this Court can substitute its own decision in the matter.

...

[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 9f their guilt' or innocence – see S v Dlamini (supra in paras [151 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 of the Republic of South Africa, Act108 of 1996.'

20. I propose dealing with the present appeal as held by Binns-Ward AJ.

21. At the outset Mr van der Berg emphasized that the presumption of innocence remained of full force at all times, that the requirement of "*exceptional circumstances*" did not exclude ordinary circumstances[18] and that an accused had the right not to contest the merits of the case against him and that no negative inference may be drawn against him when he exercises that right.

22. Mr van der Berg also pointed out that in terms of section 60(11B)(a) the record of the bail proceedings is part of the record of the trial, whilst, at the bail stage, the accused would not be permitted insight into the docket. He was therefore hamstrung in his decision as to whether he could or should enter into the merits of the case against him. I am not satisfied that Mr van der Berg is correct on either score.

23. If I understand Dlamini correctly Kriegler J held that it does not follow from subsection (11B)(c) that the record of the bail proceedings, and in particular his own evidence, is without more admissible against the appellant. Kriegler J held as follows:[19]

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[18] See for instance S v Josephs 2001 (1) SACR 659 (C) at 669e per Binns-Ward AJ (as he then was)
[19] At paragraph [99]

> *"Provided trial courts remain alert to their duty to exclude evidence that would impair the fairness of the proceedings before them, there can be no risk that evidence unfairly elicited at bail hearings could be used to undermine accused persons' rights to be tried fairly. It follows that there is no inevitable conflict between s 60(11 B)(c) of the CPA and any provision of the Constitution. Subsection (11B)(c) must, of course, be used subject to the accused's right to a fair trial, and the corresponding obligation on the judicial officer presiding at the trial to exclude evidence, the admission of which would render the trial unfair. But it is not only trial courts that are under a statutory and constitutional duty to ensure that fairness prevails in judicial proceedings. The command that the presiding judicial officer ensure that justice is done applies with equal force to a bail hearing. There the presiding officer is duty bound to ensure that an accused who elects to testify, does so knowing and understanding that any evidence he or she gives may be admissible at trial."*

24. Moreover, in respect of access to the docket, and as Kriegler J pronounced in Dlamini[20]

> *"Therefore, notwithstanding the provisions of subsection (14), a prosecutor may have to be ordered by the court, under subsection (11), to lift the veil in order to afford the arrestee the reasonable opportunity prescribed there…"*

25. The appellant, in my view, had to decide whether he would enter the arena and dispute the strength of the case against him – he elected not do so. That is his right, but in the absence of evidence to the contrary, regard must be had to the evidence of inspector May to the effect that the case against the appellant is very strong.

[20] At paragraph [84]

26. The appellant's personal circumstances are ordinary. Mr van der Berg relied on the argument that considered cumulatively they were no longer ordinary, and constituted exceptional circumstances. He relied on a decision by Conradie J as he then was in S v C[21] – referred to by Kriegler J in Dlamini at footnote 103.[22] Kriegler J there commented as follows: *"There is no reason to believe that courts will find it impossible to find that release on bail is justified where an 'ordinary' circumstance is present to an exceptional degree."* (but see paragraph 14 above).

27. Mr van der Berg submitted that, indeed, this was a case where the cumulative effect of the ordinary circumstances was such that they constituted exceptional circumstances which permitted the appellant's release.

28. Mr van der Berg submitted that the cumulative effect of the following factors constituted the exceptional circumstances which the learned magistrate ought to have found, and which he had erred in not finding. In making his submissions Mr van der Berg carefully dissected the provisions of section 60(4) of the Criminal Procedure Act.

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[21] 1998 (2) SACR 721 (C)
[22] paragraph [77]

(a) First that the there was no evidence that there was a likelihood that the appellant would endanger the safety of the public or would commit a Schedule 1 offence.[23]

(b) Second, there was no evidence that the appellant would attempt to evade his trial.[24]

(c) Third, there was no evidence, nor was it the State's case that the appellant would influence or intimidate State witnesses, conceal or destroy evidence.[25]

29. With regard to Section 60(4)(a) of the Criminal Procedure Act, section 60(5) sets out a number of factors which a court may take into account in considering whether subsection (4)(a) has been established. Mr van der Berg submitted that only the following of these factors may be of relevance:

(a) First, the prevalence of the particular type of offence.[26]

(b) Second, any evidence of the appellant having previously committed a Schedule 1 offence whilst being on bail (emphasis added).[27]

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[23] Section 60(4)(a) of the Criminal Procedure Act
[24] Section 60(4)(b) of the Criminal Procedure Act
[25] Section 60(4)(c) of the Criminal Procedure Act
[26] Section 60(5)(f) of the Criminal Procedure Act
[27] Section 60(5)(g) of the Criminal Procedure Act

(c) Third, any other factor which, in the opinion of the court, should be taken into account.[28]

30. With regard to the type of offence the evidence was that it was indeed prevalent and a major problem in the Western Cape. In S v Jimenez[29] Lewis AJA (as she then was) commented as follows at paragraph [9]

> "*There is no doubt that in the exercise of the sentencing discretion a court should have regard to public policy and the public interest. The expression of policy in a statute - as in the Criminal Law Amendment Act - is most certainly a factor that should be taken into account. Indeed, that statute shows the disquiet experienced by the public, represented through the Legislature, at the prevalence of certain offences and their effect. The imposition of minimum sentences is a clear indication of what is perceived to be in the public interest. It is trite that the public interest, or the interest of the community as it is often put, is a factor that should be considered when the sentencing discretion is exercised. In an oft-cited dictum Rumpff JA said in S v Zinn 1969 (2) SA 537 (A) at 540G - H that what must be considered 'is the triad consisting of the crime, the offender and the interests of society'. The provisions of the Act inform courts of the attitude of society to crimes of a particular nature, specified in a schedule to the Act, which includes drug trafficking where the value of the drug exceeds a certain amount. Part II to Schedule 2 specifies a contravention of certain provisions of the Drugs and Drug Trafficking Act where the value of the 'dependence-producing substance' exceeds R50 000 (the offence in respect of which the appellant was convicted), or where it exceeds R10 000 and the offence was*

[28] Section 60(5)(h) of the Criminal Procedure Act
[29] 2003 (1) SACR 507 (SCA)

committed by a group of persons 'acting in the execution or furtherance of a common purpose or conspiracy'.

31. I am satisfied that the learned Magistrate had correctly had regard to the prevalence of type of offence.

32. Mr van der Berg emphasized that there was no evidence of the appellant having a conviction of a Schedule 1 offence whilst being on bail. He contended that, though it was common cause that Schedule 6 applied, the appellant was entitled to the presumption of innocence. This meant that it could not be held against him that he had previously been charged with being in possession of 1 kilogram of heroin and that therefore the State could not rely on this fact to establish a "*propensity*" to commit such an offence.

33. S v Patel[30] and S v Ho[31] is authority for the proposition that bail may be refused if a real likelihood exists that an accused will commit further offences while on bail.

34. In my view, the fact of the previous arrest and charge of the appellant for possession of 1 kilogram heroin is a factor which is very relevant in the present case. Precisely because of this charge Schedule 6 found application. It would, in my view, also be a relevant factor under section 60(5)(h).

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[30] 1970 (3) SA 565 (W)
[31] 1979 (34) SA 734 (W)

35. In the instant matter, and bearing in mind the *onus* cast on the appellant, it was for the appellant to put up those facts which would discharge the *onus* resting on him. It is not in dispute that he had twice been arrested for the same offence, on both occasions he was found in possession of substantial quantities of illegal drugs. Does this permit an inference to be drawn that there was a risk that the appellant would commit such a crime in the future. The answer to my mind is yes, indeed.

36. With regard to the ground – evasion of trial – the court may take into account, *inter alia*, the ties of the appellant to the place of trial, his means of travel and travel documents, the nature and gravity of the offence, the strength of the State's case and the incentive to flee, the nature and gravity of the likely penalty, the efficacy of bail and the enforceability of bail conditions, or any other factor.

37. I accept the argument advanced by Mr van der Berg that whenever a person has been arrested on a charge in consequence of which he faces the prospect of punishment which may be severe and which may even consist of a term of imprisonment, the risk of abscondment will be ever present. In the instant case this risk already arose on the first arrest - and nonetheless the appellant was granted bail. The risk, however, in my view, increased greatly with the second arrest. As will be set out below, the strength of the

State case plays an important role here – the stronger the case, the stronger the incentive to abscond.

38. With regard to the ground – undermining the system of justice – the court may take into account, *inter alia*, whether the appellant supplied false information during his arrest, and any previous failure by the appellant to comply with his bail conditions.

39. The evidence was that the appellant had misled the investigating officer regarding his current residential address. It was only when it was insisted that he takes them to the address where the remote control for a gate could be operated that he took them to his wife's home. It was there that they found the passport in a safe – a fact which was not previously disclosed. These factors both permit inferences to be drawn that there is a risk of flight and that the appellant was not open about his situation.

40. From the evidence of Captain May, it is clear that the state has a strong *prima facie* case against the appellant and, should such evidence be presented at the trial, it would unequivocally point towards the guilt of the appellant. According to Heher JA in S v Kock[32], the strength of the State case is relevant to the '*existence of exceptional circumstances.*' The appellant did not deny the

[32] 2003 (2) SACR 5 (SCA)

serious and damning allegations against him. I have already dealt with this fact hereinabove.

41. The appellant previously undermined the proper functioning of the criminal justice system. He was released on bail for a similar offence and whilst released on bail committed a similar offence. He clearly showed that, if released on bail, he still has the means to continue dealing in dangerous dependence-producing substances. The two previous convictions for similar offences do not weigh that heavily as the convictions were a long time ago. Nevertheless there is a real likelihood that the appellant, if he were released on bail, will continue with his illegal activities, as is evident from his more recent conduct, and will thus endanger the safety of the public or commit further offences.

42. It was not suggested that the appellant's income or business would suffer as a result of his incarceration. The evidence was that though he conducted the business of a tavern, he did so without having a liquor license.

43. It is contended by the appellant that bail coupled with appropriate bail conditions might permit his release on bail. The imposition of appropriate bail conditions will not provide effective safeguards and will have no binding effect on the appellant, as is evident from his past conduct. It did not previously deter him. He clearly has a

propensity to commit this type of crime. He was released on bail for a similar offence and abused this position by committing this offence. It is therefore likely that he will commit a similar offence.

44. Having regard to the totality of the evidence, I am of the view that the conclusion reached by the Magistrate, namely that the appellant had failed to discharge the *onus* upon him of showing, on a balance of probabilities, that exceptional circumstances existed permitted his release on bail was correct.

45. The court *a quo* did not misdirect itself in refusing to admit the appellant to bail and that it is therefore not open to this Court to interfere with the magistrate's decision on appeal.

46. The appeal is accordingly dismissed and the order of the Magistrate refusing bail is confirmed.