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

**CASE NO: A49/22**

In the matter between

**ZANDILE CHRISTMAS MAFE** APPLICANT

AND

**THE STATE** RESPONDENT

Date of Hearing: 25 April 2022 and 30 May 2022
Date of Judgment: 31 May 2022 (to be delivered via email to the respective counsel)

JUDGMENT

**THULARE J**

**INTRODUCTION**

[1] This is an appeal against the judgment of the Regional Court held in Cape Town which dismissed the appellant's application to be granted to bail. The appellant was charged with four counts, to wit:
(a) Housebreaking with intent to commit terrorism and arson;
(b) Contravention of section 2 alternatively section 5(b) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004) (the POCDATARA);
(c) Arson and

(d) Theft.

**THE ISSUE**

[2] The issue is whether the decision to refuse the application to grant the appellant to bail was wrong.

**THE FACTS**

[3] The appellant is charged with an offence referred to in schedule 6 and the court had to order that the appellant be detained in custody until he was dealt with in accordance with the law, unless the appellant, having been given a reasonable opportunity to do so, adduces evidence which satisfied the court that exceptional circumstances existed which in the interests of justice permitted his release. This is what section 60(11)(a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977 (the CPA) envisaged. The Director of Public Prosecutions for the Western Cape Province issued a written confirmation to the effect that she intended to charge the accused with an offence referred to in schedule 6. This is envisaged in section 60(11A)(a) of the CPA.

[4] The State alleged that on Monday 3 January 2022 Captain Adriana Nigrini (Nigrini) who was a detective in the Digital Forensic Laboratory at the Directorate of Priority Crime Investigation in the South African Police Service (SAPS) attended to Parliament to provide technical support in the downloading and investigation of mobile devices, computer, data and digital devices. He downloaded all footage pertaining to the fire incident at Parliament and it took him more than a week to do so. The footage was forensically handled, sealed and was in his possession. At the request of the investigating officer, Colonel Christiaan Gabriel Theron (Theron), Nigrini provided a compacted photo album on the case for purposes of the bail application. The photos he compacted were taken from the video footage secured at Parliament.

[5] In essence, the State case is that the video footage captured developments around and in Parliament between the night of 01 January 2022 and the morning of

02 January 2022. In particular, the footage followed the trail and course taken by an initially unknown person from the night of 01 January 2022 and tracked his path through Parliament until it arrived at where the person was arrested by members of the SAPS on the morning of 02 January 2022. The compacted photo album prepared by Nigrini essentially captured the milestones of the trail and track. I understood the State's case to be that the circumstantial evidence was overwhelming that the appellant was the person who put the building that house Parliament on fire.

[6] The footage and compacted photo album, according to the State, which was captured by camera systems at Parliament, downloaded and saved as video evidence. It is approximately 30 hours CCTV footage capturing the period between 01 and 02 January 2022. Screenshots were also made from the video footage. The State alleged that the footage showed the movements of the appellant between the new and old National Assembly buildings and that in some photos the appellant is clearly identifiable.

[7] The footage picked up the person alleged to be the appellant from around 12:13:25 am on 01 January 2022 at Tuynhuys from the garden side outside Parliament grounds, through the inside of Parliament grounds and later inside Parliament until his arrest at 06:30:44 am on 02 January 2022 as he exited through the window of Parliament. The same person allegedly identifiable in some footage as the appellant, is seen walking around inside Parliament at one point in the new Assembly and also in the old Assembly. The footage showed him carrying boxes and papers and was seen pushing papers and boxes underneath different office doors within Parliament. In other scenes he was seen placing boxes and chairs against doors and poring some substance over it. He is seen pouring some substance on to the floor in inside Parliament.

[8] At 06:02:55 am on 02 January 2022 he was seen at the window of Parliament. This was before any indication of anything being set alight. He was also seen putting a bag on the windowsill at 06:03:28. There was still no sign of any fire at that stage. There are scenes where the person was seen lighting paper and throwing it from the gallery into the National Assembly. At 06:12:05am on 02 January 2022 there is

smoke in the Old Assembly passage from the offices. The appellant was seen peeping with his body up to the chest out of the window at the Old National Assembly and waving at members of the SAPS who came to the scene at 06:29:35. At this time both buildings were set alight and on fire. He put more bags on the windowsill whilst the building was on fire at 06:30:00 and the SAPS members walk towards him whilst he was still inside Parliament at its window at 06:30:04. He exited the building through the window.

[9] The appellant's arrest was depicted and it was at 06:30:44 on 02 January 2022. He was arrested as he exited Parliament through a window, having stolen goods with him. At the time of arrest, the appellant was wearing the blue knee high jean, grey long sleeve top and grey tekkies, which is clothing that the person inside Parliament was depicted wearing. At some stages the person is seen trying other clothing inside Parliament and those scenes also appear on the footage. At the time of arrest, the appellant was found in possession of cutlery, a kettle, a toaster, stationery and shoes belonging to Parliament and officials at Parliament.

[10] It was the developments after the arrest of the appellant which kicked some dust between the parties. The interview of the appellant by members of the SAPS, after his arrest, led to a contested pointing out, a contested statement and a contested opinion by a medical practitioner. The admissibility and weight, if any, of the contested pointing out and the statement are matters for the trial court. For purposes of this judgment, it is the opinion of the medical practitioner that called for some consideration as a factor to contribute to the issue between the parties, to which I will revert.

[11] Following the interview, the police obtained a search warrant and searched the residence of the appellant, Q321, Site B, Khayelitsha in Cape Town. Pieces of cardboard with some marker pen writings were found in the appellant's home. The boards were written in capital letters. One of them was written: "JALUZ RELEASE 2022". The other also with capital letters had the words "11 FEBRUARY 2022 JALUZ WALUZ RELEASED SPEND AFTER 27 YEARS IN JAIL". Another board read: "RAMAPHOSA A SERIAL KILLER". There was a yellow t-shirt known to be ANC

national election regalia with the face of President Ramaphosa and the inscription VOTE ANC with an X next to the words underneath that face.

[12] There was an old Sunday Times newspaper clip with the title: “1981-2006: ROAD TO FREEDOM” depicting what appears to be three White police officers in a shooting squat position with firearms aimed at fleeing Africans and underneath the photo it was written: “OPEN FIRE: A field outside Boipatong becomes a battle ground with police shooting at ANC supporters the morning after an attack by Inkatha hostel …” (the paper was cut). There was also an old newspaper clipping of the report and photo of begging by the late AWB general Alwyn Wolfaardt as he surrendered to Bophuthatswana armed forces moments before he was shot dead. His two fellow generals were also killed and appear on that photo. There was also an old newspaper clip of what was reported as rightwingers praying before the bust of Dr HF Verwoerd was removed from the then HF Verwoerd hospital in Pretoria and taken to Voortrekker monument.

[13] Before the disputed pointing outs and statement were made, on 03 January 2022, the appellant was taken by the SAPS to Karl Bremmer Hospital for a medico-legal examination by a health care practitioner, Dr Zelda van Tonder (the Doctor). The Doctor completed two documents, to wit a six-page report commonly referred to as the J88 and a one-page Standard Operating Procedure Assessment of an accused person referred by the courts. On the first document it is page 2 thereof that is material, in my view. It is the Doctor’s entries under Clause C which is titled “MEDICAL HISTORY” specifically points 2 and 5 that are of interest. Point 2 provides for information on other impairments and disabilities noted. With regard to the first two, hearing and visual impairments, “No” was marked, as well as on other disability which is the fourth and last.

[14] The third is ‘mental illness’ and “Yes” is marked. Underneath the fourth appear the words “Specify” and the following was handwritten:

“Possible paranoid schizophrenia”.

Point 5 deals with the history and the source and method of obtaining information and the following is handwritten:

“History given by patient Zandile Christmas Mafe He was brought to the Unit for a mental health assessment after being arrested for housebreaking, theft and arson”.

[15] On the SOP Assessment one-page document, the following appear under the title “PHYSICAL EXAMINATION”:
(a) The letters “NAD” are circled.
(b) In the title ‘appearance’, “disheveled” is circled. Untidy and well- groomed are not circled.
(c) In the title ‘Psychomotor’, “Distraction” is circled. Retarded (slowed), restless and no abnormality noted are not circled.
(d) In the title ‘Speech’, “rapid or pressured speech” is circled. Sparse, talkative and no abnormality noted are not circled.
(e) In the title ‘Mood”, “expansive” is circled. Depressed, euthymic and elevated are not circled.

[16] I deem it preferable to deal with the Doctor’s notes under ‘psychotic symptoms’ by reference to what is typed and what is handwritten. The first typed entry reads “hallucinations (specify). The handwriting thereon is ‘none’. The second typed entry is “delusions (specify). The handwriting thereon is “Paranoid delusion”. The last typed entry reads “thought disorder (difficult to follow his/her train of thought)”. The handwriting thereon is “Yes”. Under cognition three questions are asked, both answered with a yes and these are: Is he orientated to time/place/person? Does he know what the charge is? Can he name officers in the court? (magistrate/prosecutor/lawyer). On “Provisional Diagnosis” the Doctor wrote “Paranoid Schizophrenia”. On the typed recommendation that he should be referred for a formal 30-day observation with the option of a choice between “Yes” and “No”, the Doctor circled “Yes”.

[17] It is on the basis of this medical report that the District Court Magistrate made an order for the admission and examination of the appellant to Valkenberg Psychiatric Hospital and directed that psychiatrist(s) and or their head enquire into whether the accused, by reason of mental illness and/or intellectual disability was capable of understanding the court proceedings so as to make a proper defence, and/or at the time of the commission of the offence to what extent the capacity of the accused to

appreciate the wrognfulness of the act in question and to act in accordance with an appreciation of the wrongfulness of his act at the time of the commission thereof, was affected by mental illness of intellectual disability or any other cause; and to report thereon, and the magistrate further ordered the detention of the appellant at Pollsmoor prison on the expiry of the psychiatric examination period pending his next court appearance.

[18] The manner of arriving at this decision, and the failure to consider the appellant's bail application at the time, aggrieved the appellant and he sought relief at the High Court. The High Court found that the procedure followed by the Magistrate in arriving at this decision was irregular and set that decision aside and replaced it with the order that the appellant be detained at Pollsmoor prison pending his bail application, and directed the expedition of the hearing of the bail application. The bail application was heard by the Regional Court.

[19] The appellant used a dual approach to his application for bail. He relied on an affidavit and also adduced evidence under oath. The appellant intended to plead not guilty to the charges but did not wish to deal with the merits of the case in the application for bail. He preferred to deal with the merits when the matter went to trial, and there was an indication that the trial would be in the High Court. He had been in custody for 27 days at the time of the application, part of which was spent in Valkenberg Hospital pursuant a referral which at the time of the application had been declared unlawful. He only had little opportunity to freely consult with his legal team.

[20] Amongst other impediments, he had been diagnosed with Covid-19 whilst in Valkenberg hospital and had been in isolation for 10 days, which made it difficult to consult with his lawyers. He consulted only once with the instructing attorneys and only met his Senior Counsel, Junior Counsel and Instructing Attorney the day before the hearing. In his view, he was referred to Vakenberg just as a delaying tactic so that the bail application remained and he did not consult with his lawyers. The delay in the hearing of his application and the fact that he could not consult with his lawyers caused him to go on a hunger strike. The hunger strike was also motivated by the fact that when he was outside he roamed around town looking for food, he did not have food and government did not help him, but now that he was in custody it

was easy for government to feed him. He accepted that the charges that he faced were serious.

[21] In his founding affidavit in his High Court application, the affidavit on which he also confirmed and relied under oath, the appellant indicated that his home of origin is in Lonely Park in Mahikeng in the North West Province where his biological relatives still reside. His current residential address in the last two years is Q321, Site B, Khayelitsha. Both these addresses had been verified by the SAPS. He had property at his address in Khayelitsha which included a fridge, queen bed and TV. He is the middle child of three siblings born to his late mother and his father. He did not know his mother as she passed on when he was very young. He was raised by his stepmother who still resided at his childhood home. He attended Primary School at Signal Hill Primary and attended Lapologang High School under grade 12. His father was a security officer and his mother unemployed.

[22] Life was very difficult and the financial hardships caused him to leave home. He first went to Johannesburg to search for a job as he could not find a job in Mafikeng. When he failed in Johannesburg he also went to Pretoria. When he could not succeed he went to Pietermaritzburg. He got a job there and stayed for a while. He went back to Mafikeng and thereafter went to Port Elizabeth. He did odd jobs, stayed for five years and then came to Cape Town in 2014 in search of a better life. He had been in Cape Town since.

[23] Due to his low level of education he has not been able to secure stable employment and had only been able to perform occasional and menial jobs just to make ends meet. He first worked in a bakery in Cape Town from 2014 until 14 February 2018 when he lost his job. Since then he did casual jobs which included carrying groceries to cars of shoppers at supermarkets for tips of small change and sometimes items of food. He would go to Belville or Cape Town from the 25th to the 5th of the month and would make around R800, R900 up to R1000-00. He lost his dignity and felt ashamed doing these jobs but he was forced to do them because he had rent of R450 to pay and did not want to lose his place. He also had to buy groceries, R100 for DsTV and had to have R21 taxi fare for a single trip or R42 return trip from home to these jobs.

[24] The situation was often dire and it was not economically viable and made it impossible to commute daily between the City and Khayelitsha. The taxi fare ate up at what would be available for grocery and rent. Some of the days he would be forced to try and save the little money made and end up sleeping in Cape Town. During those times he did not have a place to sleep in Cape Town and sought shelter in the streets of Cape Town, like many other who are poor. One of those spots was the vicinity of Parliament. He would go to his shack in Khayelitsha after three or four days to check on his place to ensure its safety so that people do not see that he is not always there and steal from him, and change clothing. He only came into Cape Town because of hunger. If the State were to provide him with a grant, that will stop him from coming into Cape Town.

[25] Prior to his arrest he had been sleeping outside the precinct of Parliament. On 2 January 2022 after six o'clock in the morning he was woken up by members of the SAPS and then noticed for the first time that the Parliament building was on fire with black smoke coming from its roof. He was severely and violently manhandled and intimidated by the SAPS members who also dragged him into the precinct of Parliament where he was given boxes to carry. He did not know what the boxes contained. His own belongings were confiscated by members of the SAPS. In the process SAPS members accused him of having caused the fire at Parliament, which he denied.

[26] Members of the SAPS then took him to Cape Town Central Police Station. A few hours later he was taken to an unknown place by car. At that place a White man told him that he would be sentenced to death for burning Parliament unless he cooperated with them. He was terrified and promised to cooperate with whatever they required of him. It turned out to be an empty promise from the White man as he was not released and was still in custody after two weeks. He was later that day taken to his home in Khayelitsha where a search was conducted.

[27] He was not a flight risk. He had a fixed address. He was a South African and have never lived or travelled to any country outside South Africa. He had no passport or other travel documents to allow him to travel to other countries. He did not know

the state witnesses and could not interfere with state witnesses. He was not a threat to anybody. The rumours in the media about video footage showing him committing the alleged offences were false and appeared to be deliberately manufactured to portray him in a negative light. He intended to challenge the authenticity and accuracy of such video footage at the trial, if it existed.

[28] His release on bail would not jeopardise public safety or the public interest. He had never posed such a threat. He intended to plead not guilty and did not wish to reveal his defence or explanation at this stage. He was not a terrorist but an ordinary and destitute South African like millions of other citizens. Like them he was angry about his conditions but he was not a violent man and was also not insane. Although he did not intend to discuss the merits of the case, he maintained his innocence. He continued to be portrayed in a negative light in the local and international media. He was used a scapegoat for the failures of those who were supposed to ensure that Parliament was properly secured.

[29] The appellant's view was that the most bizarre feature of his arrest was the inability of the State to explain why he would have remained in the vicinity after committing the alleged crime. If he did not flee after committing the crime, it followed that he would not flee the resultant trial. His intention was to stand trial, prove his innocence and proceed to sue the State. Following his experience at the hands of the State, he was keen to tell his story on behalf of the other poor and unemployed South Africans who are subjected to such humiliation on a daily basis. He was not a criminal but a poor person who found himself at the wrong place at the wrong time. He had no pending cases, no warrant of arrest issued against him and no previous convictions. He would abide by all bail conditions which may be determined by the court including reporting his movements to a police station. He had no funds from which to pay any significant amount of bail money. He relied on the assistance of his relatives. He intends to sue the state. His face was now known everywhere and he could not hide.

[30] From a young age whilst still at home and when at school he had a grammatical, a stutter or speech impediment. He never had a problem reading but had a problem when talking. The State may think differently but his stuttering did not mean that he

was mentally disturbed. He had never been diagnosed that he was mentally disturbed and nobody ever suggested anything like that, even at the time when he was employed. Up until now it was only the State doctor who diagnosed him with mental illness. He was unmarried and had no children. He had no dependents.

[31] He had been to the farms in the Ventersdorp area, places of the late Eugene Terre'Blanche and the owners of the farms in Ventersdorp were his friends. Eugene Terre'Blanche was his friend when he was alive, but he was killed in 2010 on Good Friday on his farm. In Bellville he had written in the books that Janus Waluz must be released on 11 February because he had been in custody for 27 years. He was requesting that Janus Waluz be released on the day that Mr Mandela was released. Janus Waluz's family was getting R100 000-00 per month from the State because he had served the same duration in custody as Mr Mandela and justice should be served to him. The appellant said that anyone who came to his house would find the cardboard writings that the SAPS found because that was his home and he would not dispute that they were his placards.

[32] The State is of the view that the evidence it relied upon found reasonable grounds to believe that the appellant might be convicted of the charges against him. Its position was that it had a strong case against the appellant. Its argument was to that the appellant failed to put up any substantial answer to the State's case on the charges preferred against him. The State's position was further that the appellant would endanger the safety of the public or any particular person or commit a schedule one offence if he were released on bail and that the public peace and security would be undermined. The case was that the appellant was a danger to himself and the community.

[33] The appellant on the other hand relied on a number of grounds individually and collectively to sustain his argument that exceptional circumstances had been established. Amongst others are the failure of the district court magistrate to consider his bail application, his detention for a period beyond 7 days without his application for bail being heard, his irregular referral for mental observation, the unfair referral to his hunger strike and alleged confession by the regional magistrate who refused bail and the State's narrative that he was not of a sound mind. His contracting Covid-19

whilst detained at the mental institution, not being a flight risk and that he would not interfere with state witnesses, commit further crimes as well as the high profile nature of the case which rendered the appellant recognizable and the appellant willing to accept bail conditions were cited as some of the factors establishing his exceptional circumstances.

[34] The potential loss of income from informal income generating means, which was indispensable for the appellant and the adverse impact thereof including the threat of losing a home if rental remained unpaid or personal belongings, it was argued, were not considered. The appellant also relied on the failure of the regional magistrate to analyze the factual and legal basis underlying the bail application as compared to the review application. It was argued that the magistrate failed to consider the binding effect of the High Court decision which set aside his referral and detention for mental observation and his further detention thereafter. It was argued that the regional magistrate failed to consider the impact of the appellant's evidence that he will not evade trial and in so doing jeopardise his civil claim against the State for illegally incarcerating him for much longer than it was legally permissible.

[35] The appellant's argument was further that the magistrate misconstrued the meaning of the term 'exceptional circumstances' and that the magistrate erred in finding that the appellant had not established that it is in the interests of justice to grant bail. It was also argued that the magistrate misdirected herself and committed gross and other irregularities. This included the State being allowed to question the appellant on the merits of the case or to confront him with the allegations contained in a statement of a State witness which until that stage was not yet before court, or photographs and video footage, which the court had not admitted.

[36] Counsel's objection was based on the approach that the reading-in of information and documents which had never been mentioned or seen before was prejudicial to the appellant due to the high national importance of the matter and the seriousness of charges. It was argued that the State sought to place information in the public sphere which had not been authenticated, whose admissibility was in question, and which appellant had continuously declined to answer to. It was argued that as a result of the grossly irregular manner in which the State conducted its

cross-examination, the magistrate made multiple unsubstantiated remarks in her judgment.

[37] The appellant had issue with how the State approached his right to information and his case was that whilst the prosecutor had a discretion to discover the contents of the docket, that discretion was not an unfettered one, but rather one that may be overruled by the court if it was unreasonably and groundlessly exercised against an accused. The appellant's case was further that the magistrate admitted evidence obtained in violation of his rights and placed reliance on his alleged confession in denying him bail. The appellant had issue with that his reliance on section 35(5) of the Constitution was not considered.

[38] Section 65(4) of the CPA reads as follows:
"65. (4) 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."

[39] It is necessary to refer to some well-known facts in the history of the Republic to contextualize the significance of the issues between the State and the appellant as well as the evidence as a whole in the bail application. South Africa emerges out of apartheid. This was a system of government by White South Africans which thrived on the oppression of Blacks. Its race classification disconnected the people of South Africa. Religious extremism, especially Christian fundamentalism, did not even spare an Afrikaner mother who was in mourning for her child who died in an unnecessary covert civil war. It was in her grief that the religious extremists showed no sense of shame, using pulpits in their churches, to separate the South African people. Apartheid thrived on the delusion that Whites were a superior race and that Afrikaners were God's chosen nation.

[40] Politics, especially the unrestrained aspiration for self-determination and separate development as well as the preservation of customs and cultures, was used to divide the people. Wealth creation opportunities were reserved to disadvantage Blacks. It used health to marginalize and exclude others from living

normally and without access to adequate resources. Its education system distinguished Blacks and set them up for failure, poverty and despair. Rightwingers, to date, yearn for and strive to return to those “White glory days”. They subscribe to Dr. HF Verwoerd’s thinking that Blacks can only be good as hewers of wood and drawers of water for the convenience of Whites. The record kept by the appellant include an article and photos of rightwingers who were opposed to the removal of the statue of Dr. HF Verwoerd when the academic hospital in Pretoria was renamed from him to the Apostle of Black Consciousness, Steve Biko. It is against this background that a Black person, especially an African, who regard Afrikaner rightwingers with reverential respect and an admiring deference, without more, attracts some interest if not questions.

[41] The charges suggest that the appellant is an African man and in his words, a friend of rightwingers. I understand the State’s case to be that the appellant honoured rightwingers with ritual acts of keeping a record of their deeds, like the killing of Blacks in Boipatong. The killings in Boipating, it must be remembered, were part of a campaign to frustrate the African National Congress which at the time, was accepted to be the leader of the Black majority. The record kept, through articles and photos, reveal a pattern of deeds which were committed to frustrate the African National Congress in particular and Blacks in general, in continuing with the processes that led to the first democratic elections where Blacks were to vote for the first time. The record keeper and rightwing praise-singer, the appellant, is alleged to have gone to Parliament in the middle of the night of New Year’s eve of 2022 and put Parliament on fire.

[42] In in his lifetime, Clive Derby Lewis, a conservative rightwinger, was recorded explaining that Chris Hani was killed to make the country ungovernable so that the rightwingers could take over government. The man who pulled the trigger that killed Chris Hani was Janus Waluz. The killing of Chris Hani had a political objective and was politically motivated. Chris Hani was an enemy of the rightwingers and was killed to prevent a takeover by the ANC government. The consideration for the release of Janus Waluz is a highly controversial and politically contested issue, which includes litigation currently being pursued in the courts. The release of Janus Waluz require careful consideration as it could ignite civil instability and political

polarization which would undermine public peace and security. The appellant called for the immediate release of Janus Waluz.

[43] The rightwing element in the country was becoming a fringe group. It was becoming the outer or less important part of the groups whose activity did matter in our body politics. It was peripheral and no longer formed part of the mainstream of our politics. This was mainly because of the view that its actions and manner were marked by extreme eccentricity. The rightwingers are known for their apparent deviation from conventional or accepted usage and conduct of decent human beings towards other human beings. Violent extremism appeals to the rightwing. The State's case, as I understand it, is that the odd or whimsical ways of the appellant, deviated from a pathelliptical sense, and thus in the fringes and in the same spirit as the rightwing. The appellant's deviant behavior would endanger the safety of the public and was an existing threat to commission of similar offences.

[44] There are many in the country, including in some Unions and in some political parties represented in Parliament, who hold the view that President Ramaphosa was in one way or another responsible for the killing of the miners in Marikana. It is in the main, although not exclusively, political opponents of President Ramaphosa who want to hold him accountable for the killing of the miners. A single placard labelling President Ramaphosa a serial killer, on its own under the circumstances, may not say much. Holding an opinion is not frowned upon in the Republic. However, when the ANC t-shirt and the Ramaphosa placard are considered with the other factors, together with what one may call a malevolent mindset by the appellant towards the current government, his ill-disposition adds to the threat. I am unable to hold that there is no probable cause for the State to harbour the fear of a threat posed by the appellant.

[45] The High Court threw the dirty water out in the review application, but the baby was still alive. The process of arriving at a decision to send the appellant for psychiatric assessment was irregular, but the decision of Dr Van Tonder withstood the cleaning process. As things stand, Dr Van Tonder had considered the appellant's psychotic symptoms. She had found that the appellant presented delusions and specified these to be paranoid delusions and indicated that the appellant presented

thought disorders which made it difficult to follow his train of thought. Dr Van Tonder's provisional diagnosis for the appellant was paranoid schizophrenia, and she then recommended that the appellant be referred for a formal 30-day observation.

[46] With the greatest of respect, the views of Adv. Mpofu SC, Adv. Menigo and the Regional Magistrate, in our law, are not sufficient to stand in contradistinction to that of Dr Van Tonder. They are a relevant consideration, but cannot be conclusive. All three are esteemed lawyers, and that is how far they can take the matter. They are lay persons in medicine, and their opinions as regards the psychotic state of the appellant can at best be speculative. In my view, Dr Van Tonder simply said that the appellant presented mental health problems that caused him to perceive or interpret things differently from others around him, which involved delusions. *The Concise Oxford English Dictionary,* tenth edition, revised, edited by Judy Pearsall, 2002, (the dictionary) defines "delusion" as "an idiosyncratic belief or impression that is not in accordance with a generally accepted reality". The dictionary defines "impressions" as "an idea, feeling or opinion about something or someone, especially one formed without conscious thought or on the basis of little evidence". It follows, in my view, that delusions may be covert. In other words, Dr Van Tonder diagnosed the appellant with what I would call a possible silent mental health problem. Dr Van Tonder ruled out hallucinations, which are overt and therefore open and easily observable to even a medically untrained eye and mind. In my view, the fear harboured by the State, in respect of the threat posed by the appellant if released, was not without merit.

[47] Some of the appellant's concerns around the procedure and reasons therefor to which he was subjected to, by our criminal justice system, which translated not only in his successful review application but also found his reasons for appeal in this matter, are not without merit. It is the result thereof that require some attention in some detail. The appellant's grounds of appeal have made it necessary for one to deal with his path of travel through the system and for the sake of not making the judgment tediously wordy, I will touch on them as briefly as possible but as long as I deem necessary.

[48] I have to state categorically that this case is one of those that reveal that the CPA is a monument of history which in many respects is not fit for purpose to allow the criminal justice system to deal with the current challenges presented by policing, prosecuting and adjudicating in a democratic and constitutional State with a Bill of Rights. Theron followed up on what he deemed odd behavior including what the appellant in his own words termed “bizarre”. This included when a person who allegedly burned Parliament, whilst the police were approaching Parliament to investigate, peeped from the inside at the window and waved at the Police, thus exposing his presence inside Parliament, instead of hiding and seeking to escape undetected. Chapter 5 of the CPA, specifically sections 39 to 49 which deals with an arrest, do not provide for a police officer to send an accused person for a mental health assessment after the arrest.

[49] The referral for a mental assessment by Theron was therefore not in terms of the CPA. The question whether his referral was in furtherance of section 205(3) of the Constitution, in particular the investigation of crime and the upholding and enforcement of the law, was not argued before us. The legality of the referral of an accused person for mental assessment by a member of the SAPS after arrest but before the first appearance at court was not argued before us. Suffice to state that in my view, in our country, being a creature of statute has graduated to extend and to include to being a creature of our Constitution, which is also part of our statutes.

[50] Some of the prosecutors in the district court who dealt with this matter made no valuable contribution to respect, protect, promote and fulfil the rights of the appellant as section 7(2) of the Constitution envisaged. In fact, as regards the appellant’s application for bail, a desire expressed from the first day of his appearance, I am unable to say that they advanced his right to be equal before the law and to equal protection and benefit of the law. The non-disclosure of the concerns about the mental health status of the appellant at the earliest available opportunity to his lawyers and the failure to assist the appellant to have a sufficient and truncated-time-periods opportunity to consult with his legal representatives especially to adequately prepare for his intended bail application, elicit concern. However, the incompetence or mistakes of a prosecutor cannot be a basis for exceptional

circumstances as envisaged in section 60(11) of the CPA to entitle an accused to bail [*S v Ali* 2011(1) SACR 34 (ECP) at para 16].

[51] The right to be released from detention if the interests of justice permit, subject to reasonable conditions at the first appearance after being arrested, is Constitutionally entrenched [section 35(1)(e) read with (f)]. The oath or solemn affirmation of a judicial officer reads: "…, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law."

[52] The first appearance of an accused person, in our constitutional judicial system, is not a traditional gathering where the rituals of postponement and further detention are announced by magistrates. It is intended to examine the reasons for the detention and if needs be to place the further detention of an accused under judicial oversight [*Mashilo v Prinsloo* 2013(2) SACR 648 (SCA) at para 11]. The courtroom in the first appearance of an accused is the theatre where especially the charge and the detention of the accused undergo analytical, precise, dispassionate and excellent judicial operative procedure by the Specialist Constitutional Surgeon, the Magistrate. Section 35(1)(e) and (f) of the Constitution read as follows:
"Arrested, detained and accused persons
35. (1) Everyone who is arrested for allegedly committing an offence has the right –
(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
(f) to be released from detention if the interests of justice permit, subject to reasonable conditions."

[53] The Constitution therefore obliges that a magistrate be presented with the charge sheet, indictment or at least be informed of the summary of the substantial facts that underpin the arrest of the accused and why the accused is before the court. The Constitution conceived the possibility, especially in serious offences, that the charges may include data or information which would still require further technological or scientific investigation. It would be further information which would form part of the evidence and was necessary to be acquired before the State was in a position to frame the true and correct charges and present an indictment or charge

sheet. The position of the State to formulate charges upon which the accused would be required to plead was, under those circumstances, a desirable future event still contemplated by the Prosecutors.

[54] Having regard to the nature of the allegations and charges against the appellant, I do not agree with the proposition that he was entitled to be given, on 4 January 2022, the indictment or complete charge sheet for the charges he was contemplated to face in the High Court some time in the future. Nigrini, amongst other investigations done after 4 January 2022, had not yet downloaded and completed working on all that was captured on Parliament's cameras, when the appellant made his first appearance. It is not surprising that the facts that underpin the charges related to what Nigrini discovered were unknown to the State at the time of appellant's first appearance and did not form part of the allegations against him. There is nothing unconstitutional or illegal about the charges that were later added to the list which the appellant had to face. The proposition that he should have been informed of all the charges to be preferred against him at his first appearance or at any stage before they were known to the State is not sustainable.

[55] The charge or at least the substantial facts upon which the charge is founded, is a relevant factor in determining, and providing reasons to an accused person, for his detention to continue. A detained person has an entrenched right to challenge the lawfulness of the detention before the court, and this right may be exercised at his first appearance [section 35(1)(e) read with (f) read with section 35(2)(d) of the Constitution]. Section 35(2)(d) of the Constitution reads:
"Arrested, detained and accused persons
35. (2) Everyone who is detained, including every sentenced prisoner, has the right –
(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released."
An accused person has a right to bring and to be heard in their bail application at his first appearance [section 60(1) of the CPA].

[56] Magistrates cannot outsource their responsibility to uphold and protect the rights of a detained person which are entrenched in the Constitution, and as a matter of practice or routine, unfairly favour the State with a postponement at the first

appearance, to the prejudice of the detainee. Where an accused faced a schedule 6 offence and the State was able to formulate the charges, the situation is easier for a magistrate. The accused is entitled to apply to be released on bail [section 50(6)(a)(i)(bb) of the CPA] This section reads:

"50. Procedure after arrest

(6) (a) At his or her first appearance in court a person contemplated in subsection (1)(a) who –

(i) was arrested for allegedly committing an offence shall, subject to this subsection and section 60 –

(bb) be charged and be entitled to apply to be released on bail."

[57] The principles applicable to the case of a person in detention, in the position that the appellant was, are different. Such person may, but is not entitled to, apply for bail, in my view. I have already indicated that the law accepts that the State may not be ready with all the information necessary to formulate a charge or all the charges against such a person. Where such person, as the appellant did, applied for bail, the magistrate may not disregard the application. The right to apply for bail is such accused person's, and it remains their choice to exercise. What such person may not do, is to complain that he did not yet have an indictment or the charge sheet at the first appearance. He cannot be heard to complain about the consequences of his own choice. My understanding of the record and the submissions was that the magistrate did not disregard the bail application of the appellant on the first appearance date. The application was considered but postponed to 11 January 2022, in accordance with the provisions of section 50(6)(d) of the CPA. What the appellant was entitled to, was to be informed by the court of the reasons for his further detention [section 50(6)(a)(i)(aa) of the CPA].

[58] The proceedings of 11 January 2022 were the subject matter of the review application. I deem it necessary for purposes of this judgment to make some comments in respect of that day, in furtherance of the clarity of what the full bench of this Division is saying, even though differently constituted. The matter was postponed for a bail application, which meant that what was before the magistrate on 11 January 2022 was a bail application. The magistrate clearly lost focus and therefor lost his path. My understanding of the record is that no party alleged that the

appellant was by reason of mental illness or intellectual disability or for any other reason not criminally responsible for the offences charged.

[59] The review court dealt with what the magistrate ought to have done, if it appeared to him that the appellant might by reason of mental illness or intellectual disability or for any other reason not criminally responsible for the offence charged. The appearance to the court, for whatever reason it was founded on, was clearly disputed by the appellant. It was necessary under the circumstances, for the appellant to be allowed to present evidence to the court and Dr Van Tonder would have had to come and present evidence and the appellant would have been entitled to cross-examine her or any witness called by the court or the State. The State was also entitled to present evidence and cross-examine the appellant or any of his witnesses, before the court was to decide on the referral.

[60] It is important to note that the referral would have been in the context of a bail application. It would have been a referral to determine whether the appellant suffered from paranoid schizophrenia, as part of the evidential material to assist the court to determine whether the interests of justice permitted his release pending his trial. The focus would be to protect the investigation and prosecution of the case. Bail applications are urgent proceedings and it is against that background that the review court expressed itself for such medical investigation to be expedited. Theron recognized the urgency and although the CPA did not make provision for his action, he was aware of the constitutional rights of the appellant and the need to expedite such investigation.

[61] The prosecutors and the district magistrate did not appreciate the nature of the investigation and its urgency. Although the review court did not expressly say so, an inductive reading of its judgment clearly indicates that it envisaged an urgent procedure distinct from that envisaged in section 78. A bail hearing is an interlocutory and inherently urgent and unique judicial function [*S v Dlamini, S v Dladla and Others, S v Joubert, S v Schietekat* 1999(4) SA 623 (CC) at para 11]. The interests of justice demands of courts to intervene and take new paths and create innovative measures in upholding and protecting the rights of accused persons, in the interests of justice, where antique laws fail to reach out. Where it

appears to the court at any stage of bail application proceedings that the accused may by reason of mental illness or intellectual disability or for any other reason endanger the safety of the public or any particular person or commit further offences if he were released on bail or that the public peace and security would be undermined, the court, in my view, is judicially duty bound to direct that the matter be urgently enquired into and expeditiously be reported on.

[62] A judgment consists of two main parts, to wit, the reasons and the order. In my view, section 65(4) is primarily concerned with the order, in its reference to the decision of the court. The road to the order is built on the facts considered and the factual findings made as well as the law considered applicable and the rulings on the law. It is possible that one may find part of the reasoning to be wrong, but still be unable to say that the order was wrong. The regional magistrate in her reasons denying the appellant bail relied heavily on the disputed statement allegedly made by the appellant. There are areas of concern in the Magistrate's reasons which the judgment of my Brother Lekhuleni highlighted and I deem it not necessary to repeat them.

[63] However in my view, the State case against the appellant appears strong even without reliance on the disputed statement or any statement made by the appellant or even the mistakes made by the bail application regional magistrate. On the other hand, the appellant did not state the material facts upon which his dispute was based, as regards the authenticity of the video footage that the State alleged was downloaded from the Parliament camera's showing his arrest at the window of Parliament and depicting him earlier within the building setting Parliament on fire. The appellant elected a bare denial as opposed to taking the court into his confidence and stating his case with precision. The appellant's denial lacked clarity, was evasive and did not answer the direct point of substance of the State case, which was that he was arrested at the window of Parliament, exiting it after setting it alight. As regards the alleged statements and pointing out by the appellant after arrest, it stands to be noted that he did not establish, on a balance of probabilities, that they will be shown to be devoid of all effect at trial [*S v Viljoen* 2002(2) SACR 550 (SCA) at para 19 p559h-i]. At best for him, he simply indicated, with nothing

more than his mere say so, his intention to challenge the admissibility of that evidence at trial.

[64] The State was within its right to put its case to the appellant, as part of its responsibility to set out further details to its charge to the appellant during his cross-examination in the bail application [*S v Mauk* 1999(2) SACR 470 (W) at 488E]. It was the appellant who elected to not precisely define the issues between him and the State, by refusing to engage with the State case in his cross-examination. His refusal to deal with the merits, was well within his rights. However, its consequences included that the refusal did not facilitate a free and open discussion of the question of his involvement in the burning of Parliament. He failed to use the opportunity to exchange views with the State and by extension failed in getting rid of a foul case against him through the supply of a fresh and different perspective.

[65] An accused person who is detained, charged and is entitled to apply for bail, or who is detained and informed of the reason for his detention to continue but nevertheless apply for bail, has the right to be presumed innocent, to remain silent and not to answer the State case in his bail application proceedings [section 35(1)(e) and (f) read with section 35(3)(h) of the Constitution, read with section 50(6) of the CPA]. The right to be presumed innocent is a non-derogable right and subsists until conviction by a competent court [*S v Acheson* 1991(2) SA 805 (NmHC) at 822A]. I am not persuaded by the views that it has no bearing on bail application proceedings [see *S v Mbaleki & Another* 2013 (1) SACR 165 (KZD) at para 14; *S v Shabangu* 2014 JDR 2171 (GP)]. It is in that context that I understand the view that it does not pay an operative role in bail applications [*Conradie v S* (A248/2020) [2020] ZAWCHC 177 (11 December 2020 at para 19]. However, where the Director of Public Prosecutions has issued a certificate as provided for in section 60(11) and the State had set out its case with sufficient particularity in a summary of substantial facts upon which its case is found, in a bail application, an accused in the position of the appellant must satisfy the court, when using the opportunity presented by the hearing of their bail application, that there is a genuine dispute of fact that disturb the probabilities that appear from the facts that the State presented.

[66] This will enable the court hearing the bail application to critically examine the alleged issues to determine whether in truth there is a dispute of fact that cannot be satisfactorily determined without the aid of a trial, as part of its determination of exceptional circumstances that justify the release of the accused from detention in the interests of justice. If there are no real or genuine disputes of fact in the applicant's case, or the bail applicant does not use the opportunity for what it is intended, there is nothing to gainsay the probabilities appearing from the State case. It is undesirable that persons accused of serious crimes should frustrate their detention and trial by simply relying on bare denials or raising apparent fictitious issues of fact [*Nampesca (SA) Products (Pty) Ltd v Zaderer and Others* 1999 (1) SA 886 (CPD) at 892H-I and at 893A-B]. An accused has an onus, in an interlocutory application specifically designed to help the court to make an informed prognosis of his release, to establish what he deems relevant factors within his knowledge.

[67] The elected representatives of the people of South Africa, in the Legislature, have entrusted courts with the responsibility to evaluate the facts and ensure that persons accused of serious crimes, who raise triable issues, are not unduly held in prison. In my view, section 60(11) of the CPA is a process to ensure that there is sufficient disclosure of the nature and grounds of an accused defence and the facts upon which the defence is founded, if he elects to advance chances of his liberty. There must be a discernable defence which is sustainable in the sense that it is one that is good in law. The object of the procedure is to ensure that if an accused really has no defence against a clear and serious offence, he should remain in custody. It is an extraordinary procedure. Courts do not require the precision of a genuine plea during the bail proceedings, but material sufficient to satisfy the threshold that what is advanced is not a sham defence. This unique procedure need not turn courts into a programme for fictional cartoon characters. The respect, protection and promotion of accused's Constitutional rights must be a genuine "Mandela bridge of hope" for our communities sick and tired of serious crimes, and not turn this time in our country into the equivalence of the Biblical wilderness between Egypt and Canaan.

[68] The Prosecutor, during bail proceedings, was hamstrung by a series of objections basically to the effect that what he put to the applicant as the State case, was not yet properly before the court. It must be remembered that the right to a fair

trial includes the right to be informed of the charge with sufficient detail to answer it [section 35(3)(a) of the Constitution]. Having regard to the nature of the objections raised in the bail application in this matter before the Regional Magistrate, and the rights and responsibilities of both the State and an applicant, I am convinced that a proper case has been made out for the State to begin, in bail applications, so that the salient facts upon which its charge is founded are properly placed before the court, to enable an applicant to mount an application well informed about the charge. It is against the background of this scheme and system that I have my doubts about the proper location, currently, of the duty to begin, although the onus is correctly placed on such an applicant.

[69] In my view, there is no reason why the right to be properly informed of the charge with sufficient detail to answer it cannot extend to a bail application, irrespective of its schedule. It is in that sense that the extremes of section 60(14) of the CPA can be mitigated and justified. Currently it seems that a bail applicant facing serious charges is blindfolded in darkness but expected to hit the target. Even those accused of serious crimes must see and feel justice to be manifestly done. Section 60(14) reads as follows:
“Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the prosecutor otherwise directs: Provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for purposes of his or her trial.”

[70] In my view, fairness and justice call for the State to put the substantial facts upon which its charge is founded, first, and that the accused then has an opportunity to provide an answer and show exceptional circumstances where applicable, and if needs be the State gets an opportunity to rebut. In that case a court can be well-informed to form an opinion whether it has reliable, sufficient or important information to reach a decision on the bail application, as envisaged in section 60(3) of the CPA, without infringing on the responsibilities and rights of the State and of an accused. In

*Naude and Another v Fraser* 1998(4) SA 539 (SCA) at 563E-G it was said in the context of a civil matter:

"It is one of the fundamentals of a fair trial, whether under the Constitution or at common law, standing co-equally with the right to be heard, that a party be apprised of the case which he faces. This is usually spoken of in the criminal context, but it is no less true in the civil. There is little point in granting a person a hearing if he does not know how he is concerned, what case he has to meet. One of the numerous manifestations of the fundamental principle is the subrule that he who relies on a particular section of a statute must either state the number of the section and the statute, or formulate his case sufficiently clearly so as to indicate what he is relying on: *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G. As the proposition itself indicates there is no magic in naming numbers. The significance is that the other party should be told what he is facing."

In his book, "*The Land is Ours*", Penguin Books, 2018, Adv. Tembeka Ngcukaitobi, SC, on page 1 of "Introduction" said:

"The Judiciary must protect the Bill of Rights, enforce its promises and monitor the conduct of government. Yet, despite the admiration of the world, many promises contained in the Constitution remain a hollow hope."

[71] The State is required to put all the necessary and relevant substantial facts before the court for the purposes of upholding the right of a bail applicant to be apprised of the case which he faces, in the bail application. This will enhance the impartiality of the courts and their independence in exercising their judicial functions. It also adds to the flavor of bail proceedings being *sui generis.* A bail application is unique and special. Its inquisitorial characteristic is one manifestation. In my view, the other manifestation of its unique and special character are that the interests of justice demands that the State begin and apprise the applicant and the Court of the case which the applicant has to face*,* especially in section 60(11) proceedings where the so-called reverse onus is found. The further manifestation is that the applicant bears the onus to satisfy the court on a balance of probabilities that the interests of justice do not require their detention [*S v Branco* 2002(1) SACR 531 (W) at 532E-G]. The onus on the applicant and the State bearing the duty to begin and adequately inform the court of the substantial facts, are not mutually exclusive in a unique procedure specifically designed to administer justice. The prosecutor is *dominus litis*

and is responsible for the charges. In *S v Sehoole* 2015(2) SACR 198 (SCA) at para 10 the Supreme Court of Appeal said the following:
"[10] The State as *dominus litis* has a discretion regarding prosecution and pre-trial procedures. For instance the State may decide, inter alia, whether or not to institute a prosecution; on what charges to prosecute; in which court or forum to prosecute; when to withdraw charges and so forth."

[72] The general principles on bail were set out in *S v Smith and Another* 1969(4) SA 175 at 177E-178A as follows:
"The general principles governing the grant of bail are that, in exercising the statutory decision conferred upon it, the Court must be governed by the foundational principles which is to uphold the interests of justice; the Court will always grant bail where possible, and will lean in favour of, and not against, the liberty of the subject, provided that it is clear that the interests of justice will not be prejudiced thereby (*McCarthy v R.,* 1906 T.T> 657 at p. 659; *Hafferjee v R.,* 1932 NPD 518). …
These principles have been formulated and expressed in varying fashion, but basically the Court's task is to balance the reasonable requirements of the State in its interest in the prosecution of alleged offenders with the requirements of our law as to the liberty of the subject. A pertinent, and with respect persuasive, statement of the position is contained in the judgment of MILLER, J., in the case of *S. v. Essack,* 1965(2) SA 161 (D) at p. 162, where it was said:
"In dealing with an application of this nature, it is necessary to strike a balance, as far as that can be done, between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice. I refer, in acknowledgement of those words, to the judgment of DIEMONT, J., in the case of *S. v. Mhlawi and Others,* 1963(3) SA 795 (C) at p. 796. The presumption of innocence operates in favour of the applicant even where it is said that there is a strong *prima facie* case against him, but if there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if je is allowed out on bail, the Court would be fully justified in refusing to allow him bail. It seems to me, speaking generally, that before it can be said that there is any likelihood of justice being frustrated through an accused person resorting to unknown devices to evade standing trial, there should be some evidence or some indication which touches the applicant personally in regard to such likelihood. General observations applicable to

a certain group of persons are undoubtedly relevant and entitled to some weight if the applicant is a member of that group, but they can never be conclusive in themselves."

[73] The approach to a schedule 6 bail application was set out as follows in *Solomons v S* 2019(2) AllSA 833 (WCC) at para 15 and 16:
"[15] … However, before a Court may grant bail to a person charged with a schedule 6 offence it must be satisfied upon an evaluation of all the facts that are ordinarily relevant to the grant or refusal of bail, that circumstances exist that warrant an exception being made to the general rule that the accused must remain in custody. Differently put, exceptional circumstances do not mean that they must be circumstances above and beyond, and generally different from those enumerated in ss 60(4) –(9): '*ordinary circumstances present to an exceptional degree may lead to a finding that release on bail is justified.'*

[16] What is required in respect of schedule 6 offences is that the Court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify the release of the accused. 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'.*
[74] In *Dlamini,* it had been said at para 64:
"[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 sch 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 sub-ss 60(4)-(9) (and required by s 35(1)(f)) in which the interests of the accused in liberty are weighed against the factors that would suggest that bail be refused in the interests of society. Section 60(11)(a) contemplates an exercise in which the balance between the liberty interests of the accused and the interests 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 standard set by s 35(1)(f). Its effect is to add weight to the scales against the liberty of the

accused and to render bail more difficult to obtain than it would have been if the ordinary constitutional test of the “interests of justice” were to be applied.”

[75] There is evidence of the goodwill of the appellant towards rightwingers, that is, those who are opposed to a democratic and constitutional dispensation led by the Black majority in South Africa. There is evidence of a settled way of thinking or feeling of the appellant towards the Black majority government, which seems malevolent. There is evidence of a particular mental state of the appellant towards the President and the trajectory that his government is leading, which is disrespectful. These facts point to the motive for the crime [*S v Yanta* 2000(1) SACR 237 (Tk) at 247e; *S v Fikeni* 2019 JDR 1404 (GJ) at para 19, 20 and 22]. There is evidence of the arrest of the appellant inside Parliament at its window at the reasonably appropriate period contemporaneous with the time that the Parliament of the Republic was set on fire, whilst he was in possession of goods stolen from inside Parliament. The seriousness of the offences and the possible sentences militate against releasing the appellant on bail [*S v Oosthuizen & Another* 2018(2) SACR 237 (SCA) at para 38].

[76] The nature of the offences and the circumstances under which the offences were committed induced a sense of shock and outrage in the country. It was Parliament, the seat of the country’s National Legislature which was destroyed. The work and workplace of the people’s democratically elected representatives were disrupted. The sense of peace and security among the members of Parliament in particular, and the nation at large will be undermined and jeopardized by the release of the appellant on bail [*S v Miselo* 2002(1) SACR 649 (C) at para 23-29]. This is moreso because there is evidence of a possible mental health challenge of the appellant, which relates to his opinions which are formed without conscious thought or on the basis of little evidence and not being in touch with reality. The release of the appellant at this stage will certainly undermine the public confidence in the criminal justice system. In my view, there is a reasonable possibility that the appellant would endanger the safety of the public or any particular person or commit a schedule one offence if he were released on bail. There is a real risk [*S v Bennett* 1976(3) SA 652 (CPD) at 655] that the public peace and security will be undermined and that the appellant is a danger to himself and the community.

[77] I do not find the evidence presented by the appellant, including his case which is devoid of any objective facts to support his narrative, and his personal circumstances in this matter, to be weighty so as to even move, let alone balance the scales of justice in order to minimize the danger, to wit, that his release would prejudice the interests of justice. I am unable to conclude that the appellant adduced evidence which showed that the State's case against him was non-existent, or that it was subject to some serious doubt [*S v Mathebula* 2010(1) SACR 55 (SCA) at para 12; *S v Jonas* 1998(2) SACR 677 (SEC) at 679h-i]. As regards his personal circumstances, the only notable departure from the ordinary is his speech impediment. Viewed in isolation or cumulatively with the other factors, there is nothing to qualify, on a balance of probabilities, as exceptional circumstances [*S v Scott-Crossley* 2007(2) SACR 470 (SCA) at para 12]. A mere bare denial of the considerations in section 60(4) is insufficient to show exceptional circumstances [*S v Botha en n' Ander* 2002(1) SACR 222 (SCA) at para 18]. I am not persuaded that the interests of justice permit the release of the appellant on bail. The appellant failed to establish that the decision of the regional magistrate was wrong.

[78] For these reasons I would make the following order:

The appeal is dismissed.

**DM THULARE**
**JUDGE OF THE HIGH COURT**

I agree

**CN NZIWENI**
**ACTING JUDGE OF THE HIGH COURT**

**LEKHULENI J (DISSENTING)**

**INTRODUCTION**

[79] I have had the distinct benefit of reading the well-crafted judgment of my brother Thulare J. I find myself in respectful disagreement with its reasoning and order. As my colleague points out, this appeal is against the refusal of the appellant's bail application by the Regional Court, Cape Town, on 29 January 2022. At the bail hearing, the Regional Court found that the appellant had failed to place exceptional circumstances before the court which in the interests of justice permit his released on bail. It is against this decision that the appellant now appeals to this court, in terms of section 65(1)(a) of the Criminal Procedure Act 51 of 1977 ("the CPA"). The appellant was legally represented by Mr Mpofu SC ("Mr Mpofu"), while Mr Menigo, a senior State Advocate of the office of the Director of Public Prosecutions, Cape Town, represented the State both in this court and in the court below.

[80] At the time of the bail application the appellant was charged with four counts, namely: housebreaking with the intent to commit terrorism and arson; contravention of section 2, alternatively, section 5(b) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004; arson and theft. It is common cause that some of these charges fall under Schedule 6 of the CPA, and therefore the appellant has a duty to adduce evidence to satisfy the court that exceptional circumstances exist which in the interests of justice permit his released on bail.

**THE FACTUAL MATRIX**

[81] The appellant was arrested on 02 January 2022, at the Parliament buildings in Cape Town, and subsequently detained at Pollsmoor Correctional Centre. On 03 January 2022 the appellant was taken to a District Surgeon, one Dr Van Tonder, at Karl Bremmer Hospital, for urgent observation and assessment. Dr Van Tonder examined him and made a provisional diagnosis that the appellant was suffering from possible paranoid schizophrenia. She recommended that the appellant be referred for a formal 30-day observation in an appropriate institution. Subsequent thereto, the appellant was interviewed by members of the SAPS, and Lt. Col. Nqxaki took the appellant to the Caltex garage in Durban Road, Bellville, to point out the

place where the appellant allegedly bought R10 worth of petrol. The appellant was then taken to the Parliament building where, according to Col. Theron, the appellant pointed out to the police how he gained entry into the Parliament building.

[82] After the so-called pointing out was completed, the appellant was taken to Lt. Col. Spannenberg to make a confession. Meanwhile, Capt. Nigrini of the Directorate of Priority Crime Investigation ("DPCI") was requested to access the camera system installed at Parliament, and to forensically download any footage that was available. Capt. Nigrini obtained footage of the suspect moving around in the Old and New National Assembly building. According to Capt. Nigrini, she is in possession of footage showing the suspect setting the Parliament building alight in different places. Screenshots were taken of the footage and incorporated in the bail proceedings, as annexure "CGT 4(ii)".

[83] Col. Theron, also of the DPCI, avers that the screenshots / photos depict the appellant being arrested wearing the same clothes as the person seen on the video footage. At the hearing of the bail application, the State made an application to play the video footage in court. The defence opposed the application and impugned the authenticity of the video footage. In addition, the appellant disputed that he was the person on the video footage and denied that he was involved in the commission of the said offence, as alleged or at all. After considering the application, the bail court upheld the objection of the defence and excluded the video footage from the bail proceedings.

[84] The appellant was formally charged on 03 January 2022, and he appeared before court on 04 January 2022, at the Cape Town Magistrates Court. On the said date, the police obtained a search warrant to search at the appellant's premises at Q321, Site B, Khayelitsha. The police executed the search warrant and found newspaper cuttings bearing the caption: "1981 – 2006 Road to Freedom", and other documents bearing this writing, such as: "February 2022 – Janusz Walus released after 27 Years in Jail – Ramaphosa a serial killer". A yellow t-shirt, with the face of President Ramaphosa bearing the inscription "Vote ANC", was also found.

[85] The appellant's case was postponed to 11 January 2022 for further bail information. On 11 January 2022 the appellant's defence team was furnished with a charge sheet, which specified that the appellant was charged with offences falling under scheduled 6 of the CPA. The appellant's legal representative was also furnished with a written confirmation, in terms of section 60(11A) of the CPA, to the effect that the Acting Director of Public Prosecutions, Western Cape, intended to charge the appellant with an offence referred to in Schedule 6. On the said date, the preliminary report prepared by the District Surgeon indicating the abovementioned provisional diagnosis, was handed in to the court. Pursuant to that report, and against the protestation of the appellant's counsel, the appellant was referred to Valkenberg Hospital for psychiatric observation.

[86] Subsequent thereto, the appellant launched an urgent application for bail to this court. However, when the matter came before this court, the appellant amended his notice of motion and sought to also review the decision of the Magistrates Court referring him to Valkenberg for mental observation. The High Court declined to hear the bail application and referred same to the Regional Court for hearing. However, the High Court reviewed and set aside the decision of the Magistrates Court referring the appellant to Valkenberg Hospital, as it was found to be irregular and unlawful.

[87] On 29 January 2022 the appellant brought a hybrid bail application before the Cape Town Regional Court. The application was based on both evidence on affidavit as well as viva voce evidence. Prior to him giving oral testimony, the Regional Magistrate warned him, in terms of section 60(11B)(*b*) and (*c*) of the CPA, that should he testify under oath, he may refuse to answer questions that deal with the merits of the matter, and that if he, however, chose to waive that right and answer those questions, his answers may be used against him in evidence during the trial of the matter. In response, the appellant informed the court that he did not wish to deal with the merits of the case during the bail application. He further informed the court that he would deal with the merits of the case when the matter went to trial, and that he would enter a plea of not guilty at the trial. The State opposed the application and relied on the affidavit of Col. Theron, as well as on certain documents which are discussed later in this judgment. After considering the matter, the Regional Court

dismissed the appellant's application to be released on bail. It is this order that the appellant seeks to assail in this court.

**GROUNDS OF APPEAL**

[88] The appellant's grounds of appeal, set out in the notice of appeal dated 18 February 2022, can succinctly be summarised as follows:

1. That the magistrate erred in finding that the appellant did not discharge the onus to establish any exceptional circumstances.

2. That the magistrate erred in failing to consider all the exceptional circumstances the appellant raised.

3. That the magistrate misconstrued the meaning of the term exceptional circumstances as contained in section 60(11)(*a*) of the CPA.

4. That the magistrate erred and committed a gross irregularity when she allowed the State counsel to cross-examine the appellant on the merits of his case, notwithstanding his counsel's objection to such questioning.

5. That the magistrate failed to consider the impact of the credible evidence that the appellant will not evade trial, and in so doing jeopardised his civil claim against the State for illegally incarcerating him for much longer than it is legally permissible.

6. That the magistrate failed to consider the fact that the appellant was not a flight risk, the appellant's potential loss of income and the adverse impact thereof, despite the appellant leading evidence to the effect that he earned between R800 and R1000 per month from his menial jobs.

7. That the Magistrate failed to consider the binding effect of the High Court decision reviewing and setting aside the unlawful referral to a mental institution, and the fact that the appellant remained in custody even after the High Court decision, despite his Covid-19 status.

**PRINCIPAL SUBMISSIONS BY THE PARTIES**

[89] At the hearing of the appeal, Mr Mpofu argued on behalf of the appellant that the State's case against the appellant was very weak. According to him, the appellant raised twelve grounds of exceptional circumstances and, of the twelve, the court below dealt with only three and ignored the rest. Counsel argued therefore that this alone amounted to a gross misdirection and irregularity, let alone a breach of the appellant's constitutional right to access the courts. Mr Mpofu contended that the Regional Magistrate relied on a document, which she termed an alleged confession, to refuse the appellant bail, which document, Mr Mpofu argued, did not amount to a confession. Even if it was a confession, so the contention proceeded, it did not say or support what the Regional Magistrate claimed in her judgment. He contended that from the reading of this document it could not be said that the appellant admitted all the elements of the offence. It was counsel's contention that the said document was just a casual comment and to base a denial of right on a document like this was in conflict with the Constitution.

[90] Though the court is seized with bail proceedings, counsel argued that the Constitution remained relevant in bail proceedings, which must therefore be looked at through a constitutional lens. This includes the presumption of innocence. He contended that the contested confession was allegedly made immediately after the appellant was diagnosed with paranoid schizophrenia by Dr van Tonder. According to counsel, it could not therefore be said the document was made freely and voluntary by a person in his sound and sober senses. It was counsel's contention that the appellant filed an affidavit in support of his application, and that in it he averred that he was induced to make a confession, which was not disputed by the State. It was further contended that the court below had failed to consider, as an exceptional circumstance, the State's unlawful request to have the appellant referred to a psychiatric institution without the opportunity to apply for bail, and that this was a suppression of the appellant's constitutional right to liberty. Counsel contended further that the Regional Magistrate failed to consider the appellant's potential loss of income and the adverse impact thereof, despite the appellant leading evidence to the effect that he earned between R8000 and R1000 per month from his menial jobs prior to his arrest.

[91] Mr Menigo on the other hand, argued that there was nothing advanced by the appellant that justified interference with the findings of the court *a quo*. He contended further that the mere fact that a court gave brief reasons for dismissing a bail application, was not itself a sufficient ground for the court of appeal to infer that insufficient weight was given to the considerations set out in section 60 of the CPA. It was argued that where the appellant did not even make out a *prima facie* case for exceptional circumstances, as is the case in casu, there was no duty on the State to present evidence in rebuttal thereof. To this end, it was contended that the appellant did not present a case warranting rebuttal. Counsel for the State maintained therefore, that the court *a quo* was correct in its findings and, in particular, that it was not obliged to deal with every conceivable circumstance raised by the appellant.

[92] As far as the provisional psychiatric report is concerned, the State argued that during the course of taking the accused for a confession, the investigating officer, as is customary, and in order to rebut later claims of assault, took the appellant to a medical practitioner, not for a psychiatric evaluation, but for a physical examination. It was during the course of this examination that the doctor, after interacting with the appellant, made a provisional diagnosis of paranoid schizophrenia and recommended his referral for psychiatric observation as stated above. Despite the appellant's contention that he is sane, it was submitted on behalf of the State that there is however no record that the appellant disputed the doctor's provisional diagnosis. He only asserted that he was entitled to be released on bail.

[93] It was further argued that the State had *prima facie* evidence that the offence was premeditated, as the appellant allegedly purchased petrol before making his way to Parliament. It was counsel's argument that the court *a quo*, having had regard to the evidence and the arguments by counsel, correctly found that the appellant had failed to place exceptional circumstances before the court which in the interests of justice permitted his release on bail. He implored this court to dismiss the appeal.

**THE DISPUTED ISSUES**

[94] From these arguments, this appeal in my view raises three critical questions. First, whether the appellant has discharged the burden placed on him by section

60(11)(*a*) of the CPA, to be admitted to bail. Secondly, whether the presumption of innocence has a role to play in bail applications. Thirdly, whether an accused person who has been referred for mental observation in terms of section 77 and 78 of the CPA, can still bring an application to be released on bail pending a report on his capacity to understand proceedings, or whether in such a case the bail should be held in abeyance pending the finalisation of the report. For the sake of brevity and completeness, I will deal with these issues in this judgment *ad seriatim.*

**APPLICABLE LEGAL PRINCIPLES AND ANALYSIS**

[95] It is trite that a court hearing an appeal in terms of section 65(4) of the CPA 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 shall give the decision which in its opinion the lower court should have given. Thus, this court can only interfere with the decision of the court *a quo* if the Regional Magistrate misdirected herself in some material way, in relation to either the facts or the law. In the absence of a finding to that effect the appeal must fail. See *Fourie v S* (A107/2020) [2020] ZAGPPHC 260 (8 June 2020) paras 16-17, and *S v Mpulampula* 2007 (2) SACR 133 (E) at 136E.

[96] Bail applications are regulated by section 60 of the CPA. As a general rule, an accused person who is in custody is entitled to be released on bail, if the court is satisfied that the interests of justice so permit. Section 60(1)(*a*) provides that: 'An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.' Section 60(4)(*a*) – (*e*) on the other hand provides that the interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established, namely:

'(a) Where there is the likelihood that the accused, if he or she were 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 the 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 the 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 the 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; or

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.'

[97] The grounds listed in paragraphs (b) and (c) above, concern the impact that the granting of bail might have upon the conduct of a particular case, while the remaining three grounds concern the impact that the granting of bail might have upon the administration of justice generally, and upon the safety of the public in particular. (See *S v Mabena and Another* 2007 (1) SACR 482 (SCA) para 4). The five grounds elucidated above are further developed in sections 60(5) to 60(9) of the CPA, which contain an extensive and detailed list of the potential factors for and against the grant of bail, to which a court must pay due regard in considering where the interests of justice lie. (See *Mabena* para 4; *Solomons v S* [2019] 2 AII SA 833 (WCC) paras 11-12). For reasons of convenience and simplification, I deem it opportune and pragmatic to quote these sections verbatim as they are relevant for the purposes of this judgment.

[98] Section 60(5) expounds the provisions of section 60(4)(a) and provides as follows:

'In considering whether the ground in subsection 4(a) has been established, the court may, where applicable, take into account the following factors, namely –

(a) the degree of violence towards others implicit in the charge against the accused;

(b) any threat of violence which the accused may have made to any person;

(c) any resentment the accused is alleged to harbour against any person;

(d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;

(e) any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct;

(f) the prevalence of a particular type of offence;

(g) any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or

(h) any other factor which in the opinion of the court should be taken into account.'

[99] Section 60(8A) elaborates on section 60(4)(e) and states as follows:

'In considering whether the ground in subsection (4)(e) have been established, the court may, where applicable, take into account the following factors, namely –

(a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;

(b) whether the shock or outrage of the community might lead to public disorder if the accused is released;

(c) whether the safety of the accused might be jeopardised by his or her release;

(d) whether the sense of peace and security among members of the public will be undermined or jeopardised by the release of the accused;

(e) whether the release of the accused will undermine or jeopardised the public confidence in the criminal justice system; or

*(f)* any other factor which in the opinion of the court should be taken into account.'

[100] Section 60(9) sets out a weighing exercise which the court must do in determining where the interest of justice lies. In terms of this section the court must weigh the interests of justice against the right 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. This section provides:

'In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right 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, namely-

(a) the period for which the accused has already been in custody since his or her arrest;

(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;

(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;

(d) any financial loss which the accused may suffer owing to his or her detention;

(e) 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;

(f) the state of health of the accused; or

(g) any other factor which in the opinion of the court should be taken into account.'

[101] More serious offences listed in Schedules 5 and 6 of the CPA are subject to a more stringent regime. Only the regime that applies to Schedule 6 offences is

relevant to this appeal. It is against this backdrop that I turn to consider the question whether the lower court erred in refusing to admit the appellant to bail.

**DID THE COURT A QUO ERR IN FINDING THAT THE APPELLANT DID NOT DISCHARGE THE ONUS TO ESTABLISH EXCEPTIONAL CIRCUMSTANCES?**

[102] As discussed above, the charges levelled against the appellant involved offences listed in Schedule 6 of the CPA, and his application in the court *a quo* had to be determined in terms of section 60(11)(a) of the CPA, which provides as follows:

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

[103] An arrested person is generally entitled to be released on bail if a court is satisfied that the interests of justice so permit, however the reverse applies where a person has been charged with a Schedule 6 offence. From the aforesaid provision, it is clear that a court is obliged to order an accused's detention where he stands charged of Schedule 6 offences, and a court will only be empowered to grant bail in those instances provided the accused can advance exceptional circumstances why he should be released. (See *S v Jonas* 1998 (2) SACR 677 (SE) at 678C-D). The standard of proof is on a balance of probabilities. (See Van der Berg: *Bail: A Practitioner's Guide*, 3rd Ed (2012) at 97.)

[104] In a Schedule 6 bail application, the accused has a clear and definite obligation to persuade the court. Section 60(11)(a) places a burden or an *onus* on an accused to satisfy the court by way of evidence and on a balance of probabilities that exceptional circumstances exist which, in the interests of justice, permit his release on bail. In *Mabena,* para 6, the Supreme Court of Appeal observed that before a court may grant bail to a person charged with a Scheduled 6 offence, it must be satisfied, upon an evaluation of all the factors that are ordinarily relevant to the grant

or refusal of bail, that circumstances exist that warrant an exception being made to the general rule that the accused must remain in custody.

[105] There is no definitive or exhaustive list of what constitutes 'exceptional circumstances' in the context of this provision. Each case has to be dealt with according to its merits. Exceptional circumstances do not mean that they must be circumstances above and beyond, and generally different from those enumerated in subsecs 60(4) – (9) of the CPA. In fact, ordinary circumstances, present to an exceptional degree, may lead to a finding that the release on bail is justified. (See *S v Rudolph* 2010 (1) SACR 262 (SCA) para 9.) On the meaning and interpretation of exceptional circumstances in terms of section 60(11)(a) of the CPA, Van Zyl J noted in *S v Petersen* 2008 (2) SACR 355 (C), para 55, that there have been 'wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept.' The learned Justice observed that '[g]enerally speaking "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different.' He was of the view that there are 'varying degrees of exceptionality' and that this depends on the context and the particular circumstance of the case under consideration.

[106] In *S v Bruintjies* 2003 (2) SACR 575 (SCA) Shongwe AJA gave the following exposition on what is meant by exceptional circumstances:

'What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify her or his release. What is exceptional cannot be defined in isolation from the relevant facts, save 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.'

[107] In this matter, the appellant's personal circumstances were placed on record through his affidavit, and during his oral evidence that was presented in court. The appellant is 49 years old. He testified that he resides at Q321, Site B, Khayelitsha, Western Cape. His original home is in an area known as Lonely Park in Mafikeng,

North West Province, where his biological relatives still reside. His mother passed away while he was still young and he was raised by his step-mother, who still resides in Mafikeng. He did his primary education at Signal Hill Primary School in Mafikeng, and after completing his primary school education, he attended Lapologang High School, where he continued with his studies until he reached grade 11. Due to his low level of education he was unable to secure stable employment in Mafikeng, so he travelled through a number of provinces looking for employment, until he came to the Western Cape eight years ago. Ever since he arrived in the Western Cape he was able to perform occasional menial work just to make ends meet. This included carrying groceries to the cars of shoppers at supermarkets for tips of small change, and sometimes an item of food. It was his testimony that the situation was so dire that it was economically unenviable, and impossible to commute daily between the City of Cape Town and his home in Khayelitsha. During these times he sought shelter in the streets of Cape Town, including the vicinity of the Parliamentary precinct.

[108] Upon his arrest on 2 January 2022, he was found sleeping outside the Parliament building, when he was woken up by members of SAPS. He then noticed for the first time that the Parliament building was ablaze, with black smoke escaping from the roof. He averred in his affidavit that upon his arrest he was severely and violently manhandled and intimidated by members of SAPS, who accused him of having caused the fire. He denied this. It was his evidence that upon arrest he was taken to an unknown place by members of SAPS, where a certain white man told him that he would be sentenced to death for burning the Parliament building unless he cooperated with them. He was terrified and as a result he promised to cooperate with whatever they required of him. However, this turned out to be an empty promise from the white man as he was not released.

[109] As explained above, the State opposed the bail application and the appeal in this court. The State filed a comprehensive affidavit by Col. Theron, and other confirmatory affidavits from members of SAPS, in opposition of the bail application. Col. Theron noted in his affidavit that while nobody was hurt in the incident, the applicant caused extensive damage to a National Key Point, and created a threat to the safety and wellbeing of the public. He averred that the appellant was found in

possession of cutlery, a kettle, a toaster, stationery and shoes belonging to Parliamentary officials, who still have to identify these items. He also relied on still photographs and CCTV footage, and the appellant's alleged confession in which he alleges that the appellant harbours intense resentment towards the South African Government and prominent political figures, including the President of South Africa, and has allegedly acted on that resentment. His motive for setting the building on fire flows from his deeply held beliefs, which makes his release on bail a threat to the public and public officials.

[110] As discussed hereinabove, the appellant denied any involvement in the commission of the offence. The appellant also denied that he was the suspect featured in the video footage. In my view, the innocence or guilt of the appellant is an issue which should be left to the trial court for determination. What this court has to consider is whether the court *a quo* erred in dismissing his application to be released on bail. It is interesting to note that the Regional Magistrate based her refusal to release the appellant on the contested confession that the appellant made immediately after he was arrested. The Regional Magistrate relied on the evidence (confession) that the motive for setting the building on fire flows from the appellant's deeply held beliefs, which makes his release on bail a threat to the public and public officials.

[111] The Regional Magistrate also made a finding that in the alleged confession the appellant claimed that he will not stop his activities and is clearly willing to risk life and limb for his beliefs. These findings created the impression that if released on bail, the appellant would be a danger to the public and that he was disposed to committing further offences. From a careful reading of the record and from arguments of the parties at court, it became apparent that the Regional Magistrate's finding in this regard was, with respect, not supported by the facts or the evidence on record. The purported confession referred to by the Regional Magistrate, as well as the affidavit of Col. Theron, do not contain these allegations. The court *a quo* therefore erred in making a finding which was not based on the facts.

[112] However, and most importantly, the court *a quo* relied heavily on the appellant's purported confession in arriving at its decision to refuse the appellant

bail. It is trite that bail proceedings are *sui generis* and are concerned with the liberty of an individual, a right which is enshrined in the Constitution. Our courts in similar cases have said that the admissibility of a pointing out and the purported confession made by an applicant is not an issue that has to be determined by the bail court. It is an issue which is best left to the trial court to consider after all the evidence is tendered before it. (See *Mpulampula*). I agree with these propositions. However, in my view, the inquiry does not end there. It is my considered opinion that the protection afforded to accused persons in terms of section 35(5) of the Constitution is not confined or limited to trial proceedings only, but also prevents any conduct or outcome which would be otherwise detrimental to the administration of justice, such as accepting a confession under the present questionable circumstances.

[113] It must be stressed that this appeal involves the question of deprivation of personal liberty of the appellant and as such the Constitution must prevail. The Constitution does not take a leave of absence simply because the court is dealing with a bail application. Evidence obtained in conflict with the Constitution cannot be easily accepted merely because it is bail proceedings, and the rules of procedure are relaxed. For although a bail enquiry is less formal than a trial, it however remains a formal court procedure that is essentially adversarial in nature with serious adverse consequences for the accused. In *Mabena*, para 7, the Supreme Court of Appeal noted that bail proceedings remain an ordinary judicial process, adapted as far as needs be to take account of its peculiarities, that is to be conducted impartially and judicially and in accordance with the relevant statutory prescripts. In my view, section 35(5) applies equally in bail proceedings as in trial proceedings. Furthermore, there is a constitutional right to have a fair hearing in bail applications. It is therefore instructive for the courts, in conformity with section 39(2) of the Constitution, to interpret section 60 of the CPA in a manner which promotes the spirit, purport and objects of the Bill of rights.

[114] In my view, the Constitution enjoins this court in this appeal to look at the purported confession relied on by the court *a quo*, whether it *prima facie* meets the requirements of a confession in terms of our law. Without pre-empting the finding of the trial court I have some difficulty with this document. I do not intend to deal with the formal requirements of a confession, as that will be done by the trial court.

However, on the face of it, this document patently does not amount to an unequivocal acknowledgment of guilty on the part of the appellant. Furthermore, the appellant averred in his affidavit in support of his application for bail that he was induced or influenced to make this purported confession. The State had the opportunity to lead evidence and challenge these averments. These allegations were not refuted by the State on the papers. In my opinion, the court below erred in placing undue reliance on this document.

[115] However, what I find even more concerning is that before the appellant could make the purported confession, he was examined by a doctor and the doctor made a provisional diagnosis that the appellant was suffering from paranoid schizophrenia. There was a recommendation that he be referred for a formal 30-day psychiatric observation. Notwithstanding the knowledge of this provisional diagnosis of mental illness, members of SAPS proceeded to obtain a contested confession and pointing out from the appellant. In my view, and without pre-empting the decision of the trial court in relation to this document, I am in doubt whether it can be said that this document was made by the appellant in his sound and sober senses, or even freely and voluntarily. It is my considered opinion that the court below erred in attaching much weight to the alleged confession which was made by a person who, according to the doctor, suffered from a mental illness.

[116] During the bail proceedings, the court below also had to do a proportionality test in terms of section 60(9) of the CPA, by weighing the interests of justice against the appellant's right to his personal freedom. Unfortunately, the Regional Magistrate failed to consider the provisions of section 60(9) of the CPA, which on its own is a material misdirection warranting interference by this court, especially when regard is had to the seminal decision of the Constitutional Court in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC). (See also *S v Nel and Others* 2018 (1) SACR 576 (GJ) para 26.) The Regional Magistrate also failed to bring a reasoned and balanced judgment to bear in an evaluation in which the liberty interests of the appellant are given full value accorded by the Constitution.

[117] In addition, the court below erred in failing to properly apply its mind to a whole panoply and array of factors potentially in favour of or against the grant of bail,

and only concentrated on and overemphasized the seriousness of the charges facing the appellant. The court *a quo* held that there were placards with slogans found in the appellant's home, which the appellant admitted in court. The court also found that the fact that the appellant confirmed that he wanted Janusz Walus to be released, and demanded a social grant from Government because he was unable to find employment, lined up with what was contained in the contested confession as reasons why he committed the offence. These findings, with respect, cannot prevail. It must be stressed that like everyone else, the appellant has a right to freedom of expression and opinion, as entrenched in section 16 of the Constitution. In addition, this right embraced the right to receive, hold and consume expressions transmitted by others. (See *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) para 25). Furthermore, the alleged documents referred to by the court *a quo* were found pursuant to a search warrant at the appellant's home. These were not prohibited publications and they were found at his home, a sacred and hallowed place for the appellant.

[118] The record reveals that the appellant raised twelve points as exceptional circumstances for him to be released on bail. I am inclined to agree with the appellant's counsel that the court *a quo*, in its judgment, did not address or consider all the circumstances raised by the appellant during his bail application. The court *a quo* paid scant regard to the totality of facts the parties placed before her. This, in my view, constitutes a misdirection on the part of the court *a quo*.

[119] Moreover, the court *a quo*, in my view, erred in failing to consider the fact that the appellant worked and did odd jobs to sustain himself. The fact that he earned R800 to R1000 per month was not disputed by the State during his evidence. Therefore, the submission by the respondent's counsel that the appellant made no effort in placing his income and expenditure before court, cannot be correct. The appellant made it abundantly clear that he pays rent monthly, DSTV subscription, travelling expenses to and from Khayelitsha to Cape Town, and that the balance of his income is spent on food. While the amount the appellant generated per month may be meagre to some, it is, however, indispensable and of value to the appellant. In my view, the fact that he is not formally or gainfully employed and registered with

the Department of Labour, must not be weighed against him, lest an impression is created that there is law for the rich and the law for the poor, and that those in formal employment stand a better chance than poor people when bail applications are considered.

[120] Furthermore, in my considered opinion, the court *a quo* also failed to consider the fact that the appellant was resolute that he would not evade trial and in so doing jeopardise his civil claim against the State. There was no evidence placed before the court to gainsay the appellant's version in this regard. More so, the evidence tendered by both the appellant and the State was that the investigating officer verified the appellant's addresses in Cape Town and in Mafikeng. Mr Menigo's contention that the appellant should at least have provided the court with a lease agreement, ignores the dynamics and the reality facing people who are living in informal settlements, shelters and streets because of poverty. It also fails to recognise that the majority of our people living in informal settlements have no written lease agreements, but verbal lease agreements if any lease at all. The submissions on behalf of the State appear to be oblivious of the reality of the majority of the indigent.

[121] In addition, an accused person cannot be kept in custody pending his trial as a form of anticipatory punishment. In *S v Acheson* 1991 (2) SA 805 (NMHC) at 821 F-H the court said 'the presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.' Meanwhile in *Dlamini,* at para 53, the Constitutional Court observed that the interests of justice in regard to the grant or refusal of bail therefore do focus primarily on securing the attendance of the accused at trial and on preventing the accused from interfering with the proper investigation and prosecution of case.

[122] The appellant's counsel contended in this court that the court below and the prosecution disregarded the appellant's constitutional right to a fair trial, to dignity and respect, in that documents like the affidavit of Col. Theron and the contested confession, were disclosed at the bail proceedings and with no prior warning to the defence. In response, the State relied on section 60(14) of the CPA, which provides:

‘Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the prosecutor otherwise directs: Provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for purposes of his or her trial.’

[123] The provisions of this section vest a discretion in the prosecutor to disclose information or material in the docket. (See also *S v Josephs* 2001 (1) SACR 659 (C) at 664C-D). Mr Menigo contended that if the State, as a matter of course, were to disclose all that is contained in the docket in bail proceedings, this would compromise ongoing police investigations. I agree with this argument. However, it must be stressed that this subsection does not provide an absolute or ‘blanket’ prohibition on the disclosure of the contents of the docket. Instead, all that it does is to deny the accused an entitlement to the contents of the police docket. (See Van der Berg: *Bail: A Practitioner’s Guide*, at 68.) Thus, a prosecutor has a discretion to discover the contents of the police docket, and that discretion is not untrammelled or unfettered, but rather one that may be overruled by the court if it is unreasonably or groundlessly exercised against an accused person.

[124] In *Dlamini* the Constitutional Court found that, notwithstanding the provisions of subsec 14, a prosecutor may have to be ordered by the court, under subsec 11, to lift the veil in order to afford the arrested person the reasonable opportunity prescribed there. The court further observed that subsec 14 can therefore not be read as sanctioning a flat refusal on the part of the prosecution to divulge any information relating to the pending charge(s) against the arrested person, even where the information is necessary to give effect to the ‘reasonable opportunity’ requirements of subsec 11(*a*).

[125] It is not in dispute in this matter that the contested confession was not requested by the defence. The defence requested the relevant charge sheet from the State. The contested confession was made available to the defence during the

bail proceedings. In my opinion, the appellant's counsel should have requested this information from the prosecution, after consulting with the appellant in preparation for the bail proceedings. If the State denied the appellant's request to provide this information, the appellant's counsel could have approached the court to compel the State to lift the veil and disclose this information. If the court found that the said information was relevant and necessary for it to reach a just decision in the matter, the court could have compelled the prosecutor to disclose the documents, or invoked section 60(3) of the CPA and ordered that such evidence be placed before it.

[126] In my view, the appellant cannot cry foul belatedly that he was not furnished with these documents, when he did not request the relevant information from the State. The Supreme Court of Appeal noted in *S v Mathebula* 2010 (1) SACR 55 (SCA), para 12, that the State is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence. Whilst I have some difficulty with the contested confession, I agree with the views expressed by Mr Menigo that the bail court and the State could not exercise their discretion in terms of section 60(3) and 60(14) of the CPA in a vacuum. In my view, it was incumbent upon the defence to have requested this information before the hearing of the matter.

[127] Much as I accept that the appellant is facing serious charges, I must however record that no evidence was placed before the court *a quo* that the appellant would evade his trial if released on bail, as envisaged in section 60(4)(b) of the CPA. The appellant testified that he has family and occupational ties in the Western Cape where this matter will be tried. He has a relative residing in Simons Town, an area located within the jurisdiction of this court. The appellant has resided in Cape Town since 2014. He rents an informal settlement (shack) in Khayelitsha and it is his fixed and permanent address, which has been verified by the police. Prior to his arrest, he commuted daily between the City and his home in order to make money to pay his rent and meet his daily necessities. Due to financial constraints, when he commuted to the City, he often sought shelter in the streets of Cape Town. The Parliamentary precinct was one of the spots where he would find shelter.

[128] In weighing up the deprivation of liberty of the appellant, who is presumed innocent, against the legitimate interests of society, as envisaged in section 60(9) of the CPA, this court finds that it was not established that the appellant is a flight risk. There was no evidence presented suggesting that he would be prepared to become a fugitive of the law for the rest of his life. The appellant has no pending cases. He has no outstanding warrants and no previous convictions. He has no passport and has never been outside of the Republic of South Africa. There was no evidence before the bail court demonstrating that the appellant had a disposition to commit offences. The appellant has been in custody for almost five months now. It cannot be disputed that the matter will take time to be finalised. There was an indication that the trial of this matter will be heard in the High Court. The matter is still in the lower court. At the hearing of this appeal, the court was informed that the State will proceed with its application in the High Court to have the appellant referred for mental observation in terms of section 77 and 78 of the CPA. In my view, the continued incarceration of the appellant pending the finalisation of the trial of this matter, would manifestly be prejudicial to the appellant especially bearing in mind the provisions of section 12(1)(a) of the Constitution which makes it abundantly clear that everyone has a right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily without a just cause.

[129] In addition, it is also not in dispute that the State's witnesses are unknown to the appellant. There is therefore nothing to suggest that, if released on bail, the appellant would attempt to influence or intimidate witnesses or attempt to conceal or destroy evidence. At the time the bail application was heard, the investigation was almost complete. The only evidence outstanding was the forensic evidence, and there was nothing to indicate that the appellant would interfere with the police investigation. In my view, the court below did not attach appropriate weight to these factors, but rather concentrated on the seriousness of the offences while ignoring that the case in large measure depended on the questionable confession and the disputed video footage. While I appreciate the fact that the charges the appellant faces are serious, in my view this is not the only determining or the sole factor the court must have regard to.

[130] Most importantly, there is nothing indicating that if the appellant were to be released on bail he would be untraceable or a danger to the public or that the administration of justice would be undermined, as envisaged in section 60(4) of the CPA. The allegations against the appellant are that he set fire to the Parliament building. The State relies on his purported confession, photographs and CCTV footage compiled by Capt. Nigrini. The State alleges that the video footage depicts the appellant setting the Parliament building on fire and also depicts his arrest at the window of Parliament. The State relies on this video footage for the strength of the State case. As explained above, the appellant challenged the authenticity of this video footage and denied that it was him on the footage. Col. Theron averred in his affidavit opposing bail that the video footage and screenshots will be enhanced and submitted to a facial comparison expert for analysis. At the bail hearing, the State applied to introduce this video footage into the record and its application was refused by the court. In giving judgment on this application, the court explicitly excluded this piece of evidence and stated as follows:

"The court having considered the submissions in favour of and in opposition to the admission of said footage will render its decision at this stage and will give proper reasons at a later stage. The application by the state to introduce the video footage is refused."

[131] Notwithstanding this finding, the court *a quo* accepted and relied on this still photographs which were obtained from the same video footage which the court refused to have introduced into evidence. In my view, the approach of the court *a quo* in this regard was wrong.

[132] The appellant has denied all the allegations levelled against him and pleaded his innocence. He also denied that he was the person depicted on the video footage prepared by Capt. Nigrini. His version was that he was found lying outside the Parliamentary precinct when the building was already on fire. During cross-examination he chose not to answer questions which related to the merits of his defence. He testified that he will deal with the merits of his case when the matter is on trial in the High Court. This was after the Regional Magistrate warned him in terms of section 60(11B)(*c*) of the CPA. Notably, the appellant was frank, open and

candid with the police when they arrested him. He cooperated with the police and gave them his correct physical addresses, which were duly verified by the investigating officer. He gave the correct information during the bail proceedings and upon his arrest. In my view, there is nothing to suggest that the criminal justice system would be undermined if the appellant is released on bail.

[133] At the hearing of this appeal before the full bench and the full court, this court was concerned with whether it would be in the interests of justice to unleash the appellant on the public, notwithstanding Dr Van Tonder's provisional report that the appellant suffered from paranoid schizophrenia. The fears of the court were allayed by both parties in court. Both counsels informed the court that if indeed the appellant had a mental health problem, the Regional Magistrate who sat in the bail hearing would have detected it. During argument, Mr Menigo informed the court that he found the appellant to be an intelligent person when he cross-examined him during the bail hearing. He also contended that in terms of section 78(1A) of the CPA, every person is presumed not to suffer from a mental illness or intellectual disability so as not to be criminally responsible in terms of section 78(1), until the contrary is proved on a balance of probabilities. It was his contention that as of now, it has not been proven on a balance of probabilities that the appellant suffer from a mental illness. It was also his argument that this court should not concern itself with this issue. I agree with these submissions, in my opinion, they are correct and to the point.

[134] In her judgment the Regional Magistrate noted that, save for a speech defect, no other mention was made of any health issues experienced by the appellant. I accept the explanation of both counsels. Furthermore, the issue relating to the provisional report of Dr Van Tonder was dealt with by this court in the review application. This court is not sitting as a court of appeal in respect of the review application, but as a court of appeal in respect of the bail application. I also accept the fact that the Regional Magistrate and the two counsels are not medical experts as the main judgment proposes. However, I agree with the views expressed by both counsels that the issue relating to the appellant's mental health should be dealt with by the trial court in the event it arises. In fact, Mr Menigo informed this court that it is envisaged that before the matter is enrolled for trial in the High Court, the State will ensure that the appellant's mental status is addressed in that court. Significantly,

even if I were to accept that the appellant has a mental health concern, that in itself, in my view, is not a sufficient ground on which to be refused bail. To hold otherwise, in my view, will be in conflict with the tenets and values enshrined in the Constitution.

[135] To my mind, taking all these factors together, in particular that the State relied on a questionable confession and pointing out, which the court *a quo* relied upon to dismiss the appellant's bail application, that the State relied on still photographs and video footage which is in dispute, and which the bail court excluded from the record during the bail hearing, I am of the view that the State's case is subject to some doubt.

[136] To this end, I share the views expressed by Legodi J in *S v DV and Others* 2012 (2) SACR 492 (GNP), where he found that, cumulatively, the fact that the State case was subject to some doubt, the low risk pertaining to flight, the absence of likelihood of interference with state witnesses and the low risk of re-offending, constituted exceptional circumstances.

[137] On a conspectus of all the evidence placed before me, in particular the personal circumstances of the appellant, the fact that other than the charges the appellant is presently facing, he has been a law-abiding citizen, which dispels the idea that the appellant may reoffend, the fact that it was not established that the appellant is a flight risk, the fact that the investigating officer confirmed that the appellant had a fixed address and that this was verified, the fact that there is no evidence that the appellant will interfere with the investigation, the fact that the appellant does not know who the witnesses are in this case and the fact that there is no evidence established that he will interfere with witnesses, the fact that the purported confession is suspect, and the fact that the hearing of this matter in all probability is likely to take time, all these factors and those discussed above, cumulatively, in my view, do constitute exceptional circumstances as envisaged in section 60(11)(*a*) of the CPA permitting the appellant's release on bail. (See also *Mooi v The State* (162/12) [2012] ZASCA 79 (30 May 2012).)

[138] Taking into account all these factors together, and in particular the appellant's defence to the matter and his unblemished record, and the fact that he resides and

works within the jurisdiction of this court, in my view the Regional Magistrate erred in finding that the appellant did not show the existence of exceptional circumstances. It is further my considered view that the circumstances discussed above constitute exceptional circumstances as envisaged in section 60(11)(*a*) of the CPA. When all the allegations are weighed up, none of the grounds listed in section 60(4) have been established to warrant a refusal of bail. In my judgment, the appellant is not a bail risk in terms of any of the provisions of section 60(4) of the CPA.

**DOES THE PRESUMPTION OF INNOCENCE PLAY A ROLE IN BAIL PROCEEDINGS?**

[139] This question arose during the hearing of the bail application in the Regional Court and during the hearing of this appeal. Mr Mpofu argued that though the court is seized with bail proceedings which are informal in nature, the presumption of innocence remains relevant and the bail proceedings must be looked at through a constitutional lens. Furthermore, during the bail proceedings the State applied to hand in video footage, which the defence opposed, relying amongst others on the presumption of innocence. The defence challenged the authenticity of the video footage and argued, *inter alia*, that the appellant had to benefit from the presumption of innocence until he was found guilty. The state in response relied on *S v Mbaleki and Another* 2013 (1) SACR 165 (KZD) para 14, where it was said that the right to be presumed innocent is not a pre-trial right, but a trial right. The state also relied on *S v Shabangu* 2014 JDR 2171 (GP) para 20, where the court stated that the issue of guilt or innocence is an issue that has to be dealt with by the trial court. The court went on to say that the reliance on the appellant's right to be presumed innocent until proven guilty does not have any bearing on the bail application proceedings.

[140] Section 35(3)(*h*) of the Constitution provides that every person has a right to a fair trial, which includes the right to be presumed innocent during proceedings. It is trite that the rights in the Bill of Rights, including the right to be presumed innocent, can only be limited by law of general application as envisaged in section 36 of the Constitution. The presumption of innocence, specified as a fair trial right in subsection 35(3)(*h*), is traditionally viewed as the ballast of fairness in criminal justice proceedings (see Currie I and De Waal J: *The Bill of Rights Handbook* (2005) at

745). It is a fundamental right which plays a pivotal role in our criminal justice system. It is however not absolute, but its value and weight will differ according to a variety of factors and circumstances against which it is pitted on the scales. (See *S v Coetzee* 1997 (3) SA 527 (CC) para 122). It is a hallowed principle lying at the very heart of criminal law. (See *R v Oakes* [1986] 1 S.C.R. para 29.)

[141] Steytler N: *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (1998) at 317, notes that the word 'proceedings' envisaged in section 35(3)(*h*) of the Constitution should be taken to refer to the entire court process, inclusive of plea proceedings and the trial proper. I agree with these sentiments. In my view, the word 'proceedings' in the section also extends to bail proceedings. The presumption of innocence does not take a break during a bail inquiry. It is the golden thread which runs throughout the criminal proceedings. An accused person facing a criminal trial must be presumed innocent from the time he appears in court up until judgment is passed. To the extent that the cases relied on by Mr Menigo as stated above suggest that this right does not find application in bail proceedings, with respect, I do not agree with that proposition.

[142] This right in my view plays a critical role in the interpretation of bail legislation and it must be considered at every step of criminal proceedings, including bail proceedings. (See Mokoena: *A Guide to Bail Applications*, 2nd Ed (2018) 110); Van der Berg: *Bail: A Practitioner's Guide* at 22 – 25). However, I must emphasise the fact that the presumption of innocence must not be accentuated or given more prominence than other factors when it comes to the consideration of the merits of the bail application. For the court may in fact serve the needs of justice by refusing bail if there is a cognizable indication that the accused will not stand trial if released on bail. (See *S v Fourie* 1973 (1) SA 100 (D) at 101G-H).

[143] In summary, the presumption of innocence is one of the factors that must be considered together with the strength of the State's case. However, this right does not automatically entitle an accused person to be released on bail. What is expected is that in Schedule 6 offences the accused must be given an opportunity, in terms of section 60(11)(*a*), to present evidence to prove that there are exceptional circumstances which, in the interests of justice, permit his release. The State, on the

other hand, must show that, notwithstanding the accused's presumption of innocence, it has a *prima facie* case against the accused. In reaching a value judgment in bail applications, the court must weigh up the liberty interest of an accused person, who is presumed innocent, against the legitimate interests of society. In doing so, the court must not over-emphasise this right at the expense of the interests of society. This leads me to the final issue for consideration, which I would term the intersection between sections 77, 78 and section 60 of the CPA.

**CAN AN ACCUSED PERSON BRING A BAIL APPLICATION NOTWITHSTANDING THAT HE HAS BEEN REFERRED FOR PSYCHIATRIC OBSERVATION IN TERMS OF SECTION 77 OR 78 OF THE CPA?**

[144] This question arose during the hearing of this bail appeal in particular before the full bench. In my view, this question is moot, as it was answered by this court in its reasons of judgment in respect of the review application. (See *Mafe v Acting Director of Public Prosecutions Western Cape and Another* (871/2022) [2022] ZAWCHC 63 (29 April 2022).) The reasons of judgment furnished by the review court, for setting aside the District Court order which referred the appellant for psychiatric observation notwithstanding the fact that he intended to apply for bail, was only furnished by the review court after this appeal was heard. In its judgment, the review court found that the more pertinent issue before it related to the Magistrate's election to displace the bail application. Of significance for present purposes, the court found that despite the application for the appellant's referral for psychiatric observation, the appellant was entitled to apply for bail. In the court's view, the Magistrate made no inquiry into the appellant's ability to understand the proceedings. Notably, the court found that there was nothing preventing the Magistrate from proceeding with the bail application, and that the provisional report of Dr Van Tonder which diagnosed the appellant as suffering from paranoid schizophrenia, would have been one of the factors to be considered in the appellant's bid for bail.

[145] For the sake of certainty, following the reasons discussed above, an accused person cannot be barred from bringing a bail application because of a referral, or an intended referral, in terms of sections 77 or 78 of the CPA. It must be stressed that

the right to be released on bail is a constitutional imperative, envisaged in section 35(1)(*f*) of the Constitution and given effect to by section 60(1)(*a*) of the CPA. The quintessence or the core content of this right envisages a judicial determination whether or not an accused person should be released and, if so, under what conditions. Furthermore, it must be emphasised that it is possible for a report to be compiled in terms of section 79 of the CPA even where the accused has been released on bail, and seen during the day by psychiatrists. In *S v Volkman* 2005 (2) SACR 402 (C), para 36, the court noted that in *S v Eadie (1)* 2001 (1) SACR 172 (C) the accused raised a defence of non-pathological incapacity and a report was compiled without the accused having been committed to Valkenberg for 30 days (and nights).

[146] In my view, during the bail proceedings the fact that the accused is suffering from a mental incapacity is one of the factors that the court would consider in determining whether to release the accused on bail or not. The court hearing the matter will be placed in a better position during the bail inquiry to consider whether the accused satisfied the requirements of section 60. In my opinion, this view is fortified by the decision of the Supreme Court of Appeal in *Mabena,* where the accused was released by the High Court on bail notwithstanding the fact that he was referred for psychiatric observation, and a unanimous report in terms of section 79 of the CPA was obtained from three psychiatrists. The psychiatrists found that the accused was fit to stand trial. The report of the psychiatrists was disputed by the accused and informal evidence from the accused's mother and brother was led to negate the report that the accused was fit to stand trial. The inquiry impugning the report of the psychiatrists before the High Court took long to be finalised. Subsequent thereto, before the inquiry could be finalised and before the accused could plead, the High Court *mero motu* released the accused on R1000 bail, without conducting a proper inquiry in terms of section 60. On appeal, the Supreme Court of Appeal set aside the decision of the High Court and further found that whether or not the respondents were entitled to bail, should they be minded to apply for it, does not fall before it to decide. However, the court said it is a matter, should it arise again, *that is capable of being determined only after a proper enquiry has been made in accordance with the provisions of the Act*. The court found that no inquiry was conducted in that matter and the bail was set aside.

[147] Last but also important, it is trite that bail is not a form of punishment but serves to guarantee that the accused person will not evade trial. Despite the seriousness of the crime the main purpose of bail is to protect personal freedom of an accused person as enshrined in our Constitution. In dealing with bail a court must be loath to determining the bail on the basis of the seriousness of the crime as a sole determining factor and overlooking the liberty of the accused especially taking into account what is said in the preceding paragraphs regarding the right to be presumed innocent.

**ORDER**

[148] In the result, having considered all the evidential material placed before court as well as the arguments of both parties, I would have upheld the appeal and directed that the appellant be released on bail subject to certain conditions.

**LEKHULENI J**

**JUDGE OF THE HIGH COURT**