

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



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

CASE NO: A36/22

In the matter between:

JEAN PIERRE COETZEE

Appellant

And

THE STATE

Respondent

Bench: P.A.L. Gamble, J

Heard: 3 August 2022

Delivered: 25 August 2022

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 15H00 on Thursday 25 August 2022.

JUDGMENT – BAIL APPEAL

GAMBLE, J:

INTRODUCTION

1. The appellant, a 36 year old male, was arrested in a township outside Mossel Bay in the early hours of the morning of 15 May 2021. He was in a car belonging to the deceased in this matter along with two other men. The police found various household items of value belonging to the deceased in the vehicle when the appellant was arrested. A short while after the arrest of the appellant, the police went to the home of the deceased where he was found naked in his bathroom, trussed up with a length of rope. The State suggests that the deceased sustained lacerations to the head and that he suffocated in his own blood.

2. The appellant appeared before the local magistrate on 17 May 2021 on a charge of murdering the deceased together with the other two occupants of the vehicle. He was charged with one count of murder, read with the provisions of section 51 of the Criminal Law Amendment Act, 105 of 1997 ('the CLAA'), and a further count of theft of a motor vehicle. The fact that the prosecution at that stage incorporated reference to section 51 of the CLAA in the charge sheet implied that the State would, at the trial, allege that a minimum sentence was applicable in the event that the appellant was convicted of murder.

3. On 4 October 2021 the appellant applied for bail before the local magistrate. It was common cause before her that the provisions of Schedule 6 of the Criminal Procedure Act, 51 of 1977 ('the CPA') were applicable to those proceedings. The effect of the State's reliance on the aforesaid Schedule 6 is that the appellant attracted an onus in terms of s 60(11)(a) of the CPA to show that there were exceptional circumstances present which permitted his release on bail in the interests of justice.

4. To this end, the appellant gave evidence in person and adduced the evidence of his partner, a German national, who is the mother of their twin boys who were then just 7 months old. The State led the evidence of the investigating officer, whereafter the parties' legal representatives both addressed the court.

5. On 3 November 2021 the magistrate denied bail and furnished her reasons in an ex tempore judgment. She found that the appellant had not discharged the Schedule 6 onus. The appellant then filed an application for leave to appeal the refusal of bail in the Eastern Circuit Local Division sitting at George (“the George Circuit Court”) during February 2022. It is unclear what became of that application but the matter eventually served before this Court sitting in Cape Town on 2 August 2022.

6. During the course of the appeal hearing it became evident that the appellant is to be tried in the George Circuit Court, and the State handed up its indictment in that regard. This Court was informed that it was possible that the trial might be heard during the current sitting of the George Circuit Court which ends at the end of the current term, 16 September 2022. For that reason the Court advised the parties that it would hold its decision in abeyance. However, the Court was advised by the appellant’s legal representative on 23 August 2022 that the trial would only be heard during the sitting of the George Circuit Court in the first term of 2023, hence the delay in the delivery of this judgment.

7. The State’s indictment refers to 3 offences – murder, robbery with aggravating circumstances and housebreaking with intent to steal and theft. In respect of the first two offences, the State has given notice that it will seek minimum sentences under s51 of the CLAA, viz. life imprisonment on the murder count and 15 years on the robbery count.

THE APPROACH TO BAIL APPEALS

8. This matter is to be determined under the provisions of s 65(4) of the CPA which is to the following effect:

“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 opinion, the lower court should have given.”

9. In S v Porthen and others 2004 (2) SACR 242 (C) Binns-Ward AJ conducted an extensive review of the authorities on point with which I fully associate myself.

Importantly that matter was decided under the Constitution and similarly involved consideration of the Schedule 6 onus which itself has passed constitutional muster. (S v Dlamini 1999 (2) SACR 51 (CC))

10. In a case in which the offence with which the accused is charged falls within the ambit of Schedule 6, s60(11)(a) of the CPA directs that the court shall not grant bail “*unless the accused, having been given a reasonable opportunity to do so, produces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his.. release.*”

11. In Porthen the Court remarked as follows with respect to the approach of the court hearing a bail appeal where the case is governed by the provisions of s60(11)(a).

“[14] On the issue of the existence of ‘extraordinary circumstances, within the meaning of s 60(11)(a) of the CPA, there is a ‘formal *onus*’ of proof on the applicant for bail. The ordinary equitable test of the interests of justice determined according to the exemplary list of considerations set out in s60(4) – (9) of the [CPA] has to be applied differently. See *S v Dlamini*...in para [61]. In my view, a court making the determination whether or not that onus of proof has been discharged exercises a discretionary power in the wide sense of discretion. The appellate Court is, in terms of s65(4) of the CPA, enjoined to interfere with the lower court’s decision of a bail application if it is satisfied that the lower court’s *decision* was wrong.

[15] Accordingly, in a case like the present where the magistrate refused bail because he found that the appellants had not discharged the *onus* on them in terms of s60(11)(a) of the CPA, if this Court, on *its* assessment of the evidence, comes to the conclusion that the applicants for bail did discharge the burden of proof, it must follow (i) that the lower court’s decision was ‘wrong’ within the meaning of s65(4) and (ii) that this Court can substitute its own decision in the matter.”

12. I should mention in passing that during argument of this appeal, Mr. Booth, for the appellant, submitted that, notwithstanding the fact that the appellant and the prosecutor both accepted in the Court *a quo* that the matter was governed by Schedule 6, on a proper assessment of the case it actually resorted under Schedule 5 to the CPA. In such circumstances, it was submitted that the appellant bore the

onus to show that his release on bail was governed by s60(11)(b) – in which the operative phrase is that the applicant “*satisfies the court that the interests of justice permit his release*”. This implies a lesser onus than under s60(11)(a) where exceptional circumstances are required to be shown.

13. I do not agree with Mr. Booth that the matter before the magistrate was governed by Schedule 5. Besides the fact of the parties’ acceptance that Schedule 6 applied, the facts and the formulation of the charges in the charge sheet before the Court *a quo* sufficiently established this and, as I have said, that is in any event the basis for the indictment in the George Circuit Court.

DID THE APPELLANT ESTABLISH EXCEPTIONAL CIRCUMSTANCES IN THE COURT A QUO?

14. The onus which the appellant attracted in the Court *a quo* is encumbered by the provisions of s60(4)(a) to (e) of the CPA which set out five distinct circumstances which preclude a finding that an accused’s release on bail is in the interests of justice. These are, generally speaking, that–

(i) his release on bail may endanger public safety or lead to the commission of a Schedule 1 offence under the CPA ;(s60(4)(a))

(ii) the accused may attempt to evade his trial ;(s60(4)(b)) or

(iii) the accused may attempt to intimidate witnesses ;(60(4)(c)) or

(iv) the release of the accused on bail will undermine or jeopardise the proper functioning of the criminal justice system (s60(4)(d)); and

(v) in exceptional circumstances the release of the accused is likely to disrupt the public order or undermine the public peace. (s60(4)(e))

15. Like a game of snakes and ladders, the CPA then expands on each of these general categories in ss60(5) to 60(8A) and sets up a series of further considerations to be taken into account when assessing each of those categories. For present purposes, I shall focus on s60(6) which is to the following effect –

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

- (a) the emotional, family, community or occupational ties of the accused to the place at which he... is to be tried;
- (b) the assets held by the accused and where such assets are situated;
- (c) the means, and travel documents held by the accused, which may enable him...to leave the country;
- (d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
- (e) the question whether the extradition of the accused could readily be effected should he... flee cross the borders of the Republic in an attempt to evade his... trial;
- (f) the nature and gravity of the charge on which the accused is to be tried;
- (g) the strength of the case against the accused and the incentive that he...may in consequence have to attempt to evade his...trial;
- (h) the nature and gravity of the punishment which is likely to be imposed should be accused be convicted of the charges against him...;
- (i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
- (j) any other factor which in the opinion of the court should be taken into account.”

I do not intend to deal with each of these criteria individually. Rather, I shall describe the relevant facts which collectively impact thereon.

THE MATERIAL FACTS AND CIRCUMSTANCES

16. The evidence adduced before the Court *a quo* by the appellant and his sometime German partner, Ms. Ricara Moss, is problematic in respect of many these

criteria. It reveals that the accused has led a peripatetic lifestyle, living in Durban, Jeffrey's Bay, Mossel Bay and nearby Hartenbos where he became acquainted with the deceased – a 76 year old man living on his own. On occasion he lived with Ms. Moss and their twins in Mossel Bay and sometimes he lived alone in Hartenbos.

17. At the time of his arrest, the appellant worked on a casual basis as an odd-job-man in the Hartenbos area. The appellant has no assets of any value and no fixed income. By his own admission he has a lengthy history of substance abuse but claims to have found religious salvation while awaiting trial.

18. Ms. Moss told the court that she arrived in South Africa in 2019 and helped out at a children's home in Jeffrey's Bay where she met the appellant while in South Africa on a visitor's visa. She evidently has no permanent resident status in the country and has no entitlement to work. Yet she told the court that she resided at the time (October 2021) at [...] 25th Avenue, Valeria, Pretoria and that that was where the appellant would reside if he was released on bail. She claimed that she has a business degree and might start a business of her own.

19. That was almost a year ago and this court does not know if Ms. Moss is even still in the country and if so, what her residency status is. In any event, she said she liked Pretoria because there was an expatriate German community there in excess of 10 000 persons, but she gave no firm evidence of her earning capacity in South Africa, or whether it was legal.

20. Ms. Moss told the Court *a quo* that she had managed to secure employment for the appellant in Pretoria and furnished the contact details of the prospective employer, one Thabilo Mhlanga. When this was followed up by the investigating officer, she established that there was no such employment as alleged and that the person who answered the call, a Zimbabwean man, did not know anything of the appellant's prospective employment.

21. In regard to the existence of exceptional circumstances warranting his release on bail, the appellant said that he needed to assist Ms. Moss in caring for their twin sons, one of whom was sickly and required brain surgery. Ms. Moss told the Court *a quo* that she had given birth to twins in South Africa in April 2021 and thereafter had returned to Germany for the sick son to receive medical care which was readily

available to her there. The investigating officer confirmed that according to her passport, Ms. Moss returned to South Africa in August 2021.

22. The evidence of the appellant, confirmed by Ms. Moss, was that he has three sons aged 11, 13 and 15 born of his marriage to their mother, who is deceased. Those children were taken into care with the family of the deceased prior to his arrest and they have been subsequently been placed in foster care. Clearly, the appellant has a poor history of parenting and his release on bail to care for his older 3 sons is not required, nor warranted. As far as the twins are concerned, Ms. Moss is a foreign national and comes from a European country with a sophisticated welfare and health system. Should she be unable to manage with their care in this country, she does have other viable options in her home country.

23. I am accordingly not persuaded that the personal circumstances of the appellant are out of the ordinary to the extent that they can be construed as exceptional circumstances under s60(11)(a) of the CPA (See S v Botha [2002] 2 All SA 577 (SCA))

24. A further factor which counts against the appellant under s60(6) of the CPA is that he faces a potential life sentence if convicted of murder and, if not, a lengthy term of imprisonment for robbery and/or housebreaking. In addition, the investigating office was of the view that the case against the appellant was a strong one. He was said to have been seen driving the deceased's car by the latter's girlfriend who knew the appellant. She suspected that something was amiss and tried to apprehend him. An argument ensued when she tried to grab the car keys and the appellant then sped off. The police were alerted and with the aid of a locksmith the deceased's flat was opened where the grizzly scene was found. The appellant was arrested later that night still in the car, with his co-accused and a stash of the deceased's property. The police found blood on his clothes which were sent away for DNA analysis. There can therefore be no doubt that there is a *prima facie* case for the appellant to answer.

25. Lastly, the investigating office explained that she knew the community where the deceased had lived and that she was concerned that his release on bail may pose a danger for further attacks in that community. I might mention, *en passant*,

that this Court has sat in the Circuit Court in nearby Mossel Bay on several occasions and it is apparent that Hartenbos has a large community of elderly and retired persons.

CONCLUSION

26. The magistrate had regard to the law and properly considered all the relevant facts and circumstances. A homeless, unemployed man with a history of substance abuse was linked to the crime shortly after it occurred and now faces life imprisonment. Having considered the evidence before the Court *a quo*, I am satisfied that the magistrate exercised her discretion properly and I am unable to conclude that her decision to refuse bail was wrong. On the contrary, the release of such a person on bail would not be in the interests of justice and would constitute a travesty of justice.

ORDER OF COURT

The appeal against the refusal of bail is accordingly dismissed.

GAMBLE, J

APPEARANCES

For the appellant: Mr. W Booth
W Booth Attorneys
Cape Town.

For respondent: Ms. R Uys
Instructed by
Director of Public Prosecutions
Cape Town.