

Reportable:	YES
Circulate to Judges:	YES
Circulate to Magistrates:	YES
Circulate to Regional Magistrates:	YES



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER: CAB 05/2021

In the matter between: -

TANYA CHARLOTTE BADENHORST

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

PETERSEN J

Introduction

[1] This is an appeal by the appellant against the refusal of bail by the magistrate, Ventersdorp (“the court *a quo*”).

- [2] The appellant is charged in the district court, with a co-accused, with two counts of theft. On count 1 the appellant and her co-accused are alleged to have stolen a motor vehicle and on count 2, R45 000.00 cash, a lawn mower and a generator.

The grounds of appeal

- [3] The appellant relies on the following grounds of appeal in assailing the court *a quo*'s decision, both in fact and law:

- "1. The Magistrate erred and misdirected herself in refusing to fix bail for the Appellant, pending the hearing of her trial.
2. The Magistrate erred and misdirected herself in that she did not exercise the inherent common law power to grant bail consistently with the nature and purpose of section 39(2) of the Constitution and subsequently failed to interpret Section 60 of Act 51 of 1977 in the light of the above mentioned section of the Constitution of South Africa.
3. The Magistrate erred and failed to show that there is a likelihood that any of the grounds mentioned in Sec. 60(4) of Act 51 of 1977 will occur and consequently should have granted bail to the Appellant as it would be in the interests of Justice to do so.
4. The Magistrate erred and misdirected herself in finding that the State had a very strong *prima facie* case against the Appellant without referring in her judgment to any reasons or ground to support such a submission.
5. The Magistrate erred and misdirected herself in finding that the appellant does not have any family, emotional, community and occupational ties (Sec. 60(6)) by ignoring the fact that the mother of the Appellant clearly indicated that her daughter was to stay with her and also in that she (the mother) was present in court during

the entire bail application of the Appellant demonstrating her support for her daughter in the hope that bail will be granted to her.

6. The Magistrate erred and misdirected herself further in speculative grounds without any reference to the basis for these assertions pertaining to a flight risk that the Appellant supposedly will pose as her elderly mother would not be able to keep her at home.
7. The Magistrate further erred and misdirected herself in that since the Appellant does not possess any assets there is a real probability that she will evade her trial and therefore clearly did not sufficiently or at all weigh up all the factors listed in Section 60(6) of Act 51 of 1977 read with Section 60(4) of Act 51 of 1977 to assist the honourable Magistrate to come to an impartial and judicially correct decision.
8. The Magistrate erred and misdirected herself by dismissing the lengthy incarcerated time spent by the Appellant on the premise that it is not by fault of the state and failed to recognise that it was equally not due to the fault of the Appellant as the Appellant was exclusively dependant on third parties for the procurement of legal representation.
9. The Magistrate erred and misdirected herself by not considering at all any appropriate and or additional bail conditions which could alleviate any fear in that the Appellant will not stand trial and would have effectively put the concern with regard to Section 60(6) of Act 51 of 1977 to rest.
10. The Magistrate erred and misdirected herself by not taking the state of health of the Appellant and the possible dire consequences when contracting Covid-19 could have on the health of the Appellant as contemplated by Sec. 60(9)(f) of Act 51 of 1977 into consideration especially taking the health challenges faced by the inmates midst the Covid-19 pandemic.”

The applicable bail schedule and onus

- [4] At the bail hearing in the court *a quo*, the bail application was dealt with on the basis that it resorts within the ambit of Schedule 5 of the Criminal Procedure Act 51 of 1977 (“the Criminal Procedure Act”). In this bail appeal, the same approach is adopted by *Adv van der Walt*, for the appellant and *Adv Goloda* for the respondent.
- [5] The basis of the aforementioned approach to the bail application is clearly premised on the appellant’s previous conviction for fraud in 2008. Premised on this assumption, all the *dramatis personae* consider the bail application to resort within the ambit of Schedule 5 of the CPA. The appellant notably has no other convictions since 2008.
- [6] The provisions of Section 271A of the CPA in respect of the *status quo* of the 2008 fraud conviction merits scrutiny as to its relevance to bail applications. Does section 271A of the CPA find applicability to bail proceedings when determining the applicable bail Schedule.
- [7] Section 271A of the CPA provides:-

“Where a court has convicted a person of –

- (a) any offence in respect of which a period of exceeding six months without the option of a fine, may be imposed but –
 - (i) has postponed the passing of sentence in terms of section 297(1)(a) and has discharged that person in terms of section 297(2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297(1)(c),
or

(b) any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine, may be imposed,
that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period the person has been convicted of an offence in respect of which a sentence for a period exceeding six months without the option of a fine, may be imposed.” (my emphasis)

This has been the position since the substitution of section 271A of the CPA by section 2 of Act 65 of 2008.

[8] In *S v Rabele*¹ the following sentiments were expressed by , Molitsoane AJ, in respect of the relevance of section 271A of the CPA in bail proceedings:

“[23] In terms of section 271A of the CPA, certain convictions fall away as previous convictions after expiration of ten years. It has been submitted by counsel for the state that this related to sentence only and not to section 60 (11B) in bail proceedings. The court shares the same sentiments with counsel for the state.”

I respectfully disagree with these sentiments, for reasons which follow.

[9] Chapter 9 of the CPA deals with Bail in sections 58 to 71. It is apposite to have regard to the wording employed by the legislature in certain relevant sections of the Bail Chapter, applicable to this appeal. In the context of Schedule 5 of the CPA read with section 60(11) of the CPA, in particular, the following wording is employed:

¹ (76/2014) [2016] ZAFSHC 178 (29 September 2016) at paragraph [23]

“60(11)(b) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

in Schedule 5, but not 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 the interests of justice permit his or her release.” (my emphasis)

The provisions of the CPA as a whole are clearly not disregarded in the Bail Chapter.

[10] Section 60(11B)(a) of the CPA, further makes it plain that:

“(a) In bail proceedings the accused, or his or her legal adviser, is compelled to inform the court whether- (i) the accused has previously been convicted of any offence; and (ii) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges.

(b) Where the legal adviser of an accused on behalf of the accused submits the information contemplated in paragraph (a), whether in writing or orally, the accused shall be required by the court to declare whether he or she confirms such information or not.”

[11] This peremptory procedure essentially mirrors, with the necessary changes, the provisions under Chapter 27 of the CPA which deals with *PREVIOUS CONVICTIONS* (ss 271-273). Chapter 27 further stands separate from Chapter 28 which deals *SENTENCE* (ss 274-299A). The insertion of section 60(11B) of the CPA by the legislature, was clearly to alleviate the burden on the prosecution to prove the existence of previous convictions which could bring about by delays in securing a SAP 69 or J14, which may reflect any

previous convictions. Section 60(11B)(a) of the CPA was clearly rendered necessary by the legislature, following the inclusion in Schedules 5 and 6 of offences listed in Schedules 1 and 5 respectively.

- [12] The implications of not disclosing previous convictions or correctly disclosing previous convictions or pending cases on which an accused has been released on bail, comes with serious consequences in terms of section 68 of the CPA. Section 68 of the CPA provides that bail granted, may be cancelled, which holds serious implications for the liberty of an accused. It provides that:

“68 Cancellation of bail (1) Any court before which a charge is pending in respect of which bail has been granted may, whether the accused has been released or not, upon information on oath that-

...

(e) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;

...”

- [13] It has to follow, in my view, that the provisions of section 271A of the CPA, reasonably cannot be left out from the equation, when determining the applicable bail schedule, as it impacts similar to section 68(1)(e) of the CPA, on the liberty of an accused. In my view, therefore, determining the applicable bail schedule for purposes of bail, must have regard to section 271A of the CPA. How then does section 271A of the CPA find applicability in the present appeal?

[14] In *S v Jacobs*², in the context of an appeal against sentence, the Full Bench, interpreted section 271A as follows:

“[45] The definition of the offences that fall away after 10 years in terms of this paragraph differs in two significant respects from that of the 1992 version. The first is that the introductory words changed from ‘any other offence than that’ in the 1992 version to ‘any offence’ in the 2009 version. The second is that the words ‘exceeding six months’ in the 1992 version were replaced by the words ‘not exceeding six months’ in the 2009 version.

[46] In terms of a literal interpretation of the 2009 version of paragraph 271A(b), its meaning is found in the ipsissima verba used by the legislature. A sentence of imprisonment for a period not exceeding six months without the option of a fine, may, depending upon the circumstances, be imposed for practically any offence. The 2009 version of paragraph 271A(b) of the CPA, compared to the 1992 version, thus radically enlarged its ambit to include virtually all offences. Hiemstra’s Criminal Procedure 27-3 expresses this literal meaning of paragraph 271A(b) as follows:

‘After the amendment by Act 65 of 2008, with effect from 6 May 2009, the category under section 271A(i)(b) - includes practically all offences. Even for a serious offence like murder, imprisonment of less than 6 months without the option of a fine can be imposed’.

[47] A striking feature of the 2009 version of paragraph 271A(b) of the CPA, however, is that its wording is clumsy and confusing, compared to that of the previous versions. The 1991 and 1992 versions of s 271A of the CPA drew a clear and sensible distinction between serious and less serious offences. Convictions in respect of serious offences did not fall away after 10 years, convictions in respect of less serious offences did. The period of six months effective imprisonment defined the upper limit of less serious offences.

² (A322/14) [2014] ZAWCHC 192; 2015 (2) SACR 370 (WCC) (10 December 2014)

[48] In terms of the 1991 and 1992 versions of paragraph 271A(b), less serious offences were excluded from the wider category of all offences. That made sense. Upon a literal interpretation of the 2009 version, however, the categories of less serious offences and serious offences are now defined in such a way that both comprise all offences. This does not make sense as there is now no longer an exclusive category of serious or less serious offences.

[49] A third feature of the 2009 amendment of paragraph 271A(b) of the CPA is that it rendered paragraph 271A(a) redundant. The 1991 and 1992 versions of paragraph 271A(a) excluded certain offences from the general category of serious offences. The probable reason for this was that the lenient nature of the sentences in question showed that the offender's personal circumstances were such that he/she should be treated as if his/her offence were a less serious one. The 1991 and 1992 versions of paragraph 271A(a) were therefore consistent with the contents of paragraph 271A(b). Paragraph 271A(a) was, however, not amended in 2009. Upon a literal interpretation of paragraph 271A(b) all offences now fall away after 10 years and paragraph 271A(a) thus became redundant.

[51] ...The test for implying a provision into a statute is, however, quite strict. In *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC) the Constitutional Court, at para [192], formulated it as follows:

"...words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands. In addition, such implication must be necessary in order to 'realise the ostensible legislative intention or to make the [legislation] workable.'"

[52] It is accepted, furthermore, that the content of a statutory provision which is sought to be implied, must be clear and certain. See *The Firs Investments (Pty) Ltd v Johannesburg City Council* 1967 (3) SA 549 (W) at 557E - G:

“Moreover, a strong factor militating against the implication of any such limitation is the difficulty of formulating it. In contract a term will not be implied where considerable uncertainty exists about its nature and scope, for it must be precise and obvious.... I think that the same must apply to implying a term in a statute, for the process is the same....”

[53] We have considered whether it is feasible to import an implied term in paragraph 271A(b) of the CPA in order to give effect to the assumed intention of the legislature. It is our view, however, that it is not. The reasons, in short, are first that we are unable to determine what the true intention of the legislature was and secondly that we are unable to formulate the wording of an implied term that would reflect such an intention.

[53] We are accordingly constrained to give effect to a literal interpretation of paragraph 271A(b)...” (my emphasis)

[15] Upon a proper interpretation of section 271A of the CPA, the previous conviction of the appellant for fraud in 2008, with no further convictions since, has fallen away. The previous conviction could therefore not have been considered for concluding that the bail application resorts within the ambit of Schedule 5. The two offences of theft with which the appellant is charged are offences listed in Schedule 1 of the CPA and the bail application had to be considered solely with reference to the provisions of section 60(4)(a) to (e) and 60(10) of the CPA. There was accordingly no onus on the appellant to adduce evidence as required by section 60(11)(b) of the CPA to show that the interests of justice permit her release on bail. The onus to prove why the appellant should not be released on bail, was in fact, on the State.

[16] The peculiar circumstances of this matter where the appellant has only one previous conviction which is older than ten years must be qualified, to clarify the approach when considering previous convictions which may fall within

the ambit of section 271A of the CPA. Whilst section 60(11B)(a) of the CPA makes it peremptory for an accused to disclose whether he or she has previous convictions, the disclosure should not end with a mere incantation of previous convictions, where applicable, without particularity. As a rule of practice, it is incumbent on the presiding judicial officer, as far as is practically possible, to require of an accused to provide the date/s of all previous convictions including the court/s where such previous convictions originated. The importance of the date/s of the previous convictions is pivotal in determining whether or not previous convictions disclosed, may or may not have fallen away. If the information provided by the accused or his legal representative falls shy of providing sufficient particularity in this regard, it provides a basis for the State to be granted an indulgence to investigate the information, to assist the Court in its duty to give a proper ruling on the applicable bail schedule.

[17] In *S v Nel and Others*³, I said the following in respect of the duty of a court to give a timeous ruling on the applicable bail schedule: –

“It remains a salutary practice to give a timeous ruling on the applicable schedule, particularly in the case of schedule 5 and 6 offences. The procedure at a bail application should be carefully adhered to in a step by step process dictated by the bail chapter and related schedules in the Criminal Procedure Act. In *Nwabunwanne v S* 2017 (2) SACR 124 (NCK), Erasmus AJ agreed with a suggestion by Binns-Ward AJ in *S v Josephs* 2001 (1) SACR 659 (C) at 661*f-h*

“... that, given the drastic consequences for an accused if section 60(11) of the CPA applies, it is desirable that the procedural provisions of s60(11A) of the CPA should be closely adhered to and that proof of the nature of the charges should occur with some formality, either at the commencement of proceedings or as soon thereafter as possible”. I agree.”

³ 2018 (1) SACR 576 (GJ) at paragraph [10]

[18] In light of what has been said *supra*, I may add, having regard to the present appeal, that regard must be had to Section 271A of the CPA in the determination of the applicable bail schedule.

The approach to a bail appeal

[19] The approach to this bail appeal must accordingly be considered against on the basis of this Court's finding *supra*. An appeal against the refusal of bail is governed by section 65(4) of the CPA which provides that:

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

[20] The sentiments expressed in *S v Barber*⁴ are apposite:

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

⁴ 1979 (4) SA 218 (D)

The strength of the State's case against the appellant

[21] The appellant challenges the court *a quo*'s judgment on the strength of the State's case on an allegation that the case for the State is weak and that the court *a quo*, in particular, "erred and misdirected herself in finding that the State had a very strong *prima facie* case against the Appellant without referring in her judgment to any reasons or ground to support such a submission." The attack on the State's case is premised in the main on the fact that it is based on circumstantial evidence which is weak.

[22] In *S v Viljoen*⁵, Olivier JA said the following about the issue of a *prima facie* case and the conduct of a bail application, which in my view is very relevant to the present appeal:

"[24] Daar is twee algemene aspekte wat in verband met borgaansoeke en -appèlle kommentaar verdien.

(Loosely translated by this Court: There are two general aspects in respect of bail applications that merit comment.)

"[25] Die eerste is die kritiek wat in die onderhawige appèl teen die geleerde Regter *a quo* deur die appellant se regsverteenwoordigers uitgespreek is omdat hy, ten aansien van die appellant se bewerings dat hy deur polisie-beamptes aangerand is, gesê het dat dit 'n kwessie is wat beter deur die Verhoorhof bereg kan word. Dit is wel so dat in sommige van die hierbo genoemde uitsprake (sien veral *S v Jonas (supra)* en *S v Mauk (supra)*) gesê is dat waar in 'n bestrede borgaansoek die beskuldigde feite aanvoer wat *prima facie* op sy of haar onskuld mag dui, die Staat nie bloot kan terugsit en geen weerlegging aanvoer nie. Dit volg uit die gewone en welbekende

⁵ 2002 (2) SACR 550 (SCA) at 561g-l, paragraph [25]

bewysregtelike beginsels betreffende die weerlegging van 'n *prima facie*-saak. Ek wil egter twee voorbehoude op hierdie uitgangspunt in borgaansoeke noteer. Die eerste is dat waar 'n beskuldigde wat met inagneming van dit wat reeds op rekord is, nie eers 'n *prima facie*-saak kan uitmaak nie, daar geen plig op die Staat rus om weerleggende getuienis aan te voer nie. Die tweede, en meer belangrike, voorbehoud is dat daarteen gewaak moet word om van elke borgaansoek 'n uitgerekte verhoor vóór die strafverhoor te maak...”

(Loosely translated by this Court: The first is the criticism in the present appeal of the learned Judge *a quo* by the appellants' legal representatives, because he in light of the appellant's allegations that he was assaulted by members of the police, said that it was an issue to be adjudicated by the Trial Court. It is so that in some of the decisions above (see in particular *S v Jonas (supra)* en *S v Mauk (supra)*) it was said that where accused adduces facts which *prima facie* point to his or her innocence, the State cannot simply sit back and adduce nothing in rebuttal. This follows from the ordinary and well-known principles of evidence regarding the rebuttal of a *prima facie* case. I wish, however, to note two reservations in bail applications.

The first is with reference to an accused faced with evidence already on record, not being able to make out a *prima facie*-case, in which case there is no duty on the State to adduce evidence in rebuttal. The second, and most important reservation, is that caution must be had not to turn every bail application into drawn-out trial before criminal trial...”)

- [23] In the context of the present bail appeal, the assessment of the circumstantial evidence in my view is a duty best left for the trial Court when the context of the circumstantial evidence together with other direct evidence, if any, will have to be considered as a whole. The task of the trial Court as opposed to a court considering bail is well demonstrated when regard is had to the

sentiments expressed in *S v Reddy & others*⁶ where Zulman AJA, as he then was, said the following in respect of circumstantial evidence and the approach of a trial court to such evidence:

“In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted *dictum* in *R v Blom* 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such ‘that they exclude every reasonable inference from them save the one sought to be drawn’. The matter is well put in the following remarks of Davis AJA in *R v De Villiers* 1944 AD 493 at 508-9:

‘The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.’

Best on Evidence 10th ed 297 at 261 puts the matter thus:

‘The elements, or links, which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the *number, weight, independence, and consistency* of those elementary circumstances.

⁶ 1996 (2) SACR 1 (A) at (8c - 9e)

A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish. . . . Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone. . . Lord Coleridge, in *R v Dickman* (Newcastle Summer Assizes, 1910 - referred to in *Wills on Circumstantial Evidence* 7th ed at 46 and 452-60), made the following observations concerning the proper approach to circumstantial evidence:

'It is perfectly true that this is a case of circumstantial evidence and circumstantial evidence alone. Now circumstantial evidence varies infinitely in its strength in proportion to the character, the variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts cast around the accused man. That network may be a mere gossamer thread, as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture, that no efforts on the part of the accused can break through. It may come to nothing - on the other hand it may be absolutely convincing. . . The law does not demand that you should act upon certainties alone. . . . In our lives, in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds. . . The law asks for no more and the law demands no less.'

It should be clear that aforementioned task of a trial court cannot be demanded from a bail court. In the present appeal, the circumstantial evidence against the appellant at the very least constitutes a *prima facie* case on the charges proffered.

Is the appellant a flight risk?

[24] The appellant challenges the decision of the court *a quo* in this regard, alleging that:

“The Magistrate erred and misdirected herself in finding that the appellant does not have any family, emotional, community and occupational ties (Sec. 60(6)) by ignoring the fact that the mother of the Appellant clearly indicated that her daughter was to stay with her and also in that she (the mother) was present in court during the entire bail application of the Appellant demonstrating her support for her daughter in the hope that bail will be granted to her and that her elderly mother would not be able to keep her at home.”

[25] The appellant’s mother was neither called to testify at the bail application nor was an affidavit adduced in support of the assertion that the appellant would be allowed to live with her, if released on bail. The assertion was made by *Adv van Walt* from the bar when cross examining the investigating officer, who maintained that he had visited the appellant’s mother, who informed him that the appellant was troublesome and that she was not prepared to house her. That evidence remained un-assailed by evidence to controvert it. Whilst hearsay evidence has come to be allowed at an application for bail, ordinarily by way of affidavit or oral evidence, submission or contentions by Counsel from the Bar, tantamount to evidence from the bar, remains inadmissible and cannot be countenanced. The appellant on the evidence has no fixed address of abode.

[26] The issue does not end there. The court *a quo* placed much emphasis on this fact in judgment and raised questions about the failure to call the appellant’s mother. In this regard, the court *a quo* misdirected itself in respect of its duty in a bail application, considering that it used this as a basis, *inter*

alia, to refuse bail. Bail proceedings are inquisitorial by nature and in this regard the provisions of section 60(3) of the CPA, are instructive:

“60(3) If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.”

[27] This begs the question whether this matter is correctly before this Court on appeal and whether or not, an application should have been brought before the court *a quo*, on new facts. Section 65(2) of the CPA provides that:

“65(2) An appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts are first placed before the magistrate or regional magistrate against whose decision the appeal is brought and such magistrate or regional magistrate gives a decision against the accused on such new facts.”

[28] The peculiar circumstances of the present appeal are such that counsel for the appellant failed to adduce the evidence of the appellant’s mother at the bail application and the court *a quo* failing to invoke section 60(3) of the CPA, failed to call for such evidence, when it could clearly have been adduced.

[29] In my view, the evidence should be adduced before the court *a quo* rather to call on this Court, as *Adv van der Walt* has, to grant bail and remedy the position with an appropriate bail condition.⁷

⁷ *S v Green and Another* 2006 (1) SACR 603 (SCA) par [23] and [25]

Conclusion

[30] The decision of the court *a quo* was clearly premised on an incorrect approach and stands to be corrected by this Court through an order which is just and equitable to the appellant and the public as represented by the State. If the State persists in its opposition of bail, the onus is on the State to adduce evidence to that effect.

Order

[31] In the result the following order is made:

- (i) The decision of the court *a quo* in refusing the admission of the appellant to bail, is set aside.
- (ii) The bail application is remitted to the court *a quo* to the same presiding officer to hear further evidence and to deal with the matter as a bail application not resorting within the ambit of Schedule 5 of the Criminal Procedure Act, Act 51 of 1977, within seven (7) days of date of this order.
- (iii) The appellant may adduce evidence in support of her application for bail, in relation to the issue of whether or not she poses a flight risk, which evidence may include, *inter alia*, the evidence of her mother.
- (iv) The respondent may adduce evidence in answer to any further evidence adduced by the appellant.

- (v) The appellant shall, pending the adjudication of the bail application, remain in custody.



A. H. PETERSEN
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

FOR THE APPELLANT	:	ADV N. VAN DER WALT (Instructed by Legal Aid South Africa)
FOR RESPONDENT	:	ADV N. GOLODA (DPP – Mmabatho)
DATE OF HEARING	:	23 SEPTEMBER 2021
DATE OF JUDGMENT	:	28 SEPTEMBER 2021

**(HANDED DOWN ON: 28 SEPTEMBER 2021 AT 10h00 BY WAY OF E-MAIL
TO THE PARTIES LEGAL REPRESENTATIVES)**