FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No : A66/2013

In the appeal between:

JOHN MARTIN KEEVY Appellant

and

THE STATE Respondent

JUDGMENT: DAFFUE, J

HEARD ON: 25 MARCH 2013

DELIVERED ON: 2 APRIL 2013

INTRODUCTION

[1] Appellant, a 48-year old South African male, was arrested on 16 December 2012. He, together with two of his co-accused, unsuccessfully applied for bail. On 23 January 2013 their bail application was dismissed by the Chief Magistrate of Bloemfontein. A fourth co-accused was granted bail.

[2] Being dissatisfied with the outcome of the bail application, applicant filed a notice of appeal on 20 March 2013. By agreement between the parties, Adv Abrahams on behalf of

the State and Mr Bruwer on behalf of appellant, the matter was heard by me on Monday, 25 March 2013.

[3] It is common cause that appellant and his co-accused face two serious charges, the first count being high treason and the second conspiracy to engage in a terrorist activity in contravention of section 14(c) read with sections 1, 2, 15(1)(a), 15(1)(b)(i), 15(4), 16(1), 17(2) and 18(f) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 33 of 2004. High treason is an offence listed in schedule 5 of the Criminal Procedure Act, 51 of 1977, ("the CPA") and the second offence falls within the ambit of schedule 6 of the CPA.

THE ISSUES

[4] The grounds of appeal can be summarised as follows, i.e. that the court *a quo* erred

4.1 in applying the case law pertaining to the safety of the public incorrectly;

4.2 in applying the case law incorrectly with reference to appellant's probable evasion of his trial and he being found to be a flight risk, without considering his personal circumstances and family relationships;

4.3 with regard to possible intimidation of witnesses;

4.4 with regard to undermining of the criminal law system;

4.5 in accepting the strength of the State case notwithstanding the fact that the investigating officer's affidavit was not properly deposed to and could not be accepted as evidence to name but one aspect;

4.6 in neglecting to accept that appellant's health was such that he needed medical treatment and for that purpose should not be incarcerated;

4.7 in not taking proper cognisance of the fact that appellant's business would suffer severely if he was not released on bail;

4.8 in not considering that the trial may last a long time;

4.9 in accepting the evidence *ex facie* the confession of accused 1 in support of a finding that appellant is linked to the offences;

4.10 in interpreting the case law pertaining to exceptional circumstances incorrectly.

[5] I do not intend to canvass all arguments raised by the parties, either as stated in their written heads of argument consisting of 88 and 52 pages respectively, or their oral argument herein, save to mention that I have considered these as well as the judgment of the court *a quo* and the evidence placed before it.

[6] Although Mr Bruwer strenuously emphasised in his written heads of argument that an alleged statutory non-compliance occurred relating to commissioning of the affidavit of Captain Laux, the investigating officer, placed before the court *a quo*, I pertinently invited him during his oral address to make detailed submissions substantiated by case law in support of such argument, which he failed to do. In fact, he conceded, as did his colleagues on behalf of the other three accused in the court *a quo*, that the affidavit of the investigating officer

was eventually properly deposed to. It should also be mentioned that appellant had due regard to that affidavit and filed a replying affidavit in response thereto.

[7] The other issue raised in the notice of appeal as well as the written heads of argument was the court *a* quo's acceptance of accused 1's confession. Certain allegations therein link appellant with the offences. Again, Mr Bruwer declined my invitation to address me and to make appropriate submissions substantiated by case law. He accepted that hearsay evidence is allowed in bail applications. This also applies to evidence contained in a confession by one of the accused, which may be taken into consideration against the other accused during bail proceedings. *In casu* accused 1 deposed to an affidavit confirming his confession, but suggesting that it was not freely and voluntarily made.

[8] As mentioned earlier it is common cause, as was the case in the court *a quo*, that the offences fall within the ambit of schedules 5 and 6 of the CPA respectively and that appellant and his co-accused were saddled with the onus to prove on a balance of probabilities that they were entitled to be released on bail.

<u>THE JUDGMENT OF THE COURT *A QUO*</u>

[9] The court *a quo* considered the following to be major grounds on which the appellant and his co-accused relied to be released on bail, to wit

9.1 their medical conditions;

9.2 outstanding artillery and pending investigations by the State;

9.3 possible commission of further offences;

9.4 the possibility of evading trial;

9.5 their personal and family circumstances, emotional state and financial prejudice;

9.6 the weakness/strength of the State case.

LEGAL PRINCIPLES

[10] Section 60(11)(a) of the CPA stipulates, pertaining to schedule 6 offences, that

> "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 interest of justice permit his or her release;"

Section 60(11)(b), dealing with schedule 5 offences, stipulates that

> "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 permits his or her release."

[11] The functions and powers of a court of appeal hearing a bail appeal is similar to those in an appeal against conviction and sentence. Section 65(4) of the CPA stipulates that the court

of appeal shall not set aside the court *a quo's* decision unless such court is satisfied that the decision was wrong. Therefore, in the case of doubt, the court of appeal should not interfere. Hefer J (as he then was) considered the issue as follows in **S v Barber** 1979 (4) SA 218 (D) at 220E – H:

> "This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion."

Binns-Ward AJ (as he then was) stated in **S v Porthen and Others** 2004 (2) SACR 242 (C) at para [17] after discussing the aforesaid dictum of Hefer J that it remains necessary:

> "to be mindful that a bail appeal, including one affected by the provisions of section 60(11)(*a*), goes to the question of deprivation of personal liberty. In my view, that consideration is a further factor confirming that s 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal court's competence to decide that the lower court's decision to refuse bail was 'wrong'."

The court of appeal may only consider the issue of bail afresh where the court *a quo* misdirected itself materially on the facts or legal principles. See **S v Mpulampula** 2007 (2) SACR 133 (E) at 136e and **S v Jacobs** 2011 (1) SACR 490 (ECP) at para [18]. See also Van der Berg, **Bail, A Practitioner's Guide,** 3rd ed p. 232-4.

[12] It is for purposes hereof not necessary to deal with the requirements of section 60(11)(b) which place a less onerous duty on an accused. It is important to note that for purposes of section 60(11)(a) an accused shall be detained in custody until dealt with in accordance with the law, unless he/she after having been given a reasonable opportunity to do so, satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release. The standard of proof is on a balance of probabilities. See Van der Berg, *loc cit* p. 97 and **S v Dlamini; S v Dladla; S v Joubert; S v Schietekat** 1999 (2) SACR 51 (CC) at paras [61], [78] and [79].

[13] Once exceptional circumstances have been established by a bail applicant, the enquiry must focus on the balance between the interest of the State as set out in section 60(4) – (8)A on the one hand and the appellant's interest in his personal freedom as set out in section 60(9) on the other. See Du Toit *et al* **Commentary on the Criminal Procedure Act**, p 9-48B. The following dictum of Vivier ADCJ in **S v Botha en 'n Ander** 2002(1) SACR 222 (SCA) para [19] is apposite:

> "Gewoonlik, maar nie noodwendig nie, sal dit ("with reference to 'exceptional circumstances'") omstandighede wees wat daarop gemik is om die onwaarskynlikheid van die gebeure genoem in art 60(4)(a) - (e) te bewys. Met betrekking tot daardie gebeure, of andersins, moet die aangevoerde omstandighede, in die konteks van die besondere saak, van so 'n aard wees dat dit as buitengewoon aangemerk kan word… Dit is vir die hof om in

> elke saak in die besondere omstandighede van daardie saak 'n waarde-oordeel te vel of die bewese omstandighede van so 'n aard is dat dit as buitengewoon aangemerk kan word."

See also **S v Scott-Crossley** 2007 (2) SACR 470 (SCA) at paras [7] and [12]. Section 60(4)(a) – (e) concern the likelihood that the accused, if released, (i) will endanger the safety of the public or a particular person, (ii) will attempt to evade his trial, (iii) will attempt to influence or intimidate witnesses or to conceal or destroy evidence, (iv) will undermine the proper functioning of the criminal justice system or (v) will disturb the public order or undermine public peace or security.

[14] "Exceptional circumstances" as a concept has not been defined thus far. The Constitutional Court declined to define it in **Dlamini** *loc cit,* but made it clear in paragraph [76] that even so-called "ordinary" circumstances may serve to establish "exceptional circumstances. See also **S v Rudolph** 2010 (1) SACR 262 (SCA) at 266 h-i and **Mooi v S** [2012] ZASCA 79 (unreported SCA case no 162/12, 30 May 2012 at paras [11] – [12]. There is no onus on the State to disprove exceptional circumstances. The accused must on a balance of probabilities prove that the State's case was non-existent or subject to serious doubt. See again **Mathebula**, *loc cit.* In **S v Petersen** 2008 (2) SACR 355 (C) at para [55] the Full Bench concluded as follows on the meaning and interpretation of exceptional circumstances:

> "Generally speaking 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different… This may, of course, mean different things to different people (exceptional circumstances), so that allowance should be made for a certain measure of flexibility in the judicial approach to the question… In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all the applicable legal criteria."

[15] An accused who alleges innocence and claims that he will ultimately be acquitted, must prove his future acquittal on a balance of probabilities. See **S v Mathebula** 2010 (1) SACR 55 (SCA) at paras [11] – [13]. Van der Berg *loc cit* at para 7.16.5 regards this as an "outrageous *onus".* Where an accused, confronted with allegations that he has committed a schedule 6 offence, does not make out a *prima facie* case of the prosecution failing, there is no duty on the prosecution to present evidence in rebuttal. See **S v Mathebula**, *loc cit*, para [12] and **S v Viljoen**, 2002 (2) SACR 550 (SCA) at para [15].

[16] Personal circumstances which are really "commonplace" cannot constitute exceptional circumstances for purposes of section 60(11)(a). See Du Toit *et al, loc cit* at 9-62 and **S v Scott-Crossley**, *loc cit*, at para [12]. Compelling reasons of health and proof that continued detention will seriously prejudice the accused's health may constitute an exceptional circumstance. See Kruger, **Hiemstra's Criminal**

Procedure, loose-leave ed at 9-13. However where an accused does not receive proper medical attention whilst detained, bail is not the proper remedy as other legal remedies are available. See **S v Van Wyk** 2005 (1) SACR 41 (SCA) at 45h-j. In **S v Mokgoje** 1999 (1) SACR 223 (NC) the court *inter alia* found that the fact that the bail applicant's business was suffering in his absence did not constitute exceptional circumstances. Kruger *loc cit* at 9-13 does not agree with this statement. The author's view point is as follows:

> "Proof that the accused's business interests will be seriously jeopardised by continued detention qualifies as an exceptional circumstance which can be taken into account (contrary to what was held in S v Mokgoje 1999 (1) SACR 233 (NC).)"

[17] The fact that a bail appellant will contest the admissibility of a confession on the ground that it was induced by a police assault and which may to an extent be thought to take away from the strength of the State case, was not considered as an exceptional circumstance in **S v Mpulampula**, *loc cit*, at 136b.

[18] It is not the function of the court considering bail to make a provisional finding of guilt, but to assess the *prima facie* strength of the State case. See **S v Van Wyk** *loc cit* at para [6].

EVALUATION OF THE EVIDENCE AND JUDGMENT OF THE COURT *A QUO*

[19] The starting point as far as I am concerned is the nature of the offences *in casu* which is totally distinguishable from, for example, an offence such as murder, which might be seen as a once-off offence committed by, for example, a jealous husband. High treason is committed by a person owing allegiance to the Republic of South Africa who unlawfully engages in conduct within or outside the Republic with the intention of overthrowing the government, coercing the government by violence into any action or inaction, violating, threatening or endangering the existence, independence or security of the Republic or changing the constitutional structure of the Republic. See Snyman: **Criminal Law**, 5th ed, p 309. The hallmark of high treason is not a certain type of act, but the hostile intent with which an act is committed. In terms of section 14(c) of Act 33 of 2004 any person who conspires with any other person to commit an offence in terms of the particular chapter of the Act, is guilty of an offence. The security of the State and the public interest are of paramount importance when these offences are alleged to have been committed. These illegal activities have a direct impact on the well-being of the public and the State, unlike the scenario where an isolated offence such as murder has been committed.

[20] The confession of accused 1 directly links appellant to illegal activities and the offences referred to above. Furthermore appellant's e-mail dated 24 March 2012 is damning and his

failure to deal with the contents of this e-mail in his replying affidavit in a satisfactory manner is indicative of his attitude towards the government and its laws. On his version in reply the e-mail is his own personal view and the proposals contained therein are actually nothing but a song of lamentation -"'n klaaglied". This is preposterous and a blatant lie. I do not intend to deal extensively with the document, save to mention a few proposals: (i) all traitors of the "Boervolk" must be executed by a firing squad; (ii) all air force bases must be taken over; (iii) parliament, when in session, should be taken out and Luthuli house should be demolished; (iv) all ministerial residences should be demolished; (v) water and electricity supply to black townships should be cut; (vi) black leaders must be executed (killed). On 19 November 2012 he conducted a reconnaissance of the venue of the ANC elective conference to be held at the University of the Free State in Bloemfontein. He has been photographed whilst taking pictures of the dining hall at the University of the Free State. On his arrest, he was found in possession of a note in his own handwriting consisting of GPS co-ordinates of the venue at the University of the Free State. Having regard to the affidavit of the investigating officer, these photographs and GPS co-ordinates were apparently the products of appellant's reconnaissance at the University. This would be used, on the information available to the State, to execute the attack on the ANC leadership which was scheduled for 16 December 2012. Appellant failed to deal in any manner whatsoever with this damning evidence. Therefore it is not

disputed that the GPS co-ordinates are indeed of the venue at the Free State University and that appellant took the photographs relied upon by the State. Appellant was the only person that could explain the purpose of the pictures and GPS co-ordinates. There might have been an exoneration, but in the absence of an explanation these were probably intended to facilitate, further co-ordinate and execute the attack as alleged by the investigating officer. It is clear from the affidavit of the investigating officer that the accused and in particular accused 1, 2 and 3, which includes appellant, together with others acted in common purpose to overthrow the government. They do not accept the government and its laws. *Ex facie* the available evidence they were prepared to go as far to eliminate the President, Ministers and all other people that are regarded as traitors of the "Boervolk" to which they belong. The planned attack of 16 December 2012 was not carried out eventually due to a lack of resources, but there is a serious risk that appellant, if released on bail, and his co-perpetrators will continue with their plans to overthrow the government and the commission of the offences of high treason and conspiracy to the detriment of the public safety and the government. The appellant did not show on a balance of probabilities that the case against him is non-existent or that he will eventually be acquitted on the charges. In fact, the effect of the State's evidence constitutes at the least *prima facie* proof of appellant's involvement in the charges preferred against him. The court *a quo's* finding in this regard cannot be faulted.

[21] The appellant's medical condition does not qualify in itself as a factor that constitutes exceptional circumstances, although, if more reliable and acceptable evidence was placed on record, it might possibly have been taken into consideration with other factors to prove exceptional circumstances. Many people suffer from the same ailments. It is accepted that he needs medication on a regular basis and there is no reason why prescriptive medicine cannot be provided to him while detained, that is if the State cannot provide this medicine free of charge. Notwithstanding the evidence of the medical practitioner, there is no history of regular treatment or therapy to which appellant was subjected for any of his conditions. I would have expected the doctor to indicate that appellant was treated on a regular basis and/or that counselling sessions had been conducted or therapy provided and that these had to be continued with in future on a regular basis and also that it would not be possible whilst appellant was detained. The court *a quo* correctly considered the facts and the case law in coming to its conclusion in respect of this issue.

[22] Appellant also relied on the fact that his business will go bankrupt in his absence. He relied on a contractual obligation of his close corporation as proof that his presence was of cardinal importance. However, the document attached is proof of a contract entered into for the period August to September 2012 which was supposed to be finalised already in September last year. There was no indication that this contract was extended or that the close

corporation was conducting any business whatsoever when the bail application was heard. In any event and having considered the financial statements of the close corporation, it is apparent that it has incurred serious losses for the 2011 and 2012 financial years and it may in any event be on the brink of bankruptcy due to other factors that existed before appellant's arrest. No management statements or other financial information have been provided for the period from 1 March 2012 to date of the bail application. On the information before the court *a quo*, there was thus no proof that the close corporation was actually involved in business activities at the stage when the application was heard. In any event appellant's wife is a co-member of the close corporation and also employed by it although in an administrative capacity. There is certainly no reason why appellant could not make provision for the appointment of a manager to oversee his business in his temporary absence in co-operation with his wife. However this is also not on its own an aspect that could be regarded as exceptional circumstances. If this was the case, all business owners and private practitioners such as doctors, advocates and the like would be able to rely on the fact that their practices would be seriously undermined if detained. The court *a quo* cannot be faulted for its reasoning in this regard.

[23] It may very well be that the appellant may face a lengthy trial, but this in itself can never be a factor constituting exceptional circumstances. It is clear from the evidence of the investigating officer that a person or persons within the

close-knit right-wing organisations or movements leaked information to the South African Police Service. This was surely a factor considered by the court *a quo* in exercising its discretion whether or not to grant bail, although not mentioned in particular. The court *a quo* elected to refer to aspects such as untraced weapons and poison. Obviously and once appellant is granted bail, he would be in a position to do investigations to ascertain who betrayed him and/or infiltrated the organisations in order to interfere with such witnesses and/or the investigation of the matter and/or the administration of justice in general. It is evident from the affidavit of the investigating officer that witnesses fear for their lives. Bearing in mind appellant's proposal in his e-mail that people who act contrary to the wishes of the right-wing organisations should be eliminated, it cannot be regarded as improbable that appellant might try to undermine the criminal law system by eliminating witnesses when granted bail. The offences *in casu* are directed at the government and the public at large. Appellant and his co-perpetrators, at least based on the information before the court *a quo,* was not involved in a once-off crime, but there intention was to overthrow the government and to kill the political leaders of this country. There is no indication that they, and he in particular, has retracted since arrest. The court *a quo* correctly relied on the public safety as a factor in not granting bail. There is indeed a likelihood that the safety of the public at large and/or political leaders will be endangered if appellant is released on bail.

[24] Appellant is not a born and bred Bloemfonteiner. He is originally from Port Elizabeth and has been staying in Bloemfontein from the beginning of 2012 only. He does not own fixed property in the Free State, although his close corporation is the owner of fixed property in Port Elizabeth. Bearing in mind his allegiance to the so-called right-wing and the close-knit relationship amongst members of right-wing organisations, it is possible that he may try to evade his trial if released on bail, especially having regard to the duration of imprisonment he would be facing if convicted. He was correctly regarded as a flight risk and there is no reason to interfere with that conclusion.

[25] Having regard to the totality of the evidence presented to the court *a quo*, the case law referred to by the court *a quo* as well as the legal representatives on behalf of the parties and the case law referred to herein, I am not convinced that the court *a quo* misdirected it materially on the facts or the legal principles or that it exercised its discretion incorrectly by dismissing appellant's bail application. In the notice of appeal as well as in Mr Bruwer's argument the court *a quo* was accused of applying the case law to which it referred from time to time incorrectly and/or that judgments relied upon did not support the conclusions reached. I have carefully considered these submissions, but found them to be without merit. Consequently the appeal cannot succeed.

ORDER

[26] The following order is issued:

1. Appellant's appeal against the dismissal of his bail application is dismissed.

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J.P. DAFFUE, J

On behalf of appellant: Mr M Bruwer
Hugo Bruwer Attorneys
BLOEMFONTEIN

On behalf of respondent: Adv S.K. Abrahams
VGM Building
123 Westlake Avenue
PRETORIA

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