

SOUTH AFRICA / JUDGMENT

Babuile and Others v S (CC32/2014) [2015] ZAGPPHC 1110 (13 October 2015)

[2015] ZAGPPHC 1110

COURT

North Gauteng High Court, Pretoria

BEFORE

Ranchod

CASE / FILE NUMBER

CC32/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO:CC32/2014

DATE:

13/10/2015

In

the matter between:

KEOBAKILE

FANUEL

BABUILE

FIRST APPELLANT

ITUMELENG

JOSEPH MOLEBATSI

SECOND

APPELLANT

WILLIAM

LESOLE MALEFO

THIRD

APPELLANT

KHOTSO

BENNET

KADI FOUTH

APPELLANT

and

THE

STATE

RESPONDENT

JUDGMENT

RANCHOD J:

- [1] This is an application for bail pending an appeal to the Full Court of this Division on conviction by the first and second applicants and on both conviction and sentence by the third and fourth applicants.
- [2] The applicants were convicted on one count each of conspiracy to murder and one count each of murder in the Gauteng Division of the High Court sitting as the Circuit Local Division of the Western Circuit District at Klerksdorp.
- [3] They were each sentenced to lengthy terms of imprisonment, viz. applicants 1 and 2 to effective terms of 15 and 18 years respectively
- and applicants 3 and 4 to life imprisonment.
- [4] Applications for leave to appeal were refused by the trial court. The applicants' petition to the Supreme Court of Appeal was successful in that it appears that leave to appeal to the Full Court of this Division on conviction by all four applicants was granted and to applicants 3 and 4 in respect of sentence as well.
- [5] The applicants then launched the present application for bail pending the appeal.

Legal Principles applicable to bail pending appeal

- [6] The mere fact that an accused who has been sentenced to undergo imprisonment has¹noted an appeal or has been granted leave to appeal does not automatically suspend the operation of
- his sentence [1] , nor does it entitle him to bail as of right, especially for a serious crime such as murder.[2]
- [7] Somewhat different considerations come into play in an application for bail pending an appeal as opposed to an application for bail pending trial. For example, intimidation of witnesses or interfering in the investigation may be relevant considerations in the latter instance but not in the former as the trial has already been concluded. On the other hand, in the former case the reasonable prospect of success on appeal, the seriousness of the crime for which the applicant has been convicted and whether he is a flight risk are important considerations. In *S v Williams*[3] the court said:

"Different considerations do, of course, arise in granting bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that it is putting it too highly to say that before bail can be granted to an applicant on appeal against conviction there must always be a reasonable prospect of success on appeal. On the other hand even where there is a reasonable prospect of success on appeal bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding. Such cases as *R v*

Milne and Erleigh (4) 1950(4) SA 601 (W) and R v Mthembu 1961 (3) SA 468 (D) stress the discretion that lies with the Judge and indicate that the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. In my view, to apply this test properly, it is necessary to put in the balance both the likelihood of the applicant absconding and the prospects of success. Clearly, the two factors are inter-connected because the less likely the prospects of success are the more inducement there is on an applicant to abscond. In every case where bail after conviction is sought the onus is on the applicant to show why justice requires; that he should be granted bail."

[8] Insofar as prospects of success on appeal is concerned in S v De Abreu[4] it was stated that:

'the prospects of success on appeal also form a factor to be taken into account in an appeal against the refusal of bail [pending appeal]. If, for example, the view of this Court should be that the appeal to the Provincial Division is hopeless, this Court would probably be reluctant to alter a judgment refusing bail.'

[9] However, it should be noted that these cases were decided before the amendments to the Act[5] in 1995 and 1997 which introduced more stringent bail conditions. In the cases cited earlier, the test required was whether there was an arguable case on appeal. However, since the amendments, bail pending appeal against conviction of charges under schedule 6 to the Act appear to require the application of a more stringent standard, i.e. the requirement for the applicant for bail to show that exceptional circumstances exist which permit him or her to be released on bail. In S v Bruintjies it was held:[6]

'The section deals, on the face of it, with unconvicted persons. However, it must follow that a person who has been found guilty of a Schedule 6 offence cannot claim the benefit of a lighter test. It was conceded that the mere fact that a sentenced person has been granted leave to appeal does not automatically suspend the operation of his sentence, nor does it entitle him to bail as of right. (See R v Mthembu 1961

(3) SA 468 (D).)'

[10] In Bruintjies the court held further: [7]

'The main thrust of the appellant's counsel's submissions before us was that the grant of leave to appeal on the merits presupposed the existence of a reasonable prospect of success in the appeal. Such a prospect, said counsel, of itself constituted an exceptional

circumstance within the meaning of the section. If that were so, however, the great majority of persons facing

charges involving Schedule 6 offences would have to be released on bail pending their trial without regard to other important considerations, such as, for example, the public safety. The mere fact that the trial court considers that the

appellant has a reasonable prospect of succeeding on appeal does not of itself amount to an exceptional circumstance. 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 his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the Legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the Legislature has attached to the commission of a Schedule 6 offence. The prospect of success may be such a circumstance, particularly if the conviction is demonstrably suspect. It may, however, be insufficient to surmount the threshold if, for example, there are other facts which persuade the court that society will probably be endangered by the appellant's release or there is clear evidence of an intention to avoid the grasp of the law. The court will also take into account the increased risk of abscondment which may attach to a convicted person who faces the known prospect of a long sentence. Such matters, together with all other negative factors, will be cast into the scale with factors favourable to the accused, such as stable home and work circumstances, strict adherence to bail conditions over a long period, a previously clear record and so on. If, upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail.'

[11] Brintjies was referred to with approval in *S v Scott- Crossley*[8] where the Supreme Court of Appeal held:

'[5] To discharge the onus the appellant gave no viva voce evidence but relied on affidavits deposed to by himself, his wife and his attorney. It appears therefrom that the most important factor relied upon is the fact that the Supreme Court of Appeal has granted leave to appeal against his conviction. It is the appellant's case that he therefore has reasonable prospects of success which, in cases not covered by s 60(11), is an important consideration in favour of the granting of bail; see, for example, *R v Mthembu* 1961 (3) SA 468 (D) at 471A-D; *S v Anderson* 1991 (1) SACR 525 (C) at 527e-g; *S v Hudson* 1996 (1) SACR 431 (W) at 434b-d; *S v De Villiers en 'n Ander* 1999 (1) SACR 297 (0) at 310c; *S v Rawat* 1999 (2) SACR 398 (W) at 401f-g; and *S v Mabapa* 2003

(2) SACR 579 (T) at 588 in para [17].

[6] It is important to note that the majority of cases mentioned in the preceding paragraph were decided before the advent of the new bail dispensation ushered in by the Criminal Procedure Second Amendment Act 85 of 1997 and the Judicial Matters Amendment Act 34 of 1998, the constitutionality of which is now settled (*S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* [1999] ZACC 8; 1999 (2) SACR 51 (CC) (1999 (4) SA 623; 1999 (7) BCLR 771)). As a consequence of this legislation, the approach to bail pending appeal in respect of certain serious offences has become less lenient and less liberty-orientated in the last decade. Hiemstra *Suid-Afrikaanse Strafbepalingen* 6 ed (2002) by J Kriegl and A Kruger at 150.

- [7] The prospects of success do not in itself amount to exceptional circumstances as envisaged by the Act - the Court must consider all relevant factors and determine whether individually or cumulatively they constitute exceptional circumstances which would justify his release (*S v Bruintjies* (supra)). In evaluating the prospects of success it is not the function of this Court to analyse the evidence in the Court a quo in great detail. If the evidence is extensively analysed it would become a dress rehearsal for the appeal to follow: cf *S v Viljoen* 2002 (2) SACR 550 (SCA) ([2002] 4 All SA 10) at 561g-i. Findings made at this stage might also create an untenable situation for the court hearing the appeal on the merits.'

The present application

- [12] As I said, the applicants have been convicted for conspiracy to commit murder and murder and sentenced to lengthy terms of

imprisonment,

- [13] Applicants' counsel argued strenuously that the convictions are 'demonstrably suspect' [9]. It was submitted that the trial court relied primarily on the evidence of a single witness. The witness, so it was submitted, had materially contradicted herself under cross-examination. Ms Sono, for the respondent, when making submissions opposing the bail applications submitted that this court was not in as good a position as the trial court, which had the benefit of observation of the witnesses and so on. It is indeed so, as the presiding Judge in the trial would have been steeped in the atmosphere of the proceedings. However, having said that, it does not mean that another court is not able to deal with a bail application pending appeal at all - neither did I understand Ms Sono to say that. In this matter the presiding trial Judge was not available to entertain the bail applications. I am not aware of the

reasons

why. This court must therefore do the best it can in the circumstances.

- [14] Respondent's counsel said it was incorrect to say that the State relied on the evidence of a single witness. There were other

witnesses who also testified for the State. The learned Judge found that apart from the evidence of Simphiwe Mphandana and Thlako [the person referred to as a so-called 'single witness' by Mr Moekwena for the applicants], the evidence of the rest of the witnesses in the [first] count does not advance the State case, and apparently did not refer to their evidence any further in the judgment insofar as the applicants are concerned.

- [15] The evidence of Mr Mphandana, said the learned Judge, is uncontested. He had testified that he met the first, third and fourth applicants in a Shoprite store on 13 December 2012, where the fourth applicant told him that 'the deceased must come out' - an apparent reference to killing the deceased. He also testified about an earlier occasion when he travelled with first, third and fourth applicants in a Kombi when it was stopped at a police road-block. He said

third applicant took out a firearm in his possession and gave it to someone else in the Kombi to hide it from the police.

- [16] A perusal of the judgment indicates that the learned Judge relied primarily, if not exclusively, on the evidence of the witness Thlako and in that context she was a single witness. It is not for this court to form an opinion on the witnesses' credibility nor to analyse the evidence in this regard. That is to be left to the Full Court. Suffice to say that the Supreme Court of Appeal did consider the prospects of success when it granted leave to appeal on petition.
- [17] However, as I said earlier, that is not the only factor to be taken into account. I turn then to the risk of abscondment if the applicants were to be admitted to bail. Mr Mokwena pointed out that when bail was granted pending trial, the applicants already knew that if convicted on the murder charge they faced a lengthy term of imprisonment. Yet they did not abscond. They now have reasonable prospects of success on appeal hence they have less inducement to abscond, so it was argued. It was also stated that the applicants were not even required to report to the police whilst they were on bail during the trial. It is indeed a persuasive submission but one to be weighed in the balance with the other factors.
- [18] I turn then, to consider each of the applicant's personal circumstances.
- [19] From the record it would appear that all the applicants have their roots in Klerksdorp.
- [20] The first applicant was sentenced to an effective term of 18 years' imprisonment. He is 32 years old and married with three children; the eldest is eight and the younger two both three years old. His membership of the Provincial Legislature in North West Province was terminated after he was sentenced but the position remains vacant. He earned R55 000.00 net. First applicant says further that his wife is unemployed hence he is the sole breadwinner. He owns a

residential property valued at R1 200 000.00 in Klerksdorp and a Mercedes Benz motor vehicle. The applicant also runs a construction company but it has ceased operations since his arrest. He says he handed over his passport to the police. He has never used it. Finally, he says he has his family ties in and around Klerksdorp where he has lived all his life. His extended family also resides in Klerksdorp.

- [21] The second applicant was also sentenced to an effective term of 18 years' imprisonment. He is 51 years old and married with 2 children of whom one is a major (25 years old) and the other 13 years old. His wife is unemployed. His family (including a 3 year old grandchild) depend on him for support. He was employed as a municipal ward councillor and earned R12 000.00 per month but he has lost his income since his conviction. Second applicant says he owns a residential property valued at about R50 000.00 and movables of R125 000.00. Like the first applicant, he says his roots are firmly in Klerksdorp where he, his family and his extended family all live. He has no family outside of South Africa and he does not have a passport. He says he has no pending cases but he has a previous conviction for theft in 2001

for which he was sentenced in terms of section 300 of the Act to compensate the victim.

[22] The third applicant was sentenced to an effective term of life imprisonment. He says during December 2012 he was called to

Klerksdorp police station and questioned about the death of the deceased and thereafter set free. In February 2013 the police came

looking for him. He went to the police with his attorney, but he was told that the police officer looking for him would contact him. During the course of the ensuing weekend he heard of the arrest of first and second applicants. He attended their first court

appearance the following Monday together with the fourth applicant. The police did not make any attempt to arrest them at court so they went forward to the police and offered themselves up to be arrested because the police had been looking for them. Apparently, they were not detained. Later that afternoon third applicant went with his attorney to present himself to the Hawks on the advice of the Magistrate presiding over the first appearance of the first and second applicants. He was then detained and later, on 14 March 2013 admitted to bail pending trial. He stresses that during the two months prior to his detention he had made no attempt to flee.

[23] Third applicant is 49 years old and unmarried. He has 5

children - the eldest a daughter 21 years old and unemployed, three boys aged 12, 8 and 4 years old respectively and a daughter who

was 15 at the time he deposed to the affidavit in the present application. He maintains all his children. Prior to his conviction

he was employed as a field worker for the Economic Freedom Fighters (EFF) earning R5 000.00 per month. He was elected as Provincial

Organiser for the EFF in abstentia as he had already been sentenced. The position carries a monthly salary of R18 000.00 and someone else is acting in his position pending the outcome of the appeal in the present case.

[24] Third applicant says he has no pending cases. However, he has two previous convictions for escaping from custody in 1994 and 1995 respectively. He also has two previous convictions for robbery for which he was sentenced to 18 years' imprisonment and of which he served 12 years, having been released on parole in November 2007.

[25] Like the other applicants, third applicant says he has lived in and around Klerksdorp all his life. He owns his house, which is valued at about R25 000.00. His extended family also lives in Klerksdorp. He does not have a passport.

- [26] Finally, the fourth applicant. Like the third applicant, he too is serving an effective term of life imprisonment. The circumstances leading to his arrest are virtually identical to that of the third applicant. Like the third applicant, he too stresses that he did not attempt to flee during the approximately two months prior to his arrest nor subsequently when he was on bail pending the trial over a period of about two years.
- [27] Fourth applicant is 38 years old and married with four children, all girls ranging in age between 5 and 18 years. The three older children are in school and the youngest in a creche. He maintains his wife and children. Fourth applicant is a self-employed taxi owner with three taxis but one of them has been repossessed by a bank since his imprisonment. He earns about R15 000.00 per month net from the taxi business which, he says is less than what he was earning before his incarceration as his wife is incapable of running the business. He says he was elected as Regional Treasurer for the EFF during October
2014. The position attracts a salary of R11 000.00 per month but he says he has yet to earn it as there is someone else acting in his position pending the outcome of his appeal in the present matter. He owns three motor vehicles - all of them fully paid up. He has no previous convictions or any pending cases. Like the other applicants, he too says he has lived all his life in Klerksdorp as does his extended family. He owns a residential property worth about R500 000.00. He has a passport which he has never used to travel abroad. He was to have surrendered his passport as part of his bail conditions when he was admitted to bail pending his trial but, he says, he could not do so because it was lost.
- [28] The trial has been concluded, hence there is no fear of intimidation of any witnesses. The applicants all have their roots in Klerksdorp. They all own residential properties there. Except for third applicant they have no previous convictions. As far as third applicant's previous conviction is concerned, it would appear that he has for all intents and purposes served his sentence. It is so that all of them abided by their bail conditions, pending trial in the face of the prospect of facing possible life imprisonment. Of course, it is the case that the third and fourth applicants have in fact been sentenced to life imprisonment. The Supreme Court of Appeal is of the view that the applicants have reasonable prospects of success on appeal. However, it should also be borne in mind that in *Scott-Crossley, supra*, it was said that

'the most important factor relied upon is the fact that the Supreme Court of Appeal has granted leave to appeal against his conviction. It is therefore appellant's case that he therefore has reasonable prospects of success which, in cases not covered by section 60(11), is an important consideration in favour of the granting of bail....'

The corollary to that is that in cases covered by section 60(11) (of the Act), as is the case here, the prospects of success are not as important in the consideration of bail pending appeal. The applicants must show (more so now that they have been convicted) that exceptional circumstances permit their release on bail pending appeal. However, as stated in *Scott-Crossley* the Court must consider all relevant factors.

[29] As was said in *S v Beetge*[10] where, as in this matter before me, it was argued that the appellant had strong prospects of success because her conviction was founded on materially flawed circumstantial evidence and that her favourable personal circumstances were accorded insufficient weight by the court below. Nevertheless, the appeal in respect of bail pending appeal was dismissed. It was 15aid that the burden to established exceptional circumstances lay squarely on her shoulders and that she had been convicted of an extremely serious offence.

[30] In my view when one takes all relevant factors into account the applicants have failed to discharge the onus upon them to prove

exceptional circumstances which would entitle them to be admitted to bail pending appeal.

[31] In the result I make the following order:

The applications of all four applicants to be admitted to bail pending appeal are dismissed.

RANCHOD

JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Appellants : Mr Mokwena

Instructed by

:Tumi Mokwena Incorporated

Counsel on behalf of Respondents : Adv Sano

Adv Tenga

Instructed by

: Director of Public Prosecutions, Pretoria

Date heard

: 6 October 2015

Date delivered

: 13 October 2015

[1] Section 321 of the Criminal Procedure Act 51 of 1977 (the Act) provides: I. The execution of the sentence of a superior court shall not be suspended by reason of any appeal against a conviction or by reason of any question of law having been reserved for consideration by the court of appeal, unless - (a) ... [paragraph (a) deleted by section 2 of Act no 33 of 1997] (b) the superior court from which the appeal is made or by which the question is reserved thinks fit

to order that the accused shall be realised on bail or that he be treated as an unconvicted prisoner until the appeal or the question reserved has been heard and decided: Provided'

1 . The execution of the sen)ence of a superior court shall not be suspended by reason of any appeal against a conviction or by reasuH of any question of law having been reserved for consideration by the court of appeal, unless - (a) ... [paragraph (a) deleted by section 2 of Act no 33 of 1997] (b) the superior court from which the appeal is made or by which the question is reserved thinks fit to order that the accused shall be realised on bail or that he be treated as an unconvicted prisoner until the appeal or the question reserved has been heard and decided: Provided'

[1] Section 321 of the Criminal Procedure Act 51 of 1977 (the Act) provides:

I. The execution of the sentence of a superior court shall not be suspended by reason of any appeal against a conviction or by reason of any question of law having been reserved for consideration by the court of appeal, unless -

- (a) ... [paragraph (a) deleted by section 2 of Act no 33 of 1997]
- (b) the superior court from which the appeal is made or by which the question is reserved thinks fit to order that the accused shall be realised on bail or that he be treated as an unconvicted prisoner until the appeal or the question reserved has been heard and decided:

Provided'

1 . The execution of the sen)ence of a superior court shall not be suspended by reason of any appeal against a conviction or by reasuH of any question of law having been reserved for consideration by the court of appeal, unless -

- [2] S v Mthembu 1961(3) SA 468 (N) at 471 A-B.
- [3] S v Williams 1981(1) SA 1170 (ZAD) 11 72H- 1 I 73B.
- [4] S v De Abreu 1980(4) SA 94 (W) at 100
- [5] Act 51 of 1 977
- [6] 2003(2) SACR 575 (SCA) at 577 paragraph [5]
- [7] At paragraph [6]
- [8] 2007(2) SACR 470 (SCA) at paragraphs [5]-[7]
- [9] Bruintjies at paragraph
- [6] f-g
- [10] (925/12) [2013] ZASCA 1 (11 February 2013)

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