

SOUTH AFRICA / JUDGMENT

Brown v S (CA+R05/2020) [2020] ZANCHC 32 (26 June 2020)

[2020] ZANCHC 32

COURT

Northern Cape High Court, Kimberley

BEFORE

Makoti, Phatsoane

CASE / FILE NUMBER

CA+R 05/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH

COURT, KIMBERLEY)

CASE

NO: CA+R 05/2020

In the matter between:

BENNIE

NEVILLE

BROWN Applicant

And

THE

STATE Respondent

JUDGMENT

- BAIL

MAKOTI AJ

- [1] In the application which Phatsoane J and I decided, the applicant, Mr Bennie Neville Brown ('Brown'), was granted leave to appeal against the sentence that was imposed on him by the Regional Magistrate court sitting in Postmasburg. I will use reference to Brown and applicant interchangeably in the body of this judgement. What stands before me is an application in which Brown seeks to be released on bail pending the hearing of his appeal.

- [2] The applicant was convicted by the trial court on two counts of serious criminal offences, namely: (a) one count of attempted murder; and (b) a count of discharging a firearm in a built-up area in contravention of s 120(7) of the Firearm Control Act ('the FAC Act').^[1] Individually, the offences are punishable through the imposition of direct prison sentences.
- [3] The trial court, after convicting the applicant, treated the offences as one for purposes of his sentencing. It then imposed a direct imprisonment term of six (6) years on the applicant and, also, declared him unsuitable to possess a fire-arm. He was not offered an option of a fine. An application for leave to appeal that was moved from the bar on the day of sentencing was dismissed by the trial court. His application (petition) for leave to appeal had achieved only partial success, with the High Court only granting him leave to appeal against sentence.
- [4] This court has been informed that the applicant has approached the Supreme Court of Appeal ('the SCA') for special leave to appeal also in respect of his conviction on both counts. Mr Nel, on the applicant's behalf, submitted that he enjoys particularly good prospects of success to overturn the convictions on both offences. Ms Ilanga opposed this application on behalf of the state and she argued that the court should outrightly reject the notion that the application has good prospects of success at the SCA.
- [5] According to Ms Ilanga, the state does not view Brown as a potential flight risk and has filed an affidavit of the IPID officer, Obaken Jood, who handled the investigation of the complaint against Brown. He confirmed that Brown, who had been out on warning, attended all the court sittings from the inception of the trial until it was concluded when the sentence was pronounced on 16 September 2019.

Issues for consideration

- [6] The case for Brown is that, since he has been granted leave to appeal the sentence, and because he has applied to the SCA for leave to appeal against his conviction, he should be granted bail pending the finalisation of the appeal processes. By way of reminder, subsequent to his conviction and sentence Brown petitioned the Judge President of this Division for leave to appeal both convictions and the sentence of six years imprisonment. The High Court found no prospects of success of overturning the convictions. His partial success took into consideration that a contravention of the provisions of s 120(7) of the FA Act attracts a maximum sentence of five (5) years and not the six years that the trial court imposed.
- [7] Mr Nel on behalf of Brown sought to persuade the court that the matter will have to be remitted to the trial court for sentencing, and, therefore, bail pending appeal should be allowed. The basis for this contention was that the trial court had not been provided with two reports that had been requested on Brown's behalf, being the probation officer and correctional officer's reports. When the matter came before court on 16 September 2019 the reports were still not available, leading to Brown and the defence team abandoning them.

- [8] A case was not made as to why the defence team should be granted a second opportunity to present the reports that they had elected to abandon during sentencing proceedings. It is on record that on the day of sentencing the defence addressed the trial court and took the position that the reports were no longer required. I have great difficulty in accepting the proposition that the reports have become necessary. In my view, there is sufficient information on record for the question of sentencing to be decided without remitting the issue for a fresh consideration by the trial court, and without the need to consider the reports mentioned herein. This is so because the personal circumstances of Brown were fully canvassed and considered by the trial court.
- [9] Concerning the other grounds of appeal against the convictions, both the trial and the High courts were not persuaded that there are reasonable prospects of success for overturning them on appeal. That issue stands to be determined by the SCA and I say no more than will be necessary. What this court is faced with is the task of determining whether bail should be granted, pending Brown's appeal, or whether he should remain in prison until the matter is finalised.

Applicable principles

- [10] Brown has been convicted of two serious schedule 5 criminal offences and he no longer stands in the position of an accused who must be presumed innocent until proven guilty. The state contended that his release on bail is likely to disturb public order or undermine public peace or security, which is one of the grounds envisaged in s 60(4)(e) of the Criminal Procedure Act. By this the state argued that Brown had to show the existence of exceptional circumstances warranting his release on bail, and that he failed to show that they exist.
- [11] To release Brown on bail at this stage, the state's contention went further, will undermine the public's confidence in the country's criminal justice system. The contention was that the general public expects people who have been convicted of serious offences to serve jail term, and not to be released back into society without repercussions. There is merit in the state's

contention, though this is not the only factor for consideration.

- [12] Countering the above contentions, Mr Nel referred the court to what was stated by the Constitutional Court to be the correct approach for dealing with the question of exceptional circumstances. He referred to the principles that emanated from the case of *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat*[2] which were captured as follows:

"[57] It is important to note that sub-s (4)(e) expressly postulates that it is to come into play only "in exceptional circumstances". This is a clear pointer that this unusual category of factors is to be taken into account only in those rare cases where it is really justified. What is more, sub-s (4)(e) also expressly stipulates that a finding of such exceptional circumstances has to be established on a preponderance of probabilities ("likelihood").

Lastly, once the existence of such circumstances has been established, paragraph (e) must still be weighed against the considerations enumerated in sub-s (9) before a decision to refuse bail can be taken. Having regard to these jurisdictional prerequisites, the field of application for sub-ss (4) (e) and (8A) will be extremely limited. Judicial officers will therefore rely on this ground with great circumspection in the knowledge that the Constitution protects the liberty interests of all. Incorrect application of the criteria listed in sub-s (4) by elevating one of them unduly, is a matter for the criminal justice system to remedy. It must do so by applying s 60(4) - (9) in the balanced manner prescribed and in accord with “the spirit, purport and objects of the Bill of Rights.” The limitation of the right is therefore as narrowly tailored as possible to achieve the compelling interests in maintaining public peace, and meets the requirement of

proportionality between this purpose and the nature of the right.” (Emphasis added)

[13] Although the impression that one gets from reading s 60(4)(e) and (9) is that the court is enjoined to consider all the circumstances for and against the granting of bail, mainly to an awaiting trial prisoner who is to be presumed innocent, the provisions are still applicable where a convicted person who is applying for bail pending the adjudication of his or her appeal.

[14] However, it must be pointed out that there are some differences in considerations of bail before trial to those that are to be looked into at the stage where a person is applying to be released on bail pending appeal. This was captured, with reference to the case of *S v Williams*,^[3] by Seegobin J in *S v Bailey*^[4] in the following manner:

“Generally while courts would always lean in favour of granting bail to an accused person pending his/her trial, different considerations apply after conviction and sentence. This was pointed out by the court in S v Williams where the following was stated:

‘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 ... 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.’” (Emphasis added)

[15] Leave to appeal against the convictions has been refused by the trial court, and after the petition was considered by two Judges of the High Court. In the application for special leave to appeal to the SCA the same grounds that were found unconvincing by the High Court have been repeated. That leave was refused by the High Court is one of the primary indicators of the lack of reasonable prospects of success of the matter on appeal. Also, in the judgment

from the trial court regarding the prospects of success on appeal in respect of all the convictions were canvassed. And I am mindful of the caution issued by the SCA that the application for leave to appeal and bail pending appeal is 'not a dress rehearsal' for the court ultimately hearing the appeal. Nonetheless, it remains my view that there are no reasonable prospects for overturning the convictions.

- [16] Adding to the discourse, Ms Ilanga stated that it is highly unlikely that the appeal court will temper with the sentence in respect of the attempted murder conviction.[5] She said this while simultaneously conceding that the sentence for discharging a firearm in a built-up area was inappropriate. Further, she contended that Brown will not suffer prejudice if he remains in prison while his appeal is still to be determined. Lastly, the state argued that the issues relating to the personal circumstances of Brown have already been canvassed in full by the trial court. Ultimately, the contention was that the interests of justice will not be served by releasing Brown on bail while the appeal processes are still pending.
- [17] Regarding the question of sentence, it is trite that sentencing is a matter that falls within the preserve of the trial court.[6] The court of appeal may only temper with a sentence that was imposed by the trial court if it finds that the sentence was vitiated by an irregularity, a misdirection or if it is disturbingly inappropriate.[7] In other words, an appeal court will interfere with sentence in order to prevent the miscarriage of justice.[8] Brown has advanced a compelling point regarding the aspect of the sentence that did not comply with the provisions of the FA Act. I have no doubt that that part of the sentence will be corrected on appeal. Nevertheless, there is no contention or indication that the trial court did not apply its mind correctly on the conviction of attempted murder. Brown has not made out a case that the sentence of six (6) years is shockingly inappropriate. In fact, Mr Nel conceded on this point that a sentence of six years for attempted murder is not inappropriate.
- [18] Mr Nel referred the court to the judgement of *S v Anderson*[9] in which it was held that where there is no real chance of a bail applicant absconding, and where the refusal of bail may lead to successful appeal against sentence being rendered nugatory, the court should consider releasing the applicant on bail in order to eliminate the risk from happening. This case is not similar. The real risk is in respect of the sentence on the conviction of discharging a firearm in public, but not so for attempted murder. A conviction of attempted murder usually attracts sentences similar to the one imposed by the court. As indicated, no case was made as to why that is to be considered inappropriate and warranting the court to temper with it.
- [19] The court in *S v Bruintjies*[10] regarded the issue of prospects of success as one of the considerations for deciding whether to grant bail pending appeal. Even so, Shongwe AJA cautioned that the mere demonstration that conviction was suspect may not be sufficient, without more, to surmount the required threshold in instances where other factors such as the endangering of the interests of justice are present. He went

on to suggest that:

“... 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.”

[20] I am not persuaded about the prospects of success on appeal against the convictions, or that the court on appeal will interfere with the sentence(s) to the point where Brown will be made to suffer prejudice. The circumstances of this case differ with those that prevailed in *S v Naidoo*[11] the court found that the prospects of success on appeal were present and, as a result, found that magistrate had erred in refusing to grant bail pending appeal.

[21] On the balance of the facts of this matter, I am not at all convinced that the applicant has satisfied the requirements for bail pending the determination of his appeal. In the circumstances, I make the following order:

[a] The application is dismissed.

MZ MAKOTI AJ

Acting Judge of the High Court

Northern Cape Division, Kimberley

APPEARANCES

Counsel for applicant: Adv I J Nel

Instructed by: Lofty-Eaton Attorney

Counsel for respondent: Adv F K Ilanga

Instructed by: Office of the Director of Public Prosecutions

Date of hearing: 18 June 2020

Date of Judgment: 26 June 2020

[1] Act No. 60 of 2000.

[2]

[1999] ZACC 8; 1999

(4) SA 623; 1999 (7) BCLR 771 (3 June 1999).

[3] *S v Williams* 1981 (1) SA 1170 (ZA).

[4] *S v Bailey* 2015 JDR 1117 (KZP) para 26.

[5] *R v Zinn* 1969 (2) SA 537.

[6] *S v Malgas* (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001).

- [7] S v Rabie 1975 (4) SA 855 (A) at 857D-F.
- [8] R v Deetlefs 1953 (1) SA 418 (A); R v Myburgh 1922 AD 249; S v F 1983 (1) SA 747 (O) at 752E–754 C.
- [9] 1991 (1) SACR 525 (C).
- [10] 2003 (2) SACR 575 (SCA).
- [11] 1996 (2) SA 250 (W).
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