

SOUTH AFRICA / JUDGMENT

Essop v S (17/2017) [2017] ZAGPPHC 618; 2018 (1) SACR 99 (GP) (29 September 2017) [2017] ZAGPPHC 618

COURT

North Gauteng High Court, Pretoria

BEFORE

Maakane

CASE / FILE NUMBER

17/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

DATE

29 September 2017

APPEAL

NO: 17/2017

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

AADIEL

ESSOP Appellant

and

THE

STATE Respondent

JUDGMENT

MAAKANE A J

INTRODUCTION:

1. This is an appeal against the decision of the Regional court Magistrate of Sebokeng in dismissing the Appellant's application for bail pending finalisation of his appeal.

BACKGROUND:

2. The Appellant stood trial and was convicted in the Regional Court sitting at Sebokeng on 45 counts involving among others, possession of child pornography in contravention of the Films and Publications Act, 1996 (Act 65 of 1996).
3. Count 46 involved a kidnapping in that he is alleged to have removed a minor female child from the custody of her mother, without the knowledge and or consent of the mother of the said minors.
4. The Appellant pleaded guilty to all charges and was duly convicted on his plea. A detailed statement in terms of the provisions of Section 112(2) of the Criminal Procedure Act 51 of 1977 ("the CPA) in which he admitted all the elements of the offences, was handed in as an exhibit. In this statement, he fully sets out the facts and general circumstances under which these offences were committed.
5. The Section 112(2) aforesaid, the factual background as well as the general circumstances under which all these offences were committed, was accepted by the State. It follows therefore that this being the case, these facts became common cause between the State and the defence.
6. Having heard evidence by experts as well as considerations of various reports in this regard, the Magistrate sentenced the Appellant to an effective term of ten (10) years imprisonment. All the 46 counts were taken together for the purpose of sentence.
7. Application for leave to appeal to this Court against sentence was granted. In doing so, the Magistrate held that another Court may arrive at a different sentence. His application for bail pending appeal was, however, dismissed.

EVIDENCE IN SUPPORT OF THE APPLICATION:

8. The Appellant filed a detailed affidavit in support of his application for bail pending appeal. In the affidavit, he fully sets out his personal circumstances, marital status, his minor children and dependants. He also deals with his work history, assets he has and so on. These Ideal with hereunder.

9. Appellant states that he is a South African citizen by birth. He was born on [...] May 1975 in Johannesburg. He completed his matric in 1994 at Springs, whereafter he enrolled for B.Sc degree in Occupational Therapy at the University of the Western Cape. He completed this degree in

1998. In 2005 he obtained his MBA degree.

10. After obtaining his B.Sc degree in 1998, he took a gap year in 1998. From the year 2000, he took up employment with various institutions as an Occupational Therapist, in and around Gauteng.

11. From May 2009 - 2016, he was employed as the Chief Executive Officer of Tallisman Foundation. He was dismissed from this position in 2016. Since then, he has been doing consultancy work, from which he earns an average of R10,000.00 per month.

12. According to him, he is currently divorced and is not involved in a relationship. He has two (2) minor children, a son and a daughter from his previous marriage. They are aged 16 and 14 respectively and are both school-going.

ASSETS:

13. He states that he is the lawful owner of the house and immovable property in which he now resides. This is situated at [...], Johannesburg and is valued at R1,4 million. ABSA bank has a registered bond over the property, to the tune of approximately R700,000.00.

14. He also owns movable property, being a BMW motor vehicle valued at R50,000.00. Over and above that, he has household appliances, furniture as well as some personal effects valued at approximately R100,000.00.

OTHER EXCEPTIONAL CIRCUMSTANCES:

15. Appellant argues that the sentence imposed is shockingly inappropriate and so severe that the Appeal Court will almost certainly interfere with same. For this reason, he has strong prospects of success on appeal.

16. He further states that he is not a flight risk and will never abscond. He points out that prior to his conviction, he was on bail for a period of approximately three (3) years. He has at all times complied with all his bail conditions and attended his trial to finality.

17. According to him, he does not have any assets or relatives outside the Republic of South Africa. He does not have a valid South African passport, and has never travelled outside the Republic. He is therefore not a flight risk.

18. I pause to mention at this stage that the State did not lead any evidence, whether oral or by way of an affidavit, to oppose this application.

19. It is also important to point out that as I understand the record in his address to the Court, the Prosecutor did concede that:

19.1. The Appellant is not a flight risk and that he, over a period of three (3) years, fully complied with his bail conditions until the finalisation of his trial;

19.2. There are reasonable prospects that the Appeal Court will interfere with the sentence imposed on the Appellant.

THE APPROACH OF THE APPEAL COURT

20. In dealing with appeals such as this one, the approach and limited powers of this Court are governed by the provisions of Section 65(4) of the Criminal Procedure Act 51 of 1977 ("the CPA"). The section provides as far as is necessary as follows:

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

See also : S v Barber 1979 (4) SA 218 D

21. Hefer J in Barber (supra), put the position as follows:

"It is well known that the powers of this Court are limited where the matter comes before it on appeal and not as a substantive application. This Court has to be persuaded that the Magistrate the discretion that which he has wrongly. Accordingly though this Court may have a different view, it should not substitute its own view for that of the Magistrate no matter what this Court's views are, the real question is whether it can be said that the Magistrate who had the discretion to grant bail exercised that discretion wrongfully."

22. It follows therefore that this Appeal Court will only interfere if the Magistrate has misdirected himself materially. The Appeal Court will also interfere if the Magistrate overlooked some important aspects of the case or unnecessarily overemphasized others, in considering and dealing with the matter.

See: S v Mpulampula 2007 (2) SACR 113 (E)

23. It is not the duty or function of the Appeal Court to analyse the evidence led in the Court a quo in great detail. To do so would create an antenable situation for the Court that will subsequently be dealing with the appeal.

S v Viljoen 2002 (2) SACR 550 (SCA)

STATUTORY PROVISIONS:

24. Sections 60(4) and

(5) of the Criminal Procedure Act, 51 of 1977 (" the Act") provides as far as is necessary as follows:

"(4) the interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

[Words preceding para (a) substituted by s 9(b) of Act 62 of 2000]

- (a) where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or

[Para. (a) substituted by S. 4(c) of Act 85 of 1997]

- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
- (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- (d) where there is the likelihood that the accused, if he or she were released on bail, will jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security; or [sic]

[Para.

- (e) added by s. 4(d) of Act 85 of 1997]

[Sub-s, (4) amended by s. 9(b) of 62 of 2000]

- (5) In considering whether the ground in subsection (4)(a) has been established, the court may, where applicable, take into account the following factors, namely -
 - (a) the degree of violence towards others implicit in the charge against the accused;
 - (b) any threat of violence which the accused may have made to any person;
 - (c) any resentment the accused is alleged to harbour against any person;
 - (d) any disposition to violence on the part of the accused, as is evident from his other past conduct;
 - (e) any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct;
 - (f) the prevalence of a particular type of offence;
 - (g) any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or
 - (h) any other factor which in the opinion of the court should be taken into account."

24.1. As I have pointed out, it has never been suggested, nor is there evidence that the Appellant is of a violent character or a flight risk or will undermine the criminal justice system.

24.2. On the contrary, it now appears to be common cause that he is not a flight risk. Over that, he has over a period of three (3) years while his trial was pending, he co-operated with authorities and complied fully with all his bail conditions.

WHETHER THE REQUIREMENTS OF SECTION 60 HAVE BEEN MET:

25. It was submitted on behalf of the Appellant that the offences he has been convicted of, are offences referred to in Schedule 1 to the CPA. This being the case, Appellant does not therefore bear the onus provided for in Sections 60(11)(a) or (b) of the CPA.

26. On the other hand, Ms Mohammed, for the State argued that Appellant bears the onus of proving that he is not a flight risk and generally that the interests of justice requires that he be released on bail.

27. I do not find it necessary to deal with this question any further. I will however assume in favour of the State that the Appellant bears the onus. This being so, the following appears to be common cause between the parties.

27.1. The Appellant was granted bail in the amount of R10,000.00 pending finalisation of his trial. To this, certain strict conditions were attached.

27.2. He was on bail for approximately three (3) years before his conviction on a plea of guilty. He has throughout this period observed all his bail conditions and stood his trial.

27.3. After his conviction, he was released and remained on bail for a further period of approximately eight (8) months awaiting sentencing. Throughout the eight (8) months period, he continued to observe all his bail conditions.

27.4. The State did not lead any evidence, to suggest that anything has changed to justify the reconsideration of the factors on the strength of which the Court a quo granted bail and the finding that it was in the interest of justice to grant such bail.

28. In my view therefore, I find that the Appellant has crossed this first hurdle. There is no evidence to suggest that he is a flight risk or that he may abscond in the event his appeal being unsuccessful.

PROSPECTS OF SUCCESS:

29. The mere fact that the Magistrate granted to the Appellant leave to appeal against his sentence, does not mean that there are reasonable prospects of success within the context of the test of "reasonable prospects of success" test to be applied.

See: S v Bruintjies 2003 (2) SACR 575 (SCA) at 577 d - i

30. It has also been held that the test and or standard in such instances has been set low, to the effect that an appeal must be reasonably arguable and not manifestly doomed to failure.

See: *S v Anderson* 1990 (1) SACR 525 at 525 e - f

31. In *SA v Hudson* 1996 (1) SACR 431 (W), the Court had to deal with how the test of "reasonable prospects of success" has to be applied. It held as follows:

"I will place no reliance on (but am aware of) the dictum in *S v Williams* (supra at 1172H) which reads: 'It is putting it to high to say that before bail can be granted there must always be a reasonable prospect of success on appeal'. In *S v Richardson* 1992 (2) SACR 169 (E) Erasmus J explained why the desirability that sentence be served as soon as possible if there is no reasonable prospect of success on appeal, 'should be applied with circumspection and care, and only in clear-cut cases' (my emphasis). In *S v Anderson* 1991 (1) SACR 525 (C) Marais J, with reference to a case where there is no reason to be concerned about whether there 'is' a reasonable prospect of success. He said that if the appeal is 'reasonably arguable and not manifestly doomed to failure', the lack of merit in the appeal should not be the cause of a refusal of bail. I agree. I add that if the conclusion that the appeal is manifestly doomed to failure can be reached only after what is tantamount to or approximates a full rehearing, the appeal should ordinarily for purposes of considering bail be treated as an appeal which is arguable. The question is not whether the appeal 'will succeed' but, on a lesser standard, whether the appeal is free from predictable failure to avoid imprisonment. Cf: *S v Moeti* 1992 (1) SACR 462 (B) wherein it was said that the Appellant for bail must convince that there is a 'reasonable possibility' that the appeal will avert imprisonment."

32. In *S v Scott-Crossley* 2007 (2) SACR 470 (SCA) at paras 5 and 7 the Court referred to the relevance of prospects of success in cases not covered by section 60(11) of the CPA, but that in a section 60(11) situation where there has been a conviction for a serious offence the consideration of prospects of success does not of itself constitute an exceptional circumstance but is one of the considerations to be weighed in determining whether exceptional circumstances exist. In para 7 the court also dealt with the level of examination of prospects of success required of the court hearing the bail application. The court said:

"The prospects of success do not 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 561 g - i. Finding made at this stage might also create an untenable situation for the court hearing the appeal on the merits."

33. In *S v Mabapa* 2003 (2) SACR 579 (T) at 587 a - e, Van Rooyen AJ expressed himself as follows:

"Once there is no concern about whether the Appellant will abscond and where the criteria in s 60 of the Criminal Procedure Act have been met insofar as release on bail is concerned, there is no reason not to apply a lesser standard on the question of prospects of success. In other words, if the appeal is reasonably arguable and not manifestly doomed to failure, bail should be allowed. If the grounds are frivolous, it may be deduced that the Appellant is simply seeking to delay imprisonment and the application should be denied. The test applied by Joffe J in *S v Naidoo* (supra) would seem to be constitutionally justifiable. It is not that far removed from the lesser standard applied by Flemming DJP. In the end the constitutional question remains: is it in the interests of justice that the convicted Appellant, who has a constitutional right of appeal, should be released on bail in spite of the fact that the presumption of innocence is to a substantial extent spent? On the other hand, the right of appeal is intact and the question arises whether requiring too high a standard to be met for bail is not in effect countering unreasonably the right to appeal. Is a right to appeal to be heard? If the general standard is lowered to that of Flemming DJP or Joffe J, a person would at least be more readily entitled to bail, where there are no circumstances which otherwise make bail unacceptable in terms of s 60 of the Criminal Procedure Act."

34. In denying the Appellant bail, the Magistrate was of the view that his appeal has no reasonable prospects of success. In coming to this conclusion the record reveals that the Magistrate was excessively influenced by and relied on two
- (2) cases namely *Director of Public Prosecutions, Pretoria v Alberts* 2016 (2) SACR 419 (GP) as well as *S. v P.* An unreported case of the Western Cape High Court (Case No. A483/15).
35. In my view, these cases are distinguishable from this case. Despite this, the Magistrate's remarks and comments show that he seems to be labouring under the impression that Appellant was convicted of contravening of the Sexual Offences Act and or sexual assault of the complainant, which offences carry a more severe type of punishment.
36. I have given this matter a serious and consideration. I am fully aware of the constitutional and protective obligation that this Court has towards minors and children in general. I have also taken into account the victim's impact report prepared by experts on the person of the complainant. There is quite a number of very important factors and considerations that the Magistrate overlooked. I do not have to deal with or analyse the evidence in any further detail in this regard. This is the function of the Appeal Court.
37. I am therefore satisfied and of the view that the Magistrate did misdirect himself.
38. In my view, this is a case where bail pending appeal has to be granted. However, to such bail, strict conditions have to be attached as an alternative to imprisonment. According to the record, such conditions were imposed prior to the trial and the Appellant complied with same.

39. With regard to the amount of bail payable, I have to remind myself that the Appellant has now been convicted and sentenced. The presumption of innocence does no longer apply. Prior to his trial, he was released on R10,000.00 bail. Counsel for the State suggested that if I grant bail it has to be in the region of R20,000.00.
40. In my view this amount is too low taking into account his current status. I also have to remind myself that the amount should not be so high as to be out of reach of the Appellant. The amount has to be fair and serve as an incentive.

ORDER:

41. Taking into account all of the above I make the following order:
1. The appeal succeeds and the Magistrate's decision in refusing bail pending appeal, is set aside.
 2. The Appellant is granted bail in the amount of R30,000.00 (Thirty Thousand Rand) pending finalisation of his appeal.
 3. The Appellant shall prosecute his appeal in terms of and within time limits provided for in the Rules, Practice notes and Legislation applicable in this Court.
 4. The Appellant shall report in person, at the Moffatville Police Station three (3) times a week every Monday, Wednesday and Friday between 06H00 and 20H00.
 5. The Appellant shall not leave or travel out of the Gauteng Province without the knowledge and permission of the Investigating officer.
 6. The Appellant shall surrender and hand over all his passports and or travel documents, if any, to the Investigating Officer and shall not renew and or apply for a passport and or any travelling document while on bail.
 7. The Appellant shall not visit, be in or at or remain in or near any airport, border post or gate, harbour or any other point of entry and or exit of the Republic of South Africa.
 8. If the appeal is dismissed and or abandoned, the Appellant shall hand himself over to the authorities within seven (7) days of such dismissal and or abandonment, such authorities being the Registrar of this Court.

S S MAAKANE

Acting Judge of the

High Court of South Africa

Gauteng Division

Pretoria

APPEARANCES:

For the Appellant : Mr J Venter (Attorney)

B D K Attorneys

Johannesburg

For the Respondent: Adv. S. Mahomed

National Prosecuting Authority

Department of Public Prosecution

PRETORIA

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