

SOUTH AFRICA / JUDGMENT

Martins v S (A49/2019) [2024]

ZAWCHC 440 (17 December 2024)

[2024] ZAWCHC 440**COURT**

Western Cape High Court, Cape Town

BEFORE

Kholong AJ

CASE / FILE NUMBER

A49/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****WESTERN CAPE DIVISION,****CAPE TOWN****Case NO: A49/2019****District****Case No: BDSH1/189/06****REPORTABLE:**

NO

OF

INTEREST TO OTHER JUDGES: NO

In the matter between:

ANDREW ALTONDENE

MARTINS

APPLICANT

and

THE

STATE

RESPONDENT

Coram:

Kholong AJ

Heard:

27 November 2024

Delivered:

17 December 2024

JUDGMENT**KHOLONG AJ****Introduction**

1. Applicant is applying for bail pending his appeal of his conviction and sentence meted against him amongst others under the Prevention of Organized Crime Act 121 of 1988 (herein-after “POCA”). Applicant had previously been granted bail and upon conviction was called to surrender himself to serve his sentence. He has now lodged leave for further appeal to the Supreme Court of Appeal (“SCA”) after his appeal to this division from the regional court on conviction and sentence was dismissed. Applicant’s leave to appeal to the Supreme Court of Appeal is still pending that higher Court’s approval.
2. In the interim, applicant seeks bail or if regard is had to his papers “extension of bail” whilst his leave to appeal is lodged and considered by the SCA.

Background

3. The applicant and four others had been charged and convicted under the Prevention of Organized Crime Act, Act 121 of 1998 and the Marine Living Resources Act, Act 18 of 1998 and the Drugs and Drug Trafficking Act, Act 140 of 1992. The Applicant was convicted on 17 July 2013 of contravention of Section 2(1)(e) of POCA (Count 2); two counts of contravening regulation 39(1)(a) of the Marine Living Resources Act, Act 18 of 1998 (herein-after “MLRA”) and two counts of contravening section 5(b) of the Drugs Act.
4. The record indicates that applicant was sentenced to 15 years imprisonment in respect of count 2; 2 years imprisonment in respect of count 7 and 8. 5 years imprisonment in respect of count 5 and 9. The record indicates that the regional court directed that the sentences in respect to counts 5, 7, 8 and 9 run at the same time. In effect sentencing him to 20 years imprisonment.

The Judgment on Appeal

5. The High Court hearing the appeal dismissed applicant’s appeal on conviction and sentence amongst others by finding that applicant could not specify the evidence that he had complained was incorrectly admitted nor could he refer the Court to the relevant section in the record where this issue arose. The Court hearing the appeal found that his complaint of alleged admission by the Court below of hearsay evidence incorrectly had to have regard to the fact that section 3(1) of the Law of Evidence Amendment Act 45 of 1988 provides for provisional admission of hearsay evidence and the fact that the person upon whose credibility the probative value of such evidence depended, had testified themselves to such evidence later in the trial, thereby making such evidence no longer hearsay by the end of the trial. The Court hearing the appeal also noted that the legal representative for applicant

could not during the hearing identify the hearsay evidence complained of. On sentence the Court held that before it could interfere as a Court of appeal, the trial Court must have committed a material misdirection, which it didn't find on the evidence before it.

6. It is noteworthy that relevant to incarceration the Court hearing the appeal observed that the sentences imposed in respect of appellant's convictions were indicative of the seriousness with which the legislature considered the offences. That although minimum sentence was applicable, it was not brought to applicant's attention and therefore was not imposed by the Court below. In illustrating the point, it made example that for contravention of Section 2(1)(e) of POCA, the act provides for life imprisonment when section 5(b) of the Drugs Act empowered the Court to impose imprisonment for a period not exceeding 25 years. It thus concluded that the trial Court committed no material mis-directions when sentencing nor was the sentence disturbingly inappropriate.
7. It is against the aforesaid backdrop of the judgement in the regional Court and the findings in the appeal judgement that applicant requests this Court to look at bail favorably given his circumstances pending the appeal to the SCA.
8. Counsel for applicant in argument concedes that applicant is convicted with an offence of which section 60(11)(b) of the Criminal Procedure Act[1] is applicable. This section provides that where an accused is charged with an offence referred to in schedule 5 the Court is compelled to order if regard is had to ordinary meaning of the word "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 reasonable opportunity to do so, adduces evidence which satisfies the Court that it is in the interest of justice to permit his or her release. It was held in *S v Yanta*[2] that in discharging this onus, the accused must show on a balance of probabilities that ordinary circumstances in the interest of justice exist, which justifies his release on bail.
9. Counsel for applicant, in argument, inter alia submitted that this Court must consider that section 60(4) of the Criminal Procedure Act ("CPA") is not applicable as applicant is not a danger to the safety of the public; could not evade arrest; intimidate witnesses; jeopardize proper functioning of the criminal justice system, including the bail system nor disturb public order. Counsel was at pains to point to this Court that section 60(5);(6);(7) and (8) CPA requirements are mere guidelines and not prescriptive.
10. Counsel on behalf of applicant further pointed out that applicant has ties to the community of the Western Cape. That his surrender to prison following dismissal of his appeal took place without a warrant being issued. That he had no outstanding warrants; is not a flight risk; at 48 years of age, he had dependent children; that his family loses financially from his inability to generate income whilst he remains in prison awaiting his appeal; that he has chronic medical condition. It is on these basis that applicant

seeks his release, even with reasonable conditions, if the Court so deemed fit.

11. Counsel for applicant referred this Court to the authority in *S v Dlamini*[3] to advance the argument that the Constitutional Court noted that not only the innocent, as he argued, are entitled to be released on bail pending trial.
12. In opposition, Counsel on behalf of the state submitted that application for bail must be considered in the light of the circumstances that exist at the time the application for bail is made. She argued that applicant has been convicted and sentenced of very serious crimes. That the Court is compelled to exercise its discretion judicially having taken into account the totality of facts and circumstances in order to arrive at a proper discretion. That it was significant for the Court to consider that applicant's status had changed since he had first applied for bail as he has now been convicted and sentenced to imprisonment for 20 years. She further contended that the Court had to consider whether there were reasonable prospects of success on further appeal to the Supreme Court of Appeal.

The Law

13. Section 321 (1) provides that 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:

“(b) the Superior Court from which the appeal is made or by which the question is reserved thinks fit to order that the accused be released on bail or that he be treated as a convicted prisoner until the appeal or the question reserved has been heard and decided...”

14. Evidently Section 321 contemplates a different scenario in respect of a convicted person in a manner that is different to those of an accused person applying for bail as contemplated in Section 60 of the CPA. Section 60 deals with an accused person who is still presumed innocent whose rights to freedom of movement and economic activity must be interrupted, if needs be, with great circumspection given the considerations set out in that section. When section 321 deals with a person already convicted of a crime or crimes. For what it is worth, guidance to the extent it may be relevant can be explored from consideration of how our Courts

looked at the question of bail, in respect of accused persons still presumed innocent. This is so especially given how counsel for both the state and the applicant made argument premised on this section of the CPA. Section 60(11)(b) of the Criminal Procedure Act provides that:

“Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

- (b) 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”.

15. Salie-Hlophe J in Rohde[4] held that applicant in that matter had the evidential burden of demonstrating that it is in the interest of justice to be released on bail. The Court found in that matter that the accused had the evidential burden given that he had been convicted of a schedule 5 offence to show that it is in the interest of justice that he be released on bail. The Court noted that Section 60(4) sets out circumstances where the interests of justice do not permit the granting of bail. That section 60 (5)-(9) outlines which factors a Court should take into account when considering the grounds in section 60(4).
16. It appears from the aforementioned dictum that the changed status of a person from being accused person thereby presumed innocent to being convicted is relevant in a Court's exercise of its discretion and presents its own hurdle which applicant had to overcome as the presumption of innocence no longer operates in his favor. The Court noted the following:

“Pre-trial release allows a man accused of crime to keep the fabric of his life intact, to maintain employment and family ties in the event he is acquitted or given a suspended sentence or probation. It spares his family the hardship and indignity of welfare and enforced separation underlying this rationale is the fact that the accused enjoys the fundamental right of being presumed innocent”.
17. Salie-Hlophe J in Rohde distinguished the fact that in circumstances where an accused is convicted is different to those where he is presumed innocent. It distinguished on the facts of that case S v Essop[5] where the application for bail was unopposed by the state and found as held in S v Scott-Crossly[6] that the prospects of success do not in itself amount to exceptional circumstances as envisaged in the CPA. That the Court had to consider all the relevant factors and determine whether individually and cumulatively they constitute exceptional circumstances.
18. On the facts of Rohde, the Court held that 20-year sentence is undoubtedly a lengthy period of incarceration which the Court had to have regard to. That the fact that the state did not present evidence that Rohde is a flight risk is not in itself dispositive of that possibility. That the onus is on the applicant to prove that it would be in the interest of justice to release him on bail. That failure and success on appeal are both equal possibilities that are not mutually exclusive. Bail was consequently denied in that matter as the Court took the view that the evidential burden was not discharged to the Court's satisfaction and that it was in the interest of justice to release him on bail.

Analysis of the Evidence

19. The facts of this case point to applicant having been convicted and sentenced to an effective 20-year imprisonment. Accordingly, as contemplated in section 321 of the CPA the conviction and sentence are not suspended pending the appeal unless this Court thinks fit upon presentation of an appropriately compelling case. It is common cause that Mr. Martins has now been convicted and sentenced to 20 years. He is not an accused person presumed innocent. This Court can therefore not find credence in the argument by counsel for the applicant that he has previously been granted bail and didn't abscond. Circumstances have

self-evidently changed. Counsel argued that he handed himself in when called to do so without a warrant for his arrest being issued.

20. This court considers that conviction and sentence changes the circumstances and the onus is on applicant to prove that it is in the interest of justice to be released on bail. This court is not satisfied on the evidence presented that applicant has discharged that onus if proper regard is had to the basis of the Court hearing the appeal's dismissal of his appeal. The reasons for appeal court's dismissal of Mr. Martins appeal cannot be ignored by this Court considering its assessment that there were no merits to the appeal from the Court below. It is considered relevant that the appeal court found no basis nor evidence that hearsay evidence on the facts of that case were incorrectly admitted. It found no irregularity that justified its interference with the conviction and sentence.
21. It is not lost to this court that having examined the record, the Court hearing the appeal found that applicant has been charged with a number of very serious crimes which the Court considered carried minimum sentences, which fact if having been duly factored by the Court below may have possibly resulted in an even lengthier sentence by the applicant. This point is relevant to this Court's weighing of the question of prospects of success on conviction and sentence and also possibilities of abscondment in the light of this appeal judgement. This Court accepts that applicant voluntarily handed himself over when called to do so. It is, however, equally relevant that the prospects of success are as balanced as those of failure in the event the SCA were to grant his application for leave to appeal. This question of prospects, if it is considered that two separate Courts found against the applicant on the same set of facts, must be weighed objectively by this Court. The balance on the evidence, appears to this Court not to favor applicant. This factor in itself increases the risk of abscondment, which must be considered in deciding to grant bail. This Court thus finds no compelling reason in the interest of justice to grant bail without having to undermine the bail system and proper functioning of the criminal justice system.

Conclusion

22. In the result this Court is not persuaded with the facts before it that they are sufficiently compelling to justify interrupting applicant's sentence. On the contrary, the interest of justice require that he should continue serving his sentence.
23. Wherefore the application for bail pending the SCA's decision to consider hearing the appeal must fail and I order as follows:

IT IS ORDERED THAT:

1. The application for bail is dismissed.

SST KHOLONG

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA WESTERN CAPE DIVISION,

CAPE TOWN

APPEARANCES:

For the Applicant:

Mr. A. Paries

Instructed by:

R Davies Attorneys

For the Respondent:

A Du Preez

Office of the Director of Public

Prosecutions: Western Cape

[1] Act 51 of 1977.

[2] 2000 (1)SACR 237 (Tk).

[3] S v Dlamini [1999] ZACC 8; 1999 (4) SA 623 (cc).

[4] Rohde v S (2019) JOL 45444 (WCC).

[5] 2018 SACR 99.

[6] 2007

(2) SACR 470 (SCA).

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