

SOUTH AFRICA / JUDGMENT

Mooki v S (CAB 07/2024) [2024] ZANWHC 284 (14 November 2024)

[2024] ZANWHC 284

COURT

North West High Court, Mafikeng

BEFORE

Reddy

CASE / FILE NUMBER

CAB 07/2024

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IN THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

Reportable: YES /NO

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APPEAL CASE NO: CAB 07/2024

MAGISTRATE'S CASE NO: RC/101/2019

In the matter between:-

BENJAMIN MOTSEOATILE MOOKI APPELLANT and THE STATE RESPONDENT

Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is 14 November 2024 at 16h00.

ORDER

The appeal against the refusal of bail is dismissed.

JUDGMENT

Reddy J

Introduction

- [1] This is an appeal against the refusal of bail pending appeal, by the Regional Magistrate Mr Zulu, sitting at Taung, ('the court a quo') on 08 December 2022. On 24 August 2022 leave to appeal was granted on conviction and sentence by the court a quo.

Background

- [2] Three accused were arraigned before the Regional Court at Taung on four counts. The appellant was cited as accused 3. The State proffered the following charges against all three accused: kidnapping (counts 1 and 2), attempted murder (count 3) and murder (count 4). The murder count was read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 (as amended). On 19 January 2019, the appellant and the erstwhile accused 3 were convicted of all charges. Accused 2 was acquitted on all counts.
- [3] On 09 February 2022, the appellant and accused 3 were sentenced as follows:
- Count 1: Three (3) years imprisonment.
- Count 2: Three (3) years imprisonment.
- Count 3: Five (5) years imprisonment
- Count 4: Eighteen years imprisonment.
- [4] It was ordered in terms of section 280(2) of the Criminal Procedure Act 51 of 1977 ('the CPA') that the sentences imposed on counts 1-3 were to run concurrently with the sentence imposed on count 4. Furthermore, the court ordered that in terms of section 103(1) of the Firearms Control Act 60 of 2000, the accused were ex lege unfit to possess a firearm.
- [5] On 05 December 2022, the appellant and his erstwhile accused 3 applied for bail pending appeal. On 08 December 2022, the court a quo refused the application for bail pending appeal. It is only the appellant who proceeded with an appeal against this decision of the court a quo.

The applicable bail schedule

- [6] It is common cause between the appellant and the respondent that the bail application in the court a quo resorts under the provisions of section 60 (11) (a) read with Schedule 6 of the CPA, by virtue of the conviction on the murder charge, count 4.
- [7] Section 60(11) (a) of the CPA provides that:

"Notwithstanding any provision of this Act, where an accused is charged with an offence-

- (a) referred to 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 exceptional circumstances exist which in the interests of justice permit his or her release.”

The grounds of appeal

- [8] The appellant’s grounds extrapolated from the Notice of Appeal are as follows:

‘GROUNDS FOR APPEAL FOR REFUSAL OF BAIL PENDING APPEAL

- (a) On the transcribed records page 11 the appellant confirmed that he was attending court regularly during the trial stage until to its finality without tampering with the admiration of justice, or intimidating any witnesses, or even interfering with the police investigations. The appellant will stand his appeal proceedings until its finality and comply with bail conditions which may be imposed by the above Honourable Court.
- (b) On transcribed records page 11 line 6-9, the appellant confirmed that he will report at the nearest police station. This condition was not imposed before or during trial stage, therefore it is an exceptional circumstance. The appellant will comply with any bail condition which the above Honourable Court deems fit.
- (c) Furthermore at page 11 line 14-17, the appellant confirmed that in the event appeal for bail pending appeal is granted and thereafter at a later stage it turns out that the appeal against both conviction and sentence fails or appeal is not upheld he will report back to prison or Correctional Service Centre at Rooigrond where he is currently incarcerated to continue with his sentence. The

appellant will not hamper or undermine the administration of justice.

- (d) It is our submission that the Regional Magistrate erred in his judgment on bail pending Appeal, due to the fact that the above grounds indicate clearly that the appellant did show exceptional circumstances which in the interests of justice permit his release on bail pending, despite the fact that his right of presumption of innocence has been limited by virtue of his sentence.’

The law

- [9] The legislative empowering provision for determining an appeal relating to bail proceedings is section 65(4) of the CPA which provides as follows:

‘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.’

- [10] The high watermark for interfering with the court a quo’s

judgment

is whether it misdirected itself in a material way, in relation to facts or the law. In this regard the following was stated in *S v Barber* 1979

(4) SA 218 (D) at 220 E – H:

‘It is well-known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive

application. 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 review for that of the magistrate because that would be an unfair interference with the magistrate’s exercise of its discretion. I think it should be stressed that, no matter what this Court’s own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail but exercised that discretion wrongly.’ See also *Kula v S* (CAB 02/2023) [2023] ZANWHC 35; 2023

(2) SACR 52 (NWM); [2023] 3 All SA 218 (NWM) (4 April 2023) at paras 5 and 6.

[11] It follows axiomatically that if such misdirection is established, the appeal court is at large to consider whether bail ought, in the circumstances, to have been granted or refused, and in the absence of a finding that the magistrate misdirected him or herself the appeal must fail.

[12] The grant or refusal of bail is a discretionary decision under judicial control, and judicial officers have the ultimate decision as to whether, in the circumstance of a particular case, bail should be granted. *S v Joubert*; *S v Schieteket* [1999] ZACC 8; 1999

(2) SACR 51 (CC) at 88H – I, 89 E and 90B-D.

The bail proceedings in the court a quo

[13] On 05 December 2022, the appellant testified in support of his application for bail pending appeal. The following factors were placed before the court a quo. The appellant was thirty-six (36) years old, unmarried and unemployed. He was the father of two (2) children, his eldest child was ten (10) years old and the second was one (1) year old. The elder of his two children resides at the parental home of the appellant due to the passing of this child’s mother. The youngest resides with him and his partner at Takaneng Village Taung. The address cited has been his place of abode since 2019.

[14] Pursuant to his arrest in January 2019, the appellant was released on bail of five hundred rand (R500-00). The appellant confirmed that from his release on bail until his conviction on 19 January 2022, he observed all his conditions of bail. In the same vein, the appellant contended that should bail be granted pending appeal, he would be able to deposit a sum of three thousand rand (R3000-00) and would report daily to the Taung South African Police Services (‘the SAPS’). Finally, the appellant asserted that should his appeal be dismissed, he would report back to the Rooigrond Correctional Facility to serve what remains of his

sentence.

[15] Miss Khula the prosecutor in the court a quo elected not to adduce any evidence at the hearing of the application for bail pending appeal. In this regard the record reads as follows:

‘COURT: Yes State.

PROSECUTOR: Your Worship the state is not going to lead evidence in this application to be released on bail pending appeal. I did speak to Mr Mbokazi, who is the prosecutor handling this matter Your Worship. He indicated that the state does not have an objection to the accused being released on bail pending appeal due to the fact that they were on bail for the duration of the trial and that they never absconded. However, Your Worship the state is of the view that R3000-00 bail will not be sufficient Your Worship and that the suggestion is that bail fixed in the amount of R5000-00 and that the accused persons do report at the nearest police stations as a condition....”

[16] On 08 December 2022, the court a quo, dismissed the application for bail, primarily on the basis that the appellant had not assailed the test of demonstrating exceptional circumstances which in the interests of justice permitted his release on bail.

[17] The court a quo having correctly found that the duty to adduce and present exceptional circumstances which was in the interest of justice, permitted the release of the appellant was on the appellant. The court a quo was fully alive to the personal circumstances of the appellant and concluded that the appellant had not surpassed the threshold of meeting the statutory requirements as set out in section 60(11)(a) of the CPA. In the premises, bail pending appeal was refused.

The bail appeal in this Court

[18] Adv Motlhale contended that given the stance of the respondent in the court a quo, there was no evidence in rebuttal that the appellant was a flight risk and would evade the serving of his sentence in the instance of his appeal being dismissed. Moreover, Adv Motlhale submitted that the appellant was implicitly aware that when released on bail in January 2019, the murder charge that was proffered against him carried a mandatory sentence of life imprisonment in the absence of substantial and compelling circumstances. Notwithstanding the gravity of the sentences that may be imposed on conviction, the appellant stood trial.

[19] Adv Motlhale avowed that while considerations of the prospect of success on appeal must come into play in determining the success or otherwise of an application for the admittance on bail pending appeal, the facts of each case should play a notable hand in the determination of that application for bail. As such, where no prospect of success on appeal are apparent, the court may still grant bail pending appeal.

- [20] Conversely, Adv Motlhale continued that the facts prevailing in the individual case may dictate that the application for the admittance to bail be refused even where it appears that there are prospects of success on appeal. To bolster this contention Adv Motlhale, referred to *Ndou v State* (A38/2020) [2022] ZAGPPHC 264 (3 May 2022) at page 26; and *S v Smit and Another* 1969 (4) SA 175 (N) at 177. Adv Motlhale concluded that the appellant will succeed in his appeal. In the unlikely event that the appellant's appeal is dismissed, he will immediately surrender himself to the SAPS at Taung or the Rooigrond Correctional Services Facilities.
- [21] Adv Ndlovu for the respondent opposed the appeal contrary to the posture taken by the State in the court a quo. In addressing the appellant's contention of having regularly attended court in strict acquiescence of his condition of bail, Adv Ndlovu submitted that post-conviction the presumption of innocence as evinced in section 35(3)(h) of the Constitution had been rebutted. To this end, the appellant had been convicted and sentenced to an effective term of eighteen (18) years imprisonment. Thus, Adv Ndlovu continued the imposed effective sentence would 'motivate' the appellant to flee. That being so, bail conditions would be wholly adequate in this context.
- [22] Significantly, Adv Ndlovu submitted that the appellant was granted leave to appeal on 24 August 2022 and has been indolent in the prosecution of same. This, so the contention ran speaks volumes as regards the confidence that the appellant has in the appeal being upheld. According to Adv Ndlovu, the delay in the prosecution of the appeal is simply another strategy to be released from the Rooigrond Correctional Facility and ultimately evade the completion of the effective sentence.
- [23] Insofar as, the issue of the prospect of success of the appellant's appeal is concerned, Adv Ndlovu postulated that the appellant is acutely aware that his appeal has no prospect of success. Furthermore, Adv Ndlovu's contention ran that it is solely for this reason that the appellant is wilfully neglecting to prosecute the appeal on the merits.

Discussion

- [24] The bail application pending appeal, in the court a quo, must be placed in proper context. Section 58 of the CPA provides that:

"58. Effect of bail

The effect of bail granted in terms of the succeeding provisions is that an accused who is in custody shall be released from custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, and that he shall appear at the place and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned, and that the release shall, unless sooner terminated under the said provisions, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or, where sentence is not imposed forthwith after verdict and the court in question extends bail, until sentence is imposed: Provided

that where a court convicts an accused of an offence contemplated in Schedule 5 or 6, the court shall, in considering the question whether the accused's bail should be extended, apply the provisions of section 60(11)(a) or (b), as the case may be, and the court shall

take into account—

- (a) the fact that the accused has been convicted of that offence; and
- (b) the likely sentence which the court might impose.

[25] It is against the provisions of section 58 of the CPA, that the court a quo was to consider the application for bail pending appeal. In *S v Porritt & another* (unreported, GJ case no SS 40/2006, 21 July 2017) at [36] and [37] Spilg J opined that section 58 is an 'umbrella' or 'overarching provision' and that it required that all the sections within Chapter 9, the Bail Chapter are to be read as incorporating its provision'.

[26] It is settled law that in the ordinary course of the criminal proceedings bail is valid should there be compliance with all conditions of bail until a verdict is given. See generally *S v Brown & another* 2019

- (1) SACR 691 (ECP) at [15]; 2020
- (2) SACR 444 (GP) at [10]. In terms of section 58 of the CPA in instances where sentence is not imposed immediately after verdict, the court in question may extend bail until sentence is imposed.

[27] The mere fact that the convicted offender has been granted leave to appeal is an inadequate ground to justify the release of a convicted offender on bail pending appeal. See: *S v Shabangu & others* (unreported, GP case no CC168/15, 7 December 2016) at [10]; *S v Pataka* 2018

- (2) SACR 135 (GJ) at [15], [22], *S v Barnard* 2019
- (1) NR 78 (HC) at [19], *S v D Villiers en 'n ander* 1999
- (1) SACR 297 (O).

[28] Whilst the introduction of features set out in section 58(a) and (b) of the CPA, have not rendered existing factors nugatory, a conviction founded on the commission of a serious offence and the likely sentence to be imposed remain crucial considerations in the making of an informed decision concerning the question of whether bail should be extended (or granted) pending the imposition of sentence. Tellingly, where the conviction is in respect of a Schedule 5 or 6 offence, the court is now obliged to act in terms of s 60(11) of the CPA. First, in terms of section 60(11) of the CPA, two scenarios are delineated. In terms of section 60(11)(a) of the CPA the accused/ appellant also has the onus, in certain instances, to prove 'exceptional circumstances'. See: *S v Bruintjies* 2003

- (2) SACR 575 (SCA) 577b–c; *S v Scott-Crossley* 2007

- (2) SACR 470 (SCA) at [3]; *S v Shabangu & others* (unreported, GP case no CC168/15, 7 December 2016) at [11]. The second is, that section 60(11) (b) of the CPA puts an onus on the accused in that the court shall order detention ‘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’. Section 60(11)(a) and (b) must be read subject to the clear proviso in section 58 of the CPA. What stands out from a reading of these provisions is that no distinction is made between a convicted and unconvicted accused.
- [29] What was required of the appellant in the court a quo was that evidence was to be tendered that effectively addressed two surmountable legislative requirements. The first, was that of adducing exceptional circumstances and second, the latter of which were in the interests of justice that permitted the appellant’s release. It must be borne in mind that section 60(11)(a) of the CPA is not to be read in isolation. It must be read conjunctively with section 60(4) – 60(9) of the CPA.
- [30] Exceptional circumstances are largely undefined. Exceptional is indicative of something unusual, extraordinary, remarkable, peculiar or different. There are of course varying degrees of exceptionality, usualness, extraordinariness, remarkableness, particularity of indifference. See: *S v Petersen* 2008 (2) SACR 355 (C) para 55, *S v Mazibuko and Another* 2010 (1) SACR 433 (KZP) para 19.
- [31] What stands out ex facie the record of the court a quo is that the appellant placed much reliance on his (i) personal circumstances, (ii) the fact that leave to appeal the conviction and sentence was granted (iii) and that the respondent had not opposed bail. I turn to deal with each of these factors disjunctively.

The personal circumstances of the appellant

- [32] For the appellant’s personal circumstances to qualify as sufficiently exceptional it must be either collectively or individually such that it weighs exceptionally heavily in favor of the appellant, thereby rendering the case for the release of the appellant exceptionally strong or compelling.
- [33] The regular attendance of the appellant whilst on bail prior to conviction and sentence is of no moment. The constitutional presumption of innocence as evinced in section 35(3)(h) of the Constitution had been rebutted. This inexorably led to a change in the complexion of the process. Section 58 of the CPA is also clear in affirming the trite position in our law prior to its enactment, that the court a quo had to bear in mind that it convicted the appellant of an offence envisaged in Schedule 6 of the CPA. Moreover, the appellant merely glossed over some of the grounds fundamental to the interests of justice. No primary facts were provided which substantially addressed the various factors as set out in section 60 (4)(a)-(e) of the CPA.

The granting of leave to appeal by the court a quo

[34] It is a hallow principle of our law, that the reasonable prospect of success on appeal, the seriousness of the crime for which the appellant has been convicted and whether he is a flight risk are important considerations. See: Pataka v S (A337/2017)

[2018] ZAGPJHC 73; 2018 (2) SACR 135 (GJ) (23 April 2018).

[35] In S v Williams 1981

(1) SA 1170 (A) the following was postulated:

“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.”

[36] In S v De Abreu 1980

(4) SA 94 (W) the following was held insofar as the prospects of success on appeal is concerned:

“the prospects of success on appeal is 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.”

[37] In S v Anderson 1991

(1) SACR 525 (C) it was held that it was in fact sufficient if an appeal is arguable and not manifestly doomed to failure. Further in S v Hudson 1996

(1) SACR 431 (W) at 43c it was held that 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. In S v Naidoo 1996

(2) SACR 250 (W) “the possibility of success on appeal” was held to be sufficient to consider bail.

[38] In casu the appellant relied exclusively on the fact that leave to appeal was granted against the conviction and sentence. Whilst the judgment of the court a quo is unhelpful as regards the reasons for having acceded to the granting of the application for leave to appeal, it is irrefutable that leave to appeal was granted against the merits and sentence. The mere fact that the court a quo granted leave to appeal does not automatically suspend the operation of the appellant's sentence, nor does it entitle him to bail as a right. See: *S v Mthembu* 1961 (3) SA 468 (D).

[39] The prospects of success do not in itself amount to exceptional circumstances as demonstrated by section 60(11)(a) of the CPA. The prospect of success is not considered in isolation. This Court is not required to scrutinise the evidence of the court a quo in miniscule detail, as that may amount to a dress rehearsal for the appeal to follow. See: *S v Viljoen* 2002 (2) SACR 550 (SCA) 4 All SA 10 at 561 G-I.

The failure of the respondent to oppose bail

[40] The appellant placed much store on the failure of the State to oppose bail in the court a quo. The fact that the State in the court a quo did not oppose the release of the appellant on bail pending appeal, added nothing to the onus placed on the appellant to show exceptional

circumstances. I may hasten to add, that the non possumus of the State in the court a quo, ran counter to the peremptory provisions of section 60(2)(d) of the CPA which requires of the State in matters involving Schedule 5 or 6 offences to place on record the reasons for not opposing the bail application. Those reasons undoubtedly had to account for the fact that the appellant was convicted and sentenced on an offence envisaged in Schedule 6. The conduct of the appellant in attending court prior to his conviction, is but one of the factors that had to be addressed. The State, however, failed even tangentially in assisting the court a quo in this regard.

[41] In *S v Schietekat* 1998

(2) SACR 707 (C) at 713h-714j Slomowitz AJ placed the nature of evidence the State is required to adduce in offences falling within the ambit of section 60(11)(a) and (b) of the CPA in context where he stated that:

‘Bail proceedings are sui generis...The State is thus not obliged in its turn to produce evidence in the true sense. It is not bound by the same formality. The court may take account of whatever information is placed before it in order to form what is essentially an opinion or value judgment of what an uncertain future holds. It must prognosticate. To do this it must necessarily have regard to whatever is put up by the State in order to decide whether the accused has discharged the onus...’

(own emphasis)

[42] In *S v Viljoen* 2002 (2) SACR 550 (SCA) at 561G-I, paragraph 25, the Supreme Court of Appeal further placed the approach to evidence adduced by an accused on whom the onus rests in a Schedule 5 bail application, and the concomitant duty of the State in the face of the absence of a prima facie case made out by an accused as follows:

“[25] (Loosely translated by this Court): ... I wish, however, to note two reservations in bail applications. The first is with reference to an accused faced with evidence already on record, not being able to make out a prima facie-case,

in which case there is no duty on the State to adduce evidence in rebuttal. The second, and most important reservation, is that caution must be had not to turn every bail application into drawn-out trial before criminal trial...”

[43] In *Mathebula v S* (431/2009) [2009] ZASCA 91; 2010 (1) SACR 55 (SCA); [2010] 1 All SA 121 (SCA) (11 September 2009) regarding schedule 6 bail applications, Heher JA (Ponnan JA and Bosielo AJA concurring) stated as follows:

“[11] In the present instance the appellant’s tilt at the state case was blunted in several respects: first, he founded the attempt upon affidavit evidence not open to test by cross-examination and, therefore, less persuasive: cf S v Pienaar 1992

(1) SACR 178 (W) at 180h; ...

[12] But a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: *S v Botha* 2002

(1) SACR 222 (SCA) at 230h, 232c; *S v Viljoen* 2002

(2) SACR 550 (SCA) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he

was involved only on the periphery or perhaps not at all. But the state is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see *Shabalala & Others v Attorney-General of Transvaal and Another* [1995] ZACC 12; 1996

(1) SA 725 (CC). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that

route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the state to rebut his evidence to that effect: *S v Viljoen* at 561f-g....”

Conclusion

[44] On a cumulative evaluation of the proceedings before the court a quo this Court cannot find that on the test advocated in terms of section 65(4) of the CPA that the decision inherent in the order of the court a quo in refusing bail was wrong.

Order

[45] Resultantly, the following order is made:

A REDDY

JUDGE OF THE HIGH COURT

OF SOUTH AFRICA, NORTH WEST DIVISION,

MAHIKENG

APPEARANCES:

Attorney for Appellant: Advocate M I Motlhale Instructed by: Mekgwe Attorneys Office No. 2 Merlite Building Mahikeng Counsel for Respondent: Instructed by: Advocate W.P Ndlovu State Attorney 1st floor, East Gallery, Mega city, Mmabatho Date of Hearing 08 November 2024 Date of Judgment: 14 November 2024

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