

SOUTH AFRICA / JUDGMENT

Phago v S (A766/15) [2017] ZAGPPHC 385 (23 June 2017)

[2017] ZAGPPHC 385

COURT

North Gauteng High Court, Pretoria

BEFORE

Mohlala

CASE / FILE NUMBER

A766/15

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THE REPUBLIC OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO. A 766/15

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

IN THE MATTER BETWEEN

SIMON KAJA PHAGO APPLICANT

And

THE STATE RESPONDENT

JUDGEMENT

MOHLALA A.J.

INTRODUCTION

The application brought before the court is for the Applicant to be granted bail pending an application for special leave to appeal, to the Supreme Court of Appeal in Bloemfontein in respect of both sentence and conviction.

The Applicant was represented by Advocate Moeng from Legal Aid and the State was represented by Advocate Marriot.

The application was heard before court on 06 June 2017.

BACKGROUND

The background facts are that the Applicant is an adult male who is currently incarcerated. The Applicant has been convicted of rape of a minor and was sentenced to fifteen (15) years imprisonment by the Regional Court in Gauteng on 31 .October 2011 and 24 May 2013 respectively.

The Applicant brought an application for leave to appeal and the appeal was heard and was dismissed on both conviction and sentence on 24 March 2017.

The Applicant has now petitioned the Supreme Court of Appeal for leave to appeal and this having been done on 31 March 2017. Subject to the outcome of the petition of the leave to appeal to the Supreme Court Appeal the Applicant has brought an application to be released on bail pending the outcome thereof.

LEGAL ARGUMENT

The legal argument presented to the court was the following:

APPLICANTS ARGUMENT

The Applicant counsel firstly and most importantly argued that the Applicant is not a flight risk. To substantiate this, he argued that at the time when the Applicant's application for leave to appeal was denied the applicant handed himself over to authorities to serve his sentence. Had he been a flight risk he would have made every attempt to avoid further incarceration.

The Applicant's counsel also argued that the applicant's personal circumstances would have to be taken into account and these are as follows:

PERSONAL CIRCUMSTANCES

"a I was born on the [...] August 1992 and I am currently 45 years old.

b I was born in Mamelodi and my parents passed away (mother around 2011 father around 2007).

c I was married in community of property to A. M. Marriage ended whilst I was in prison as a result of this matter,

d I have one child from my marriage to maintain, namely R. P., a girl aged 17 years old. She is currently attending school in [...]. She is not enjoying good health as she is epileptic.

e I have passed standard 9 at school I also have the following certificates

- National Certificate in Computers from National Computer College;

- Diploma in train the Trainer from Damelin
- Diploma in computer literacy

.....

(the detail of the personal circumstances appear on pages 4 to 6 of the applicants AFFIDAVIT IN SUPPORT OF THE BAIL APPLICATION PENDING SPECIAL LEAVE TO APPEAL TO THE SCA)

q My brother and I are currently running a family business trading as Amalgamated Funeral Services and Advocacy. I worked as an Admin Manager and earned an Income In the sum of R 2500.00 per month. The business was at a disadvantaged stage; however, it was beginning to gain momentum in my presence."

The Applicants counsel further argued that with respect to the aspect of balancing the public interest vis a vis the the applicants right to liberty, that it was in the interest of justice that the Applicant be released because he has reasonable prospects of success on the merits on appeal. Further he argued that the Applicant had been in custody awaiting trial from 2009 until his release on bail pending appeal on the 06 November 2015. During this period the Applicant had at all times complied with all his bail conditions until he had to hand himself over again when the appeal was dismissed. The Applicant's counsel also argued that he is not a flight risk and has duly demonstrated his ability to adhere to bail conditions Most importantly the Applicant's counsel further argued that his release will not undermine administration of justice and or disturb public order.

With respect to the issue of actual or potential prejudice the Applicants counsel argued that the Applicant was in custody for four years and after conviction served two years prior to getting bail pending appeal. In effect he argues that the Applicant has already served x years in prison. He further argued that whilst out on bail for a period of one year four months he at all times complied with his bail conditions.

Lastly the the Applicant's counsel argued that there are good prospects of success on appeal. This is specifically because on the charge of rape one of the key elements of penetration is missing, there is no medical evidence of penetration. He also argued that when the child was examined by medical experts the hymen was intact Therefore, based on this medical evidence the important requirement of rape would not be met. Thus the prospects of success are very good.

STATES ARGUMENT

In answer the State argued as follows:

The State opposed the application for bail. The State further counter argued that the facts were clear. According to the version presented in the court a quo the Mother testified that on the day of the said rape, she had called out from the courtyard for the child to come to her, the child was then pushed out of the Applicants room (who at the time resided in the back room) with her under wear and her clothes down to her knees and she was crying. The child however refused to confirm what had happened to her because she was scared, due to threats issued by the

Applicant.

The State referred the court to the case of *S v Brunintjies* 2003 (2) SACR 575 (SCA) which enunciated that when making a determination of an application for bail pending appeal the Applicant can not claim the

benefit of a lighter test. The court in determining whether to grant bail must consider all relevant facts and determine whether

cumulatively they warrant a finding that exceptional circumstances exist to justify release. The State further referred the court to *S v Masoanganye* and another 2012 (1) SACR 292 (SCA) where the court held that in determining a bail application the court must consider whether the Appellant is a flight risk and the personal circumstances of the person are to be taken into account. Further the court held that the seriousness of the crime and the real prospect of a lengthy period of incarceration if the accused fails to have his conviction overturned must be considered.

The State also submitted that should the court be inclined to grant bail then the usual conditions of bail must be granted and attached thereto. Specifically, the bail condition to be attached is that whenever the Applicant leaves the province he must notify the investigating officer of his intention to leave the province.

ANALYSIS

The principle that the court must adopt when making a decision whether or not to grant bail is that to be very careful to ensure that they do not end up trying to sit in the position of the trial court or the appeal court that is to make a determination on the merits. The court on determining the issue of bail must weigh the right of the prisoner to their liberty vis a vis the duty of the court to act in the best interests of justice.

The facts of this case are clearly laid out above. However one must also be mindful of the principles enunciated in case law specifically the case of *S vs Bruintjies* 2003(2) SACR 575 (SCA) 577b and *S vs Scott - Crossley* 2007 (2) SACR 470 (SCA) at (3),(7) and (12), the court in these cases held that when considering the release on bail of a convicted person pending an appeal one not only considers prospects of success but also considers all the cumulative factors and considers whether individually or cumulatively the circumstances warrant that the finding that the circumstances are of an exceptional nature and as such warrant that the person be released on bail. Further the court held that what is an exceptional circumstance is an issue that is to be defined in the context of the relevant facts. The court also indicated that in making such an inquiry the court must also be alive to the fact that the Appellant does not pose a danger to society and is not at risk of abscondment in view of the fact that he/she has already been convicted and faces a lengthy period of time in jail if the appeal fails.

Therefore, having heard the arguments and considering the case law, the court has to apply the test of whether exceptional circumstances exist that justify the release of the applicant on bail. The undisputed facts before court are that firstly the Applicant has at all times fully co-operated with the law enforcement authorities. In that when called upon to surrender himself after appeal had been dismissed he did so without hesitation. Secondly he has already served a period of six years in prison. Thirdly and most importantly whilst out on bail for one year and four months he never violated his bail conditions and did not transgress any laws. However, these issues have to be balanced against the nature of the conviction which is that of rape of a minor and the gravity of the sentence which he has been sentenced to. This raises questions of whether he does or does not pose a danger to society and is he a flight risk. However, considering that he has been out on bail after his conviction and he never-ead'led his conditions of bail. He has also not committed a similar offence or any offence for that matter. He even handed himself over when the bail was revoked.

The strength of the States case is also a relevant consideration as has been held by the court in the case of *S vs Viljoen* 2002 (2) SACR 550 (SCA). The facts of the case as presented by the State present a version, however the said version makes it difficult for the court to come a *prima facie* view whether against or on behalf of the Applicant. Therefore, the court can not rely on this version to make a determination against the Applicant. This issue will be considered more fully by the appeal court which will have the full record.

The court holds that based on the preceding exceptional circumstances do indeed exist. Firstly, as already stated above the Counsel for the Applicant has argued that there are real pro's of success on appeal to the SCA because a key and important requirement for rape does not exist. Secondly with respect to the issue of being a danger to society I believe that the court has a unique set of facts in this case that address this very issue in that in the past when the Applicant was released on bail he not only did not commit any further crimes but fully complied with his bail conditions. Also and very importantly the Applicant does not pose a risk to witnesses as they have already testified. Therefore, it can not be argued that his release on bail would not in any way pose a risk to the interests of justice or society. Lastly on the issue of the risk of abscondment the Applicants counsel has argued that when the applicants bail was revoked after the appeal was dismissed he did not try to evade the authorities but simply handed himself over hence his currently being incarcerated.

The court therefore concludes that it is in the interests of justice for the Applicants right to liberty to be given preference. This is more so because, taking all the above factors into account the court concludes that cumulatively the circumstances of an exceptional nature exist that warrant that the applicant be released on bail.

The court therefore deems it to be appropriate and in the interests of the Applicant and justice that bail be herein granted to the Applicant.

ORDER

The court therefore orders the following:

- 1 The application is herein granted; ·
- 2 The applicant is to be released on bail pending the outcome of his Special leave to appeal to the Supreme Court of Appeal in Bloemfontein
- 3 The bail so granted is to be subject to the condition that whenever he leaves the province the probation officer is to be notified;
- 4 The bail is to be set at a monetary amount of R 10 000.00 (Ten Thousand Rands).

ACTING JUDGE OF THE GAUTENG

DIVISION, PRETORIA

HEARD ON: 06 JUNE 2017

FOR THE APPLICANT: MR MOENG

INSTRUCTED BY:

FOR THE RESPONDENT: ADV MARRIOT

DELIVERED ON THE: 23RD JUNE 2017

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