

SOUTH AFRICA / JUDGMENT

Roy v S (CAB11/2022) [2023]

ZANWHC 76 (5 January 2023)

[2023] ZANWHC 76

COURT

North West High Court, Mafikeng

BEFORE

S Mfenyana

CASE / FILE NUMBER

CAB11/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION – MAHIKENG

Case

No . CAB11/2022

In

the matter between:

MATABOGE

ROY

Appellant

and

THE

STATE

Respondent

This

judgment was handed down by electronic transmission and circulation to the parties' representatives via email. The date of the handing

down of this Judgement is deemed to be 5 January 2023.

ORDER

In

the result the following
order is made:

The

appeal is dismissed.

JUDGEMENT

MFENYANA AJ

- [1] The appellant was convicted by the Regional Court in Temba (the court a quo), on 3 August 2021 on a charge of attempted murder. On 22 February 2022 he was sentenced to five years imprisonment. He remained in custody until he was sentenced. It appears from the record that on 4 March 2022, the appellant through his attorneys of record addressed a letter to the Clerk of the Court in Temba requesting a transcript of the proceedings.
- [2] On 7 March 2022, the appellant, duly represented by his attorney applied for the extension of the period of 14 days prescribed for the application of leave to appeal as he had appointed a new legal representative who required to appraise himself of the matter and apply for transcripts. The extension was granted by the court a quo. On the same day he applied for a postponement pending an application for leave to appeal. That application was also granted by the court and the matter was postponed to 10 March 2022.
- [3] On 10 March 2022 the appellant applied for bail pending appeal. On the same day the appellant informed the court that he intended to lodge an appeal against both conviction and sentence and handed up a power of attorney in respect of that intended application. The state opposed the application.
- [4] At the commencement of the proceedings, the appellant averred that the application for bail could be entertained 'despite the fact that application for leave to appeal (had) not been heard yet. The Honourable Court can still entertain an application for bail pending appeal'[1] he proceeded.
- [5] As reasons for the application, the appellant stated that he was still employed as a police officer and was required to report to work to avoid dismissal. It was further stated that he was not a flight risk and that the interests of justice permitted his release on bail.
- [6] On 22 March 2022 the court a quo dismissed the application for bail pending appeal. The primary reason cited by the court for the dismissal of the application was that the application was premature, it being the case that no application had been brought for leave to appeal. As a result, the court concluded, that it was not in a position to say with certainty that the application for leave to appeal had any reasonable prospect of success.
- [7] The present application lies against that refusal of bail by the court a quo.
- [8] The application is opposed by the state.

Legal framework

- [9] The appellant was convicted and sentenced for an offence listed in Schedule 5. Generally, the approach to be adopted in considering an application for bail is set out in section 60 (11) (b) of the Criminal Procedure Act.[2] The section provides:

Bail application of accused in court

60. 11 (a) ...

(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.

[10] The section applies equally to accused persons who are awaiting trial as it applies to persons who have been convicted and sentenced.

[11] In circumstances such as the present, the main consideration is whether the appellant will serve his sentence if released, should his appeal against sentence not succeed. The court should consider the likelihood of the appellant absconding, bearing in mind that he has been convicted and sentenced to a term of imprisonment. Prospects of success on appeal play a pivotal role in the determination. These factors, properly considered, determine whether it would be in the interests of justice to release an accused person on bail.

[12] Section 309 deals with appeals from lower courts by convicted persons. The relevant provisions state:

"309B Application for leave to appeal

(1) (a) Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any accused, other than a person referred to in the first proviso to section 309 (1) (a), who wishes to note an appeal against any conviction or against any resultant sentence or order of a lower court, must apply to that court for leave to appeal against that conviction, sentence or order.

309

(4)(a)...

(b) When an appeal under this section is noted, the provisions of-

sections 307 and 308A shall mutatis mutandis apply with reference to the sentence appealed against".

[13] Section 307 provides that the execution of sentence will not be suspended unless bail granted.

[14] Rule 67 of the Magistrates' Court Rules provides:

"Criminal Appeals

67. (1) (a) An appellant, other than a person who applies orally for leave to appeal immediately after the passing of the sentence or order as contemplated in section 309B(3)(b) of the Criminal Procedure Act, 1977 who wishes to apply for leave to appeal in terms of section 309B(1) of that Act, shall do so in writing to the registrar or clerk of the court and shall also send a copy of the application to the director of public prosecutions concerned, or, in a case in which the prosecution was not at the public instance, to the prosecutor concerned.

(2)

(3)(a) A legal representative appearing on behalf of an appellant, shall simultaneously with the lodging of the application for leave to appeal lodge a power of attorney authorising him or her to act on behalf of the appellant, or if a legal representative is employed after an application for leave to appeal has been lodged, after such appointment".

Submissions

[15] It was submitted on behalf of the appellant that the court must approach the matter from the understanding that a person's freedom is a precious right which is protected by the Constitution. Placing reliance on the decision in *S v Branco*[3] the appellant further submitted that such freedom should only be lawfully curtailed if the interests of justice so require and that the court should lean in favour of granting bail and not against it, if it is clear that the interests of justice will not be prejudiced by that decision, subject to suitable conditions which the court may impose as an alternative to denying bail.

[16] As far as the merits are concerned, the appellant submits that the state's failure to lead any evidence in rebuttal of the evidence presented by the appellant in support of his application to be released on bail, was fatal to the state's case and should have been considered by the court a quo, and reflected in the judgement. Thus the appellant concludes that the court a quo attached no weight to the omission by the state, and that this amounts to a misdirection. It being a schedule 5 offence, all that was required was for the appellant to prove that the interests of justice permit his release on bail, so contends the appellant. I interpose here to state that while this is the case, "interests of justice" is not a lone consideration divorced of any other consideration, and in this regard, prospects of success.

[17] Of particular relevance, the appellant contends that the court a quo employed a wrong test as it considered whether leave to appeal, and not bail, should be granted. He attributes this contention to the finding of the court when it made the following observation:

"... there is no basis before me to convince me that in my conviction I erred or in my sentence I erred, as a result I cannot say with certainty that another Court may arrive at a different conclusion..."[4]

[18] The applicant challenges the finding that the application is premature as ruled by the court a quo. Mr Van As, on behalf of the appellant placed reliance on the judgment in *Hlongwane*[5] for the proposition that all that was required in the circumstances in terms of section 309(4) (b) was for the appeal to be noted. He contends in this regard that by advising the court that

the appellant intended to bring an appeal against conviction and sentence, and in applying for an extension of the period prescribed for bringing an application for leave to appeal, he had complied with the requirements. This is incorrect. An accused person who wishes to apply for leave to appeal in terms of section 309B 'shall do so in writing '[6] . It is also trite that a power of attorney must be lodged simultaneously with the application for leave to appeal.[7] Even if the appellant's understanding of 'noting' an appeal is correct there needs to be a basis for the leave to appeal and a

pronouncement by the court. This did not happen in the present case.

[19] It is further the appellant's contention that the court a quo failed to consider that the appellant might have served his sentence by the time the appeal is heard which is a factor to be considered in determining whether the interests of justice permitted his release on bail. Consequently, the appellant avers that he had proved on a balance of probabilities that interests of justice permitted his release on bail subject to reasonable conditions.

[20] Contending against the granting of the application, the respondent avers that on hearing the appeal, the court or judge 'shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong...' The respondent relies on section 65 (4) for this contention.

[21] The respondent cites the decision in *S v Barber*[8] and submits inter alia, that 'the real question is whether it can be said that the magistrate had the discretion to grant bail but exercised the discretion

wrongly.' The respondent argues that in terms of section 60(4) the interests of justice do not permit the release of an accused person from detention if there is a likelihood that the accused person would evade trial, or jeopardise the proper administration of justice or disturb the public order or undermine public peace and security. Indeed, all these factors were put forward by the appellant during the hearing of the application in the court a quo. In my view, it serves no purpose to say much more on them as they bear no relevance to the present matter.

[22] With specific reference to the appellant, the respondent contends that the right to be released from detention does not create an unqualified right to freedom, and if such a right applies as it does, to accused persons before conviction, it follows that it also applies after conviction as there is a likelihood that the appellant may evade trial or even not prosecute the appeal. In the present matter the appellant has been convicted and sentenced.

[23] The respondent contends further that the court a quo did not err in holding that the application for bail was premature and that the appellant ought to have brought the application for leave to appeal before applying to be released on bail. The respondent bemoans the short period between the time when the court was informed of the appellant's intention to bring an application for leave to appeal and when the bail application was brought. In my view, that is hardly the issue. The issue is whether in stating to the court that he intended to seek leave to appeal (at a later stage) against his conviction and sentence, the

appellant noted an appeal within the meaning and contemplation of the Act and the Rules, and in so doing entitled to apply for bail with no further ado. I think not. The whole purpose of the provisions is to prevent an injustice where an applicant who

would otherwise be entitled to bail is incarcerated pending the outcome of an appeal.

- [24] The respondent argues that there should be reasonable prospects of success on appeal and that in the present case it would be difficult to ascertain this due to the absence of the trial record before the appeal court. The respondent however further contends that the absence of the trial record is not sufficient to bypass compliance with the process of appeal.

Discussion

- [25] The issue that presents before this court is the sole issue of the appellant's release on bail pending the determination of his application for leave to appeal. This presupposes that there must be an application for leave to appeal pending determination before a court. In this case, that application is not before the court a quo, nor was it presented to it before or at the time the application for bail was brought. It is trite that an appeal is noted when the applicant makes application in writing setting out the grounds on which the application is based. This in turn enables the respondent to know what case it has to meet and prepare for it.
- [26] In *Nodu v S*[9] the court held that "prospects of success on appeal do play a role in determining whether or not bail ought to have been granted."
- [27] It is not a foregone conclusion that the appellant will be granted leave to appeal. It was submitted on behalf of the respondent that even if leave to appeal was granted, it does not automatically follow that the appeal would succeed. The question is whether it would prejudice the administration of justice if bail is granted or refused. In making that determination the Court "has to be persuaded that the magistrate exercised the discretion, which (s)he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of (her) discretion. ...(N)o 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 exercised that discretion wrongly." [10]
- [28] The respondent submits that the court a quo did not exercise its discretion wrongly or misdirect itself in any way and was correct in finding that the appellant placed nothing of substance before the court to allow his admittance to bail.
- [29] The relevance, in my view, of the observation by the court a quo that it could "not say with certainty that another court may arrive at a different conclusion", is that it was not seized with an application for leave to appeal. As such it could not 'with certainty' make a determination on the appellant's prospects of success. It did not consider this issue. The appellant's contention therefore, that the court a quo employed a wrong test is without basis. In any event, prospects of success are an integral part of an application for bail pending

appeal.

- [30] There seems to me to be merit to the respondent's contention that an appeal court seized with an application for bail pending an appeal would only be in a position to assess the prospects only once an application for leave to appeal has been brought. Prospects of success on appeal are indeed an important consideration for the court hearing the bail application.
- [31] The appellant's contention that he had in fact noted an appeal is without merit. What is more is that the appellant approbates and reprobates. At the hearing of the matter, counsel for the appellant submitted that it was permissible to proceed with a bail application pending appeal despite the fact that an application for leave to appeal had not yet been heard. However in his written submissions, he argues that he had in fact complied with the requirement in section 309(4)(b) as he had noted an appeal by informing the court orally that the appellant intended to appeal against his conviction and sentence (once he was in possession of the transcript). The issue of the transcript in my view poses a further hurdle for the appellant.

The request for the transcript was made on 4 March 2022, a mere three days before the bail application was made. The appellant cannot be heard to be saying that he is prejudiced in any way by the unavailability of the transcripts. The timing of the request, the filing of the power of attorney as well as the application for the extension of the timeframe for leave to appeal appear to have been part of a stratagem by the appellant to evade compliance with the requirements. It appears to me that the appellant is the author of his own calamity. It follows then that delays occasioned by the unavailability of transcripts should be actual and not imagined. The appellant speculates that should the transcripts not be provided promptly, the interests of justice would be prejudiced by his incarceration. He does not explain why he waited for as long as he did to consider bringing the application for leave to appeal, which in any case has not been made to date. He did not take the court a quo into his confidence why he opted to make a request for the transcript only a day before applying for the extension of time, and at which point it dawned on him that he would make application to be released on bail. In my view, the interests of justice would dictate striking a balance between the appellant's interests and the interests of the state.

- [32] I agree with Ms Maseko, counsel for the respondent, that there is no assurance that the appellant would prosecute his appeal once admitted to bail and that the personal circumstances of the appellant are not sufficient reasons for him to be admitted to bail. All these considerations, in my view, seem to support the respondent's contention that the application for bail was brought prematurely.
- [33] For all intents Hlongwane is discernible from the present matter in a number of respects and is not authority for the proposition that an appellant who has been convicted and sentenced may apply for bail even though no application for leave to appeal has been lodged.

Quite to the contrary the court held at paragraph 11:

"In the result a convicted accused person is only able to pursue his or her appeal once leave to appeal has been obtained, either from the trial court in terms of section 309B or, failing that, then upon petition from the Judge President in terms of section 309C. Having obtained leave, the appellant is then able to pursue the appeal and such appellant is able to apply for bail pending the outcome of the appeal."

[34] It is worth noting that the issue in Hlongwane concerned an application for bail in circumstances where the applicant was awaiting the outcome of a petition. The court held in this regard:

'Until such time as the appeal is noted, the only possibility for an application for bail to be brought pending the outcome of the

petition proceedings is to apply to the High Court, but only after the petition has been lodged..."[11]

[35] Also worth noting is that in paragraph 29 the court stated that "(w) hat the "noting" (in section 309(1)(a)) establishes is that an application for leave to appeal has commenced, to be completed at a later stage. But the appeal itself remains suspended pending the requirement of leave to appeal being satisfied." That requirement has not been satisfied in the present case. It would be satisfied "as soon as the application for leave to appeal and the grounds therefore have been orally noted before the trial magistrate...". It seems that the appellant has totally misconstrued the import of the decision in Hlongwane.

Conclusion

[36] The application for bail before the court a quo was simply premature. Accordingly, this court cannot find any misdirection in the finding of the court a quo and in refusing to admit the appellant to bail.

Order

[37] In the result, the following order is made:

S MFENYANA

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING: 04 NOVEMBER 2022

JUDGEMENT

RESERVED: 04 NOVEMBER 2022 DATE OF JUDGMENT: 05 JANUARY 2023 For the Applicant: Mr JC Van As Instructed by: Botha- Booysens & Van As Attorneys For the Respondents: Adv. J Maseko Instructed by: DPP, Mmabatho

- [1] Record, 'Bail pending leave to appeal', page 18
- [2] Act 51 of 1977
- [3] 2002
- (1) SACR 532
- [4] Record page 70 (paginated) paras 22 — 25.
- [5] Unreported (S v Hlongwane and Others (AR 507/13) [2015] ZAKZPHC 1 (28 January 2015)
- [6] Rule 67(1) supra
- [7] Rule 67(3)(a) supra
- [8] 1979 SA 218 (D)
- [9] (A38/2020) [2022] ZAGPPHC 264 (3 May 2022)
- [10] S v Barber 1979 (4) SA 218 (D).
- [11] At para 3

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