IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

SCA Case No.: **483/2019**
WCHC Case No.: **SS43/2017**

In the matter between:

MR JASON THOMAS ROHDE Applicant

and

THE STATE Respondent

CORAM: **JUDGE SALIE-HLOPHE**

DATE OF HEARING: **7 AUGUST 2019**

DELIVERED: **15 AUGUST 2019**

COUNSEL FOR THE STATE: **Advocate L Van Niekerk**

COUNSEL FOR ACCUSED: **Advocate King**

ATTORNEYS FOR ACCUSED: **Witz, Calicchio, Isakow & Shapiro**

JUDGMENT: APPLICATION FOR BAIL PENDING APPEAL

DELIVERED ON 15 AUGUST 2019

SALIE-HLOPHE, J:

INTRODUCTION:

[1] This is an application brought by the applicant, Mr. Jason Thomas Rohde, for bail pending the hearing of his appeal against his convictions and sentences. The applicant was convicted on 08th November 2018 of the murder of his wife, Mrs. Susan Rohde, and defeating/obstruction the course of justice by covering up the murder to have it look as if she had committed suicide. He was sentenced on 27th February 2019 to an effective term of direct imprisonment of 20 years, that being 18 years in respect of the conviction or murder and 5 years for defeating/obstruction the course of justice. Three of the five years were ordered to run concurrently with the sentence of 18 years. Mr. Rohde's bail pending finalisation of the trial, was withdrawn upon conviction and he had been incarcerated since then.

[2] Two respective bail applications were launched by him for re-instatement of bail pending finalisation of his sentence. The first application was made on the day

of his conviction. His counsel, Mr Van der Spuy, argued then that he does not pose a flight risk in that he had complied with his bail conditions; that he has strong family ties and immovable property in Plettenberg Bay and that all his three passports are in the possession of the police. The application was dismissed in that the conviction of guilt meant that the accused is no longer presumed innocent, that the nature and gravity of the conviction were serious and that he faced a minimum sentence of incarceration. These facts, inter alia, in the view of the Court, militated against the granting of or extension of bail. In the premise, the Court found that the interests of justice required the incarceration of the accused.

[3] The second application for bail was brought on the grounds that: the accused does not pose a flight risk in that he was co-operative with police and compliant of his bail conditions pending finalisation of the trial; that his passports were in the custody of the police; that his asset base had been decimated by the consequences of the criminal proceedings against him; that his further incarceration would compromise his property and business interests and his ability to save his dire consequential financial interests and lastly that his need to care for his children both financially and emotionally required his release from custody. It was also argued that the intervening December recess period amounted to a new fact upon which bail ought to be considered as the sentencing proceedings would only recommence in the new term of earlier this year.

[4] The Court considered the facts placed before it in support of bail,[1] however, dismissed the application in that the interest of justice in the circumstances does not warrant the re-instatement or granting of bail.

[5] A third application for bail had been launched during July 2019, on the basis that on the 02nd of July 2019 the Supreme Court of Appeal granted the accused leave to appeal against his convictions and sentences. Leave to appeal against his convictions and sentences were dismissed by the Court a quo on 16 April 2019 on the ground that there are no reasonable prospects of success that another Court would come to a different conclusion on the facts and circumstances of the matter.

[6] The argument on behalf of Mr. Rohde in this third application for bail is that, arising out of his conviction and incarceration, his circumstances have changed and that the facts pointed out in his founding and supplementary affidavits would justify a decision granting bail pending hearing of his appeal in the interests of justice.[2]

[7] The State opposed the application on the basis that it would be contrary to the administration of justice to release the applicant on bail pending his appeal and that such *'lenience'* would bring the administration of justice into disrepute.[3] The convictions, it submitted, are very serious and that the extent of the seriousness thereof together with the lengthy sentences must be taken into account in the context of leave having been granted by the Supreme Court of Appeal. It was further

[1] Trial record page 3716
[2] Applicant's heads of argument – page 4, paragraph 8 and 9
[3] Respondent's heads of argument – page 3

submitted that the hardships, financial impact and consequences for the applicant stemming from his convictions and incarceration could not be construed as new facts.

[8] At the hearing of this matter, Mr. King SC, who appeared for the applicant, confirmed upon enquiry from the Court that all facts which the applicant sought to place before the Court had so been placed.[4] Furthermore he confirmed that the applicant exercised his right to supplement his papers in the form of supplementary affidavits having been granted leave to do so in the days prior to the hearing of the matter. Mr. Rohde filed a supplementary affidavit dated 23 July 2019 and his attorney, Mr. Anthony Louis Mostert, filed a further affidavit dated 5th August 2019 addressing events which had transpired subsequent to the launch of this application on 3 July 2019.

[9] Mr. King SC argued that the Supreme Court of Appeal granting leave to appeal as petitioned, means that a higher court came to the conclusion that there is a reasonable prospect of success or a realistic chance of success on appeal. The argument follows that were the applicant ultimately to be successful on appeal, it would mean that he would at that stage had lost a lengthy period of time of his life and freedom, his ability to have salvaged his business, to augment his financial circumstances, to have provided for his children and that he would have had to endure the hardship and torment of life in prison. Counsel relied strongly on the case of *S v Essop 2018 (1) SACR 99* which dealt with bail pending appeal and the

[4] Transcript of record (present bail application) page 55 - 56

applicable principles with particular reference to Sections 60(4) and (5) of the Criminal Procedure Act 51 of 1977[5]. I will deal with that later in this judgment.

[10] Mr. van Niekerk, who appeared for the Respondent, submitted that the petition before the SCA had been done on the basis of the Notice of Appeal setting out the grounds of appeal, an opposing notice by the State and the judgment by the Court a quo. The record or transcript of the proceedings were not before the petitioning Judges and given the fact that the judgment developed various aspects of law, could reasonably suggest that the SCA would want to consider and pronounce on the legal principles so established by the judgment as a higher court. It was further argued by the State that the mere fact that leave to appeal is granted does not entitle a convicted prisoner to be released on bail.

APPLICABLE LAW:

[11] Section 321[6] of the CPA provides that the Court from which the appeal originates may order that the appellant be released on bail. This provision prohibits the suspension of a sentence imposed by a superior court by reason of any appeal against a conviction unless the trial court thinks it fit to order the sentenced accused's release on bail.[7]

[5] Hereinafter referred to as the CPA
[6] Section 321: 'When execution of sentence may be suspended'
[7] Beetge v The State (925/12) 2013 ZASCA 1 (11 February 2013)

[12] Pre-trial release allows a man **accused**[8] 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. It permits the accused to take an active part in planning his defence with his counsel, locating witnesses, proving his capability of staying free in the community without getting into trouble. This would include earning an income to maintain his financial needs as well as funding his legal expenses incurred in consequence of the trial.[9] Underlying this important rationale is the fact that the accused enjoys the fundamental right of being presumed innocent.

[13] In the present case however, Mr. Rohde had been convicted as charged upon finalisation of his trial and no longer enjoys the presumption of innocence. That he had been granted leave to appeal his convictions does not vitiate the finding of guilt nor does it revert his presumption of innocence.

[14] In *Essop* it was accepted that the presumption of innocence no longer applies where a convicted and sentenced person applies for bail pending finalisation of his appeal against sentence. However, the inapplicability of the presumption of innocence is only one factor to be considered in assessing all the circumstances relevant to the issue whether bail pending appeal is justified. In that matter, bail was granted, subject to strict conditions, a bail amount higher than initially fixed (pending trial) was considered in the circumstances of the case to be a fair and sufficient incentive to comply with bail pending the finalisation of the appeal. The finding

[8] Reference to an accused distinguished from a convicted prisoner
[9] Nagel (ed) Rights of the Accused (1972) pg 177 - 178

therein to grant bail was however in substantially different circumstances. The Court was of the view that the sentencing magistrate made a patent error in labouring under the impression that the appellant was convicted of committing an offence in terms of the sexual offences act[10] and/or sexual assault of the complainant, which carried a more severe punishment.

[15] *Essop* is in my view distinguishable from this case for a number of reasons. The application in that matter was not opposed, the State did not lead any evidence, whether oral or by affidavit, to oppose the application. The accused had pleaded guilty, the only aspect on appeal was that of sentence which was argued to be so severe and arrived at in error of the applicable sentencing regime, that the appeal court would most certainly interfere with same. The State conceded as much and the Court hearing the application for the applicant to be released on bail pending his appeal, accepted that the applicant was not a flight risk, complied with bail conditions pending trial and that there were reasonable prospects that the appeal court will interfere with the sentence imposed on the appellant.

[16] In *S v Scott-Crossley 2007 (2) SACR 470 (SCA)* the Court held that the prospects of success do not in itself amount to exceptional circumstances as envisaged by the Act. The Court had to consider all the relevant factors and determine whether individually and cumulatively they constitute exceptional circumstances which would justify his release. In the matter before us, the Court is required to look at the totality of the facts and circumstances before it in determining

[10] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

whether the **interests of justice** require Mr. Rohde's further detention or differently put whether the interests of justice warrant his release on bail pending his appeal.

[17] The circumstances contemplated in Section 60(4) and (5) provide that the interests of justice do not permit the release from detention of an accused during trial and preceding conviction, where one or more of a number of grounds are established.[11] For the applicant it was argued that none of those circumstances are invoked in the matter before us. However, in this case, Mr. Rohde had already been **convicted** and sentenced accordingly.

[18] Furthermore, in any event, a twenty-year (20) year sentence is undoubtedly a lengthy period of incarceration. In my view, that the State did not present evidence that Mr. Rohde is a flight risk is not dispositive of that possibility. The onus rests on the applicant to prove that it would be in the interests of justice to release him on bail, inter alia, that he would not abscond.

[19] Flight is a possible, albeit unlawful, course of action to follow for a person facing a 20 year sentence. This need not necessarily be alleged or proven by the State. In each case the Court would be in a position to make a risk assessment of the possibilities of flight by taking into account the seriousness of the crimes committed, the length of the imposed sentences and other relevant factors. Indeed Mr. King SC conceded as much in argument. However, he submitted that the risk of Mr. Rohde absconding is reduced by the fact that when the SCA granted leave to

[11] Section 60 deals with bail of accused persons pending trial and 'at any stage preceding his or her conviction…. If the court is satisfied that the interests of justice permit.' *(emphasis own)*

appeal it was on the basis that he has a reasonable chance of success to be *"acquitted and continue with his life"*. The argument thus follows that the risk of flight would be countered by the fact that he knows he has a reasonable chance of success.[12]

[20] In my view the fact that a convicted prisoner had been granted leave to appeal does not necessarily dispose of the question as to whether his is a flight risk. Human nature would make for different mind sets in similar circumstances. The Court is then left to make a judgment call as to whether there is a reasonable apprehension of flight risk. A reasonable prospect of success on appeal is not mutually exclusive to the reasonable possibility of failure on appeal. Both possibilities co-exist. The one does not exclude the other. Similarly, both options, to run or stay, remain open to a convicted accused in the position of Mr. Rohde. It is not a case of mathematical or scientific exclusion of the one to the other. Furthermore, it is not argued that the State's case was subject to serious doubt or that confirmation of the conviction is not a remote possibility.

AUSTRALIAN AND UNITED KINGDOM PASSPORTS AS WELL AS OVERSEAS BANK ACCOUNT:

[21] In determining whether to grant Mr. Rohde bail, this Court must take into account the evidence lead in the previous bail applications, including that before the magistrate's court after his arrest. Mr. Rohde, in addition to having a South African

[12] Transcription of bail proceedings – page 5, line 23 & page 6, line 2 onwards

passport, also has Australian and United Kingdom passports. Both the bail court (Stellenbosch Magistrate's Court) and the trial court heard evidence regarding the dual South African/Australian citizenship of Mr. Rohde as well as his British citizenship as his country of birth. Citizenship means the position or status of being a citizen of a particular country and the right of entry and stay in that country. Citizenship does not extinguish with the expiration of a passport nor do you lose your rights of citizenship of a country as a result of not having a passport for that country. The fact that passports are misplaced, lost or in the custody of another, in this case the South African Police, does not mean that the holder of the right of citizenship is disentitled from the relationship between him and the state of which he holds citizenship. Citizenship implies the status of freedom in a country including the rights of passage, stay and the protection of that country.[13]

[22] A passport is a document issued by a national government for international travel and it certifies the identity and nationality of the holder. A lost, misplaced, expired passport can be replaced by way of application.[14] British passport applications, since 2013, are no longer processed in South Africa and in fact are done in the United Kingdom.[15] The fact that Mr. Rohde's passports are in police custody and (some) expired, does not exclude the possibility of him obtaining other passports through other means.

[13] Encyclopaedia Britannica - Citizenship
[14] Australian passports: your easy guide on how to renew, replace or apply for a new passport/Australian Passports Acts no.5/2005
[15] Majesty's Passport Solutions: British Passport Applica

[23] This Court cannot turn a blind eye to the fact that Mr. Rohde holds these rights of passage and stay to other countries and that passports issued by those countries to its citizens are not within the control of South Africa.

[24] Submissions were made in the Stellenbosch Magistrate's Court that Mr. Rohde left South Africa in 2015 to attend the England World Rugby Cup with an expired South African passport.[16] Whilst this was brought to his attention by officials as travellers are not allowed to exit the country and travel internationally with an expired passport, he nonetheless managed to leave and returned to South Africa by using his Australian passport. This in my view illustrates a comfortable ability on the part of the applicant to stay in travel mode, vacillating between passports of different countries, notwithstanding it having been expired.[17]

[25] In the bail application before the lower Court, Mr. Rohde declared the value of his estate, which included an active bank account in Australia with an approximate balance of AUD$14 000,00 and an investment portfolio purchased on an overseas platform, National Australia Bank.[18] In *S v Petersen 2008 (2) SACR 355*, the Full Bench of this Division, took that fact into account when it dismissed Mrs. Najwa Petersen's bail appeal. She was at the time accused of murdering her husband and well known performing artist, Mr. Taliep Petersen. She had subsequently been convicted of his murder.[19]

---

[16] Exhibit Z – Bail record page 79 – line 20 (statement under oath by accused pages 71 - 81)
[17] Exhitit Z – Bail proceedings (magistrate's court) transcription record page 86 – lines 12 - 15
[18] Exhibit Z – Bail proceedings (magistrate's court) transcription record page 14 – lines 15 - 20
[19] Mrs. Petersen had an active bank account in Namibia

[26] It was submitted for the State in the bail application in the lower court that given the nature and seriousness of the charges, the State can never say that Mr. Rohde is not a flight risk. Clearly, in circumstances where Mr. Rohde had subsequently been convicted as charged, the test for bail cannot be lighter, nor the risk of flight.

COMPLIANCE WITH CONDITIONS OF BAIL DURING TRIAL:

[27] The applicant set out in his affidavit that his full compliance with his conditions of his bail during trial must weigh in his favour in the present bid for bail. This submission was also made during both his previous bail applications, after conviction, on 8 November and 6 December 2018 respectively which submission the Court rejected as not being altogether correct.

[28] The issue relates to Mr. Rohde's absence from Court with the recommencement of trial after the December / January recess. On 5th December 2017 the trial Court adjourned for a period of two (2) months and postponed the trial to recommence on 5 February 2018. Application was brought by Mr. Rohde to relax and amend his bail conditions in order to allow him to spend the holiday and Christmas period in Plettenberg Bay. The Court indulged his request and amended the bail conditions accordingly. Mr. Rohde's bail was extended on the conditions as amended and he was warned to appear at 09h30 on the 5th of February 2018 and to remain in attendance until further directed by the Court. With the recommencement of the trial on 5 February 2018, Mr. Rohde was absent. Mr Mihalik, then lead

counsel for Mr. Rohde, indicated that he had been hospitalised, that he is ill and sought a seven day postponement.

[29] No medical certificate was placed on record to confirm that Mr. Rohde had been unfit to attend Court and the proceedings stood down until 12h30 that day for Mr. Rohde to attend Court, facilitated by the Head of the Court Orderlies, Warrant Officer Dirks, and the investigating officer. Mr. Rohde did not return to Court later that day. When the proceedings recommenced the investigating officer confirmed under oath that he attended at Crescent Clinic and informed Dr. Stoloff at the clinic of the purpose of their attendance as instructed by the Court. Dr. Stoloff requested a written Court Order. Mr. Rohde came down to them at reception upon the request of SAPS and they met in a separate room. Mr. Rohde emulated Dr. Stoloff's request for a Court Order and refused to return to Court as per their advices.[20]

[30] When the proceedings commenced later that day, Mr. Mihalik sought to hand up a letter from Dr. Stoloff, addressed to the attorney of record, confirming that Mr. Rohde was in hospital for treatment of a severe major depressive episode. Mr. Rohde was admitted to hospital on Friday, the 2nd of February after an assessment on the 31st of January 2018. The letter further indicated that Mr. Rohde was "*unwilling*" (not unable) to return to Court with the SAPS as no Court Order was produced. Furthermore, Dr.Stoloff indicated in his letter that Mr. Rohde required hospitalization and treatment for a minimum of six (6) weeks in order to strengthen himself for the continuation of the legal process.

[20] Trial record, page 1504 (lines 15 – 25)

[31] The manner in which Mr. Rohde's absence from Court was addressed was cause for the Court's concern and apprehension increased with the unfolding of events during the enquiry which followed. Two sick notes were shown to me in chambers, however, it was not placed on record in Court, the contents of which Mr. Mihalik claimed to be confidential. The contents of the (undisclosed) sick notes in turn expected of the Court to postpone the matter for 6 weeks as Mr. Rohde would be booked off until 19 March 2018 to *"strengthen himself for the continuation of the legal process"* subject to a "*review of [his] mental state after this period"*. This would result practically in the trial resuming in the following term, or sometime thereafter given the reservation of his doctor to review his mental state. Mr. Rohde's illness arose at the end of a two month holiday period, he was hospitalised on the eve of the scheduled resumption of the trial on very serious charges and there was no candour in that regard before the Court.[21] Shrouded in mystery and other alarming factors,[22] it could not be said that the Court could be satisfied and justified to postpone the matter in those circumstances.

[32] Furthermore, the Court expressed concern whether Mr. Rohde would be able to comply with his bail conditions in the period during which the matter was sought to be postponed. Mr. Rohde's bail conditions included having to sign at a police station on specific days of the week, included prohibition from international ports of entry and exit as well as a number of other requirements.[23] When the Court arranged and

[21] Mr. Rohde was admitted to Crescent Clinic on Friday, 1 February 2018
[22] Trial record page 1512, line 8 - 15
[23] Trial record page 1511 – para 5 – 15 and page 1512 – para 8 - 10

called for Dr. Stoloff as a witness in the course of conducting a Section 67 enquiry into Mr. Rohde's absence from Court, counsel for Mr. Rohde objected thereto.[24]

[33] This was a classic cat and mouse game, the defence team together with Mr. Rohde sought to play hide and seek with the Court. A warrant of arrest for Mr. Rohde was then authorised and the proceedings commenced the following day. Mr. Rohde was brought before the Court.

[34] In the present bail application, Mr. Rohde set out in his affidavit at paragraph 124[25] that despite Dr. Stoloff's personal attendance at Court and his availability to answer any queries that the Court might have, the Court issued an order for his arrest. This is also set out as a ground of appeal. This averment is clearly not correct and not born out by the record.

[35] When the Section 67(3) enquiry eventually proceeded, Dr.Stoloff indicated that Mr. Rohde presented a risk to self, that he had stopped taking his prescribed medication two months earlier[26] and that he also expressed doubt that his patient was able to properly follow the legal proceedings and give instructions to his legal representatives. He indicated further that the severe major depression suffered by Mr. Rohde is a mental disorder, however, temporary. He also confirmed that Mr.

[24] Section 67: "Failure of accused on bail to appear"
[25] Record page 28 (present bail application)
[26] Trial record, page 1549 – line 17

Rohde would be unable to attend court for the duration of his treatment, a minimum of six (6) weeks.[27]

[36] The Court indicated that Dr.Stoloff's evidence appears to invoke the provisions of Section 77(1)[28] read with Section 79[29], for Mr. Rohde to be referred for mental observation in terms of the mandatory provisions of the CPA. The matter was postponed for 14 days, until 21 February 2018, subject to, *inter alia*, Mr. Rohde remaining in the care of Crescent Clinic, that the investigating officer monitor Mr. Rohde's stay at the clinic in accordance with set guidelines and that Dr. Stoloff was to file a report with the Registrar of this Court by no later than the 20th of February 2018 regarding his patient's mental health.

[37] Dr. Stoloff filed a report on 20 February 2018 setting out that Mr. Rohde had made a remarkable recovery, illustrative by his capacity to make *"decisive decisions"* which related to his legal representation in that Mr. Rohde terminated the mandate of Mr. Mihalik and two other junior counsel on the 14th of February 2018.[30] This meant that whilst Mr. Rohde who had, just days before, allegedly been mentally unfit for the next 6 (six) weeks, had now (days later) recovered and were able to make competent decisions as confirmed by his attending psychiatrist. By the time that the report was filed, Mr. Rohde had been discharged from hospital and he was found by

[27] Trial record 1552- para 1 – 10
[28] Section 77 of the CPA: Capacity of accused to understand proceedings
[29] Section 70 of the CPA: Panel for purposes of enquiry and report under sections 77 and 78
[30] Report by Dr. Stoloff dated 20 February 2018: *"…..it is my opinion that his ability to concentrate and make logical and tactical decisions, has significantly improved. This has been demonstrated, since then, by his ability to make certain decisive decisions."*

Dr. Stoloff to be fit to resume the trial on the following day, the 21st of February 2018. The trial proceeded accordingly.

[38] The Full Bench in *Petersen* referred to the accused, Mrs Najwa Petersen's medical circumstances and conditions as being a ***"boomerang"*** between events and applications.[31] She too had made remarkable recoveries and relapses which vacillated as the trial and bail enquiries proceeded. The Court in *Petersen* viewed this as bearing negatively on the determination of bail and whether the accused would comply with bail conditions. The sequence of events, when Mr. Rohde was absent from Court on the grounds of ill health and his recovery in the days thereafter to the extent that he was considered fit to resume the trial, creates the clear impression that Mr. Rohde had misrepresented or failed to disclose, the true nature and extent of his medical condition. Like the Full Bench in *Petersen* which was faced with essentially similar relevant facts, this Court is likewise satisfied that Mr. Rohde was also not totally frank, honest and in good faith regarding his state of health and showed an undermine of his bail conditions.

NEW AND OLD FACTS:

[39] Facts placed before this Court that the applicant is suffering hardship in prison; that his financial affairs are resultantly parlous; that legal proceedings declaring his ineligibility as a trustee and director resulting from his conviction had followed requiring his attention; inability to afford legal fees, are arguably not new

[31] 2008 (2) SACR 355 – paragraph 70

facts. These are consequences flowing from incarceration. They are not peculiar to Mr. Rohde and the Court was well aware of same and considered it at previous bail applications. The legal principle that an accused cannot be allowed to repeat the same application for bail based on the same facts is that same would amount to an abuse of the proceedings. However, that Mr. Rohde had been afforded leave by the SCA tilts the argument in his favour that an application afresh can be entertained as to the question of his liberty pending appeal. In *S v Vermaas 1996 (1) SACR 528 (T)* the Court held that once the application is entertained the Court should consider all facts before it, new and old and on the totality come to a conclusion. This requires of the Court to not myopically concentrate on the new fact/s alleged. Whilst in the former applications for bail, it was anticipated that the business of Mr. Rohde would suffer, it is so that certain factual developments had now materialised which together with other facts are worthy of this Court's renewed attention.

CONDITIONS OF INCARCERATION AND THE CORRECTIONAL SERVICES ACT:

[40] Mr. Rohde made a number of allegations in his affidavits that he is being incarcerated at Drakenstein Correctional Facility under circumstances such as being in a single cell for 6 months without interaction with others for the remaining 23 hours per day;[32] that he has no access to newspapers, radio and television;[33] that he is depressed and had not been able to obtain medical care or any psychiatric help or medication whatsoever.[34]

[32] Bail record page 12 – paragraph 44 46
[33] Bail record page 12 – paragraph 45
[34] Bail record page 28 – paragraph 127

[41] I pointed out to Mr. King SC that these circumstances would be irregular and warranted a remedy in the form of a complaint to the Head of Prison and/or the Office of the Judicial Inspectorate as it does not comply with the provisions of the Correctional Services Act 111 of 1998 ('the Act'). Mr. Rohde would be entitled to health care in terms of Section 12 of the aforementioned Act as well as private medical care.[35] Conditions regarding his accommodation in a single cell would have to comply with Section 30 titled: *"Segregation"* and read with section 7 titled: *"Accommodation"*.[36] Complaints and requests are provided for in terms of Section 21 of the Act and if an inmate is not satisfied with the response to his complaint or request, the inmate may indicate this with the reasons for the dissatisfaction to the Head of the Correctional Centre, who must refer the matter to the National Commissioner. The response of the National Commissioner must be conveyed to the inmate.[37] Further provision is made if the prisoner is not satisfied with the aforesaid response, to refer the matter to the Independent Correctional Centre, who must deal with it in terms of the procedures laid down in Section 93 of the Act.

[42] Mr. King SC however did not submit that Mr. Rohde was being discriminated against. These concerns apply to all prisoners alike and appears to be in line with international norms and standards. It was put to Mr. King SC in argument that the preamble to the Correctional Services Act recognised the Bill of Rights in our Constitution, recognises the international principles on correctional matters, and provides for custody under human conditions. In other words the aforesaid Act is a post 1994 legislation which recognises the fundamental rights enshrined in our

[35] Correctional Services Act 111 of 1998, Section 12 (3)
[36] Section 7(2)(e) states that the National Commissioner may accommodate inmates in single or communal cells depending on the availability of accommodation.
[37] Section 21(4)

Constitution. In response it came as no surprise that Mr. King SC abandoned averments of Mr. Rohde being mistreated in prison. After taking of instructions, Mr. King SC informed the Court that Mr. Rohde is getting medical attention and counselling in prison. **Essentially, it boils down to the fact that Mr. Rohde finds incarceration unbearable**.[38] Mr Rohde, it was argued, wants his *"freedom"* and not being *"kept in chains"* and *"in a prison cell"*.[39]

FINANCIAL AND EMOTIONAL HARDSHIP:

[43] The consequences of incarceration are such that it undeniably have a domino and adverse effect on the life, welfare and finances of the prisoner, and indeed for his children and dependants. The preceding bail application on 6 December 2018 had been brought, *inter alia*, that Mr. Rohde's release is warranted in order to provide to the emotional and material needs of his three daughters. Though they are over the age of majority, it is not in dispute that they are not yet self-supporting. At present the two younger daughters, twins aged 19, are pursuing tertiary education. The Court heard at the recommencement of sentencing proceedings earlier this year that a death policy payment was made into the estate of the late Mrs. Susan Rohde of under R1 million rand. Mr. Rohde set out in his affidavit that the children were surviving from the proceeds of the estate of his late wife, however, that this Court must consider as a new and compelling fact to grant bail, that he would have to repay the insurance payment should his appeal be successful. This argument is legally untenable and is a *non sequitor* as the insurance proceeds were paid into the

[38] Transcribed record of bail application – page 36, line 10 onwards
[39] Transcribed record of bail application- page 37, lines 18-20

deceased estate of the late Mrs. Rohde. Any claim arising therefrom would lie against the deceased estate. Notably, this argument was also set out in the notice of appeal to the SCA.[40] Mr. King SC in response abandoned this argument.[41]

[44] The "novel" economic argument in bail applications of this nature is unfortunate and displaced. This argument would mean that any prisoner whose financial circumstances are inevitably affected by incarceration should be released on bail in order to deal with the expected consequences of conviction. Incarceration comes with the inevitable consequence of financial hardship and impoverishment.

[45] In any event, this aspect in the case for Mr. Rohde, must be considered against the evidence led during sentencing proceedings *apropos* the emotional and financial support, means and welfare of the Rohde daughters as well as the findings of the Court during the preceding bail applications which were based on the same facts. Trial record page 3717 states at paragraph 14:

> *"As regards the children the Court accepts that this is a very difficult time for them. I am however satisfied as far as the children are concerned that, notwithstanding as onerous as their path of healing might be, that they are well loved by their extended family and that notwithstanding the grief for all the relatives concerned, they have and by all accounts appear to be taken care of by their families…."*

[40] Transcription of proceedings in bail application – page 43, line 14 onwards
[41] Transcription of proceedings in bail application – page 42, line 25: *"That is correct, M'Lady…. I am not proceeding with that argument."*

[46] It was not suggested or argued that the Rohde children's circumstances, as articulated by the Court in the preceding paragraph, had in any manner materially changed.

LEGAL PROCEEDINGS IN RESPECT OF BUSINESS INTERESTS:

[47] The affidavit by attorney, Mr. Mostert, sets out facts relating to legal proceedings instituted against his client in the South Gauteng High Court. The litigation in question is pending between Lew Geffen No and 1 other and Anthony Louis Mostert, Jason Thomas Rohde and 7 others, case number 19/24201. A notice of opposition on behalf of Mr. Rohde had been filed with further opposing affidavits to follow. Mr. Mostert expressed his view that only Mr. Rohde can deal with an attempt to take over his business by taking management and control of the Company and instructing legal representatives to oppose the High Court proceedings and the hostile attack on the company's business.

[48] It had also been set out in the affidavits in support of bail as well as submissions by Mr. King SC that his client's release on bail would be pivotal in earning the necessary income to secure prosecution of his appeal and the consequent legal costs. At present, Mr. Rohde is essentially represented on a *pro amico* and *pro bono* basis.

[49] In *Petersen*[42] it was submitted for the accused that the trial would take some time to finalise and that her continued incarceration for the duration of the trial would be inconvenient to her and her legal team as far as preparation for trial and ongoing consultation during trial would be concerned. The Court held that these factors, holistically speaking, were not *"weighty factors"* in deciding the issue of bail pending trial.

REQUEST TO LEAD VIVA VOCE EVIDENCE:

[50] This brings me to deal with the issue raised that Mr. Rohde wished to lead *viva voce* evidence in the present application in order to supplement his case. At the hearing of the application, Mr. King SC, confirmed that the facts upon which the application for bail is sought had been placed before the Court. Leave had been given to Mr. Rohde prior to this hearing to place any further facts deemed relevant for the determination of the application for bail, which leave was duly exercised. It is necessary to mention that the facts were not in dispute and the Court could determine the matter on the papers. The record states at page 56, paragraph 20:

> *"COURT: ….the facts which you wanted to place before me, I have read Mr. Mostert's affidavit, was quite helpful in setting out the further litigations probably consequential to section 69 of the Companies Act… his ineligibility to continue to act as a director… I am placed with those facts and it is before me*

[42] Paragraph 66 of the judgment

and I am happy that you have taken the opportunity to supplement the affidavits. Is there anything else you would like to add?

MR. KING: M'Lady, it has been pointed out to me, and correctly so, that this issue of the monetary problem associated with him getting counsel to defend him and to carry on with the appeal, was of grave importance. You will note that it is set out in …. In detail in the affidavit as well of my instructing attorney and that is of grave importance because the issue of being able to carry on litigating is of importance so there was another aspect to that and that was raised with me and that was also at the back of my mind regarding his coming to the Court….. I can take it no further unless Your Ladyship wants to hear me on any other aspect."[43]

REASONABLE PROSPECTS OF SUCCESS ON APPEAL:

[51] Counsel on behalf of the applicant submitted that leave granted means that there is a reasonable prospect of success on appeal. This fact alone does, however, not entitle the applicant bail pending the hearing of the appeal. The order granting leave does not indicate the basis upon which leave had been granted, in other words if had been granted on the basis that there are reasonable prospects of success on appeal or if it had been granted on the basis that there exists a compelling reason for it to be heard on appeal. Mr. Van Niekerk submitted that the petitioning Judges did not have access or sight of the record, that the record is voluminous, that the

[43] Line 20 - 25

grounds of appeal are not borne out by the record and that in his view leave would have been granted for reasons that it would afford the Supreme Court to pronounce on the legal principles set out in the judgment. The argument for the State followed that granting the applicant bail, in circumstances where essentially the application for rests on not more than the fact that he had now been granted leave, would not service the interests of justice.

DOES THE INTEREST OF JUSTICE REQUIRE THE APPLICANT'S FURTHER DETENTION OR WARRANT RELEASE PENDING APPEAL?:

[52] In weighing up all the relevant factors in the determination of the issue of bail pending appeal and the submissions for and against the granting thereof, the Court is mindful of factors which militate heavily against the release of bail pending the appeal. The Court held in *R v Mthembu 1961 (3) SA 468 (D) 470 – 471 A*, the fact that leave to appeal is granted does not entitle a convicted prisoner to be released on bail. Whether to grant bail or not in these circumstances is subject to the discretion of the Court, to be judicially exercised, taking into account all relevant factors. See also *R v Milne & Erleigh (4) 1950 (4) SA 601 (W)* at page 603 and *S v Bruintjies 2003 (2) SACR 575 (SCA) para 6*.

[53] In *S v Masoanganye 2012 SACR 292 (SCA) paragraph 14* the Court held that the seriousness of the offence is a factor which a Court must weigh in the balance, the risk of absconding and the likelihood that a non-custodial sentence might be imposed are factors which the court must also take into account. It is clear from

these authorities that the granting of leave *per se* must not be looked at in isolation. It is a factor to be taken into account along with other relevant considerations. Leave to appeal granted to Mr. Rohde does not mean that the trial is starting *de novo* (afresh) nor that it nullifies or vitiate his convictions and/or sentences.

WOMEN'S LIVES MATTER:

[54] Mr Rohde had been found guilty of murdering his wife and there after elaborately and methodically going about to stage her murder as a suicide. This type of crime is the ultimate and most extreme form of gender based violence. In the event the conviction is confirmed on appeal, there are no reasonable prospects that a non-custodial sentence would be imposed. Crime based on gender is an affliction in our society. The crime against women is a social ill and efforts by government and society are increasing in light of a steady increase of these type of offences. The rate of the murder of women in South Africa is alarmingly high compared to the global average. Attitudes to women determine how women are treated in society. It is the lowered perception of women as human beings, who are entitled to human dignity and equality, which results in the unhealthy social paradigm that they can be victims and in fact end up being victims of crimes because they are women. The judiciary must guard against such perceptions and creating the impression that the lives of women are less worthy of protection.

[55] It is significant to add that the contention that convicted prisoners with business and economic interests must be released on bail in order to salvage and

service same is an argument that must be dismissed for having no place in our democracy and it decries the values of our Constitution.

[56] Releasing Mr. Rohde, who was convicted of the savage murder of his wife, on the basis essentially that he had been granted leave to appeal and that his release would allow him to manage his wealth and other needs and comforts would threaten law and order. It undoubtedly offends the principle of equality and the rule of law which renders all of us equal before the law, irrespective of our economic standing and position in society. Access to justice is enshrined in our Constitution. Mr Rohde's limitation to finance his legal fees, as alleged, will not erode or extinguish that right. His rights of access to justice and legal representation is of course constitutionally protected.

CONCLUSION:

[57] In consideration of the facts and submissions in support and against the granting of bail, viewed individually and holistically, this Court is of the view that releasing Mr. Rohde on bail for the reasons advanced would offend the rule of law and would make a mockery of the criminal justice system. The case for the applicant in support of his bail does not trump the factors warranting his continued incarceration. The applicant did not discharge the onus of proof resting upon him, namely, that it would be in the interests of justice to release him on bail pending his appeal to the SCA. The administration of justice would be seriously undermined if

this Court were to grant bail for the reasons advanced and in circumstances where the applicant had been convicted of such a serious and heinous murder.

[58] In the result, the Court is not persuaded that the facts before it are sufficiently compelling to justify the interruption of Mr. Rohde's sentence of imprisonment. If anything, the interests of justice require that he should continue to serve his 20 year sentence.

[59] Wherefore, the application for bail pending hearing of the applicant's appeal must fail and accordingly, I order as follows:

(i) *The application for bail is accordingly dismissed.*

(ii) *The Chief Registrar of this Court is directed to furnish a copy of this judgment to the Supreme Court of Appeal together with the transcription of the proceedings to ensure that it is placed before the Judges hearing the appeal (Case No:* 483/2019).

_____

SALIE-HLOPHE, J