IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

_____ _____
DATE SIGNATURE

CASE NUMBER : A337/2017

In the matter between:

PATAKA VHONANI DONALD APPELLANT

And

THE STATE RESPONDENT

JUDGMENT

DOSIO AJ:

INTRODUCTION

[1] This is an appeal against the refusal of bail pending appeal, by the Regional Magistrate Mr Hamman, sitting in the Protea Court, Soweto, on the 24th of July 2017.

[2] The appellant was charged with one count of murder, read with the provisions of section 51(2) of Act 105 of 1997 and was sentenced to 12 years imprisonment.

BACKGROUND

[3] The appellant was arrested on the 27th of October 2014. He was released on bail on the 7th of November 2014 on an amount of R2000-00. He remained out on bail until his conviction on the 14th of February 2017. The bail was then revoked. The appellant was sentenced on the 7th of April 2017 and leave to appeal against conviction and sentence was granted on the 24th of April 2017.

[4] The appellant's affidavit for purposes of the application for bail pending appeal contained the following averments, namely;

1.that his family and extended family were suffering emotionally and financially.
2.that he was released on bail of R2000 and so remained until his conviction.
3.that at the time of his release he was apprised of the seriousness of the offence as well as the minimum sentence applicable.
4.that he adhered to all conditions which formed part of his release on bail and that the fact that he spent a lengthy time on bail during his trial should be considered in his favour.
5.that the team leader where he was employed confirmed that his position is still available should he be released on bail.
6.that for purposes of the application he made arrangements to reside at number 4, 5th Avenue Alexandra in a property that belonged to his deceased uncle, and further, that his cousins who reside there, have confirmed that he can stay with them.
7.that he is not a flight risk and will adhere to all conditions imposed and will even submit himself to house arrest and to be fitted with a monitoring device if needed.

[5] The prosecutor in the court *a quo* argued that there was no verification of the address provided by the appellant and neither was there a letter from the appellant's employer confirming the appellant's employment.

[6] Counsel for the respondent contended that the refusal to admit the appellant to bail by the Court *a quo* was correct, in that the appellant failed to discharge the onus resting upon him to adduce evidence that it was in the interests of justice to release him on bail.

[7] The appellant's counsel contended that the Court *a quo* erred in respect to the following, namely;

1. in finding that the appellant had not shown it to be in the interests of justice that he be admitted to bail, and that the Court *a quo* failed to attached sufficient weight to the applicant's previous conduct whilst out on bail as well as his personal circumstances;
2. in finding that the appellant had an onus to show that reasonable prospects of success on appeal exist;
3. in failing to consider granting bail in an appropriate amount coupled with appropriate conditions.

[8] The appellant's counsel contended that no onus rests upon the appellant to show that his appeal against conviction and sentence is likely to succeed. Should it appear that, *prima facie*, his appeal is arguable, and not manifestly doomed to failure, he will have discharged the persuasive burden with which he is notionally saddled. It was contended that in granting the appellant leave to appeal on both his conviction and sentence, the court *a quo* in fact tacitly conceded that the appellant has reasonable prospects of success on appeal against both conviction and sentence. It was further contended that the averments that the appellant would adhere to any conditions imposed, were not contradicted by the State and not dealt with adequately during the judgement by the court *a quo*.

LEGAL PRINCIPLES

[9] It is common cause that the charge falls in the category of offences listed in schedule 5 of the Criminal Procedure Act 51 of 1977 ("Act 51 of 1977").

[10] Section 60 (11) (b) of Act 51 of 1977 states the following:

"(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to -

(b)In Schedule 5, but not in schedule 6, the court shall order that the accused be

detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release."

[11] The learned Harcourt J in the case of *S v Smith and Another* 1969 (4) SA 175 (N) at 177 e- f stated that;

"The Court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby"

[12] In *S v Bruintjies* 2003 (2) SACR 575 (SCA) at 577 para [7] the learned Shongwe AJA, as he then was, stated:

"(f) The appellant failed to testify on his own behalf and no attempt was made by his counsel to have him testify at the bail application. There was thus no means by which the Court *a quo* could assess the *bona fides* or reliability of the appellant save by the say-so of his counsel."

[13] In *S v Mathebula* 2010 (1) SACR 55 (SCA) at 59b-c the learned Heher JA stated at para [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".

[14] In terms of section 65(4) of the Criminal Procedure Act 51 of 1977, the court hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong.

[15] The mere fact that an accused who has been sentenced to undergo imprisonment has noted an appeal, or has been granted leave to appeal, does not automatically suspend the operation of his sentence, nor does it entitle him to bail as of right, especially for a

serious crime such as murder.[1]

[16] Section 321 of Act 51 of 1977 provides:

1. The execution of the sentence of a superior court shall not be suspended by reason of any appeal against a conviction or by reason of any question of law having been reserved for consideration by the court of appeal, unless -

(a) ... [paragraph (a) deleted by section 2 of Act no 33 of 1997]

(b) the superior court from which the appeal is made or by which the question is reserved thinks fit to order that the accused shall be released on bail or that he be treated as an unconvicted prisoner until the appeal or the question reserved has been heard and decided"

[17] The reasonable prospect of success on appeal, the seriousness of the crime for which the applicant has been convicted and whether he is a flight risk are important considerations.

In *S v Williams* 1981 (1) SA 1170 (A) the court said:

"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."

[18] Insofar as the prospects of success on appeal is concerned, in the case of *S v De Abreu*

[1] Ranchod J paragraph 6 in *Babuile and others v The State* (CC32/2014 [2015] ZAGPPHC1110 (13 October 2015) and also *S v Mthembu* 1961 (3) SA 468 (D)

1980 (4) SA 94 (W) it was stated that;

"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."

[19] Counsel for the appellant contended that 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 lessor 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.

EVALUATION

[20] It is important to note that the cases of *S v De Abreu, S v Williams, S v Anderson, S v Hudson and S v Naidoo (supra)* were all decided before the amendments to Act 51 of 1977 which introduced more stringent bail conditions. In the cases cited *(supra)*, the test required was whether there was an arguable case on appeal. However, since the amendments, bail pending appeal against a conviction of a charge falling under the auspices of a schedule 5 offence, the appellant must adduce evidence that it is in the interests of justice to be released on bail. As a consequence of this legislation, the approach to bail pending appeal in respect to a schedule 5 must be less lenient and less liberty orientated than in the past.

[21] This Court cannot also loose sight of the fact that the respondent is opposing this appeal.

[22] The mere fact that the court *a quo* granted leave to appeal does not automatically suspend the operation of his sentence, nor does it entitle him to bail as of right. (See *R v Mthembu supra*). In addition, should the conviction be upheld, nothing short than imprisonment will be imposed. In the event that the conviction is over-turned and the appellant is found guilty of culpable homicide there is still the strong likelihood that a term of imprisonment will ensue.

[23] The charge upon which the appellant has been convicted is a schedule 5 offence and

although the appellant does not have to overcome the higher hurdle of proving exceptional circumstances, as required in a schedule 6 offence, the burden to prove that it is in the interests of justice is not negligible and necessitates a proper and careful evaluation by this Court.

[24] In considering this appeal, even if this Court has a different view, it should not substitute its own view for that of the court *a quo*, because that would be an unfair interference with the court ***a quo's*** exercise of discretion. It is after all the court *a quo* who would have been best equipped to deal with the question of bail, steeped in the atmosphere of the case.

[25] This court must consider all relevant factors and determine whether individually or cumulatively they warrant a finding that the interests of justice warrant his release. Of importance in this regard, are the provisions of section 60 (4) to (9). These provisions will be considered against the background of the appellant's adherence to his bail conditions during the trial, the prospect of a job, having acquired potential alternative accommodation and having no previous convictions. Looking at the seriousness of this matter and the sentence imposed, the following factors are of concern to this Court, namely;

i. in the affidavit, no mention is made why the appellant's children and family are suffering emotionally and financially;
ii. no mention is made of the assets of the appellant, if any, nor where they are situated;
iii. no mention is made whether should the appellant be released on bail it may induce a sense of shock in the community or incite members of the deceased's family to injure or kill the appellant. In the address by the State prosecutor in the court *a quo*[2], it was stated that the family of the deceased had a vested interest in this matter and attended every single appearance up to the finality of the matter;
iv. there is no confirmatory affidavit by the appellant's employer that he indeed has a job for the appellant on his release from custody. Neither is there a confirmatory affidavit from the appellant's cousins that the appellant will be staying with them.
v. the appellant did not present *viva voce* evidence in order to discharge the onus. He relied solely on an affidavit and accordingly the State was unable to cross-examine

[2] Page 48 of the transcript line 8 - 15

the appellant or to test the veracity of the averments which were made in his affidavit. Accordingly the weight to be attached to the averments made in the affidavit are less persuasive than had he taken the stand and given *viva voce* evidence.

vi. the appellant's notional temptation to abscond, is no longer the same as that of an accused person, but has to be a very real consideration as the appellant knows what his punishment entails.

[26] The prospects of success do not in itself amount to 'in the interests of justice' as envisaged by Act 51 of 1977. The mere fact that the court *a quo* considered that the appellant has a reasonable prospect of succeeding on appeal, does not automatically mean that on that basis alone the interests of justice dictate the appellant's release on bail. The court *a quo* stated that the fact that it had made its decision to grant leave to appeal should not be the only factor in considering granting bail. [3] The court *a quo* added in subsequent written reasons [4] that although the appellant attended his trial there was no guarantee that he would not abscond. The court *a quo* added that prior to the appellant's conviction and sentence there was no reason for him to abscond as there were no eye witnesses to verify the involvement of the appellant in the offence.

[27] It is not the function of this Court to analyse the evidence in the court *a quo* in great detail, as that may amount to a dress rehearsal for the appeal to follow.[5] However, after a perusal of the record of the court *a quo*, this Court cannot find any demonstrable misdirection of the court *a quo* in coming to its conclusion on conviction or sentence. The court *a quo* based its finding primarily on circumstantial evidence. In the absence of eye witnesses there was no real reason for the appellant to abscond as he possibly believed the evidence may be insufficient to sustain a conviction. Notwithstanding that he did not abscond prior to the conviction and sentence, which amounts to a persuasive argument to release him once again on bail, the above-mentioned factors at paragraph [25] *(supra)* have weighed heavily against the appellant.

[28] Counsel for the appellant contended that the facts of this case are similar to those in the matter of *Manaka v S* (A417/2015) [2016] ZAGPJHC a judgment delivered on the 15th of January 2016. This Court disagrees. Although the charge was murder as in this matter, the appellant in the *Manaka* case *(supra)* was a mother of two young children. The

[3] Page 53 of the court record at line 18 to 19
[4] Page 65 of the court record
[5] see *S v Viljoen* 2002 (2) SACR 550 (SCA) [2002] 4 All SA 10) at 561g-i

deceased's mother in the *Manaka* case testified at the trial against the incarceration of the appellant, unlike the matter before this Court. Clearly the appellant in the *Manaka* case also had a fixed place of residence where she lived with her two children, unlike the appellant before this Court. This Court does not believe that the appellant has convincingly adduced evidence to support that he will not abscond. Even if there is a reasonable prospect of success on appeal, bail may still be refused due to the gravity of the offence, notwithstanding that there is little danger of the applicant absconding. (see *S v Williams supra*).

[29] On the probabilities, this court does not find that the appellant has successfully discharged the onus as contemplated in section 60 (11) (b) of Act 51 of 1977. He has failed to show that there are factors which in the interests of justice permit his release on bail. Accordingly, this court finds that the court *a quo* correctly refused bail to the appellant.

[30] There are no grounds to satisfy this Court that the decision of the court *a quo* was wrong. The requirements of sections 65(4) of the Act were thus not met.

ORDER

[31] In the result, the appellant's application for bail is dismissed.

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D DOSIO

ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant	Adv A. Nel
On behalf of the respondent	Adv K.T. Ngubane
Date Heard:	4 April 2018
Handed down Judgment:	23 April 2018