REPUBLIC OF SOUTH AFRICA

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

Case Number: SS107/2019

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

25/10/2022
DATE SIGNATURE

In the matter between:

ARNOLD MASEKO **APPLICANT**
(Accused 3 in the trial court)

AND

THE STATE **RESPONDENT**

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] This is an application for bail pending the hearing of an appeal against both conviction and sentence.

Background

[2] On 3 February 2021, the applicant was convicted on two counts of murder, a count of armed robbery and attempted murder. Following conviction, he was sentenced on 8 October 2021 to life imprisonment. The applicant was convicted by Mogotsi AJ sitting as the court of first instance. Previously, the trial judge refused leave to appeal against the conviction and sentence.

[3] Following a petition to the Supreme Court of Appeal and on 15 July 2022, leave to appeal against the conviction and sentence was granted to the Full Court of the Gauteng Division of the High Court, Johannesburg.

[4] On 3 August 2022, following the order of the Supreme Court of Appeal, the applicant duly made his application to appeal his conviction to this Court by way of a notice of appeal served and filed in terms of Uniform Rule 49A of the Uniform Rules of Court. Due to Mogotsi AJ unavailability, the application for bail, pending appeal, is heard by me.

[5] The applicant is currently serving his sentence at the Johannesburg Correctional Centre.

Case Law and Discussion

[6] The bail application is brought pursuant to the terms of section 321 of the Criminal Procedure Act, 51 of 1977 ("the CPA") which reads as follows:

> **"321. When execution of sentence may be suspended**
>
> (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) …
>
> (b) the superior court from which the appeal is made or by which the question is reserved thinks fit to order that the accused 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:

Provided that when the accused is ultimately sentenced to imprisonment the time during which he was so released on bail shall be excluded in computing the term for which he is so sentenced:

Provided further that when the accused has been detained as an unconvicted prisoner, the time during which he has been so detained shall be included or excluded in computing the term for which he is ultimately sentenced, as the court of appeal may determine.

(2) If the court orders that the accused be released on bail, the provisions of sections 66, 67 and 68 and of subsections (2), (3), (4) and (5) of section 307 shall *mutatis mutandis* apply with reference to bail so granted, and any reference in –

(a) section 66 to the court which may act under that section, shall be deemed to be a reference to the superior court by which the accused was released on bail;

(b) section 67 to the court which may act under that section, shall be deemed to be a reference to the magistrate's court within whose area of jurisdiction the accused is to surrender himself in order that effect be given to any sentence in respect of the proceedings in question; and

(c) section 68 to a magistrate shall be deemed to be a reference to a judge of the superior court in question."

[7] In *Commentary to the Criminal Procedure Act*: Du Toit *et al*, the learned authors commented with reference to various cases as follows pertaining to what weight should be afforded to the fact that an applicant in a bail application pending appeal obtained leave to appeal:

"The mere fact that leave to appeal is granted does not entitle the convicted prisoner to be released on bail (*S v Oosthuizen & another* 2018 (2) SACR 237 (SCA) at [29]; *S v Masoanganye & another* 2012 (1) SACR 292 (SCA) [14]; *S v Scott-Crossley* 2007 (2) SACR 470 (SCA); *R v Mthembu* 1961 (3) SA 468 (D) 470-471A). Although in *R v Fourie* 1948 (3) SA 548 (T) the opinion was expressed that accused who have been convicted of serious crimes should not be released on bail, the overriding consideration remains the potential prejudice to the administration of justice caused by the appellant's release. If the court is convinced that the administration of justice will not be prejudiced by the release of the accused and that his prospects of success on appeal are, moreover, good, the court will readily grant bail, even though the accused has been convicted of a serious crime (cf R v Mthembu (supra) 470-471A; *R v Milne & Erleigh* (4) 1950 (4) SA 601 (W) 603C-D."

[8] In *S v Masoanganye and Another*[1] Harms JP found as follows:

> "I now revert to the appeal proper. An application for bail after conviction is regulated by s 321 of the Act. It provides that the execution of the sentence of a superior court 'shall not be suspended' by reason of any appeal against a conviction unless the trial court 'thinks it fit to order' that the accused be released on bail. This requires of a sentenced accused to apply for bail to the trial court and to place the necessary facts before the court that would entitle an exercise of a discretion in favour of the accused. Compare *S v Bruintjies* 2003 (2) SACR 575 (SCA) para 8."

[9] In *S v Bruintjies supra*,[2] the Supreme Court of Appeal dealt with a similar case, where the applicant was convicted and sentenced on counts within the ambit of section 60(11) of the CPA. The Supreme Court of Appeal found as follows;

> "The section deals, on the face of it, with unconvicted persons. However, it must follow that a person who has been found guilty of a Schedule 6 offence cannot claim the benefit of a lighter test. It was conceded that the mere fact that a sentenced person has been granted leave to appeal does not automatically suspend the operation of the sentence, nor does it entitle him to bail as of right. (See *R v Mthembu* 1961 (3) SA 468 (D))."

[10] Therefore, the test applied to consider the bail applications, after sentence pending appeal, was to apply the criteria of either section 60(11)(a) or (b). In the case of *Bruintjies supra* the court found that the appellants bore the onus to persuade the court that exceptional circumstances exist, which, in the interests of justice, permit their release on bail. Thus, exceptional circumstances will have to be shown before a person convicted of schedule 6 offences and sentenced to long term imprisonment is released on bail pending an appeal. Despite the wide discretion provided for in section 321, a starting point should be that exceptional circumstances will have to be shown to be granted bail which effectively suspends the sentence of the applicant until his appeal is dealt with.

[11] In *S v Rohde*,[3] Van der Merwe JA, delivering the majority judgment, made the following comment dealing with a bail application after conviction and sentence:

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[1] 2012 (1) SACR 292 (SCA) at paragraph [13].
[2] *S v Bruintjies* 2003 (2) SACR 575 (SCA) at paragraph [5].
[3] 2020 (1) SACR 329 (SCA) at paragraph [22].

"As my colleague points out, s 60 (11)(b) of CPA is applicable."

[12] Section 321 of the CPA provides the court with a wide discretion through the use of the words "thinks fit to order that the accused be released on bail…".

[13] After conviction and sentence, the granting of bail becomes more difficult for an applicant to obtain, for the very reason that a court of law already pronounced on the guilt of the accused. The presumption of being innocent no longer avails an applicant.[4]

[14] I will therefore, approach this matter and exercise my discretion on the basis that the applicant has to adduce evidence to persuade this court that exceptional circumstances exist which, in the interest of justice, permit his release on bail.

[15] The applicant brought a bail application premised primarily on the fact that by granting the leave to appeal, the Supreme Court of Appeal, by implication, found that the appeal would have a reasonable prospect of success. The further grounds were that he was not a flight risk, prior to him being convicted, he was an uber driver and therefore gainfully employed, he had an unblemished record and that he faithfully complied with his bail conditions while on bail prior to his conviction, and as such, the necessary requirements to be released on bail have been answered in his favour.

[16] The applicant's affidavit, for purposes of the application, contained the following averments:

(a) He is 42 years of age, born on 30 January 1980 in Soweto, Johannesburg where he grew up;

(b) He is a South African citizen;

(c) He has a fixed address, 19 Horwood Street, Edenvale, Johannesburg, which is the address where he resided before he was detained;

(d) Since birth, he resided at 505 Sitha Street, Zondi, Soweto, Johannesburg, where his family currently reside;

(e) He is the guardian of his late brother's orphaned son, Siyabonga Maseko, who is 17 years old;

(f) He is in a long-term relationship with Ms Mhlanga, and prior to his arrest and subsequent incarceration he was due to be married.

[4] *S v Bruintjies* 2003 (2) SACR 575 (SCA) at paragraph [5].

(g) He does not possess a passport nor has he ever travelled outside the Republic of South Africa ("South Africa") and he has no family links outside the Republic;

(h) All his assets, worth about R50 000, are in South Africa and he does not have any assets outside the country;

(i) He obtained a diploma in book keeping and a certificate in Grade A security;

(j) Prior to his conviction and subsequent incarceration, he was self-employed as an uber driver, utilising his personal fully paid-off vehicle;

(k) Save for the present matter, he has no previous convictions and no pending criminal cases against him; and

(l) The applicant indicated that he has no intention of absconding and living a life as a fugitive.

Submissions by the Applicant

[17] It was argued on behalf of the applicant that there is a high likelihood that his conviction will be overturned. Mr Seckel argued that the conviction of the applicant was premised on limited evidence. The following points were raised, firstly, the trial court found that the applicant was linked to the armed robbery in that his vehicle was used during the incident as a get-away car. Video footage was provided during the trial to corroborate the averment by the State.

[18] However, the applicant argued that the video footage shown during the trial was shown in part and thus, the trial court made a finding without viewing the entire footage. If the entire video footage was placed before the trial court, it would have concluded that there were at least two white Toyota Corollas at the scene (as opposed to its finding that there was only one) and furthermore, that the applicant had a reasonable explanation for being at the school's premises on the day of the incident.

[19] Secondly, it was common cause that the deceased persons, Ncube and Gcwabaza, were perpetrators, killed either by security guards or police officers opening fire on the robbers at the scene in defence of their own lives and those of the learners and school staff. Accordingly, the killing of Ncube and Gcwabaza was "lawful" and there was no unlawful consequence to be attributed to the applicant, even if he was part of a *common purpose* to rob the school, the definitional element of the offence, is missing, namely "unlawfulness".

[20] The applicant argued that the conduct which was attributed to him was that of the security guards and police officers who responded to the robbery, and who were not part of the *common purpose* to rob the school. The guards and police were not "contracting parties" to the *common purpose*. A finding of guilt in these circumstances is tantamount to a *versari in re illicita* doctrine. In terms of the *versari* doctrine a person is criminally responsible for all the consequences flowing from his illegal activity.

[21] The finding by the trial court of guilt, in such circumstances where definitional elements of murder are missing and, on the basis that the applicant was involved in an unlawful activity, would be tantamount to the application of the *versari* doctrine in a disguised form and therefore will not stand on appeal.

Submission by the Respondent

[22] It was argued on behalf of the State that applicant failed to show such exceptional circumstances. The State argued for the dismissal of the application.

Discussion

[23] I am alive to the fact that the mere granting of leave to appeal by the Supreme Court of Appeal does not automatically suspend the operation of a sentence imposed, nor does it entitle the applicant to bail as of right. In addition, should the conviction be upheld, nothing short of a long term of direct imprisonment will be imposed. In the event that the conviction is over-turned, the applicant would have served imprisonment as an innocent man.

[24] As already referred to above, it was argued on behalf of the applicant that there is a high likelihood that his conviction will be overturned. Various arguments were raised in this regard, which is unnecessary to discuss for purposes of this application, these arguments will be fully ventilated during the appeal. As stated in *S v Viljoen*,[5] if I consider the merits of the appeal now, it would become a dress rehearsal for the appeal to follow. Findings made at this stage might also create an untenable situation for the court hearing the appeal on the merits.

[5] 2002 (2) SACR 550 (SCA) at 561 G-I.

[25] Therefore, I am of the view, in allowing the video footage at these proceedings, a bail application pending appeal, will place the appeal court in a precarious situation. I thus ruled that the evidence will not be allowed.

[26] In this matter, due to reasons unknown to me, the Presiding Judge was not available to entertain the bail application. This Court must therefore do the best it can in the circumstances. I am required to make an independent finding to determine the prospects of success on conviction, coupled with all other relevant circumstances of this case.

[27] The applicant's first burden is that he bears an evidential burden of showing that exceptional circumstances exist for him to be released on bail, pending the outcome of the appeal. The next difficulty for the applicant is his changed status - he was convicted and as such the presumption of innocence no longer operates in his favour.

[28] Furthermore, I have to take into consideration, that at this stage, there exists an increased risk of abscondment because the applicant was sentenced to a lengthy term of imprisonment.

[29] Being granted leave to appeal is an important consideration, but it is not, in itself, a sufficient ground to grant an accused bail. In terms of s 17(1) of the Superior Courts Act 10 of 2013, leave to appeal may only be granted where the judges concerned are of the opinion that "the appeal would have a reasonable prospect of success; or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration".[6] Even if one were to accept for present purposes that the applicant has reasonable prospects of success, this is but one of the factors to be considered.

[30] It is evident that although the applicant was convicted of serious crimes, and therefore I have to consider whether there is a risk that he will abscond or not, the applicant attended the trial proceedings diligently, notwithstanding the knowledge of the seriousness of the offences preferred against him. Now that the applicant has been granted leave to appeal, and has therefore a "reasonable prospect of success", it can be

[6] Section 17(1)(a) of the Superior Courts Act, 10 of 2013.

argued that he has less inducement to abscond. An important fact that I consider in this matter before me, is the evidence tendered during the trial, in that immediately after the crimes were committed, the applicant reported to the police and informed them of what had transpired and how he became involved in the case. In that sense, the applicant co-operated with the police.

[31] Regarding the personal circumstances of the applicant, I take note of the fact that he has no previous convictions or pending cases against him, his roots are in South Africa, Johannesburg and he fully co-operated with the police prior to conviction.

[32] Having considered all the relevant circumstances, individually and cumulatively as well as the personal circumstances of the applicant, including his family ties, previous work record, his good track record in relation to previous court appearances coupled with the fact that the Supreme Court of Appeal granted him leave to appeal, I am satisfied that the applicant should be granted bail.

[33] The applicant established, on a balance of probabilities, that exceptional circumstances exist and that the interests of justice permit his release on bail. In the result, he is entitled to bail on appropriate and stringent conditions.

[34] The applicant has previously been out on bail of R 2000, but in the light of the change in circumstances, I am of the view this amount should be increased to R10 000.

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

1. The draft order marked “X” is made an order of court.

CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 13h00 on 25 October 2022.

DATE OF HEARING: **25 October 2022 – 09h30**

DATE JUDGMENT DELIVERED: **25 October 2022 – 13h00**

APPEARANCES:

For the Applicant:
Smit Sewgoolam Incorporated
Ashley Zwelihle Seckel
12 Avonwold Road
Saxonwold, Johannesburg
Tel: 011 646 0446
E-Mail: ashley@smitsew.co.za

For the Respondent:
T J Xakaza (Counsel For The Respondent)
Office of The Director Of Public Prosecutions
Private Bag X 8
Johannesburg 2000
Contact Numbers: (011) 220 4043/082 818 458102