Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: A11/2022

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

22 March 2022

In the matter between:

M[...] K[...] Appellant

And

THE STATE First Respondent

JUDGMENT

MALANGENI AJ

[1] This is a bail appeal arising from post-trial proceedings in that the appellant has been convicted and sentenced. He noted leave to appeal against conviction and sentence before the trial court. Such application was only granted in respect of sentence. He later applied for bail pending appeal of which was refused by the trial court. He is now noting an appeal against refusal by the trial court to admit him to bail pending appeal.

[2] Bail appeal is governed by section 65(4) of Act 51 of 1977. This section sets out the approach to be adopted when hearing a bail appeal. It provides as follows: *"The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event, the court or judge shall give the decision which in its opinion, the lower court should have given."* In ***S v Barber 1979 (4) SA 218 (D)***, Hefer J stated as follows (at 220E-H) *"It is well known that the powers of this court largely limited where the matter comes before it on appeal and not as a substantive application for bail. This court has to be persuaded that the magistrate exercised the discretion which 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 his discretion. I think it should be stressed that, no 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."*

[3] Appellant's bail pending appeal was conducted before the court a quo within the ambit of section 60 (11) (b) of Act 51 of 1977 by consent between the parties. This court has to consider the schedule under which the offences fall pre-trial stage. In ***Scott-Crossley v The State (2007) SCA 46 (RSA)*** paragraph 3 it was held that *"In S v Bruintjies 2003 (2) SACR 575 (SCA) this court held that (at paragraph 5) a person who has been found guilty of a schedule 6 offence and been sentenced cannot claim the benefit of a lighter test than that imposed in the case of convicted persons by section 60(11)."* Section 60(11) (b) of the act provides that *"In Schedule 5 but not 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 satisfied the court that the interests of justice permit his or her release."

[4] In consideration of bail pending appeal the other issue that needs to be taken into account is: Prospects of success on appeal. The test of reasonable prospects of success was said in ***S v Smith 2012 (1) SACR 567 (SCA)*** para 7 that *"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be sound, rational basis for the conclusion that there are prospects of success on appeal."*
On the same breath, *In* ***S v William (1981) (1) SA 1170 (ZA)*** *at* 1171H-1171B it was said that *"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 a 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 interconnected 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."*

[5] Even if appellant has managed to establish prospects of success, that does not mean he is entitled as of right to be granted bail. In ***S v Masoanganye 2012 (1) SACR 292 (SCA)*** para 14, Harmse AP (as he then was) pointed that *"Since an appeal requires leave to appeal which, in turn, implies that the fact that there are reasonable chances of success on appeal, is on its own not sufficient to entitle a convicted person to bail pending an appeal:* ***R V Mthembu 1961 (3) SA 468 (D****) at 417A-C. What is of more importance is the seriousness of the crime, the risk of flight, real prospects of success on conviction, and real prospects that non-custodial sentence might be imposed."*

[6] The appellant has based his appeal on the following grounds;

i. The Learned Magistrate, by refusing the Appellant's application, found the interests of justice do not permit the release of the Appellant on bail.

ii. The Learned Magistrate applied the incorrect test from the onset by finding that the appellant's application resorted within the ambit of Schedule 5 of the CPA, whereas the application resorted within the ambit of Schedule 1 of the CPA.

iii. It is respectfully submitted that the court a quo could not have refused bail as a result of a possibility or a risk that one of the factors as stipulated in Section 60(4) (a-e) of the CPA might be present. The court must be convinced on a balance of probabilities, based on the evidence adduced.

iv. The Appellant was convicted and sentenced on Schedule 1 offences. The burden was thus on the State to prove that the interests of justice do not permit his release on bail. The State did not adduce any evidence of any nature.

v. The Learned Magistrate erred by affectively finding that the Appellant does not have a business. The Magistrate relied on the address of the prosecutor,

which does not have any evidential value. The State did not adduce any evidence of any nature The Magistrate's finding is not supported by evidence.

vi. The Learned Magistrate failed to consider the Appellant's proven pattern of attending Court procedures.

vii. The Learned Magistrate failed to consider that the evidence the appellant adduced is conclusive in the face of the State's failure to adduce any challenging evidence and/or any evidence of any nature.

viii. It is respectfully submitted that even though the presumption of innocence no longer operates in favour of the Appellant, it to be no reason to refuse the Appellant bail. The Learned Magistrate therefore erred by not acknowledging that bail is non-penal in character.

ix. In not holding on a conspectus of probabilities that the "interests of justice" permit the release of the Appellant.

x. In not granting bail to the Appellant pending the finalization of his appeal.

[7] Whilst applying for bail in the court a quo, the appellant's affidavit contained the following averments;

i. He regards house no […], Q[…], Zone 2, Soweto as his residential place.

ii. He is married and a father of two children, aged 11 and 2 years.

iii. He is self employed as a construction worker at Kayden Projects (Pty) Ltd and employ approximately 30 people.

iv. His income from occupation is plus minus R20 000 per month.

v. He owns household goods to the value of about R200 000 and also owns a Volkswagen golf valued at R40 000.

vi. He has a personal savings of R20 000 of which it cannot be easy to forfeit.

vii. He does not have any pending cases and previous convictions.

viii. He does not have any travel documents and does not have relatives and assets outside South Africa.

ix. He has been out on bail since 2013 until he was convicted on 19 August 2021.

x. He cannot run his business whilst incarcerated, his wife cannot assist as she is employed.

[8] Factors in favour of the appellant play an important role when bail pending appeal is considered. In ***S v Jason Thomas Ronde v The State*** case no. 1007/2019 [2019] ZASCA 193 (18 December 2019) paragraph 10: The court in considering bail should take factors that are in favour of the appellant such as a stable home and work environment, strict adherence to bail conditions over a long period and a previously clear record. The court said: *"The prospect of success may be such a circumstance, particularly if the conviction is demonstrably suspect. It may, however, be insufficient to surmount the threshold if, for example, there are other facts which persuade the court that society will probably be endangered by the clear evidence of an intention to avoid the grasp of the law. The court will also take into account the increase risk of abscondment which may attach to a convicted person who faces the known prospect of a long sentence."* From the affidavit of the appellant submitted before a court a quo, there is no reference to prospects of success. To establish prospects of success, I am alive to the fact that a court does not have to analyse the evidence of the trial court in depth. In S v Bruintjies (supra), it was said if the evidence is extensively analysed it would become a dress rehearsal for the appeal to follow.

[9] During his bail application, it is not clear whether applicant owns a business thereby becoming an employer or is employed earning a sum of +- R20 000.00 per

month. This is a serious uncertainty. The issue of applicant having a business caught the trial court by surprise during bail application. The trial court in its judgment commented as follows: *"So all of sudden when the court imposed the sentence a business is mushrooming now, a business where he is alleged to have employed 30 people, which business is alleged to have been run by his wife who failed to run it when he is in custody, but surprisingly it was never said that the money from the business will be used to pay legal fees."*

[10] The business and personal assets are crucial factors that play a major role in favour of the bail appellant. This view is supported by Respondent's submissions as shown in paragraph 12 of heads of arguments. This paragraph reads as follows: It so that the factors regarding the personal assets and the occupational ties of a bail appellant, are relevant for the consideration of section 60(4) of the act. It is further so that the appellant in his initial bail application relied heavily on these factors in his attempt to secure bail. I indicated in paragraph 8 supra that factors in favour of the appellant play an important role. Appellant failed to provide the court with the particularity of his business in the form of for example registration number and SARS clearance certificate and or anything towards that so as to prove its existence. In the submission that appellant owns a business sufficient information was not presented.

[11] It is true and correct that the factors to be considered on whether one has to be released from detention or not are covered under section 60(4)(a)-(e) of CPA.

[12] The appellant's counsel in the heads of arguments: Paragraphs 35.5.1 to 35.6.4 referred this court to different cases wherein accused persons in different cases (fraud or theft) received sentences in terms of section 276(1) (i) of Act 51 of 1977. During oral submissions, he indicated that in respect of the cases he referred to accused was given such sentences whereas the money or amount involved was more than a million. However, in respect of the appellant all the twenty one offences taken together are in range of five hundred and ninety five thousand rand.

[13] In the court a quo, the appellant was sentenced on 21 fraud charges and one count of contravening section 6(a) of Prevention of Organised Crime Acts 121 of 1998. In respect of each count, he has been given direct imprisonment. I do not

intend to even attempt to predict what sentence/s the appellant may receive from the appeal court. Whether such would be in the form of custodial or non-custodial. I am alive to the fact that sentencing is the most difficult stage in the proceedings, that is why it is always said "There is no one size fits all". That issue is left in the discretion of the appeal court. (*S v Sadler 2000 (1) SACR 331 (SCA)* para [10] and *S v Kgosimore 1992 (2) SACR 238 (SCA).*

[14] Since appellant has already been convicted and sentenced, he is no longer having that presumption of innocence. Therefore, he is no longer a candidate to benefit from section 35(1)(b) of Act 108 of 1996. This section provides that "Everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions". The test in a post-trial bail application is heavier than bail application in a pre-trial stage. In respect of the former stage, the applicant has to come up with sound reasons, in order for him to be admitted to bail. At this stage, the applicant has to go further, (i.e.) convince the court that there are prospects of success in his appeal. He must satisfy the court that he will serve the sentence in the event the appeal court directs so. That is there is no likelihood of him evading the serving of sentence. All in all, he must satisfy the court that he is not a "flight risk".

[15] In appellant's heads of arguments, paragraph 13.7, his counsel submits that: the appellant was arrested on the 8th of March 2013 and religiously attended court proceedings for a period of approximately 9 (nine) years and five months, until his bail was withdrawn by the court a quo, upon his conviction on 19 August 2021.

[16] I need to mention that by that time appellant was still enjoying his presumption of innocence, he was not aware of the nature of sentence he would receive. The difference is that currently we are dealing with the appellant having been given 48 years (forty-eight) direct imprisonment.

[17] The fact that he attended the pre-trial stage until the finalisation of the case is not a guarantee that he will not evade the serving of sentence. His counsel further submitted that the trial court by granting him leave to appeal was agreeing that there are prospects of success. The Sate counsel also conceded that when it comes to

sentence, prospects of success do exist. When one has been granted leave to appeal, it does not mean that he should be granted bail. In Menyuka v S (SS216/2012) para 27: It has been found many times by our courts, including by the Supreme Court of Appeal, that the mere fact that an accused obtained leave to appeal, either from the trial court or from the Supreme Court of Appeal upon petition, is not necessarily on its own a sufficient factor to entitle a convicted accused to be released on bail. This does not establish exceptional circumstance in favour of the granting of bail.

[18] The decision whether to grant bail or not lies with the court hearing such application. It is not easy to conclude that the court hearing bail application exercised its discretion wrongly in dismissing the application. There must be substantial reasons in believing so. Then if none, it then remains that the presiding judicial officer's decision is not wrong. In R v Dhlumayo and Another 1948 (2) SA 677 (A) at 678, the court stated: "An appellate court should not seek anxiously to discover reasons adverse to the conclusions of trial judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered". I have considered the personal circumstances of the appellant that: his family ties are within South Africa. That he had been on bail from 2013 until 2021 when he was sentenced. However, such circumstances do not make him a better candidate to be released on bail. He has to satisfy the court that the interests of justice permit his release.

[19] I do not see any ground for me to interfere with the trial court's decision. Appellant failed to meet the requirements of section 60(11) (b) and further failed to show that there are prospects of success in his appeal.

[20] Appellant's appeal stands to fail.

ORDER

In the result, the following order is made:-

1. The appellant's appeal against refusal of bail is dismissed.

M MALANGENI AJ
Acting Judge of the High Court
Gauteng Division

Date of delivery:	22 March 2022
Date of hearing :	15 March 2022
Appearances:	
On behalf of the Applicant:	Adv R Gissing
Instructed by:	Strauss De Waal Attorneys
On behalf of the Respondent:	Adv M Sereme
Instructed by:	Director of Public Prosecutions