REPUBLIC OF SOUTH AFRICA

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

CASE NO: SS14/2020

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

Date: ……………   ……………………..

In the matter between:

BONGANI SLENCE BALOYI Applicant

and

THE STATE Respondent

JUDGMENT

STRYDOM J

[1] This is a bail application for bail pending appeal to the Full Bench of this Division. Leave to appeal was granted to the applicant by the Supreme Court of Appeal against his conviction and sentence.

[2] The applicant was tried and convicted on 3 counts of attempted murder and on one count of murder read with section 51(1) of Criminal Law Amendment Act 105 of 1997.

[3] The applicant was sentence on 11 June 2021 to an effective term of 18 years imprisonment by my brother Mabesele J. For reasons unknown to this court Judge Mabesele could not hear this bail application and he allocated this application to this court.

[4] As this court did not preside over the matter it rendered it difficult for this court to consider the soundness of the conviction as a record of the proceedings were not available to this court. In the exercise of a discretion to grant bail the court will have to rely more on the fact that the applicant obtained leave to appeal from the Supreme Court of Appeal not only against his sentence but also against his conviction.

[5] The parties before me in this application failed to appreciate that this bail application was an application pursuant to section 321(1) of the Criminal Procedure Act 51 of 1977 ("CPA"). This section was not referred to in the heads of argument filed on behalf of the state and was also not referred to by counsel for the applicant during his oral address. This court made counsel aware of this section.

[6] This section determines 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- (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…"*

[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]; Sv 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."*

See also S v Rhode 2020 (1) SACR 329 (SCA) and Bonginkosi Menyaka v The State, SS216/2012 a judgment delivered on 24 February 2021 where this

court discussed the issues pertaining to bail pending appeal after leave to appeal was granted by the Supreme Court of Appeal.

[8] Upon a reading of section 321(1) of the CPA it becomes clear that this court is afforded a wide discretion to grant bail considering that the legislator used the phrase: *“think fit to order that the accused be released on bail”.*

[9] 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 avail an applicant. See S v Bruintjies 2003 (2) SACR 575 (SCA) at para 5.

[10] Applicant was charged and convicted, *inter alia*, on a count of murder read with section 51(1) of the Criminal Procedure Act. His previous bail application would thus have been applied for and granted pursuant to section 60(11)(a) of the CPA.

[11] The applicant had to advance evidence which satisfied the court that exceptional circumstances existed which in the interest of justice permitted his release. Applicant must have convinced a magistrate that this was the case as bail in an amount of R5000 was granted. It is common cause that applicant stood his bail until he was sentenced.

[12] It was argued that the test stated in section 60(11)(a) of the CPA should now again be applied and that applicant will have to show exceptional circumstances before this court should grant bail despite the fact that section 321 does not bring section 60(11)(a) into the fray. This section deals with accused before conviction. I would agree with the state that this test should

again be applied, in ordinary course, as the applicant cannot now be in a better situation as before conviction. See: *S v Bruintjies supra.*

[13] It was argued on behalf of the state that applicant failed to show such exceptional circumstances. The state asked for this application to be dismissed.

[14] The incident which gave rise to the conviction of applicant was described as a "road rage" incident. Applicant and deceased got involved in some kind of argument, which according to the judgment started with a physical altercation. Applicant relied on self-defence but the defence was rejected by the trial court. He was convicted on the basis that he shot deceased and fired further shots after the deceased got back into his vehicle. It was found by the trial court that the objective evidence of the doctor, who performed the post-mortem, supported the version of the state. Despite this finding the Supreme Court of Appeal was of the view that a reasonable prospect existed that applicant's conviction could be set aside. Otherwise leave would not have been granted.

[15] Considering the findings and judgment of the trial court I am of the view that another court may at least find that the murder was not committed after pre-meditation or planning. As this court has a wide discretion to either grant or refuse bail at this stage I intend, for purposes of this bail application apply the test for bail envisaged in section 60(11) (b) of the Criminal Procedure Act ("CPA") instead of the test envisaged in section 60(11)(a). The former section refers to crimes referred to in Schedule 5 to the CPA whilst the latter refers to crimes mentioned in Schedule 6 to the CPA. Schedule 5 includes murder and Schedule 6 includes murder which was planned and premeditated. This would mean that the applicant did not have to show exceptional circumstances but

had to adduce evidence which satisfied this court that the interest of justice permits his release. That is the test referred to in section 60(11)(b). As part of applying this test the court will have to factor in the changed circumstance of the applicant now being convicted and sentenced to an effective 18 years imprisonment.

[16] This court has a wide discretion but will accept that at this stage bail should not be granted unless the court is convinced that the interest of justice would not be put in jeopardy by the granting of bail to the applicant.

[17] It was argued that the applicant has now lost his permanent employment and this made him a flight risk. This submission in my mind has no merit. If the applicant previously did not flee and fail to see that just because he now lost his employment, he will not stand his sentence.

[18] Having considered the personal circumstances, including his family ties and previous work record, of the applicant, 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 against his conviction the court is satisfied that applicant should be granted bail. Applicant satisfied this court that the interest of justice permits his release at this stage.

ORDER

[19] The following order is made:

19.1 The applicant is granted bail in the amount of R10 000 under the following further conditions.

19.2 The applicant is to pursue his appeal in the manner and within the time periods stipulated in the Criminal Procedure Act or any other applicable Act and the Rules of this Court, failing which his bail stands to be cancelled upon application by the State.

19.3 Should the appeal of the applicant fail to the extent that he still have to serve a period of imprisonment then the applicant should hand himself over, within 3 days of notification, to the registrar of criminal appeals of this court.

19.4 The applicant should remain to reside at 10221 Denmark Street, Cosmo City, Extension 9, Randburg. If the applicant have to move from this address he must inform the registrar of this court of his new address before he moves.

19.5 The applicant is prohibited to leave the country or to apply for a passport.

RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date on the roll:	9 May 2022
Date of Judgment:	16 May 2022
Counsel for the applicant:	Adv. N. Makhubela
Counsel for the respondent:	Adv. V. Dube