

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: A09/2024

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

14 March 2024 _____

DATE

SIGNATURE

In the matter between:

HAROUN, ESA

First Appellant

HAROUN, SUHAIL

Second Appellant

and

THE STATE

Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 14 March 2024.

Key words: Criminal Procedure - Bail Appeal- Magistrate Court- appeal by the first appellant dismissed but successful in respect of the second appellant.

JUDGMENT

Mudau, J:

Introduction

[1] This is an appeal against the refusal by the regional magistrate, Johannesburg to admit the appellants to bail pending appeal. Having heard counsel, read the papers, and considered the matter I granted the following order in respect of the second appellant only:

“1. Bail is granted to the second appellant in the amount of R10000.00 Ten Thousand Rand) under the conditions that:

1.1 The second appellant should not leave the province of Gauteng without the permission of the Investigating Officer;

1.2 That the second appellant will reside at 60 Limerick Road, Crown Gardens 1 Johannesburg South until the finalisation of the appeal;

1.3 The second appellant is to report to the Booyens Police Station twice a week between 06h00 and 18h00 on a Monday and a Friday.

1.4 The second appellant shall not apply for any travelling documents until the appeal is finalised;

1.5 The second appellant shall report to the Clerk of the Court, Criminal Appeals, Johannesburg, Room G72 within two days after the appeal is either dismissed or struck from the roll”.

Background facts

[2] The first appellant was convicted of murder read with section 51(2) of Criminal Law Amendment Act 105 of 1997 (Minimum Sentencing Act) for unlawful possession of a firearm and unlawful possession of ammunition on 31 August 2023. The second appellant was only convicted of murder read with section 51(2) of the Minimum Sentencing Act. The appellants were initially released on bail during their earlier appearance in court. Bail was subsequently extended until their next appearance or sentencing proceeding on 13 November 2023. The first appellant was sentenced to an effective 15 (fifteen) years imprisonment. the second appellant was sentenced to 5 (five) years

imprisonment in terms of Section 276(1)(i) of Criminal Procedure Act 51 of 1977(Criminal Procedure Act).

- [3] The appellants applied for leave to appeal against their convictions on 11 December 2023. In addition, the first appellant also applied for leave to appeal against his sentence. Leave to appeal was granted. The appellants applied for bail supported by affidavits pending appeal on 14 December 2023 on an unopposed basis, which was refused.
- [4] The appellants contend that the magistrate erred in finding that the appellants may not attend at the clerk of the court to serve their sentence in the event of the appeal failing and that it was not in the interests of justice to release the appellants on bail pending appeal. Counsel for the appellants submitted that, the appellants attended court on two occasions before they were sentenced, aware of the fact that they were facing a possible sentence of imprisonment.
- [5] Regarding the merits leading to incidents of the crimes, on the first appellant's account and briefly stated, he was travelling south to north leaving the BP garage towards the M1 highway. The road leading towards the highway from the garage is a one-way out. As he was driving, a vehicle driven by the deceased drove along the one-way in the opposite direction from the wrong side of the road thus endangering his life and that of his family members. He took pre-emptive action to avoid an accident but afterwards decided to drive to the owner of the other vehicle to ask him why he was driving on the wrong side of the road. Upon confronting the deceased at the garage, the deceased hit him around like a child to the back of his car, punched and stabbed me on my face below his left eye. The second appellant intervened. He saw the second appellant, his son, being manhandled and assaulted by the deceased, violently. Upon seeing the deceased lifting his hand with a knife attempting to stab his son which led to the fatal shooting.
- [6] The magistrate concluded, after analysing the video footage evidence as well as several witnesses (inclusive of evidence by petrol attendants at the scene) that the appellants with the help of a second son against whom charges were withdrawn were the aggressors in dismissing their version. The deceased who according to the magistrate was unarmed sustained several gunshot wounds.

The pre-sentencing report on behalf of the first appellant records that he “experiences suicidal ideation post-incident”.

- [7] In opposing bail on appeal, counsel for the State submitted that one of the significant considerations in this appeal is the strength of the case against the appellants, which could not be faulted. This is to be considered regarding the legal premise of whether there is truly a reasonable prospect of success on appeal.¹ It appears to me this a typical case of a road rage incident.

The law

- [8] It is trite that in terms of section 65(4) the Criminal Procedure Act the powers of this court on appeal against the refusal of a magistrate to grant the appellant bail are limited. The court or the judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was undoubtedly wrong.² The functions and powers of the court on appeal such as the present are like those in an appeal against the conviction or sentence.³ There is no denying that the interest of justice is the dominant criteria.
- [9] In *S v Masoanganye and Another*⁴ it was pointed out with which I align myself with that what was more of importance than merely being granted leave to appeal, were the seriousness of the crime, real prospects of success on conviction and the real prospect that a non- custodial sentence may be imposed. In *S v Rohde*, Nicholls JA pointed out, in a minority judgment, that in a bail application pending an appeal against conviction, the appellant has a ‘difficulty’ because of his ‘changed status’: ‘The stark reality is that the presumption of innocence no longer operates in his favour’.⁵ In *S v Zondi*, the full bench stated that the position changed ‘materially’ after conviction and sentence: ‘The appellant now knows that if the appeal is not successful he will have to serve life imprisonment. The presumption of innocence lapsed and thus can no longer assist the accused.’⁶

¹ *S v Smith* 2012 (2) SACR 135 GJ.

² *S v Rawat* 1999 (2) SACR 398 (W).

³ *S v Ho* 1979 (3) SA 734 (W) at 737G – H.

⁴ 2012 (1) SACR 292 (SCA) at para 14.

⁵ 2020 (1) SACR 329 (SCA) at para 5. See also *S v Bader* 2020 (2) SACR 444 (GP) at para12.

⁶ 2020 (2) SACR 436 (GJ) at para 31.

[10] The appellants had the onus of proving to the satisfaction of the court that it is in the interests of justice that they be admitted to bail pending appeal. In terms of section 60(4) of the Criminal Procedure Act the court may refuse bail where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system.

[11] The first appellant with continued suicidal ideation post-incident on his version, is a prime example of a candidate likely to undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system. With this likelihood, this primarily will jeopardise the interests of justice. The magistrate cannot be faulted for denying the first appellant bail. The prospects of success on appeal are almost non-existent. The role of the second appellant was however secondary. There was importantly, no suggestion made in the charge or in argument that the second appellant acted in common purpose with the first appellant in the murder of the deceased.

Order

[12] In the result, I make the following order—

1. The appeal by the first appellant is dismissed.
2. The order admitting the second appellant to bail is confirmed.

TP MUDAU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 23 February 2024

Date of Judgment: 14 March 2024

APPEARANCES

Counsel for the Appellants: Adv. J Muir

Instructed by: A Van der Merwe Attorneys

Counsel for the Respondent: Adv. V Mbaduli

Instructed by: The National Prosecuting Authority of South Africa