IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: CC02/2021

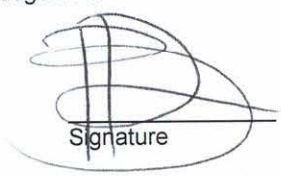
Delete whichever is not applicable

(1)Reportable: No.

(2) Of interest to other judges: No

(3) Revised.

01 December 2022
Date


Signature

In the matter between:

MUHAMAD SAJID KHAN **Applicant**

And

THE STATE **Respondent**

This judgment has been handed down electronically and shall be circulated to the parties via email. Its date and time of hand down shall be deemed to be 01 December 2022.

JUDGMENT

Munzhelele J

Introduction

[1] Mr. Khan, the applicant in this case, brought an application for bail pending an appeal hearing against both his conviction and sentence. The applicant was convicted in the High Court, Pretoria, on two counts of murder and attempted murder. On these two counts of murder, the applicant was sentenced to two life imprisonment, and on the charge of attempted murder, he was sentenced to six years' imprisonment. The applicant has been granted leave to appeal by the Supreme Court of Appeal (SCA) because the trial court dismissed the application. As a result of the SCA granting the applicant leave to appeal the conviction and sentence to the full court in Pretoria, the applicant applied for bail pending the appeal.

[2] The applicant brought the application for bail in terms of section 60 (11) (a) of the Criminal Procedure Act[1], pending the outcome and finalization of the appeal. Section 60 (11) (a) reads thus:

> *"(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-*
>
> *(a) 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 exceptional circumstances exist which in the interest of justice permit his or her release;"*

[1] 51 of 1977

[3] The bail pending appeal should be brought in terms of section 321 of the Criminal Procedure Act 51 of 1977, which reads thus:

> *"321 When execution of sentence may be suspended*
>
> *(1) (a)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 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."*

[4] The applicant brought the application for bail pending appeal on the basis that because the SCA has granted such leave in terms of section 17 (1) of the Superior Court Act[2], the SCA has, by implication, already made it clear that there is a prospect of success on the appeal. Mr. Pistorius, counsel for the applicant, repeatedly made it clear that the Judges of the SCA, based on the law and facts, have found that a different court will arrive at a different conclusion from that of the trial court and that the appeal would succeed and as such the applicant should be granted bail. I was not furnished with the reasons for granting an appeal to such an extent that I could say the appeal would succeed in the full court. All this is based on speculations by the applicant.

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[2] 10 of 2013

[5] The applicant further stated in his affidavit that there are exceptional circumstances which can compel the court in the interest of justice to release him on bail, which are;

1. The applicant is not a flight risk.
2. He attended all court proceedings.
3. All his assets in South Africa are primarily businesses and houses, as well as movable assets to the value of R30 (thirty) million.
4. The applicant is in good health.
5. He is a businessman who has 34 employees under him. If he is not released on bail, his businesses will suffer tremendously.
6. The applicant is willing to pay an amount of R50 000,00 (fifty-thousand rands) for bail. However, during arguments in court, counsel for the applicant submitted that the applicant is willing to double the amount of R50 000,00 to R100 000,00 (one hundred thousand rands) and the court should attach conditions for bail.
7. Counsel argued that because the respondent did not oppose the bail application nor present any evidence during arguments, therefore bail should succeed.

[6] It is a trite principle that the court has the discretion to consider whether bail should be granted to a sentenced prisoner or not: In *S v Masoanganye*[3] at para. 13 Harm JP said that:

> "An application for bail after conviction is regulated by section 321 of Act 51/1977. It provides that the execution of the sentence of a superior Court shall not be suspended because of any appeal against the conviction unless the trial Court "thinks it fit to order" that the accused be released on bail. This requires the 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 discretion in favour of the accused."

[3] 2012 (1) SACR 292 (SCA)

[7] The applicant has an onus to prove that exceptional circumstances exist, which in the interest of justice, permits his release on bail. The applicant, under the circumstances of this case, cannot claim a benefit of a lighter test like an unconvicted person or a person sentenced to non-violent crimes. The applicant was sentenced for two murders of two people and attempted murder which charges fall under schedule 6 of the Criminal Procedure Act 51/1977. See *Bruintjies*[4] on para. 5 where the court said that:

> "...., 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 a mere fact that a sentenced person has been granted leave to appeal does not automatically suspended the operation of the sentence nor does it entitle him to bail as of right. See section 321 of the Criminal Procedure Act 51 of 1977."

[8] The applicant should prove that his release will be in the interest of justice, considering that he is a sentenced accused. Secondly, he has to prove that he is not a flight risk. He should prove that he has exceptional circumstances that could persuade the court to rule in his favour.

[9] Section 321 of Criminal Procedure Act 51 of 1977 and also the SCA case laws in [S v Masoanganye 2012 (1) SACR 292 (SCA) at para. 13, S v Bruintjies 2007 (2) SACR 470 (SCA) at para. 5, S v Rohde 2020 (1) SACR 329 (SCA) at para. 8] has made it clear that being granted leave to appeal a conviction is not sufficient ground to grant an accused bail. The counsel has over-emphasized that he was granted leave to appeal as if that was the only requirement for granting bail pending appeal. The above reason, of the fact that leave to appeal was granted, cannot on its own be an exceptional circumstance to persuade the court to grant bail pending appeal. This fact alone is not enough.

[10] The seriousness of the offence and the facts of the case were so apparent that the likelihood of the conviction being set aside is too remote, given that the

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[4] 2003 (2) SACR 575 (SCA)

applicant shot at the deceased more than once to ward himself away from the aggression of the deceased. The applicant never made a warning shot first to ward away the people's aggression, but he just decided to shoot at the deceased eleven (11) times. The possibility of him being convicted and sentenced to prison is high in the circumstances. Therefore, the prospect of success cannot be a reason to grant bail. The Supreme Court of Appeal might have granted leave to appeal because other judgments should be considered on this appeal. So it will be difficult for the applicant to succeed on bail based on the prospect of success.

[11] The fact of the matter is that the applicant was out on bail at the beginning of the case in the amount of R10 000,00 (ten thousand rands) before conviction, where he was regarded as innocent until he was convicted. He was even able to visit Pakistan for business and came back to South Africa. However, the accused is now a convicted and sentenced person and has a different status. As already said before, this is a considerable hurdle to pass. He submits through counsel that a higher amount should be fixed and stringent conditions. I agree with Nicolls JA in the case of *Rohde*[5] at para. 6 that:

> "On conviction other considerations come to the fore. An increased risk of abscondment once a person has been convicted and sentenced to a lengthy term of imprisonment is inevitable. The severity of the sentence imposed will be a decisive factor in the court's exercise of its discretion whether or not to grant bail. The national temptation to abscond becomes a real consideration once the length of the goal sentence is known."

[12] As I already have indicated above, it is not certain that the applicant's conviction will be set aside. If it does not get to be set aside, it could be complicated for the applicant to submit himself to the authority, mainly because he has dual citizenship. He is a Pakistani citizen by birth. His roots are in Pakistan. It could be easy for him to relocate back to his own country, and extradition will be tedious.

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[5] 2020 (1) SACR 329 SCA

[13] The fact that the applicant committed or was convicted and sentenced to a schedule 6 offence is in itself a bar not to release him on bail. This is a serious offence for which the applicant has been sentenced, and the interest of justice requires such a person to serve his sentence without any interruptions unless exceptional circumstances have been adduced.

[14] The applicant is of good health and has attended all court proceedings, serving a sentence for two counts of murder. Unlike in the case of *Emmanuel Ndou* case no: [38/ 2020] delivered by Maumela J on 25 April 2022, Pretoria High Court case where in paragraph 20 the Honorable Judge said:

> "Appellant is laden with poor health. It is submitted that his unblemished record of attendance in court for purpose of standing trial whenever cases against him came up is indication enough that the refusal of his application for bail was wrong and that his appeal ought to be upheld."

The *Ndou* case is distinguishable from the present case in that the applicant was sick. In this case, the applicant is a healthy man. The applicant was sentenced for serious crimes being the murder of the two people. In *Ndou*'s case, he was sentenced for possession of firearms and ammunition and car-breaking implements. No life has been lost and as such; the two cases are not comparable.

[15] The applicant is a sentenced person who has businesses which he alleges will suffer and collapse if he is not released. It was never indicated to this court who was overseeing the businesses since 4 March 2022 and there was no evidence of such businesses collapsing. It is apparent to me that his wife is making sure that the businesses are going on and not suffering because that's where her family is deriving income and the finances to afford the senior counsel's fees for all these appeals and an offer for R100 000,00 bail. This cannot be an issue which I will regard as exceptional circumstances warranting me to grant bail pending the finalization of the appeal.

[16] The counsel's argument that the state did not bring any opposing evidence as such bail should be granted is misplaced. The applicant has a duty to prove on a balance of probabilities that exceptional circumstances exist, which warrants the court to release the applicant on bail in the interest of justice. As I have stated in paragraph 7 above, the onus is on the applicant, not the state. So therefore, the applicant has a duty to prove that after the sentence, he should be released on bail. The applicant has failed decimally to show that it will be in the interest of justice for him not to serve his sentence but be granted bail pending his appeal.

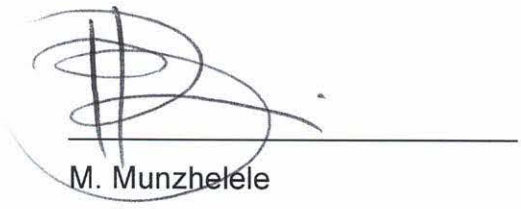
[17] The applicant has a wife and five children who are still minors. The court has not been favoured with any information about their psychological distress. Besides that, the applicant wanted to contribute to their upbringing. It has not been indicated whether they are not schooling or starving because of his absence from home. The only thing missing is the applicant's companionship or fatherly love. I am not informed about the attitude of the wife and the children towards the applicant in this application. The reasons which were adduced are, however, not enough to be an exceptional circumstance for the release of the applicant on bail.

[18] The applicant has not discharged his onus on a balance of probabilities that there are exceptional circumstances that warrant his release on bail in the interest of justice.

Order

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

1. The application for bail pending the appeal is dismissed.



M. Munzhelele

Judge of the High Court Pretoria

Virtually heard: 28 November 2022

Electronically Delivered: 01 December 2022

Appearances:

For the Appellant: Adv. E.V Sihlangu

Instructed by: The Director of Public Prosecutions

For the First Respondent: Adv. P. Pistorius SC

Instructed by: Emile Viviers Attorneys