THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 676/2002

In the matter between:

WALLEED WILFRED BRUINTJIES Appellant

and

THE STATE Respondent

Coram: Howie, P, Heher and Shongwe, AJJA

Heard: 14 January 2003
Order Made: 14 January 2003
Reasons filed: 25 February 2003

J U D G M E N T

SHONGWE, AJA/

<u>SHONGWE, AJA</u>:

[1] The appellant and other accused were convicted in the Cape High Court of one count of robbery with aggravating circumstances and one count of unlawful possession of firearms. The appellant received sentences of fifteen years and five years respectively. He applied for and was granted leave to appeal to the Full Bench against conviction and sentence.

[2] Bail pending appeal was refused by the trial judge on the ground that, given the length of the sentence, it was not in the interests of justice that he be released on bail. He appealed as of right to this Court against that refusal. After hearing argument this Court issued an order dismissing the appeal and intimated that reasons would be furnished later. The reasons are as follows:

[3] The robbery in question involved the use by one of the appellant's co-accused of a firearm, robbery of that nature being included in schedule 6 to the Criminal Procedure Act 51 of 1977 (the Act).

[4] Section 60 of the Act provides:

> "(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 interests of justice permit his or her release…"

[5] 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 his sentence, nor does it entitle him to bail as of right. (See *S v Mthembu* 1961(3) SA 468(N)).

[6] The main thrust of the appellant's counsel's submissions before us was that the grant of leave to appeal on the merits presupposed the existence of a reasonable prospect of success in the appeal. Such a prospect, said counsel, of itself, constituted an exceptional circumstance within the meaning of the section. If that were so, however, the great majority of persons facing charges involving schedule 6 offences would have to be released on bail pending their trial without regard to other important considerations such as, for example, the public safety. The mere fact that the trial court considers that the appellant has a reasonable prospect of succeeding on appeal does not of itself amount to an exceptional circumstance. What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of a schedule 6 offence. 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 appellant's release or there is clear evidence of an intention to avoid the grasp of the law.

The court will also take into account the increased risk of abscondment which may attach to a convicted person who faces the known prospect of a long sentence. Such matters together with all other negative factors will be cast into the scale with factors favourable to the accused such as stable home and work circumstances, strict adherence to bail conditions over a long period, a previously clear record and so on. If, upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail.

[7]Applying these principles to the present appeal produces the following input and conclusion:

(a) The appellant attended court punctiliously over the long duration of his trial.

(b) He scrupulously observed his bail conditions.
(c) He made no attempt to abuse his continued possession of a passport.
(d) His home circumstances appear to be stable. He supports a wife and five children.
(e) He now confronts a sentence of twenty years in jail. He has at all times maintained his innocence and does not accept the correctness of his conviction.
(f) The appellant failed to testify on his own behalf in the trial and no attempt was made by his counsel to have him testify at the bail application. There was thus no means by which the court *a quo* could asses the *bona fides* or reliability of the appellant save by the say so of his counsel.
(g) The prospects of success in the appeal, while by no means non-existent, cannot be categorized as strong. It is true that the trial court relied on the evidence of three accomplices, each of whom was subject to warranted criticism. There are, however, certain objective facts which the court on appeal will no doubt find interesting. These include

(i) the already mentioned failure of the appellant to testify in rebuttal of the state case;

(ii) the uncontradicted evidence that the appellant was in direct contact with accused 2, who was also convicted of the robbery, and the accomplices Fourie, Van Wyk and Fritz on the day preceding the robbery;
(iii) the uncontradicted evidence that shortly before the robbery was carried out by an armed gang accused 5, transported accused 1, who was armed, and the appellant to the scene; in a motor car belonging to the appellant, accused 1 and 5 were both convicted of the robbery;
(iv) after the robbery the participants gathered at appellant's house where *inter alia* the stolen goods were transferred from one vehicle to another in the presence of the appellant, a decision was taken to dispose of two vehicles and the appellant suggested that the stolen goods be sold the following day.

[8]Whether the sum of circumstantial evidence is sufficient (as the court *a quo* found) to establish the appellant's complicity in the planning and participation of the robbery must be left to the court hearing the appeal. For purposes of this appeal it is not necessary to go beyond simply stating the evidence. The fact that the appellant had been sentenced meant that, by the time of the bail application his circumstances had changed and he needed to place new facts, if any existed, before the court during his bail application in order to establish the required exceptional circumstances. (See *S v Yanta* 2000(1) SACR 237(Tk))

[9]Amongst other grounds of appeal the appellant submitted that the court *a quo* failed to hear evidence or even afford him an opportunity to adduce evidence. This submission is not borne out by the record.

[10]I consider that in a bail application pending appeal the court ought to take into account all the facts surrounding the case including any new evidence and treat the application as if it is hearing it for the first time.

[11] It is clear from the summary provided that not only are there no circumstances present which can be described as exceptional but there is no balance in favour of the release of the appellant in the interests of justice. The appellant failed to persuade us that the circumstances of his case should be regarded as exceptional, or as mitigating in any degree the harsh consequences which the legislature has linked to a charge of committing a schedule 6 offence.

[12] As a result the appeal was dismissed.

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J B Shongwe

Acting Judge of Appeal

Howie P)
Heher AJA) concur