THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No:
925/12

In the matter between:

YVONNE BEETGE **Appellant**

and

THE STATE

Respondent

Neutral citation: *Beetge v The State* (925/12) [2013] ZASCA 1 (11 February 2013)

Coram: MAYA, SHONGWE and MAJIEDT JJA

Heard: 21 December 2012

Delivered: 11 February 2013

Summary: Criminal law – application for bail pending appeal – factors to be considered.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Ismail J sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

MAYA JA (SHONGWE, MAJIEDT JJA concurring):

[1] The appellant was indicted in the North Gauteng High Court, Pretoria (Ismail J) on a charge of the murder of her fiance, Mr Jacobus Christiaan Grundling (the deceased). Despite her plea of not guilty, she was convicted as charged. She was sentenced to undergo a prison term of 15 years. Her application for leave to appeal against her conviction to the full court of the trial court's division was successful. However, the court below refused her application to be released on bail pending the appeal. This appeal challenges that decision.

[2] The appellant did not testify orally in the bail application and gave evidence by way of affidavit. The court below accepted her right to do so but lamented the fact that she would not be subjected to cross-examination, particularly in view of the affidavit's paucity on facts pertaining, among other things, to her financial position. After considering the facts placed before it, the court decided that granting bail would not be in the interests of justice because

- the amount of R20 000 bail offered by the appellant would not be sufficient inducement against abscondment in light of the prospect of a lengthy term

of imprisonment if her appeal failed and the fact that it would not be paid by her personally but by her current fiance as she was unemployed;

- the appellant had no settled address of her own and lived with her fiance with whom she could break up, an event that would render the authorities entirely dependent on her to provide her address; and
- the appellant failed to disclose her financial circumstances.

[3] These findings were strenuously challenged on appeal before us. It was contended on the appellant's behalf that (a) her appeal has strong prospects of success because her conviction was founded on materially flawed circumstantial evidence, (b) it was of no consequence that the bail amount would not be paid by the appellant herself and (c) her favourable personal circumstances were accorded insufficient weight by the court below. Thus, it was argued, the court below should have found that the interests of justice favoured the grant of bail.

[4] An application to be admitted to bail after conviction is governed by section 321 of the Criminal Procedure Act 51 of 1977. These provisions prohibit the suspension of a sentence imposed by a superior court by reason of any appeal against a conviction unless the trial court thinks it fit to order the sentenced accused's release on bail. Therefore, it behoves the sentenced accused to seek bail from the trial court. In so doing, he or she must place before the court the necessary facts that would allow it to exercise its discretion in his or her favour and grant bail. A court sitting on appeal does not readily interfere with the decision of the trial court because the latter court is best equipped to consider the question of bail by reason of its intimate involvement with the matter. Thus, a trial court's refusal of bail will be reversed only where the court failed to bring an unbiased judgement to bear on the issue, did not act for substantial reasons or exercised its

discretion capriciously or upon a wrong principle (*S v Masoanganye* 2012 (1) SACR 292 (SCA)).

[5] The mere grant of leave to appeal against conviction, which presupposes the existence of prospects of success, is not on its own sufficient to entitle a convicted accused to release on bail pending appeal (*R v Milne & Erleigh* (4) 1950 (4) SA 601 (W) at 603; *R v Mthembu* 1961 (3) SA 468 (D) at 471A; *S v Bruintjies* 2003 (2) SACR 575 (SCA) para 6). The seriousness of the offence involved, the risk of abscondment and the likelihood that a non-custodial sentence might be imposed are other factors which the court must also weigh in the balance (*S v Masoanganye* para 14).

[6] The seriousness of the crime of murder and the real prospect of a lengthy custodial sentence therefor, if the appellant fails to have her conviction overturned on appeal, are beyond question. The enquiry requires more focus on the appellant's prospects of success on appeal and whether she poses a flight risk. The contention relating to her prospects of success was based mainly on contradictions contained in two of the three post-mortem reports prepared by a key state witness, the state pathologist, Dr Nkondo, consequent to the post-mortem examination she conducted on the deceased's body. The deceased had sustained three gunshot wounds and the contradictions related to the entry and exit positions and the track of a left neck wound which the parties agreed caused his death. The court below accepted the pathologist's explanation contained in the third report, which was based on her original notes, and dismissed the contradiction as 'a human error which was tenable and clarified' and which was not 'fatal or suggested that the examination was not properly done or conducted'. Indeed, the synopsis of the evidence in the judgment on conviction shows that nothing ultimately turned on

the inconsistency.

[7] The real dispute concerned whether it was possible for the right-handed deceased, in view of the nature and track of the fatal wound, to shoot himself on the left neck as the appellant and her ballistics expert, Mr Wolmarans, claimed, a possibility that was dismissed as impossible by Dr Nkondo and the state's ballistics expert, Mr Mangena. According to the appellant the deceased, a war veteran and ex-soldier, was severely depressed and exhibited suicide tendencies, frequently brandishing a firearm, before his death. On the fateful day, he first read to her a typed suicide note which was subsequently recovered by the police at the scene next to his body, and proceeded to shoot himself in the body and face. She wrestled him over the firearm in a bid to disarm him, but did not know how the fatal shot was inflicted because she had closed her eyes when it was discharged.

[8] To rebut this version the state led, inter alia, the evidence of the deceased's longtime medical doctor, Dr Vermeulen, who treated him regularly for chronic pain and high blood pressure. According to the doctor, she observed no symptoms of a psychological disorder in the deceased. She also did not believe that he was the author of the purported suicide note because it was littered with typographical errors which she said were uncharacteristic of the deceased's meticulous nature based on her experience from regular e-mail correspondence with him. As indicated, the state's expert witnesses discounted any possibility that the fatal wound was self-inflicted because of its position and track. Mr Wolmarans, on the other hand, whilst not disagreeing with his state counterpart on the wound's nature and track, testified that it could have been self-inflicted and physically demonstrated how this could have occurred.

[9] The court below found the state version of the events compelling and accepted it. The court made strong adverse credibility findings against the defence witnesses, alternately describing the version of the appellant, whom it found an unimpressive witness, as ‘vague’, ‘inexplicable’ and ‘bizarre’. The court found Mr Wolmarans’ hypothesis and demonstration speculative and unconvincing, especially in light of the appellant’s inability to explain the firearm’s position when the fatal shot was fired. The court concluded that ‘[f]or a right handed person to inflict that wound would have required some ability in contortionism. The exit wound would not have been where it was’.

[10] As to whether the court below assessed the evidence properly and whether the evidence indeed establishes the appellant’s guilt, as was found, is not for this court to determine. Suffice it to say that the objective elements of the evidence tend to show that the state case was by no means weak. The corollary must then be that the appellant’s prospects of success cannot be categorised as strong.

[11] It remains to consider the issue of risk of flight. It is so that the fact that the appellant relies on others to pay her bail, if granted, should not prejudice her cause. But for the rest, I share the trial judge’s misgivings. We are confined to the four corners of a record which unfortunately does not reveal much about her personal circumstances. The sum of her affidavit is that she is a 45 year-old, unemployed woman with no discernible home or work background other than that she was engaged to and lived with the deceased at his house in Polokwane around his death. She became engaged to another man with whom she currently lives at his house in a different province not very long after the deceased died. She has adult, married children who presumably lead their own independent lives somewhere in Pretoria. She has no passport or family and friends outside South

Africa. She has a fraud conviction from 2004 and had a pending shoplifting case at the time of the bail application (which we learnt during the appeal had since been withdrawn). She was admitted to R1 000 bail and received treatment for a nervous breakdown during her trial. An acknowledgement of debt in the sum of R106 900 which she apparently signed in the deceased's favour, and about which very little else seems to be known, came up in evidence during the trial as mentioned in the judgment of the court below. The debt constituted one of the reasons for the trial judge's deep concern about the appellant's failure to explain the precise state of her assets and liabilities and general financial status.

[12] I find it most concerning that neither the appellant's children nor her current fiance, who would pay bail if granted, did not depose to affidavits in support of her application. Notably, in the unsigned copy of her affidavit (one presumes in her favour that the copy filed with the court below was properly commissioned) which forms part of the appeal record, whilst her fiance's name is mentioned, the name of his employer is, inexplicably, left blank. An affidavit deposed to by her fiance confirming her address and their relationship, which her own affidavit promises, is of course not attached. One gathers only from statements made in passing by her counsel from the Bar that, allegedly, her children had visited her in prison (this was presumably mentioned to show that they were involved in her life) and her fiance did not attend the bail hearing because of work commitments. But there is no real indication of who these people are and no acceptable explanation as to why all three could not depose to confirmatory affidavits. They remain shadowy, almost faceless figures, much like the appellant herself.

[13] It simply does not help the appellant to argue that the state did not contest the facts contained in her affidavit and that they are therefore sufficient. The

burden to establish exceptional circumstances justifying her release by adducing the necessary facts to the court lies squarely on her shoulders. Whilst it is a fact to be considered in her favour that she diligently attended her trial on a mere R1 000 bail, the fact is that her situation has changed dramatically. She has been convicted of an extremely serious offence. As I have said, on the facts before us the state case can by no means be said to be subject to serious doubt. It is not a remote possibility that the appellant's conviction may be confirmed. And if that should occur, she undoubtedly faces lengthy incarceration. In my view, her skimpy affidavit falls short of establishing her alleged 'strong emotional ties to the country' and that she has no independent financial means. According to the record, during the hearing the court below pertinently raised the gaps in the appellant's affidavit and its willingness to hear another bail application at a later stage. Nothing precluded the appellant, who was legally represented, from requesting an adjournment to provide better detail about her personal circumstances. As things stand, very little is known about her. And there is no guarantee that even stringent bail conditions would provide an adequate safeguard against the risk of abscondment in the circumstances. The appeal must, accordingly, fail.

[14] In the result, the following order is made.

The appeal is dismissed.

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MML Maya
Judge of Appeal

APPEARANCES

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	Instructed by:
	Wessels Attorneys, Mookghopong
	Lovious Block Attorneys, Bloemfontein
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