

REPUBLIC OF SOUTH AFRICA



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

CASE NO: A417/2015
15 JANUARY 2016

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

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DATE

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SIGNATURE

In the matter between:

TUMELO MANAKA

APPELLANT

And

THE STATE

RESPONDENT

J U D G M E N T

WRIGHT J

1. The appellant is a woman who is about thirty years old. She was charged with murder in the Regional Court at Tembisa. While awaiting trial and during trial she enjoyed bail. She returned to court on many occasions up to her conviction for murder. Her bail was extended prior to sentence. She returned to court for the sentence procedure despite the fact that she knew she faced a

lengthy term of imprisonment. She was sentenced to ten years imprisonment on 30 April 2015. She has been in custody ever since. The Regional Magistrate refused leave to appeal either conviction or sentence. Two judges of this court, on petition granted leave to appeal against conviction only. They could only have done so if it considered that the appellant has reasonable prospects of success in her appeal.

2. The appellant sought bail in the Regional Court pending appeal. Her application was unsuccessful, hence the present appeal. The appellant, at all times legally represented, provided the Regional Court with an affidavit in support of her application for bail. The state led no evidence to contradict any allegation made by the appellant in her affidavit.
3. It would appear that the appellant stabbed her fiancé once in the chest and that he died from this wound. This happened during an argument or altercation between the appellant and the deceased. I am not minded to question the finding by my two colleagues on petition that the appellant has reasonable prospects of success on appeal in regard to conviction. Compare **S v Anderson** 1991 (1) SACR 525 (C) at 526 I – J. In my view the state must accept that the appellant has reasonable prospects of success on appeal against conviction. The appeal is set down for hearing on 10 May 2016.
4. The circumstances of the murder match the kind of murder referred to in Schedule 5 to the Criminal Procedure Act 51 of 1977, namely a murder other than a murder described in Schedule 6, for example a premeditated murder. Under section 60(11) the appellant needs to adduce evidence to satisfy the court that the interests of justice permit her release.
5. The following facts are common cause:
 - 5.1 The appellant is the mother of two young children, about six and four years old.
 - 5.2 The deceased was the father of the children.
 - 5.3 The appellant had no previous convictions.
 - 5.4 The deceased's mother testified at the trial for the appellant and was against the incarceration of the appellant.

- 5.5 There are no other criminal cases pending against the appellant.
 - 5.6 The appellant has neither family nor property outside South Africa.
 - 5.7 She has lived in Tembisa all her life.
 - 5.8 She was employed, prior to sentencing as a call centre operator at African Bank earning R5800 per month. If released on bail she will return to her job.
6. In my view, given the facts set out in the previous paragraph and the appellant's return to court on many occasions during trial and in particular after conviction, the risk of the appellant absconding is relatively slight. Ms Deoraj quite correctly conceded this point.
 7. I have not been referred to express authority that this appeal lies under Section 65(1)(a) of the Criminal Procedure Act which grants an accused the right to appeal the refusal of bail by a lower court. The question is whether the appellant is an accused person for the purposes of Section 65(1)(a). Under Section 60(1)(a) an accused person who is in custody in respect of an offence shall, subject to the provisions of section 50(6) be entitled to be released on bail at any stage **preceding** his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit. (My emphasis.) Bail in the present case was sought after sentence which necessarily meant after conviction. If an accused, as referred to in section 65(1)(a) is only an accused seeking bail preceding conviction then the present appeal is not founded in section 65(1)(a).
 8. Under section 65(4) the court or judge hearing the appeal shall not set aside the decision against which the appeal is brought unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his or her opinion the lower court should have given. In my view it follows that an appeal referred to in section 65(4) is an appeal as contemplated in section 65(1)(a).
 9. In **Mabapa v State** 2004 (1) BCLR 73 (T) Van Rooyen AJ, without expressly dealing with the question that I have raised above, stated that the bail appeal before him was one brought in terms of section 65. The appellant in **Mabapa** had been convicted by a Regional Magistrate of car theft and sentenced to

eight years imprisonment. The appellant in **Mabapa** had applied for bail after sentencing and pending an appeal. The application had been dismissed by the Regional Magistrate. The greater part of the learned judge's reasoning on appeal dealt with the criteria applicable and in particular how high the hurdle was for an appellant seeking bail pending appeal.

10. In **S v Anderson** above, the learned judge, Marais J, as he then was, heard an appeal against the refusal of a Magistrate to grant bail pending appeal. The learned judge allowed the appeal after considering the test on appeal rather than the appealability of the Magistrate's decision. Marais J appears to have decided the case, like Van Rooyen AJ on the assumption that the refusal of bail by a lower court pending appeal, is appealable. In **S v Naidoo** 1996 (2) SACR 250 (W) Joffe J heard an appeal against the refusal of a magistrate to grant bail pending an appeal against sentence. The learned judge allowed the appeal on the merits of the case without expressly dealing with the question of appealability.
11. In **S v Bruintjies** 2003 (2) SACR 575 SCA, an appeal against a decision refusing bail pending appeal following a conviction and sentence in the high court it was held, at paragraph 5 that section 60(11), on the face of it, deals with unconvicted persons. However, it was held to follow that a person found guilty of a Schedule 6 offence cannot claim the benefit of a lighter test on the question of bail pending appeal. I take this paragraph as at least an implied finding by the court that section 60 is applicable in cases such as the present. See too **S v Scott – Crossley** 2007 (2) SACR 470 SCA at paragraph 12.
12. In my view there is sufficient authority for me to hold that the present appeal is to be decided on its merits and that the decision of the Regional Magistrate is appealable.
13. It is not necessary for me to decide precisely what hurdle the present appellant needs to overcome. I am satisfied that it is likely that the appellant will hand herself over to the authorities to serve her sentence if her appeal fails. Counsel for the state, Ms Deoraj sensibly suggested no other reason why the appeal should not be allowed.

14. In **S v Masoanganye** 2012 (1) SACR 292 SCA Harms AP considered the question of bail pending appeal. **Masoanganye** is distinguishable from the present, on the question of appealability in that in the former case the appeal was brought as a matter of right. The trial court was a high court which had refused bail pending appeal. I am mindful of the framing of the order in **Masoanganye** relating in particular to the prosecution of the appeal being a condition of bail. I shall frame my order along these lines.
15. The present appellant had paid bail in an amount of R1000. Mr Ngoben, for the appellant suggested that I set bail in an amount of R5000. Ms Deoraj did not suggest a different figure.
16. In my view the appeal should succeed. The learned magistrate refused bail on the ground that there is a likelihood that the appellant might not serve her sentence if her appeal fails. For the reasons stated above, I disagree.

ORDER

1. The appeal is upheld.
2. The appellant is granted bail of R5000 pending appeal against her conviction on condition that :
 - 2.1 The appellant reports to the SAPS, Tembisa, Ivory Park every Sunday between 8am and 6pm.
 - 2.2 The appellant's heads of argument in the appeal are to be delivered by 4pm on 15 February 2016.
 - 2.3 The appellant is to furnish the Registrar of this court and the Director of Public Prosecutions, Gauteng (Pritchard Street Office) with her full residential and postal address as well as the address of her attorney of record.
 - 2.4 The appellant has to surrender herself within 72 hours of the service of an order to surrender contemplated in section 307(3)(b) read with section 321(2) of the Criminal Procedure Act 51 of 1977, in the manner prescribed by the Uniform Rules on her at her residential address referred to in 2.3 of this order.

3. If the appellant should fail to comply with any part of this order bail will be provisionally cancelled and the bail money provisionally forfeited and a warrant for her arrest shall be issued.

GC WRIGHT J
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

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Date of Hearing: 15 January 2016

Date of Judgment: 15 January 2016