

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH**

In the matter between:

CASE NO: CC 27 /2016

CHARLES NQABA

Applicant

And

THE STATE

Respondent

Coram: **Goosen J**

Heard: **3 October 2018**

Delivered: **11 October 2018**

JUDGMENT

GOOSEN, J.

[1] The applicant was charged with and convicted, on 22 March 2017, of murder; attempted murder; unlawful possession of a firearm in contravention of s 3 of the ***Firearms Control Act*¹**; and unlawful possession of ammunition in contravention of s 90 of the ***Firearms Control Act***. On 19 April 2017 he was sentenced to

¹ Act No, 60 of 2000

eighteen years' imprisonment for the murder; ten years' imprisonment for the attempted murder; fifteen years' imprisonment and ten years' imprisonment respectively for the unlawful possession of a firearm and ammunition. The sentences were ordered to be served concurrently.

- [2] The trial was presided over by Tshiki J. On 1 June 2017 the learned trial judge granted leave to appeal against the convictions and sentences to the full Court of this Division.
- [3] The applicant now applies to be admitted to bail pending the appeal. The application commenced on 6 June 2018.² It appears that there was some delay in the prosecution of the application since the matter was first enrolled for hearing on 19 September 2018. On that date the matter was removed from the roll, apparently because the record of the trial proceedings was not filed. It was thereafter enrolled for hearing, before this Court, on 3 October 2018. The record had still not been filed. A copy was however made available at the hearing and then proceeded on that basis.
- [4] At the outset it is to be recorded that the learned trial judge, Tshiki J, has, subsequent to him presiding at the trial, become indisposed due to illness and has been unable to perform his judicial duties. Ordinarily it is for the trial judge, who has been steeped in the trial of the case, to adjudicate an application for bail pending an appeal against his or her judgment.³ In the present circumstances that is not possible. Given the nature of the application, it is in the interests of justice

² The applicant did not apply to the trial court after leave to appeal was granted for an extension of his bail pending the finalisation of the appeal.

³ See s 321 of the Criminal Procedure Act, Act 51 of 1977

that the application be considered by this Court. Neither party, understandably, raised any objection thereto.

- [5] The applicant filed an affidavit in support of the application for bail in terms of s 321 of the ***Criminal Procedure Act***. He also tendered *viva voce* evidence and presented the evidence of his father, Mr *Charles Nqaba Snr* (Mr Nqaba Snr), in support of his application. The state, in opposing the application, presented the evidence of the investigating officer, Warrant Officer, *Twane*.
- [6] The applicant's affidavit asserts that he has no previous convictions or any cases pending against him; that he has no passport and is therefore not a flight risk. He alleges that in the event that he be granted bail he will not endanger the public; attempt to evade his trial; attempt to influence or intimidate witnesses or undermine or jeopardize the function of the criminal justice system. These latter allegations, more particular those relating to evasion of trial and the intimidation of witnesses have, of course, no bearing on the present application.
- [7] He states further, in the affidavit, that exceptional circumstances exist which establish that it is in the interests of justice that he be released on bail. These, it is submitted, are to be found in the fact that his co-accused was acquitted of the charges; that during his trial he was granted bail and that he attended the trial; and that he was granted leave to appeal against his conviction. He further alleges that financial constraints brought about by his incarceration have impacted his ability to secure legal representation which he requires and that it is unlikely that his appeal, which has been prosecuted, will be heard before the end of this year.

- [8] In his *viva voce* evidence the applicant confirmed the contents of his affidavit. He also explained that he is the father of a young disabled child and that, prior to his incarceration, he provided financial support to the child whenever he was able to do so. He stated that in the event that he was admitted to bail, the bail money would be paid by his father and that he would reside with his parents. He stated that he would present himself to the prison authorities should his appeal be unsuccessful and that he would comply with any condition imposed by the Court in granting him bail.
- [9] In cross-examination he conceded that his child lives with the child's mother and that this situation has continued since his incarceration. Prior to his incarceration he provided financial support as and when he was able to do so from earnings he secured as a taxi driver. He stated that he wanted to be released on bail so that he could proceed with his life and that prison was not a pleasant place.
- [10] Mr *Nqaba* (Snr) testified that the applicant had been residing with him and his wife and that, in the event that he was released on bail, he would stay with them. He explained that he, that is Mr *Nqaba* (Snr), had provided financial support for the applicant's child as he had done throughout. He said that he is employed and that he would be in a position to post bail should the Court release the applicant on bail.
- [11] *Warrant Officer Twane* testified about the nature of the case and its seriousness. He explained that the offences had been committed in the context of several hijackings or robberies of business delivery vehicles in certain township areas. In

this instance the deceased was an off-duty policeman who was providing escort and protection services to delivery vehicles.

[12] He explained that at the trial the evidence was that a police patrol had come upon the scene during the commission of the offences. The applicant had been identified by the police officer as the person responsible for shooting the deceased and thereafter shooting at the police officers. The applicant had fled on foot and then made a getaway in a motor vehicle. The police patrol had found the vehicle and the applicant a short distance from the crime scene immediately thereafter.

[13] Based on this brief outline of the nature of the case against the applicant he stated that the offences are very serious. This was reflected in the sentence which had been imposed by the trial court. He stated that in the event that the applicant was released on bail there was a real risk that he would seek to evade justice in the event that the appeal was unsuccessful.

[14] In terms of s 321 of the Act, the sentence imposed by a superior court is not suspended by prosecution of an appeal unless the trial court “*thinks it fit*” to release the accused on bail. In doing so the trial court exercises a discretion in the interests of justice.

[15] As noted in **S v Masoanganye and Another**⁴,

Since an appeal requires leave to appeal which, in turn, implies that the fact that there are reasonable chances of success on appeal, is on its own not sufficient to entitle a convicted person to bail pending appeal : *R v Mthembu* 1961 (3) SA 468 (D) at 471A-C.
What is of more importance is the seriousness of the crime, the risk of flight, real

⁴ 2012 (1) SACR 292 (SCA) at par [14]; see also *Oosthuizen and Another v S* (144/2018) [2018] ZASCA 92 (1 June 2018)

prospects of success on conviction, and real prospects that custodial sentence may be imposed.

- [16] There is, in this matter, no prospect that a non-custodial sentence would be imposed in the event that the convictions are confirmed on appeal. Nor, that such custodial sentence as would be imposed would exceed the period for which the applicant would be detained pending the appeal.
- [17] That leaves consideration of whether there are real prospects of success in the appeal against the convictions; the seriousness of the crime and the risk that the applicant, if released, would not serve his sentence if the appeal is dismissed.
- [18] The applicant's application is silent in relation to the existence of real prospects of success on appeal. It appears that the application was prosecuted on the basis that since leave to appeal was granted by the trial court nothing further need be established, save that there are other considerations which establish exceptional circumstances in the interests of justice. This approach, as indicated in the authorities referred to, is incorrect. The applicant must show that there is a real prospect of success in relation to the convictions.
- [19] In order to assess the prospects of success it is necessary to have regard to the findings made by the court *a quo* and the evidence presented at the trial upon which those findings are based. It is to be emphasised however that in undertaking this exercise, this Court is not required to examine the record of evidence with the disposition of an appeal court. It would, in any event, be inappropriate to deal with matters which will be subject to adjudication by the court of appeal in due course.

All that is required is that the court consider the nature of the evidence presented at trial and the trial court's findings to determine whether there is a real prospect that the appeal against convictions will succeed.

[20] Regrettably the trial court's reasons for granting leave to appeal are not contained in the record made available by the applicant. There is also no judgment setting out those reasons in the court file. It is accordingly not possible to determine what the trial court considered to be the basis for finding that there is a reasonable prospect of success justifying the granting of leave to appeal. The order granting leave to appeal is to be viewed against the backdrop of a finding made by the trial court in its main judgment, that the evidence against the applicant presented by the state was "*overwhelming*". This finding was based upon the acceptance of the evidence of the policeman on patrol who witnessed the shooting of the deceased who identified the applicant by the clothes he was wearing. This included a black cap. A black cap was retrieved from the Ford Fiesta vehicle in which the suspect attempted to make his escape. It was linked to the applicant by DNA analysis, the evidence of which is contained in formal admissions made by the applicant at trial.

[21] The trial court also admitted into evidence the content of a statement made by the applicant to a commissioned officer, following a trial within a trial. Although the content of that statement does not place the applicant at the scene of the shooting, it implicates the applicant in a plan to commit a hijacking style robbery of the delivery truck in the role of driver of the getaway vehicle.

[22] In argument before this court it was submitted that the trial court had failed to take into account the effect of a negative result of a primer residue test conducted on

the applicant after his arrest. This evidence, it was argued, indicated that the applicant had not discharged a firearm.

[23] In my view the evidence is to be considered in its totality and the trial court's findings in relation to the nature and probative value of the evidence before it must be given due and proper weight. As indicated, it was the trial court's finding that the accepted evidence overwhelmingly pointed to the applicant's guilt. The trial court rejected the applicant's version that he had taken the Ford Fiesta vehicle, which belonged to his co-accused, to a car wash to have it cleaned and that he was arrested while at the car wash.

[24] The applicant's appeal is prosecuted upon three essential grounds, namely that the court *a quo* erred in accepting the identification evidence of the police officer; that the court erred in admitting the '**confession**' and that in any event the '**confession**' establishes only an admission of involvement in conspiracy to commit robbery; and that the court misdirected itself as to the facts. It is to be accepted that the trial court, for reasons not available to this court, considered that there was a reasonable prospect of success on appeal. As already indicated however, more must be established.

[25] The applicant did not deal with the prospects of success and did not, either in evidence or argument, seek to demonstrate with reference to the record of evidence that there is a real prospect that the convictions will be overturned on appeal. In my view this is dispositive of the application. In any event, having regard to the basis upon which the applicant premised his application for bail, I am unable

to conclude that the interests of justice weigh in favour of admitting the applicant to bail pending the appeal.

[26] The principal basis upon which the applicant seeks bail is that, having been admitted to bail during his trial, he poses no flight risk. The fact that the applicant attended the trial whilst on bail certainly weighs in his favour. However, the circumstances have significantly changed by virtue of the conviction and sentence of the applicant. He now knows his fate. That involves a very lengthy period of imprisonment in circumstances which he describes as unpleasant. His desire to be admitted to bail is motivated by wishing to continue with his life. In my view, the lengthy period of imprisonment, which faces the applicant in consequence of his conviction, carries with it an inherent risk of flight. Although the applicant tendered acceptance of such bail conditions as the court may impose the bail money is to be provided by applicant's father, and the imposition of reporting conditions will not, in my view, mitigate the risk.

[27] The particular circumstances upon which the applicant relies, namely that he has a disabled child whom he is supporting and the discomfort and constraints imposed by the rigours of incarceration, are not, in my view, exceptional. It transpired from the evidence of Mr *Nqaba* (Snr) that financial support for the disabled child had always been provided by him and not the applicant; that the applicant is dependent upon his father for support; and that the disabled child resides with and is cared for by her mother with only occasional support from the applicant prior to his incarceration.

[28] These circumstances are not exceptional. They do not, in the absence of very real prospects of success in the appeal against conviction, warrant a finding that it will be in the interests of justice that the applicant be admitted to bail.

[29] I accordingly make the following order:

The application is dismissed.

G. G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:

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