

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: SS026/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES ~~YES~~ No
(2) OF INTEREST TO OTHER JUDGES: YES ~~YES~~ No
(3) REVISED: 9/9/2022
DATE SIGNATURE

In the matter between:

DESAI LUPHONDO

Applicant

and

THE STATE

Respondent

Heard: 31 AUGUST 2022

Delivered: 9 SEPTEMBER 2022

JUDGMENT ON BAIL APPLICATION

RAMLAL, AJ:

[1] The Applicant, Mr Desai Lumphondo, was convicted on 24 August 2015 and sentenced on 23 February 2016, to serve an effective term of 35 years

imprisonment as follows:

Count 1: Contravening section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992; 25 years imprisonment

Count 2: Kidnapping; 15 years imprisonment

Count 3: Attempted Murder; 15 years imprisonment

The court ordered that 10 years of each of counts 2 and 3 be served concurrently with the sentence imposed on count 1.

- [2] The Applicant brought an application for leave to appeal against both the conviction and the sentence. The trial Judge, the Honourable Justice Lamont, refused leave to appeal on 23 April 2016.
- [3] The Applicant subsequently applied for special leave to appeal at the Supreme Court of Appeal (the SCA). On 12 August 2016, this application was dismissed by the Honourable Judges of Appeal (Navsa J and Willis J) on the grounds that there were no reasonable prospects of success on appeal.
- [4] The Applicant has lodged an application in terms of section 17(2)(f) of the Superior Courts Act, 10 of 2013 (the Act), wherein the Applicant seeks relief from the President of the SCA to refer the already dismissed application for reconsideration or variation. This decision is still pending.
- [5] The Applicant has also applied to lead further evidence in terms of section 316(5) of the Criminal Procedure Act, 105 of 1977 (the CPA).
- [6] The application before this court is to consider the release of the Applicant on bail pending the abovementioned application. The trial judge (Lamont J) is unavailable thus the matter serves before this court.

[7] Mr EL Grove appears for the Applicant and Adv R Ndou appears on behalf of the Respondent.

Legal Principle:

[8] Section 321(1)(b) of the CPA provides:

(1) 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-

(a)...

(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....

[9] Although section 321 CPA gives the court a wide discretion to consider whether bail may be granted, the criteria set out in section 60 (11) of the CPA is still applicable.

[10] The nature of the offences with which the Applicant was convicted are crimes listed in Schedule 5 of the Act. The Applicant, who wants to be released on bail under these circumstances has to prove that in terms of section 60(11)(b) of the Criminal Procedure Act the interests of justice justify that he be released on bail.¹

¹ *S v Mpulampula* 2007 (2) SACR 133 ECD at 134j-135b.

[11] *Section 60 (11)* provides that:

“(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

(a)

(b) In Schedule 5, 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 the interests of justice permits his or her release.

[12] In *S v Bruintjies* 2003 (2) SACR 575 (SCA) at para 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”.

[13] The enquiry into the release of a person charged with a Schedule 6 offence is normally a two-fold enquiry, in that, one who applies for bail has to satisfy the court that exceptional circumstances as envisaged in section 60(11)(a) of the Act exist, and that secondly the circumstances justify that in the interest of justice bail be granted.² The test is a little less stringent where the Applicant is charged with an offence listed in Schedule 5, in that he does not have to establish

² *S v Vanqa* 2000 (2) SACR 371 (Tk) at 376h-j.

exceptional circumstances exist that justify his release. He nevertheless bears the onus of satisfying the court that the interests of justice permit his release.

Applicant's Case:

[14] The Applicant brought his application by submitting evidence in the form of an affidavit (Exhibit A) as well as a Replying Affidavit marked Exhibit B and a Supplementary Affidavit marked Exhibit C. The following averments are contained in the application:

- 14.1 That he is a 52-year old married male and the father of three children aged 29, 23 and 19 years
- 14.2 That his wife and children live in a house that he owns in Sandown
- 14.3 That the estimated value of the property is R6 000 000;
- 14.4 That he is a South African citizen and that his roots are entrenched in South Africa,
- 14.5 That his occupational, emotional and family ties are within South Africa
- 14.6 That he has valuable movable and immovable property in South Africa and that he has no desire or intention to leave these assets behind to endeavour to escape;
- 14.7 That he had been released on bail pending finalisation of the case wherein he has been convicted and that he complied with the bail conditions and did not evade his trial;
- 14.8 That he undertakes to hand over his passport as he has no reason to travel outside South Africa;
- 14.9 That he will not endanger the safety of the public or any person;
- 14.10 That he will not commit a Schedule 1 offence;
- 14.11 That he will subject himself to any bail conditions which may be imposed by the court;
- 14.12 That he has no pending cases against him;
- 14.13 That he is not on parole on any other matters;

- 14.14 That there is no likelihood that if he were released on bail, that he would endanger the safety of the public or any particular person or that he would commit any other Schedule 1 offence;
- 14.15 That his release will not induce a sense of shock or outrage in the community and that it will not disturb the public order or undermine the public peace or security;
- 14.16 That his safety will not be jeopardised by his release on warning or bail;
- 14.17 That he will use his immovable asset as a guarantee to secure the payment of bail;
- 14.18 That the the merits of the pending application at the SCA is to be an integral part for the consideration that the application to be released on bail to be granted in his favour.

[15] The Applicant depends on the above assertions as being enough to satisfy the court that the interests of justice permit his release.

Respondent's Case:

[16] The Respondent submitted and Affidavit of the Deputy Director of Public Prosecutions, Matsheliso Patience Moleko, in opposition of the application. The following averments are contained in the affidavit:

- 16.1 That the decision of the President of the SCA is still pending in respect of the application lodged by the Applicant for the reconsideration of the decision to refuse leave to appeal by the two SCA Judges;
- 16.2 That the Applicant is no longer presumed to be innocent as he has already been convicted;

- 16.3 That the granting of leave to appeal does not vitiate the finding of guilt, nor does it confer on the Applicant a presumption of innocence;
- 16.4 That the seriousness of the offences attracted a lengthy term of imprisonment, to wit 35 years imprisonment;
- 16.5 That although the Applicant was released on bail during the trial, there is a material change in circumstances in that the Applicant has been convicted and a lengthy term of imprisonment has been imposed, thus there is an increased risk of absconding;
- 16.6 That simply stating that the Applicant has strong ties in South Africa is not enough;
- 16.7 That no leave to appeal has been granted to the Applicant at this stage;
- 16.8 That there is no credible evidence provided by the Applicant showing that the State witnesses have recanted their evidence as alleged;
- 16.9 That the witnesses who testified in the trial in terms of section 204 CPA have not come forward to recant their evidence;
- 16.9 There is no proof that the contents of the transcripts relied on by the Applicant, originate from the State witnesses;
- 16.10 That there is no likelihood of the application for leave to appeal or the appeal succeeding;
- 16.11 That the granting of bail would bring the administration of justice into disrepute

Determining Interests of Justice

[17] If the purpose of bail and the delicate balance which ought to be struck between the liberty of the individual, on the one hand, and the administration of justice, on the other hand, are borne in mind, it appears that a court faced with a bail application is expected to consider one issue only: will a refusal of bail constitute an injustice because it is unnecessary—or must bail be refused in order to safeguard the interests of justice, irrespective of the effect of such refusal on the individual accused? In striving to strike a balance between the interests of the accused and the interests of justice, the court will assess the risks involved in releasing the accused from custody. The paramount considerations are (a) whether the accused's release will jeopardise public safety or the public interest; (b) whether the accused will commit offences while on bail; (c) whether the accused will stand trial; and (d) whether the accused will interfere with state witnesses. In assessing these risk factors the court will each time be faced with a number of additional considerations, which may vary from case to case.³

Prospects of success in pending application:

[18] A court will ordinarily consider the strength of the State's case. In this instance the Applicant has already been convicted and he relies on the strength of his case that he has submitted to the President of the SCA to secure his release on bail.

[19] Whether or not there is a possibility that the application in terms of section

³ BAIL (A Practitioner's Guide Third Edition by John van den Berg)

17(2)(f) of the Act may be granted cannot be denied but the probabilities of the success thereof will depend on the outcome of the adjudication by the President of the SCA.

[20] This Court is not concerned with determining the outcome of that application it only looks at pointers in the direction to arrive at a decision as to whether it can be said that the Applicant has a likelihood of success. This court can only rely on the historical background to make a decision of an uncertain future. The alleged recantation by the State witnesses has not been proven by credible evidence. Despite having taken the Applicant six years to gather the alleged new evidence, same has not been presented to the court.

[21] The history of the matter is that the trial court refused the leave to appeal and the SCA also refused the leave to appeal on the grounds that there were no prospects of success on appeal.

[22] In the event that the Applicant succeeds in convincing the President of the SCA that there are exceptional circumstances warranting the referral, the Applicant will still have the onus to satisfy the President of the SCA, on proper grounds, that there is a reasonable prospect that his application to adduce "new evidence" will succeed.

[23] The provisions of section 316(5) of the CPA requires the Applicant to show that the further evidence which would presumably be accepted as true, is available. There is no reliable evidence that has been presented that the State witnesses have recanted their evidence. Seven years have passed and the said section 204 witnesses have not come forward to attempt to recant their evidence in the trial.

[24] In *MK Nkomo v The State* (979/2013) [2014] ZASCA 186 (26 November 2014), it was stated at paragraph 18-19:

"The principles governing applications for remittal of matters for the hearing of further evidence are trite. This court has affirmed on various occasions that applications of this kind must be considered against the backdrop of the fundamental and well established principle that in the interests of finality, once issues of fact have been judicially investigated and pronounced upon, the power to remit a matter to a trial court to hear new or further evidence should be exercised sparingly and only when there are special or exceptional circumstances. The reason for this is the possibility of fabrication of testimony after conviction and the possibility that witnesses may be induced to retract or recant evidence already given by them. These are the factors which must weigh heavily against the granting of the order of remittal. The mere recanting of evidence given earlier under oath 'will not ordinarily warrant the granting of an order reopening a concluded trial'.

In *R v Van Heerden & another* 1956(1)SA366(A) at 372H-373A, Centlivres CJ stated:

"it is not in the interests of the proper administration of justice that further evidence should be allowed on appeal or that there should be a re-trial for the purpose of hearing that further evidence, when the only further evidence is that contained in affidavits made after the trial and conviction by persons who have recanted their evidence they gave at the trial. To allow such further evidence would encourage unscrupulous persons to exert by means of threats, bribery or otherwise undue pressure on witnesses to recant their evidence. In a matter such as this the court must be extremely careful not to do anything which may lead to serious abuses in the administration of justice'.

[25] The following was also quoted in the judgment of Centlivres CJ:

‘...A confessed liar cannot usually be accepted as credible. To justify the reception of the fresh evidence, some good reason must be shown why a lie was told in the first instance, and a good ground given for thinking the witness will tell the truth on the second occasion’.⁴

[26] The possibility of fabrication of the testimony after conviction and the possibility that witnesses may be induced to retract or recant their testimony already given are valid concerns, which generally weigh against the exercise of the power of remittal.

[27] This court is mindful that there is no decision by the SCA at this stage to refer the matter back for the alleged new evidence to be tested.

[28] This court has a discretion, that ought to be exercised judicially, to grant or not to grant bail pending appeal.

[29] The provisions of section 60(11) of the CPA places stringent conditions on a person charged with a Schedule 5 offence in that an accused person charged with a schedule 5 offence has to adduce evidence which satisfies the court that the interests of justice permit his release. When one reads the provisions of section 60(11) one gets the impression that for a person charged with schedule 6 and Schedule 5 offence the acceptable norm is that those persons should be kept in custody unless they comply with section 60(11).

⁴ Ladd v Marshall [1954] 3 All ER 745 at 748

[30] The burden of proof thus **shifts from the state** to the accused to satisfy the court on a balance of probabilities that it would **be in the interests of justice** for him to be admitted to bail.

[31] It is trite that in determining whether exceptional circumstances exist, the right balance should be struck between accused's personal circumstances on the one hand and the interest of justice. An accused person's personal circumstances cannot be viewed in isolation.

Personal Circumstances:

[32] I have detailed the personal circumstances of the Applicant as contained in the document that forms part of the record in these proceedings and is marked Exhibit A, B and C.

The only striking difference from most other applicants in bail applications is that the Applicant is a convicted and sentenced detainee who seeks to be released on bail pending the outcome of the decision of the President of the SCA on an application that has been lodged at that court.

The rest of the personal circumstances are ordinary.

The current charges:

[33] The pending matter is the one that relates to the application that has been lodged at the SCA. The offences of which the accused has been convicted are serious and attract the imposition of minimum sentences. It is not necessary to restate this aspect at this stage. I will however repeat that this Court is not concerned with proving the guilt or innocence of the Applicant, it

only looks at pointers in the direction to arrive at a decision as to whether it can be said that the State's case is so weak or the State has failed to submit a *prima facie* case against the accused.

Previous convictions and pending cases:

- [34] The Applicant has already been convicted and a lengthy custodial sentence has been imposed.

Evasion of Trial:

- [35] Section 60(4)(b) of the CPA provides that the interests of justice do not permit the release from detention of an accused where there is a likelihood that the Accused, if he or she were released on bail would attempt to evade his or her trial. A long custodial sentence has already been imposed by the trial court and confirmed by the SCA. The likelihood of abscondment for someone in the position of the Applicant is increased.

- [36] In *S v Masoanganye* 2012 SACR 292 SCA at paragraph 14 it was held:

"The seriousness of the offence is a factor which a court must weigh in the balance, the risk of absconding and the likelihood that a non-custodial sentence might be imposed are factors which the court must also take into account".

- [37] Section 60(6) of the CPA sets out the factors which the court should take into account in considering whether the appellant has established, on a balance of probability that he will not evade his trial. A consideration of these factors as they relate to the Applicant follows:

- (a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;

The Applicant has a wife and three major children. He owns immovable property situated at 52 Adrienne Street, Sandown, Sandton.

No proof of the existence of the marriage or of the family ties have been furnished to the court.

- (b) the assets held by the accused and where such assets are situated;

Details of the Applicant's immovable property have been provided.

No details of any movable property has been provided

- (c) the means, and travel documents held by the accused, which may enable him or her to leave the country;

The Applicant undertakes in Exhibit A to hand over his passport and any other travel documents. It is unclear whether he has a valid passport, having been in custody for over six years.

- (d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;

The Applicant states that he is not in a position to forfeit any money. However, the business that he mentions to the court is dormant and not operational. A person facing a sentence of over 30 years in prison is likely to risk losing a business even if he manages to revive such business.

- (e) the question whether the extradition of the accused could readily be affected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;

No evidence has been placed before the court in consideration hereof.

- (f) the nature and the gravity of the charge on which the accused is to be tried;

The Applicant has been convicted of serious offences and a term of 35 years imprisonment has been imposed

- (g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial.

- (h) The nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charge against him or her;

A lengthy custodial sentence has been imposed

- (i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or

The history of this matter reflects that the Applicant complied with his bail conditions during the main trial.

- (j) any other factor which in the opinion of the court should be taken into account

The factual position is that the Applicant has been convicted of serious offences. 35 years imprisonment has been imposed. The trial court refused leave to appeal the conviction and sentence. Two SCA judges have also dismissed the application for leave to appeal.

- [38] The factors placed before the court suggest that the Applicant has since his conviction in 2015 demonstrated that he has no confidence or faith in the justice system. This display of lack of confidence in the justice system heightens the likelihood that the Applicant will not, if released on bail, submit himself to the justice system in the event of the decision not being granted in his favour.

[39] A further concern is the interference with the state witnesses. The Applicant has adduced evidence that had several encounters with the state witnesses since his conviction and sentence, whilst still being incarcerated, so the prospects of the Applicant having continued contact with the state witnesses if he is released on bail is increased.

[40] There is nothing remarkable regarding the personal circumstances of the Applicant. There is nothing before the court that explains how the business of the Applicant has continued during his absence and neither are there details on how the business will be revived.

[41] The principles relating to the law on bail include that in granting bail, the court should strike a balance between

41.1 the right of the accused to be presumed innocent until proven guilty and the interests of society and justice.

41.2 The amount at which bail is set is not a punishment but a mechanism to secure attendance of an accused in court. Thus the amount is not determined by the severity of the crime but rather by an assessment of whether the prospect of forfeiting that amount is sufficiently severe to ensure that the accused returns to court.

41.3 Denial of bail is not a punishment. Bail should be denied when it is assessed that the accused will fail to return to court, or will interfere with the interests of justice if granted bail.

- [42] The Applicant is not a person who is presumed to be innocent, he has already been convicted and his application for leave to appeal has been dismissed by the trial court as well as by two Supreme Court of Appeal Judges on the grounds that there are no prospects of success on appeal.
- [43] The application before the President of the SCA to order the reconsideration of the decision of the refusal to grant leave to appeal is still pending. It is not the task of this court to decide or make any pronouncements on the merits of that application.
- [44] Whilst the continued incarceration of the applicant, awaiting the decision of the President of the Supreme Court of Appeal, brings about hardships, I am not persuaded that the circumstances placed before the court amount to hardships which in the interest of justice permit his release.
- [45] Having due regard to the evidence adduced in this application and to the arguments that have been advanced by the Applicant and the Respondent, the Applicant has failed to satisfy the court that it would be in the interests of justice to admit him to bail.
- [46] In the circumstances, the application for bail is dismissed.
The Accused remains in custody.



AK RAMLAL

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

Date of hearing:

31 August 2022

Date of judgment:

9 September 2022

Appearances:

On behalf of the Applicant:

MR E L Grove

On behalf of the Respondent:

Adv. R Ndou