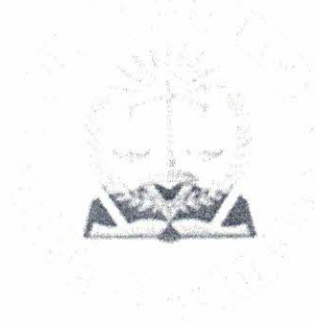


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

Case No: A 379/2018

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / <u>NO</u>
(2) OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO.
(3) REVISED.
DATE 2019/6/11
SIGNATURE 

In the matter of:

Zakhele Oscar Masuku

Appellant

And

The State

Respondent

JUDGMENT

Maumela J.

1. This matter came before this court as an appeal against judgment of the Regional Magistrate Pretoria, sitting in Pretoria, hereinafter referred to as the court *a quo*. On the 26th of January 2017, the appellant, Zakhele Oscar Masuku; a male who was 33 years of age, was convicted before the court *a quo*. He was together with 4 co-accused. The charges with which they were charged, are the following:

Counts 1 and 2: Attempted murder.

Count 3 to 5: Murder.

Count 6: Conspiracy to commit Robbery with Aggravating Circumstances.

Count 7: Conspiracy to commit Robbery with Aggravating Circumstances, read with the provisions of section 1 of the criminal procedure act 1977: (Act No 51 of 1977).

Counts 8 to 10: Unlawful Possession of Firearms in contravention of Section 3 of the Firearms Controls Act 2000: (Act No 60 of 2000).

Count 11: Theft.

Counts 12: Unlawful Possession of Ammunition in contravention of Section 90 of the Firearms Controls Act 2000: (Act No 60 of 2000).

2. The accused were sentenced as follows:

Counts 1 and 2: (Both counts were treated as one for purposes of sentence.) The accused were sentenced each to undergo 4 years imprisonment.

Counts 3 to 5: (All counts were treated as one for purposes of sentence.) On the accused were sentenced to undergo Life Imprisonment.

Counts 6 and 7: (Both counts were treated as one for purposes of sentence.) The accused were sentenced each to undergo 5 years imprisonment.

Counts 8 to 10: (All counts were treated as one for purposes of sentence.) The accused were sentenced each to undergo 6 years imprisonment.

Counts 11: The accused were sentenced each to undergo 2 years imprisonment.

Counts 12: The accused were sentenced each to undergo 12 months imprisonment.

3. On the 31st of August 2017, before the court *a quo*, the appellant and his co-accused were granted leave to appeal against both conviction and sentence on all counts, except the murder convictions in respect of which the Appellant had an automatic right of appeal in terms of the provisions of section 309(1)(a) of the Act. T. On the 27th of November 2017, the Regional Court in Pretoria refused to grant the Appellant bail pending appeal. He now appeals against the bail refusal in terms of section 65 of the Criminal Procedure Act 51 of 1977 (“the Act”).
4. Before the court *a quo*, when the appellant applied for bail pending appeal, he did not tender oral evidence. Instead, he submitted a sworn affidavit in which he tendered motivation towards his admittance to bail pending appeal. He submitted that it will be in the interests of justice if he were admitted to bail pending appeal.
5. The Supreme Court of Appeal in *S v Masoanganye and Another*¹ advised that a court on appeal should scrutinize the reasons for the refusal of bail and the evidence it was based on in order to assess the correctness of the lower court’s refusal of bail. At paragraphs [17] to [18] the Supreme Court of Appeal further advised that the judgment on conviction, the grounds of appeal and the reasons for granting leave to appeal should also be scrutinized in order to assess the prospects of a successful appeal.

¹. 2012 (1) SACR 292 (SCA) at [16].

6. It is trite that the court on appeal need not analyse the trial evidence in great detail; see *S v Scott-Crossley*². With brief reference to the relevant criteria, submissions will respectfully be made to show that the court *a quo* wrongly refused bail.

FACTUAL BACKGROUND.

7. On the 22nd of February 2011, a cash in transit heist was committed against a carrier vehicle belonging to 'Red Eagle Security'. The heist was committed along the M39 road near Rooiwal. Evidence tendered is to the effect that prior to the execution of the heist, two employees of Red Eagle Security were recruited to partake in the planned robbery. It is alleged that it was agreed that the security officers are to participate in return for a portion of the loot. Unbeknown to the perpetrators, the South African Police Services were informed about the planned robbery. A trap was set up. An undercover operation was secretly authorized and executed in terms of section 252A of the Act.
8. Security employees were tasked as police agents. They obtained information about the details of the heist. Acting upon information, received from the undercover security employees, SAPS kept watch over the suspects. Measures were applied in order to counter the robbery. On the day of the commission of the heist, three suspects were killed in the cross-fire between the police and the robbers. Appellant who sustained gunshot wounds, was arrested in the vicinity of the scene of the robbery. He pleaded not guilty. At a subsequent trial, appellant pleaded not guilty. He exercised his right to remain silent and therefore did not disclose the basis of his defence.

². 2007 (2) SACR 470 (SCA) at [7].

9. Before the court *a quo*, Appellant applied for bail pending appeal, which was denied. Among others, the reason why the appellant was denied bail was because there were allegations that there are two more cases pending against him in Lenasia and Brits respectively.
10. The appellant was 32 years of age at the time he applied for bail pending appeal. He is unmarried and is father to two minor children aged 8 and 10 respectively. The children reside with their biological mother. Prior to his arrest, his residential address was at his parental home which is number 992 Block DD, Soshanguve. He has not seen his children from the time of his arrest until now. The relationship with the mother of his children deteriorated immediately after his arrest. However, he and the mother of his children have since ironed out their differences. They have agreed that the mother of his children shall allow him to see them.
11. The appellant owned a light delivery van with which he couriered goods for a living. The vehicle has since become damaged beyond repair due to an accident. While still using the vehicle, he used to earn between R 8 000-00 and R 10,000-00 per month. He states that his father, who is retired from the South African Police Services is willing to assist him to buy another vehicle. He is therefore in a position to continue with the courier work he was doing before his arrest in order to earn a living. At the conclusion of the trial before the court *a quo*, the appellant was sentenced among others, to life imprisonment. He has noted an appeal which is yet to be set down for hearing.
12. Appellant contends that he has no reason to flee the country and to evade justice. He regards Gauteng as his permanent

place of residence. He makes the point that owing to backlogs and constraints resulting from human resource shortages, the setting down of his appeal shall be preceded by protracted delays. He is eager to build proper relationships between himself, his children and their mother. He told the court *a quo* that his parents are willing and able to assist him in raising bail money.

13. It is trite that in the event where an applicant for bail pending appeal accused stands already convicted, courts have to adopt a more stringent approach in considering applications for bail pending appeal. In the case of *Z v Williams*³, the court stated the following: *"Different considerations do of course arise in granting bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that it is putting it too highly to say that before bail can be granted to an applicant on appeal against conviction there must always be a reasonable prospect of success on appeal. On the other hand, even where there is a reasonable prospect of success on appeal, bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding. See cases such as S v Milne and Erleigh⁴ and R v Mthembu⁵."*
14. In these proceedings, the court is not to consider or to enquire into whether the appellant ought to be admitted to bail or not. The court is to determine whether the court *a quo* was correct or not, in dismissing the application by the appellant for bail. In so doing, the court is to consider the offences charged, the basis upon which the court *a quo* convicted the appellant and the averments made by the appellant before the court *a quo* in his application for bail pending appeal as contained among

³. 1981 (1) SA 1170 (ZAD), 1172 - 1173 B.

⁴. 1950 (4) SA 601 (W).

⁵. 1961(3) SA 468(N).

others within his founding affidavit. The court then has to look at the reasons on the basis of which the court *a quo* dismissed appellant's application for admittance to bail pending appeal.

15. Even if this court, on appeal were to hold different view as compared to that of the court *a quo*, it does not mean that the court *a quo* was wrong in refusing bail. In the case of *S v Barber*⁶, Hefer J stated the following: *"Accordingly, although this court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail but exercised that discretion wrongly.... Without saying that the magistrate's view was actually the correct one, I have not been persuaded to decide that it is the wrong one."*

16. The court *a quo* applied its discretion and dismissed the appellant's application for admittance to bail pending appeal. Unless it is shown that the court *a quo* erred and was wrong, or that it misdirected itself in coming to the decision it came to, this court may not interfere with its decision. In the case of *S v Fancis*⁷, on the aspect of Appellate Powers, the court stated the following: *"The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection, the trial Court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing*

⁶. 1979 (4) SA 218 (D), at page 220 E – H.

⁷. 1991 (1) SACR 198 (A).

and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony."

17. It is trite that prospects of success on appeal have to count for something in the consideration of an application for bail pending appeal. In the case of *S v De Abreau*⁸, the court stated the following concerning prospects of success on appeal in an application for bail pending appeal: *"It seems to me that the prospects of success on appeal also form a factor to be taken into account in an appeal against the refusal of bail. If, for example, the view of this Court should be that the appeal to the Provincial Division is hopeless, this Court would probably be reluctant to alter a judgment refusing bail."*
18. The court applied its discretion and refused applicant's application for admittance to bail pending appeal. Unless it is shown that the court *a quo* erred and was wrong, or that it misdirected itself in coming to the decision it made, this court may not interfere with decision made by the court *a quo*. In the case of *S v Fancis*⁹, Appellate Powers: *"The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony."*

⁸. 1980 (4) SA 94 (W).

⁹. 1991 (1) SACR 198 (A).

19. In the case of *S v Hudson*¹⁰, Flemming DJP, stated the following: *"In S v Anderson*¹¹ *Marais J with reference to a case where there is a reasonable prospect of success'. He said that if the appeal is 'reasonably arguable and not manifestly doomed for failure; the lack of merit in the appeal should not be the cause of refusal for bail. I agree. I add that if the conclusion that the appeal is manifestly doomed to failure can be reached only after what is tantamount to or approximates a full rehearing, the appeal should ordinarily for purposes of considering bail be treated as an appeal which is arguable. The question is not whether the appeal 'will succeed' but on a lesser standard, whether the appeal is free from predictable failure to avoid imprisonment. See S v Moeti*¹², *where in it was said that the applicant for bail must convince court that there is a 'reasonable possibility' that the appeal will avert imprisonment."*
20. In the case of *S v Bruintjies*¹³, the court stated the following: *"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*¹⁴)."
21. The attorney who represented the appellant from the beginning withdrew and had to be replaced. From 2011, the appellant has remained in custody. At some stage, an application towards bail which was launched was abandoned. The court *a quo* made the point that the appellant stands sentenced among others to life imprisonment. The court *a quo* viewed that this is a heavy sentence which may prompt the appellant to develop eagerness to abscond. Therefore the

¹⁰. 1996 (1) SACR 431 (W), at page 434 A – D.

¹¹. 1964 (3) SA 494 (A), at 495 G.

¹². 1991 (1) SACR 462 (B). wherein to

¹³. 2003 (2) SACR 575 (SCA).

¹⁴. *Supra*.

court viewed that the appellant is likely to attempt evading justice. It arrived at this decision notwithstanding the view of the state to the effect that its case against the appellant is weak. It based its decision on the evidence tendered before it.

22. The role of this court is appellate in nature. It is trite that appellate courts are not entitled to interfere with decision of trial courts unless certain criteria are met. The question before this court is not about whether it would or would not have granted appellant bail pending appeal given the facts at hand. The question is rather whether or not the court *a quo* misdirected itself in dismissing appellant's application for bail pending appeal. If not, this court may not interfere with the decision of the court *a quo*. If the court *a quo* misdirected itself, this court is entitled to interfere with its decision.
23. The appellant had an automatic right to appeal against his sentence to life imprisonment concerning counts 3, 4 and 5. The court *a quo* conceded that another court may arrive at a different verdict. It conceded that another court could have applied the provisions of section 174 of the Criminal Procedure Act 1977; Act No 51 of 1977. Before the court *a quo*, the state did not oppose appellant's admittance to bail pending appeal.
24. Appellant raised the point that the court *a quo* did not take into regard the discrepancies in the evidence of the undercover agents, Mr William Oupa Makola and Mr Jan Sithole. He argues that the evidence by the two witnesses only went as far as an attempt at the crime alleged and not a completed crime. He points out that the evidence in the case does not prove that he conspired to commit the crime.

28.2. Whether there are reasonable prospects of success on appeal, see *R v Mthembu*¹⁵ and *S v Nel*¹⁶.

EVIDENCE BEFORE THE COURT *A QUO* IN THE APPLICATION FOR BAIL PENDING APPEAL.

29. Before the court *a quo*, the appellant adduced evidence on affidavit. He told court that ever since his arrest on the 22nd of February 2011, he has remained in custody for 6 years and 8 months. Before his arrest he was residing at his parental home at number 992, Block DD Soshanguve. He is unmarried and has 2 minor children for whose upkeep he is responsible. He made the point that there are heavy backlogs on the court rolls in the High Court so that, it will take time for his appeal to be heard. He argues that he is likely to be prejudiced by the delay in the finalisation of his appeal.
30. In this case, the court has to examine the judgement of the court *a quo* and should determine whether or not the decision arrived at is sustained by the evidence at hand. The court has to assess the evidence presented before the court *a quo*. Considering the facts put before the court *a quo*, and the decision at which it arrived, this court finds no basis upon which to conclude that the court *a quo* misdirected itself in dismissing appellant's application for bail pending appeal. In the result, the appeal against the decision of the Regional Magistrate Pretoria to refuse the application by appellant to be admitted to bail pending appeal stands to be dismissed. The following order is made:
31. In the result, the appeal against the decision of the Regional Magistrate Pretoria, to refuse the application by applicant for

¹⁵ 1961 (3) SA 468 (D), at page 471 A - C.

¹⁶ 2002 (1) SAR 425 (T), at page 426.

bail, stands to be dismissed, and the following order is made:

ORDER.

1. The appeal against the decision of the Regional Magistrate Pretoria, to refuse the appellant's application for bail pending appeal is dismissed.

A handwritten signature in black ink, appearing to be 'T.A. Maumela', is written over a horizontal line.

T.A. Maumela.

Judge of the High Court of South Africa.