

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

CASE NUMBER: CA & R 2/06

DATE HEARD: 2006-07-05

DATE DELIVERED: 2006-07-07

In the application of:

ALEXANDER GEORGE WHITEHEAD 1st Applicant

AREND CHRISTIAAN DE WAAL 2nd Applicant

GERHARDUS JOHANNES TALJAARD 3rd Applicant

LOUIS GEORGE RADEMEYER 4th Applicant

WILLEM JACOBUS PETRUS JACOBS 5th Applicant

HANS JACOB WESSELS 6th Applicant

RYNO ADRIAAN ROSSOUW 7th Applicant

RYAN ALBUTT 8th Applicant

and

THE STATE Respondent

Coram: Kgomo JP et Majiedt J

JUDGEMENT

on

APPLICATION FOR BAIL PENDING APPEAL

MAJIEDT J

1. The eight applicants have applied for bail pending the finalisation

of their application for leave to appeal against the judgement of the regional magistrate which has been upheld on appeal by us on 2 June 2006. Their application is for the extension of the bail granted to them by the regional magistrate pending their appeal to this Court, alternatively for this Court to fix an amount of bail on such conditions as it may deem fit.

2. We heard this matter during the July recess. We find ourselves in an extremely invidious position with regard to the bail application. Since this has a direct bearing on the merits of the application, it is important that I set out in some detail the background and surrounding circumstances which have led to this application being heard during the July recess.
3. The eight applicants were convicted in the regional court of public violence and culpable homicide and in addition, the eighth applicant was also convicted on one count of assault with the intent to do grievous bodily harm. They were sentenced to terms of imprisonment which vary from eight years to ten years on the aforementioned convictions.
4. As alluded to above, we dismissed their appeal against their convictions and sentences on 2 June 2006. An application by the 1st, 4th and 8th applicants to remit the matter to the regional magistrate for the adducing of further evidence on the merits, alternatively on sentence, was also dismissed.

5. An application for leave to appeal to the Supreme Court of Appeal against our judgement confirming their convictions and sentences was lodged on behalf of the 2nd, 3rd, 5th, 6th and 7th applicants with the Registrar of this Court on 8 June 2006. A similar application was lodged on behalf of the other applicants on 9 June 2006, although the papers in that application were not in our files and were handed up to us from the Bar during the course of the hearing of the bail application.
6. My Brother, the learned Judge President, became aware of the aforementioned applications for leave to appeal, and, mindful of the possibility that he may only be available to hear such an application during November of this year, the attorneys for all the applicants before us were advised that we would be available to hear the application for leave to appeal before the end of the Court term, namely 30 June 2006. In addition, the attorneys were advised that we would be available at 9 am during any day of the week from 26 – 30 June 2006 for such an application. For reasons unknown to us and presumably by virtue of the unavailability of Counsel, the matter could not be heard during the aforementioned week, and has in fact now been set down for hearing on 16 November 2006, which is the first available date in the schedule of the Judge President at this juncture.
7. Against the aforementioned background, the applicants' attorneys

then raised the prospect of their bail being extended or bail being fixed afresh by this Court pending the hearing of the application for leave to appeal on 16 November 2006. The attorneys were advised that a formal application in this regard would have to be brought and the same dates aforementioned were suggested for the hearing of a bail application, i.e. 26 – 30 June 2006. When it became apparent that a formal bail application could not be heard during that week (again presumably due to the unavailability of counsel) the Judge President and I intimated that we would be available on either 3 or 5 July 2006 to hear the bail application. In the end, the matter was heard on 5 July 2006.

8. The ultimate effect of the aforementioned sequence of events is that we are seized with an application for bail pending appeal in circumstances where the application for leave to appeal itself is only to be heard on 16 November 2006. This is a most unsatisfactory state of affairs, since the applicants' prospects of success of their proposed appeal to the Supreme Court of Appeal is of material importance in considering their application for bail. Both Counsel who appeared for the applicants, namely Mr. Reinders for the 1st, 4th and 8th applicants and Mr. Nel for the 2nd, 3rd, 5th, 6th and 7th applicants, conceded that this is a most unsatisfactory situation. Mr. Cloete for the State has made a very valid point in the course of his address before us, namely that all the parties are before the Court, the applications for bail, supported by affidavits of all the applicants, have been duly filed

and are before the Court and all the parties are legally represented at the hearing. The question therefore arises why the application for leave to appeal itself could not be argued simultaneously. The answer to this is apparently that the 1st, 4th and 8th applicants wish to engage the services of senior counsel to argue the application for leave to appeal (I must point out that they were also represented by senior counsel and assisted by Mr. Reinders during the arguing of their appeal before us).

9. The applicants have all attested to supporting affidavits in which they set out their personal circumstances with regard to abode, employment/business interests, family ties and their commitment to adhere to any bail conditions which may be imposed in addition to the requirement that they report to the authorities should their further appeal be unsuccessful. I have no hesitation in accepting that the applicants all have fixed abodes, in all instances have either established business interests or fixed employment and have strong family ties which would greatly diminish the flight risk in all their cases. Mr. Cloete for the State has, understandably so, not opposed the granting of bail. He has, however, during the course of argument before us, pointed out that the State intends to oppose the applicants' application for leave to appeal when it is eventually heard on 16 November 2006. His attitude is that there are absolutely no prospects of success on appeal for the applicants on this matter.

10. In accepting that the applicants do not present a flight risk at all and, that they generally speaking meet all the standard requirements with regard to bail, the material and determining question in this matter in my view is the fact of the applicants' prospects of success on appeal. It is to this matter that I now turn.
11. The applicants were convicted of the offences mentioned herein above on the basis of direct eye witness evidence which placed them on the scene of the incident and ascribe certain acts to them on the strength of which they were convicted of the offences aforementioned. The magistrate has furnished a detailed judgement setting out reasons for the convictions of all the applicants. In our judgement, written by my Brother, the Judge President, and with which I have concurred, we have dealt fully with the arguments presented by the applicants and have dismissed their appeals and also, where applicable, their applications for leave to lead further evidence. Given the invidious position in which we find ourselves and to which I have made reference, I can do no more than to say that for the reasons set forth in our judgement on appeal, we take the view that the applicants' applications for leave to appeal are devoid of any merit and are in fact manifestly doomed to failure. The insurmountable and fundamental obstacle which all the applicants face with regard to their appeal against conviction, is that at the trial they all closed their cases without adducing any evidence at all in the face of strong *prima facie* evidence presented by the State. It is so that in some instances the *prima facie* case presented by the State

against some individual applicants is stronger than that presented against other applicants, but the fact of the matter is that with regard to all the applicants the State had made out a strong *prima facie* case at the trial and the applicants had not presented any evidence to controvert that of the State. In the premises, it seems to me that with regard to the appeals of the 2nd, 3rd, 5th, 6th and 7th applicants, they face a virtually impossible task to persuade another court that the regional magistrate had erred in convicting them. With regard to the 1st, 4th and 8th applicants, their application for leave to lead further evidence on the merits (i.e. their own as well as other defence evidence) was fundamentally flawed in that it did not meet the requirements as laid down in a number of leading authorities to which we have made reference in our judgement on appeal.

11. While there is some divergence of opinion in our courts as to what the test to be applied at this juncture should be, I am prepared to apply in favour of the applicants herein the test which is most advantageous to them, namely whether their appeal can be said to be at least arguable. In some cases the mere absence of reasonable prospects of success have been said to be sufficient to justify the refusal of bail; see in this regard *inter alia*:

S v Beer 1986(2) SA 307 (SE);

S v Williams 1981(1) SA 1170 (ZA).

In other cases, however, the standard was set somewhat lower to the effect that an appeal must be reasonably arguable and not manifestly

doomed to failure. See in this regard *inter alia*:

S v Anderson 1990(1) SACR 525 (C) at 527 e-f;

S v Naidoo 1986(2) SACR 250 (W);

S v Hudson 1996(1) SACR 431 at 434 b.

12. In **S v Mabapa 2003(2) SACR 579 (T) at 587 a-e**, Van Rooyen AJ stated that:

“Once there is no concern about whether the applicant will abscond and where the criteria in s 60 of the Criminal Procedure Act have been met insofar as release on bail is concerned, there is no reason not to apply a lesser standard on the question of prospects of success. In other words, if the appeal is reasonably arguable and not manifestly doomed to failure, bail should be allowed. If the grounds are frivolous, it may be deduced that the appellant is simply seeking to delay imprisonment and the application should be denied. The test applied by Joffe J in *S v Naidoo* (supra) would seem to be constitutionally justifiable. It is not that far removed from the lesser standard applied by Flemming DJP. In the end the constitutional question remains: is it in the interests of justice that the convicted applicant, who has a constitutional right of appeal, should be released on bail in spite of the fact that the presumption of innocence is to a substantial extent spent? On the other hand, the right of appeal is intact and the question arises whether requiring too high a standard to be met for bail is not in effect countering unreasonably the right to appeal. Is a right to appeal fully viable if an accused must wait in prison for many months for his or her appeal to be heard? If the general standard is lowered to that of Flemming DJP or Joffe J, a person would at least be more readily entitled to bail, where there are no circumstances which otherwise make bail unacceptable in terms of s 60 of the Criminal Procedure Act.”

13. In the present matter the sentences imposed on the applicants vary from an eight to ten year term of imprisonment. This is consequently a case where, given our view that the appeal against conviction is manifestly doomed to failure, even if an appeal against sentence should succeed, it cannot be conceived at all that sentence other than a term of direct imprisonment would be imposed. In **S v Makaula 1993(1) SACR 57 (Tk)** Davies AJ

remarked as follows at 61 e:

“I would suggest that in general, where an accused has been sentenced to a sentence of less than a year's imprisonment, bail should normally be granted pending an appeal.”

14. While it is so that an accused person has a constitutional right to his/her freedom to be admitted to bail pending appeal where there are reasonable prospects of success and such accused person otherwise meets the requirements as set forth in section 60 of the Criminal Procedure Act, 51 of 1977, the obvious corollary is that where there are no prospects of success at all on appeal, the interests of justice demand that such an accused person should commence serving his/her sentence.
15. In the premises I am of the view that, for the reasons set forth in our judgement on appeal, the applicants' application for leave to appeal is manifestly doomed to failure and they have not made out a case to be admitted to bail pending their application for leave to appeal.

16. I would consequently issue the following order:

16.1 The applicants' application for the bail granted to them by the regional magistrate pending appeal to be extended pending their application for leave to appeal to the Supreme Court of Appeal, alternatively for bail to be fixed by this Court is dismissed.

16.2 The applicants are ordered to report to the appropriate authorities within 7 (seven) days of delivery of this judgement to commence serving their sentences.

SA MAJIEDT
JUDGE

I concur and it is so ordered.

FD KGOMO
JUDGE PRESIDENT

For applicants 1, 4 and 8: Adv SJ Reinders

For applicants 2, 3, 5, 6 and 7: Adv J Nel

For the State: Adv JJ Cloete