

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: A137/2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

DATE: 19/09/2024

SIGNATURE

In the matter between:

JACQUES JACOBUS ALBERTUS COETZEE

APPELLANT

V

THE STATE

RESPONDENT

JUDGMENT

MOSOPA J

1. The appellant was convicted of one count of Murder read with the provisions of section 51(1) of Act 105 of 1997 and sentenced to life imprisonment on the 10 October 2023 in the Benoni Regional Court. It is because of the sentence imposed by the trial court, that the appellant enjoyed a right of automatic appeal against both conviction and sentence in terms of the provisions of section 309(1) of Act 51 of 1977.
2. The appellant then on the same day of his sentence brought an application to be released on bail pending the outcome of his appeal, the application was

refused by the trial court. The appellant aggrieved by such decision to admit him to bail, brought an appeal against such refusal in terms of section 65(1) of Act 51 of 1977.

3. The appeal is opposed by the state.

BACKGROUND

4. Both the appellant and respondent filed affidavits in support of bail application and in opposing the appellant to be admitted to bail. It is trite that the requirement in section 60(2)(c) that “evidence be adduced”, should not be interpreted as a demand for the presentation of oral evidence. (***S v Hartslief 2002 (1) SACR 7 (T)***).

5. In his affidavit, the appellant set out his personal circumstances that;

- 5.1. He is 37 years old, he was born on the 22 November 1985,
- 5.2. His passport has since expired and currently he does not possess any travelling documents,
- 5.3. He is residing at 1[...] B[...] Street, Boksburg, an address which was confirmed by a social worker in her report,
- 5.4. He is not married and has a sister aged 29 years old who resides in Potgietersrus, Limpopo;
- 5.5. His father is a retired shaft sinker and resides in Foschville, his mother is deceased and died because of polycystic kidney disease which the appellant is also suffering from,
- 5.6. He is employed by Noord Rand Motors earning a salary of approximately R15 000.00 a month as a sales Consultant and was employed in such a position for a period of seven years,

- 5.7. His highest academic qualification is matric. He also obtained a diploma in culinary arts and qualified as a chef. He is also a qualified security officer with a grade A qualification and he is also registered with Private Security Industry Regulatory Authority (PSIRA) as a security officer,
 - 5.8. He has movable assets to the value of approximately R50 000.00, he is an owner of a motor vehicle, a Toyota Yaris 1.8 RX valued at approximately R110 000.00 and that he can afford bail in the amount of R 5000.00 which will be in addition to the amount of R10 000.00 which he has already deposited when he was admitted to bail pending his trial matter, and
 - 5.9. He has no previous convictions except for the one he is currently sentenced for.
6. Appellant begged leave for the contents of pre-sentence report compiled by Ms Jessica Thompson, a report which was used by appellant in mitigation during the sentencing process to form part of his personal circumstances and the following can be gleaned from that report that;
- 6.1. He was diagnosed with polycystic kidney disease at the age of 3 or 4 years old. Complications associated with the disease include high blood pressure, progressive loss of kidney function, chronic pain, growth of cysts in the liver, an increased risk in aneurysms, heart valves abnormalities and colon problems. The appellant takes medication to either manage or limit the risk related to the complications associated with the disease;
 - 6.2. The appellant also reported mental health challenges in the form of depression and anxiety resulting from the incident he has been convicted and sentenced for,
 - 6.3. Appellant has suicide ideation,

- 6.4. In describing the events that led to the crime that the appellant is convicted of, it is mentioned that according to bail records he did not want to touch anything from blacks, and this explains why he ordered Mr Lahleka to put his identity book on the ground after he demanded that he produce such,
- 6.5. He admitted to shooting the deceased, but he did not have the intention to kill him but to disarm him and stop him from attacking him with a sword; and
- 6.6. That considering the appellant work history and training suggest a positive indicator for rehabilitation.

7. The respondent indicated the following;

- 7.1. That the appellant is convicted of a very serious charge of murder and the sentence imposed will encouraged him to abscond and make him to even consider leaving the country,
- 7.2. The ill-health of the appellant is not an exceptional circumstances, and
- 7.3. The fact that he has suicide ideation.

LEGAL PRINCIPLE

- 8. The appellant was convicted of an offence that resorts under schedule 6. This means that in the determination of the current appeal matter due consideration must be given to the provisions of section 60(11)(a) which provides that;

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

(a) in Schedule 6, 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 exceptional circumstances exist which in the interests of justice permit his or her release;”

9. The aforesaid position was adopted in the matter of ***S v Bruintjies 2003 (2) SACR 575 (SCA) par 6*** where Shongwe AJA stated that;

“[6] The main thrust of the appellant's counsel's submissions before us was that the grant of leave to appeal on the merits presupposed the existence of a reasonable prospect of success in the appeal. Such a prospect, said counsel, of itself, constituted an exceptional circumstance within the meaning of the section. If that were so, however, the great majority of persons facing charges involving schedule 6 offences would have to be released on bail pending their trial without regard to other important considerations such as, for example, the public safety.

The mere fact that the trial court considers that the appellant has a reasonable prospect of succeeding on appeal does not of itself amount to an exceptional circumstance. What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of a schedule 6 offence.

The prospect of success may be such a circumstance, particularly if the conviction is demonstrably suspect. It may, however, be insufficient to surmount the threshold if, for example, there are other facts which persuade the court that society will probably be endangered by the appellant's release or there is clear evidence of an intention to avoid the grasp of the law.

The court will also take into account the increased risk of abscondment which may attach to a convicted person who faces the known prospect of a long sentence. Such matters together with all other negative factors will be cast into the scale with factors favourable to the accused such as stable home and work circumstances, strict adherence to bail conditions over a long period, a previously clear record and so on. If, upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail.”

10. Section 321(1) of Act 51 of 1977 regulates the procedure pertaining to bail application after the accused person is sentenced and makes the following provisions;

“[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. (see also ***S v Bruintjies* 2003 (2) SACR 575 (SCA)**, ***Masoanganye v S* 2012 (1) SACR 292 (SCA)**”

11. What has also to be considered, in addition to reasonable prospects of success on appeal, is the seriousness of the crime, the risk of flight, real prospects of success on conviction and real prospects of success on appeal, and real prospects that custodial sentence will be imposed. (see **S v Masoanganye supra**).

12. In *Masoanganye*, it was further stated at paragraph 15, the following;

“[15] It is important to bear in mind that the decision whether or not to grant bail is one entrusted to the trial judge because that is the person best equipped to deal with the issue having been steeped in the atmosphere of the case. Through legislative oversight, something this court has complained about for more than two decades and ignored by the Executive, a convicted person has an automatic right of appeal to this court against a refusal of bail. But there is a limit to what this court may do. It has to defer to the exercise of the trial court’s decision unless that court failed to bring an unbiased judgment to bear on the issue, did not act for substantial reasons, exercised its discretion capriciously or upon a wrong principle.”

13. Jurisdictional factors listed under section 60 (4)(a)-(e) continues to play a pivotal role in these proceedings. The basic principle under section 60(4) is that bail ought to be granted unless it is not in the interest of justice. In the matter **of S v Dlamini, S v Dladla and Others, S v Joubert, S v Schietekat 1999(2) SACR 51 (CC) at para 48**, the Constitution Court defined the concept of interest of justice to concept of the following;

“[48] ‘The interest of society’ the sense in which “the interests of justice” concept is used in sub-s (4). That subsection actually forms part of a functional unit with sub-ss (9) and (10). Between them they provide the heart of the evaluation process in a bail application, sub-s (9) being predominant. If it is read first and “the interests of justice” bears the same narrow meaning akin to

“the interests of society” (or the interests of justice minus the interests of the accused), the interpretation of the three subsections falls neatly into place. The opening words of sub-s (9) (“in considering the question in sub-s (4)”) refer to the question whether bail should be refused. That question, so the presiding officer is told, is to be answered by weighing up the societal interests listed in sub-s (4) and detailed in sub-ss (5) to (8A) against the personal interests adverted to in sub-s (9). And whatever the parties may contend, sub-s (10) obliges the presiding officer to ultimately assume responsibility for that evaluation.”

14. It is clear that on the proper reading of section 60(4), that refusal to grant bail, should be in the interest of justice where one or more of the grounds as set out in section 60(4)(a) to (e) are established.

ANALYSIS

15. It is accepted by the respondent that after the commission of the offence he is convicted of he was admitted to bail. The same position persisted until the appellant was found guilty and when the matter was adjourned to a later date to deal with his sentence, bail was extended. There is no indication from the records as to whether there was an instance in which the appellant defaulted on his bail condition, this bail was only revoked after he was sentenced to life imprisonment.
16. The appellants place of residence was confirmed, according to him by the social worker who compiled his pre-sentence in the sentencing process. The affidavit of the Investigating officer in opposition to appellant being granted bail is silent on that aspect, and it can be safely assumed that such address confirmed is the permanent address of the appellant.
17. The trial court when convicting the appellant found that the murder under such circumstances was premeditated and reasoned as follows;

“It was necessary to take photos if that was the case, to make threats of shooting if you want to make a simple enquiry from your neighbour. The purpose for his visit there was never realised or accomplished, but he embarked on a different issue which led (indistinct)

Was it necessary to carry a beer, take photos with cellphone and carry a firearm on the waist to go and make enquiry about the dogs? No, it could not have been the case. Definitely not. Not in the premises of the neighbours who are also not known to you. It is on this premise that the court finds that the murder was premeditated...(sic)”

18. In sentencing the appellant, the trial court stated that;

“...on that basis, the court after having said all this accused, the court finds that it could not find any exceptional or compelling circumstances in your favour.”

“The use of the concept “exceptional or compelling circumstances” in my view is incorrect, looking at the fact that the appellant was convicted in terms of Murder read with the provisions of section 51(1) of the Act 105 of 1997. The correct concept used in the Act is “compelling and substantial circumstances.”

It can be safely inferred that the trial court found no compelling and substantial circumstances, on the part of the appellant hence a sentence of life imprisonment.

19. The seriousness of the offence under which the appellant has been convicted cannot be underestimated. The appellant is sentenced to a very lengthy period of imprisonment. In argument, Mr Wilkins on behalf of the appellant criticised the findings of the trial court and contended that the court's findings are based on wrong factual findings and as such there are reasonable prospects of success on conviction. Amongst the issues raised is the

incompatibility of the eyewitness evidence with the medical findings at post-mortem.

20. It must be noted that the appellant was at the scene after he saw his dog playing with another unknown dogs and followed those dogs. There was a hole in the parameter wall that served as a boundary to the appellant's property and where the shooting incident happened. For no apparent reason appellant when he arrived there demanded the identity documents of the people he found there. The deceased was employed as a security officer in the property. According to the appellant he was wearing a balaclava and gumboots which are normally worn by the "zama-zamas". Mr Lahleka, did not bear knowledge of the presence of "zama-zamas" next to the scene and testified that the manner in which the deceased was clad is the manner in which the Basotho or people belonging to the Basotho tribe normally wear.
21. It might have been so that the deceased did not stop when instructed by the appellant to stop and he was in possession of the weapon that was described in evidence, to me that it was not an indication that it warranted the appellant to act in defence of his life. Putative private defence in my considered view is also not available to the appellant.
22. The trial court gave reasons for its finding that the murder was premeditated. I do not see any prospects of the appellant succeeding in setting that finding aside. The appellant when he went to the neighbour's place, he was already in possession of a firearm, after instructing people to produce the identity documents he is seen going up and down talking over a phone. He eventually shot at the deceased multiple times.
23. The appellant in my considered view, even if he can succeed in setting a finding of premeditated murder aside, I do not see him escaping with a non-custodial sentence. It is therefore my considered view that the conviction is not demonstrably suspect. I consider the release of the appellant on bail, that it will have the effect in endangering the society. The appellant is the type of person who does not respect other people's property and privacy. I fail to

imagine how the presence of dogs in one property can trigger the kind of conduct displayed by the appellant. The appellant does not respect a constitutionally guaranteed right to life and the killing of the deceased was unnecessarily in my considered view.

24. I am alive to the fact that the appellant was employed at the time of his sentence and earning a good salary. He contributed to the development of the economy and had his own assets. What is not clear is whether he would still be employed if he can be released on bail. There is no affidavit by his employer that he can accept him back to his employment if released on bail.

25. Mr Wilkins criticised the respondent on not making submissions that there are no reasonable success in appeal or that the appellant's appeal is manifestly doomed for failure. I do not think that failure to address such means that the appeal must succeed.

26. The appellant's health condition was raised as an aspect that makes the circumstances of the appellant to be exceptional. In the pre-sentence report it was stated that the appellant was diagnosed with polycystic kidney disease ("PKD") when he was three or four years old. The appellant takes medication for his health condition to either manage or limit the risk related to the complications associated with this disease. It is trite that prisons are equipped with hospital and/or clinic facilities and if the condition of a prisoner cannot be maintained internally, he/she is always referred to the outside hospital facilities. Taking into account the date of sentence and the date when this appeal was brought, it is clear that if the appellant was not provided with the required treatment that aspect could have been raised in this appeal matter.

27. What I find to be problematic is the mention in the pre-sentence report that the appellant has mental challenges emanating from the commission of the offence. He is now having suicidal ideations which is not clear from the report whether he is receiving treatment for such condition at the moment. In my view given the health and most importantly, the mental challenges the

appellant is suffering from, he will be a danger to himself or society if he can be released on bail.

28. It is therefore my view that this appeal is only meant to avoid serving sentence and ought not to succeed. Prospects of a very lengthy sentence can have the effect of making the appellant to abscond and not serve sentence.

ORDER

28. As the result, the following order is made;

1. Appeal against refusal to grant bail pending the outcome of the appeal is hereby refused.

MJ MOSOPA
JUDGE OF THE HIGH COURT,
PRETORIA

APPEARANCES

FOR THE APPLICANT	:	ADVOCATE P.A WILKINS
INSTRUCTED BY	:	STRYDOM ATTORNEYS
FOR THE RESPONDENT	:	ADVOCATE M MASILO
INSTRUCTED BY	:	DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA