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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A323/24

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED

25/2/2025

In the matter between:

JAMES SIBANYONI

APPLICANT

And

THE STATE

RESPONDENT

JUDGEMENT

MATSEMELA AJ

COUNT 1

Accused unlawfully and intentionally assault Petros Mokwena and did then and with force take the following items, 1 Toyota quantum with registration number B[...] G[...], 1 Nokia 6330 cellular telephone, 1 wristwatch, 1 wedding ring being his property or in

his lawful possession with aggravating circumstances being pointing him with a firearm and Accused acted in concert in furtherance of a common purpose.

COUNT 2

Kidnapping in that on or about 5 January 2015 and at or near Bronkhorstspuit in the Regional Division of Gauteng the Accused did unlawfully intentionally deprive Petrus Mokwena of his freedom of movement by means of pointing him with a firearm and driving with to a certain area at Zithobeni;

COUNT 3

Attempted murder read with the provisions of Section 51 of the Criminal law Amendment Act 105 of 1997 and further read with the adoption of common purposes in that upon or about 5 January 2015 and or near Zithobeni Ext 4 in the Regional Division of North Gauteng, the Accused did unlawfully and intentionally intend to kill Aubrey Lekwabena, a male person by shooting him with a firearm and hitting him on his chest and abdomen;

COUNT4

Attempted murder with Section 52 of Act105 of 1977 further read with adoption of common purpose in that upon or about 5 January 2015 and at or near Zithobeni Ext4 in the Regional Division of North Gauteng, the Accused did unlawfully and intentionally attempt to kill Pleasure Mashego a male person be shooting him with a firearm and hitting him on his thigh.

2. On 8 April 2022 the Appellant testified in mitigation of the sentence and Magistrate imposed the effective sentence of accumulative 15 years direct imprisonment.

3. On or about 3 July 2023 the Applicant brought an application for Leave to Appeal against both the conviction and sentences imposed together with an

Application for Condonation for the late filing of the application pursuant to the fact that the transcribed record of the proceedings could not be located timeously before the Magistrate Mr Cook. The application was summarily dismissed.

4. The Appellant then petitioned the High Court of South Africa, Gauteng Division, Pretoria and on 14 May 2024 the Honourable Madam Justice Sasson and the Honourable Madam Justice Matthys AJ granted the petition in terms of which the Appellant's application for Leave to Appeal against conviction and Sentence was granted.

5. On the 8 October 2024 the Appellant went back to the magistrate Mr Cook brought the third application for bail based on the fact that the he has been granted leave to appeal. The Applicant never testified and the application was based on an affidavit.

6. The Magistrate delivered an ex-tempore judgement in which he dismissed the application hence this bail appeal. The Appellant has in the meantime noted his appeal against the conviction and sentences imposed upon him by the court quo in the Pretoria High Court.

GROUND OF APPEAL

7. In paragraph 10 of the judgement, the court a quo in dismissing the bail application says following:"

" ..there is a good chance that the conviction of the Court may be overturned in the High Court. That does not happen yet so I cannot go on that."

" The second is that the accused did abscond."

SECTION 60 (11)

8. In terms of Section 60 (11) (a) the onus is on the Appellant to prove 'exceptional circumstances' to be released on bail. It is true and correct that the factors to be considered on whether one has to be released from **detention or not** are not elaborated on under section 60 (11) of Criminal Procedure Act.

9. However it is trite that factors in favour of the appellant play an important role when bail pending appeal is considered. The court in considering bail should take factors that are in favour of the appellant such as a stable home and work environment, strict adherence to bail conditions over a long period and a previously clear record.

PERSONAL CIRCUMSTANCES

10. The business and personal assets are crucial factors that play a major role in favour of the bail appellant. It so that the factors regarding the personal and business assets of the Appellant, are relevant for the consideration of bail pending appeal.

11. In his affidavit the Applicant says that he:

11.1 Is a South Africa Citizen who was born and raised in South Africa to parents Willem Molato Sibanyoni and now deceased mother Betty Lizzy Nabacna; He is currently 35 years old the holder of a South Africa identity and has resided within South Africa in Bronkhorstspuit for the majority of my life. In fact the Applicant attended Enkangala School and for majority of his life resided in Bronkhorstspuit;

11.2 Has four siblings three brothers Vusi, David and John Sibanyoni and a sister Lorrain Sibanyoni; has become estranged from his siblings owing to the conviction and sentence imposed upon him and subsequent incarceration;

11.3 Has no family overseas and has strong family ties within South Africa;

11.4 Attended Enkangala School and for majority of his life resided in Bronkhorstspuit;

11.5 Does not have a valid passport and undertakes not to apply for a passport or attempt to leave the country or Gauteng Province without the express consent of the state;

11.6 Was at all times on bail during the Court Quo proceedings prior to my conviction and incarceration and attended to my trial at all other material times;

11.7 Has only once been out of South Africa on one occasion, this was during 2021 January to Mozambique;

11.8 Is married customarily to one Nhlanhla Johanna Shabangu has become estranged from the said Ms Shabangu who elected to desert him after his conviction. He has two minor children who he is the primary breadwinner of, namely M[...] N[...] S[...] S[...] who is 11 years old and A[...] E[...] S[...] who is 6 years old. The Applicant before his incarceration would send money to his children, buy food, pay their school fees, clothing and contribute towards their accommodation;

11.9 Has never been convicted save as they relate to this matter. He has no other pending charges at least none of which he is aware of;

11.10 Has a fixed address being plot 1[...] L[...] B[...], which is the same fixed address that I had provided to the Court Quo when admitted to bail during the earlier proceedings. I will reside with my father if admitted to bail at plot 1[...] L[...] B[...];

11.11 He complied with all of his bail conditions of the second bail were previously imposed upon him by the Bronkhorstspuit Regional Court when he was attending his trial and subsequent sentencing;

11.12. Has no assets outside the borders of South Africa and in fact has no means or ability to leave South Africa;

11.13. Pose no threat to any person or to the public's safety and there is no possibility that he would do anything that may be construed as anything otherwise.

11.14 If released on bail, his release shall not disturb the public or undermine the proper functioning of the criminal justice system;

11.15. Has recently been suffering from terrible stomach ulcers and cannot eat properly and needs daily medication which is not provided in Zonderwater Maximum Correctional facility;

11.16. Is the sole shareholder and director of a company known as Jumsha Trading Enterprise which has a registered address being 2[...] H[...] Street, Remar Park Bronkhorspruit. His company is involved in construction and he shall continue with his business which was successful up until his incarceration. He is also the manager of certain properties that are still operating and shall manage those properties when admitted to bail.

12. I indicated above that factors in favour of the appellant play an important role. The above mentioned factors about the Appellant are normal However in this case the Appellant failed to provide the court a qou with the particularity of his business in the form of for example registration number and SARS clearance certificate and or anything towards that so as to prove its existence. It is my view that sufficient information was not presented that the Appellant owns a business

SENTENCE

13. Regarding the sentence the Appellant argues that:

13.1. At the time of the hearing of the matter, he was the primary breadwinner and primary resident parent of two minor children, namely M[...] N[...] S[...] and A[...] E[...] and the court a quo ought to have given this due consideration when addressing the question of sentence. In this regard the court he referred to the matter of *State v M 2008 (3) SA 232 (CC)*.

13.2. The court a quo sentence induces a sense of shock. The court a quo erred by not considering the element of mercy when imposing the sentence. In this regard the Applicant refers to the matter of the *State vs Rabie 1975 (4) SA AD 855* at page 861 where the Court stated that

"Then there is no approach of mercy compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused. While recognising that fair punishment may sometimes have to be robust, mercy is a balanced is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to the society:

14. The nature and gravity of the punishment is on record. The appellant has been found guilty and faces 15 years in prison. It is also on record how unpalatable the appellant finds conditions in prison in that he is now suffering from ulcers.

15. I do not intend to even attempt to predict what sentence/s the appellant may receive from the appeal court and whether such sentence would be in the form of custodial or non-custodial sentence. I am alive to the fact that sentencing is the most

difficult stage in the proceedings. That issue is best left in the discretion of the appeal court. See (*S v Sadler 2000 (1) SACR 331 (SCA) para [10]*).

PROSPECT OF SUCCEES

16. The bail application was conducted before the court a quo within the ambit of Section 60 (11) (a) of CPA. This is because the Appellant was convicted of Schedule 6 offences. Section 60 provides as follows:

"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 interest of justice permit his or her release...

17. During his first and second application the Appellant might have satisfied Regional Court that there existed exceptional circumstances. The first reason furnished by the court a quo in rejecting the third application by Appellant was that he will not entertain the chances of the conviction being overturned on appeal was as, he put it:

"That does not happen yet so I cannot go on that."

18. The Appellant brought his third bail application premised mainly on the fact that by granting leave to appeal, this Court had, by implication, found that the appeal would have reasonable prospects of success. Counsel for the Appellant argues that, this together with the fact that he is not a flight risk which will be discussed below should qualify as an exceptional circumstances. With the grant of leave to appeal on the merits and there is a likely acquittal in the future and it would be extremely prejudicial for the Appellant to remain in custody, the argument went on.

19. The test for reasonable prospects of success was stated in *S v Smith 2012 (1) SACR 567 (SCA)* at para 7, namely:

" what the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be sound, rational basis for the conclusion that there are prospects of success on appeal".

20. In *S v William (1981) (1) SA 1170 (ZA)* at 1171H-1171 B it was stated that:

*"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. On other hand even where there is a reasonable prospect of success on appeal bail may be refused in serious cases notwithstanding that there is a little danger of an applicant absconding. Such cases as *R v Milne and Erleigh (4) 1950 (4) SA 601 (W)* and *R v Mthembu 1961 (3) SA 468 (D)* stress the discretion that lies with the judge and indicate that the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. In my view, to apply this test properly it is necessary to put in the balance both the likelihood of the applicant absconding and the prospects of success. Clearly, the two factors are interconnected because the less likely the prospects of success are the more inducement there is on an applicant to abscond. In every case where bail after conviction is sought the onus is on the applicant to show why justice requires that he should be granted bail".*

21. Even if an Appellant has managed to establish prospects of success, that does not mean he is entitled as of right to be granted bail. In *S v Masoanganye* 2012 (1) SACR 292 (SCA) para 14, Harmse AP (as he then was) pointed that:

"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 an appeal: R V Mthembu 1961 (3) SA 468 (D) at 417A-C. What is of more importance is the seriousness of the crime, the risk of flight, real prospects of success on conviction, and real prospects that non-custodial sentence might be imposed".

22. In *S v Jason Thomas Rode v The State* case no. 1007/2019 [2019] ZASCA 193 (18 December 2019) paragraph 9 the court said:

"that what was of more importance than merely being granted leave to appeal was the seriousness of the crime, the real prospects of success on conviction and the real prospect that a non-custodial sentence may be imposed. As to whether the appellant was a flight risk, the Court went on to say that: '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 placed equipped to deal with the issue, having been steeped in the atmosphere of the case.'"

23. In paragraph 10 the Court went on to say:

"The same sentiment was expressed in S v Bruintjies, 2003 (2) SACR 575 (SCA) para 7.

"what was required was that the Court examine all relevant circumstances and determine whether they, individually or cumulatively, amounted to an exceptional circumstances justifying the appellant's released on bail. These included factors in his favour such as a stable home and work environment, strict adherence to bail

conditions over a long period and a previously clear record. The Court said: '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 a 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.'

24. I hold the view that being granted leave to appeal a conviction and sentence is an important consideration but it is not, in and of itself, a sufficient ground to grant an accused bail.

FLIGHT RISK

25. The second reason that the magistrate gave was as he put it

" The second is that the accused did abscond."

26. On the 11 July 2019 the Appellant brought the second bail application in the Regional Court Bronkhorspruit. Earlier he was granted bail which he absconded from. He testified under oath and gave reasons as to why he must be given second chance. After evaluating the evidence, the magistrate Mr Chauke saw it fit that it will be the interest of justice if he is released on bail.

27. The explanation given to Mr Chauke was that he was afraid of one Babyface Ranto who he was told was looking for his blood at the time. The court of Mr Chauke was told that Babyface Ranto had passed on and therefore the Appellant had no problem attending court thereafter. Mr Chauke accepted this explanation.

28. On the third bail application the prosecutor addressed the Court that the first investigating officer looked for the Appellant for about six months when he absconded from his first bail. He could not find or locate him. The new investigating officer sergeant Kube looked for him for about a month, he found and arrested him.

29. The question is why the magistrate Mr Chauke would admit the Appellant to another bail when it took more than seven months to locate and arrest him. The Appellant did not come back to court on his own accord. He had to be arrested first.

30. According to the judgement of magistrate Mr Chauke, the Appellant was arrested and appeared in court. He gave a full explanation as to why he did not attend court. His explanation was acceptable to Mr Chauke hence they admitted him to another bail.

31. I hold the view that the magistrate Mr Cook misdirected himself when he referred to the fact that the Appellant absconded from his first bail when he was delivering his judgement. The less is said about the judgement of Mr Chauke the better.

32. The fact that he attended the pre-trial stage until the finalisation of the case is not a guarantee that he will not evade the serving of sentence. This does not establish exceptional circumstance in favour of the granting of bail.

33. The question is whether the appellant is a flight risk following his conviction and sentence. Once the accused is convicted other considerations come to the fore. Definitely there is an increase in the risk of abscondment once an accused person has been convicted and sentenced to a lengthy term of imprisonment.. The severity of the sentence imposed is the decisive factor in this Court's exercise of its discretion whether or not to grant bail. The temptation to abscond which confronts every accused person becomes a real consideration once the length of the gaol sentence is known.

34. In the case of Rhode supra paragraph 7 the Court says the following

In refusing bail pending appeal in S v Scott-Crosley 2007 (2) SACR 470

(SCA) para 6 the SCA observed that the legislature's approach to bail pending appeal had become less lenient as reflected in the Judicial Matters Amendment Act 34 of 1998. Similarly, the Constitutional Court, (S v Dlamini; S v Dladla and others 1999 (2) SA 51 (CC)) in upholding the constitutionality of s 60 of the CPA, found that the seriousness with which the legislature viewed bail was underscored by the fact that there were major amendments in 1995, 1997¹ (Criminal Procedure Second Amendment Act 75 of 1995 and Criminal Procedure Second Amendment Act 85 of 1997). For first time in SA the bail legislation focused not on the accused but the community. Clearly, said the Constitutional Court, the legislative intention was to curtail bail for suspects charged with very serious offences and to this end Section 11 was introduced in 1995, and was replaced by even more stringent provisions for persons facing serious charges listed in Schedule 5 and extremely serious charges listed in Schedule 6.

35. The appellant's version is that although he was convicted the states' evidence lacked on the doctrine of common purpose and joint possession of the firearm. The maroon Jetta which was used to commit the offences was associated with the Appellant. Accused number 1 testified that he was driving the vehicle at the time of the incident and he had borrowed it from the Appellant. Suffice to say ex facie the judgment, the conviction cannot be described as demonstrably incorrect.

36. It is not the function of this Court to second-guess the outcome of the appeal. The merits of the appeal on conviction will be adjudicated upon in due course by this Court with the benefit of the entire transcript before it. For present purposes what I have before me is a judgment.

37. I agree with the court a quo in dismissing the application, finding, inter alia, that the Appellant was a flight risk. However I do not agree with the court a quo when it reasoned that he did abscond. I hold the view that since the Appellant has been

convicted and sentenced to 15 years chances are that he would not come back and serve his sentence when the appeal is dismissed.

38. The reality is that the status of the Appellant has changed and presumption of innocence no longer operates in his favour. It is trite that pre-trial release allows a man accused of crime to keep the fabric of his life intact, to maintain employment and family ties in the event he is acquitted or given a suspended sentence or probation. It spares his family the hardship and the indignity of welfare and enforced separation. Underlying this important rationale is the fact that the accused enjoys the fundamental right of being presumed innocent. I need to mention that by that time the appellant was still enjoying his presumption of innocence, he was not aware of the nature of sentence he would receive.

CONCLUSION

39. A bail appeal is governed by section 65 (4) of the Criminal Procedure Act 51 of 1977. This section sets out the approach to be adopted when hearing a bail appeal. It provides as follow:

"The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought unless such court or judge is satisfied that the decision was wrong, in which event, the court or judge shall give the decision against which in its opinion, the lower court should have given,"

40. In *S v Barber 1979 (4) SA 218 (D)*, at 220 E-H Hefer J says the following:

"It is well known that the powers of this court largely limited where the matter comes before it on appeal and not as a substantive application for bail. This court has to be persuaded that the magistrate exercised the discretion which he has wrongly. 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 exercised that discretion wrongly".

41. The decision whether to grant bail or not lies with the court hearing such application. It is not easy to conclude that the court hearing the bail application exercised its discretion wrongly in dismissing the application. There must be substantial reason in believing so. Then if there are none, it then remain that the presiding judicial officer's decision is not wrong. R v Dhlumayo and another 1948(2) SA 677 (A) at 678, the court stated

"An appellant court should not seek anxiously to discover reason adverse to the conclusions of the trial judge. No judgement can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered...."

42. I do not see any ground for me to interfere with the court a quo's decision. The appellant failed to meet the requirements of section 60(11). In the circumstances his appeal must fail.

ORDER

The appellant's appeal against refusal of bail is dismissed.

MOLEFE MATSEMELA

Acting Judge of the North Gauteng High Court

Heard on the

31 January 2025

Delivered on the 25 February 2025

For the Appellant J LAZARUS

Instructed by JOSHUA LAZARUS ATTORNEYS

For the State CORNE PRIUS

Instructed by DPP