IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

Case no: CC130/10
Reportable: NO

In the matter between:

MZOLISI MKHANGELI Applicant

and

THE STATE Respondent

JUDGMENT (BAIL PENDING APPEAL)

Cengani-Mbakaza AJ

Introduction

[1] There are multitude of cases that demonstrate that before a conviction, the primary purpose of bail application is to strike a balance between the interests of the society, the rights of the accused as entrenched in the Constitution particularly the presumption of innocence.[1] After conviction, the presumption of innocence no longer

[1] *Minister van Wet en Orde en Andere v Dipper*1993 (3) SA 591 (A). This proposition is also fortified by interconnection between sections 60(4) and 60(9) of the CPA.

applies.[2]In instances where the application for leave to appeal has been granted, as in the present case, the offender is eligible to apply for bail, and his rights will in this regard be considered.

[2] Despite the offender's rights to apply for bail pending his appeal, the governing legislation in bail proceedings, the case law and the Constitutional prescripts will remain key indicators in examining whether he/she is eligible to be admitted on bail, the interests of justice being the culmination of all things.

[3] On 03 October 2024 the applicant filed a notice of motion seeking an order that he be released on bail on certain conditions pending the prosecution of his appeal. In addition, the applicant sought an alternative relief which is elaborated at paragraph 8 of this judgment.

The background facts

[4] In his founding affidavit, the applicant asserts that after his conviction on the crimes including murder and robbery with aggravating circumstances dated 2017, and subsequent to his application for leave to appeal which was granted, he struggled to obtain a transcribed record. He then lodged an application to compel the Minister of Justice and Constitutional Development (DoJ) to provide the transcribed record. On 08 June 2021, the application to compel was withdrawn by agreement between the parties. The withdrawal of the application followed the DoJ's compliance in obtaining the transcribed record.

[5] Despite the DoJ's compliance, it transpired that some parts of the record were missing, these are: the evidence that was collated by the trial court on 13 to 17 November 2017 and that of 29 November to 04 December 2017. There was an exchange of e-mails between the offices of the Director of Public Prosecutions (DPP) and the State Attorney. These correspondences aimed at finding a solution to obtain the missing parts of the record, however the problem was not resolved. As a consequence of that, on 17 July 2024, the applicant instructed his legal representatives to lodge an application for bail pending appeal.

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[2] *S v Bruintjies* 2003(2) SACR 565 (SCA) at paragraph 5.

[6] Although the state filed a notice to oppose the application for bail pending appeal, no opposing papers were filed. In light of the fact that bail proceedings are inquisitorial in nature, on 07 February 2025, when the matter was allocated to me, I directed the investigating officer to file an affidavit and indicate his views regarding the status of the applicant. The matter was then postponed to 14 February 2024 to allow the parties including the applicant to submit further information that will assist the court on his eligibility to be released either on bail or on warning.[3]

The parties' legal submissions and the analysis by the court

[7] Considering the fact that the applicant was convicted in the High Court on charges of murder and robbery with aggravating circumstances and further sentenced to life imprisonment, during bail proceedings the parties agreed that the matter falls under schedule 6 in terms of bail legislation. On the basis of what the Criminal Procedure Act (CPA), 51 of 1977 provides, I endorsed this proposition.

[8] Both parties filed heads of argument and further amplified their submissions orally. Mr *Calaza,* counsel for the applicant argued that the delay in obtaining the missing parts of the transcribed record violates the applicant's rights to prosecute the appeal. Referring to the applicant's founding affidavit, he argued that the applicant was released on bail in the district court before the matter was transferred to the High Court for trial. Therefore, so he argued, it is unlikely that the applicant's release on bail would jeopardise the proper functioning of the criminal justice or bail system. He further argued that if the court is hesitant to grant the applicant bail due to concerns that he may drag his feet in prosecuting the appeal, it could impose specific conditions. For instance, so he contended, the parties could be put on terms, such as mandating the state to obtain the missing parts of the record and directing the applicant to prosecute the appeal within a specified time period.

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[3] The directive conforms with section 60 (2) (*b*) of the Criminal Procedure Act 51 of 1977 which provides—

"In bail proceedings the court-

(*a*)…

(*b*) may, in respect of matters that are in dispute between the accused and the prosecutor, acquire in an informal manner the information that is needed for its decision or order regarding bail;

(*c*)…"

[9] Conversely, Mr *Makhubalo,* counsel for the state submitted that the applicant is a flight risk, given his life imprisonment sentence and a potential motive to flee. This proposition, so he argued, is motivated by the applicant's previous conduct. Referring to the investigating officer, Sergeant Cabane's affidavit (I/O), counsel pointed out that the applicant was previously granted bail in the district court. Despite the conditions imposed by the court specifically the warning to frequently attend the court when called upon to do so, he failed to appear in court on an unspecified date, resulting in a warrant for his arrest and a subsequent conviction for contempt of court. Mr *Makhubalo* argued that amongst his co-accused, the applicant was the only one who was detained until the matter was finalised in the High Court due to his conduct. He therefore contended that if released, the applicant may abscond and not prosecute his appeal.

[10] Section 321 of the CPA provides—

'**321 When execution of sentence may be suspended**

(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 and decided: Provided that when the accused is ultimately sentenced to imprisonment the time during which he was so released on bail shall be excluded in computing the term for which he is so sentenced: Provided further that when the accused has been detained as an unconvicted prisoner, the time during which he has been so detained shall be included or excluded in computing the term for which he is ultimately sentenced, as the court of appeal may determine.'

In my view, this provision aims to safeguard the interests of the society, the rights of the convicted prisoners including the rights of the victims, who are also at the centre of the criminal justice system. Therefore, when considering applicant's release on bail pending the appeal, the court must conduct a thorough analysis of the facts, striking a balance between those affected by the crime and the rights of the convicted prisoner. This provision gives a court a wide discretion to decide whether the interests of justice permit the release of the applicant. Such discretion must be exercised objectively in light of the fact that the execution of sentence is not automatically suspended by the reason of an appeal against the conviction or a question of law reserved.

[11] Section 60 (11) (*a*) of the CPA which governs bail proceedings *in casu*, contains a peremptory provision which empowers the court to detain the applicant unless he shows the existence of exceptional circumstances which in the interests of justice permit his release. This two-pronged enquiry places the *onus* on the applicant and the test is on a balance of probabilities.

[12] It is well-established that exceptional circumstances are not defined, however the court is guided by the specific facts of each case. In examining whether the interests of justice permit the release of the applicant, sections 60(4)[4] of the CPA serve as a guide. In accordance with the principles governing bail proceedings our courts have reiterated that the reasonable prospects of success should not be taken into isolation when determining the applicant's eligibility to be admitted on bail.

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[4] Section 60(4) of the CPA provides,
"The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;
(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his trial; or
(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or conceal or destroy evidence; or
(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;
(e) Where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security."

[13] In the present matter, after engagement with Mr *Calaza*, he conceded that the responsibility in ensuring the completeness of the record before appeal is prosecuted lies with the applicant. This concession is well-founded as it accords with the established principle that in criminal appeals the ultimate responsibility in ensuring that the complete and proper copies of the record are placed before the appeal court lies with the appellant especially where he/she is represented.

[14] Guided by the case law, I acknowledge that the non-availability of a proper and well-prepared record for the appeal is a breach of the applicant's right to a fair trial. However, considering the history of this matter the applicant failed to take reasonable steps to ensure that the record was properly reconstructed after obtaining the transcribed record from the DoJ in June 2021. In my engagement with the parties, it was specifically placed on record that the trial judge, the applicant's legal representative as well as the Public Prosecutor who prosecuted the trial are still available. Despite guidance from a plethora of case law,[5] the applicant and his legal representatives failed to engage the trial judge to prepare a date for the reconstruction of the missing parts of the record.

[15] In *Schoombie and Another v S*[6]*,* the Constitutional Court referred to the case of *Gora v S* and held—

> 'The obligation to conduct a reconstruction does not fall entirely on the court. The convicted accused shares the duty (my emphasis). When a trial record is inadequate, "both the State and the appellant have a duty to try and reconstruct the record". While the trial court is required to furnish a copy of the record, the

[5] The Constitutional Court in *Schoombee and Another v S* 2017[5] BCLR 572 (CC);2017 (2) SACR1 (CC) referred to a number of authorities that deals the duty to reconstruct a record. At paragraph 20, the court held—

> "If a trial record goes missing, the presiding court may seek to reconstruct the record. The reconstruction itself is "part and parcel of the fair trial processes'. Courts have identified different procedures for a proper reconstruction, but have all stressed the importance of engaging both the accused and the State in the process. Practical methodology has differed. Some courts have required the presiding judicial officer to invite the parties to reconstruct a record in open court. Others have required the clerk of the court to reconstruct record based on affidavits from parties and witnesses present at trial and then obtain a confirmatory affidavit from the accused. This would reflect the accused's position on the reconstructed record. In addition, a report from the presiding judicial officer is often required." [accentuation added]

[6] Ibid at para 21.

appellant or his/her legal representative carries the final responsibility to ensure that the appeal record is in order.' [footnotes omitted]

Therefore, the applicant's approach of shifting the blame to the DPP and State Attorney's offices is illogical. Borrowing the words of Makgoka AJ (as he then was), in the case of *S v Ntopane*[7] (although the facts and the outcome of that case differ from the one under consideration), if a substantial part of the blame for the delay in reconstructing the trial record can be attributed to the applicant, he is not automatically entitled to be admitted on bail as of right.

[16] Furthermore, the applicant failed to respond to the averments made by the I/O regarding his failure to appear in court after being released on bail in the district court. This information was not known to the defence, however Mr *Calaza* confirmed that the applicant was detained until his trial in the High Court was concluded. Taking all these factors into account, releasing the applicant on bail given the history of defaulting court proceedings in the district court and his failure to engage a trial judge in preparation for the reconstruction of the record would be absurd. Gleaning from the trial record, a witness that testified pursuant to the provisions of section 204 of the CPA in addition to other pieces of evidence implicated the applicant in the commission of the offences of murder and robbery with aggravating circumstances. That witness was found to be credible and reliable by the trial court. Although the trial court had already pronounced on the reasonable prospects of success on appeal, it is not a verifiable conclusion that his admission on bail should follow. Therefore, it is my finding based on the facts presented that the applicant, if released on bail may abscond.

[17] Considering all these factors cumulatively, I conclude that the applicant has shown no exceptional circumstances which in the interests of justice permit his release either on bail or on warning. Consequently, the application must fail.

Order

[18] The application for bail pending the appeal is dismissed.

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[7] 2009 JDR 0177 (GPN) at paragraph 14.

N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant	:	Adv: Calaza
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Date Heard	:	14 February 2025
Date Delivered	:	04 March 2025