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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 1007/2019

In the matter between:

JASON THOMAS ROHDE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Rohde v The State* (1007/2019) [2019] ZASCA 193 (18 December 2019)

Coram: Maya P, Van Der Merwe and Nicholls JJA

Heard: 28 November 2019

Delivered: 18 December 2019

Summary: Bail – pending appeal – factors to be considered – whether there is a real prospect in relation to success on convictions – whether appellant a flight risk.

ORDER

On appeal from: Western Cape Division of the High Court, Port Elizabeth (Salie-Hlophe J sitting as court of first instance):

1 The appeal is upheld.

2 The order of the court a quo is set aside and replaced with the following:

'The applicant's application for bail pending his appeal to the Supreme Court of Appeal is granted. The applicant's release on bail is subject to the following conditions:

(a) The payment of the amount of R200 000 in terms of s 60(13)*(a)* of the Criminal Procedure Act 51 of 1977; and

(b) The furnishing of a guarantee in the amount of R1 million to the Registrar of the Western Cape Division of the High Court in terms of s 60(13)*(b)* of the Criminal Procedure Act;

(c) The applicant shall prosecute his appeal in the manner and within the time periods prescribed by the rules of court failing which his bail shall be cancelled forthwith;

(d) The applicant shall reside at his residential address at […] Road, Plettenberg Bay;

(e) Should the applicant need to be in Johannesburg or Cape Town to attend court cases or conduct business, he shall reside at […], Lonehill in Johannesburg and at […], Greenpoint in Cape Town;

(f) The applicant shall notify the commanding officer of the Plettenberg Bay Police Station in person two days prior to his departure when he is travelling to Johannesburg or Cape Town and will set out the duration of such a stay, which period shall not exceed five weekdays for each such stay away from Plettenberg Bay;

(g) The applicant shall report to the Plettenberg Bay Police Station between the hours of 6 am and 6 pm on Wednesday and Saturday of each week;

(h) The applicant shall notify the Registrar of this Court in writing, of any change of his residential, Johannesburg or Cape Town addresses three days prior to any such change;

(i) The applicant shall report to the Plettenberg Bay Police Station within 48 hours of a written notice to that effect being served on his attorney of record, Mr D Witz of Witz Inc Attorneys, 1st Floor, The Conservatory, 13 Blake Street, Rosebank (Tel: (011) 0100400, e-mail Daniel@ Witzinc.co.za) should his appeal be unsuccessful or partially unsuccessful and he has to undergo a period of imprisonment; and

(j) The applicant is prohibited from applying for any passport.

3 This order must forthwith be made available to the South African Department of Home Affairs and the British and Australian Embassies in South Africa.'

JUDGMENT

Nicholls JA:

[1] This is an appeal with the leave of this court against the refusal of the Western Cape Division of the High Court (Salie-Hlophe J) to grant the appellant bail pending an appeal against his conviction and sentence. In a highly published case the appellant was found guilty of the murder of his wife and obstructing the administration of justice in that he concealed the murder to look like a suicide. He was sentenced to 20 years' imprisonment.

[2] On 16 April 2019 the court a quo refused the appellant leave to appeal his conviction. The appellant then applied to this court for the noting of a special entry and for leave to appeal against his conviction and sentence. On 2 July 2019 the appellant's application for a special entry in terms of section 371 (sic) of the Criminal Procedure Act

51 of 1977 (the CPA) was dismissed. (The reference to section 371 is clearly a typographical error and should have been s 317 which entitles an accused person to apply for a special entry if any of the proceedings in the trial court were irregular or not accordance with the law.) This Court, however, granted the appellant leave to appeal against his conviction and the resultant sentence.

[3] This led to the appellant bringing a 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. The further grounds were that he was not a flight risk; his business interest would suffer if he remained incarcerated; he had an unblemished record in that he had faithfully complied with all his bail conditions while out on bail prior to his conviction; and insofar as relevant provisions of section 60 of the Act dealing with bail were concerned, the necessary requirements had been answered in his favour. The court a quo dismissed the application, finding, inter alia, that the appellant was a flight risk and that he had not previously strictly complied with his bail conditions.

[4] The appellant's first hurdle is that he bears an evidential burden of showing that it is in the interests of justice that he be released on bail. This is because he has been convicted of a Schedule 5 offence which requires that an accused persuade the court that it is in the interests of justice to permit his release on bail.[1] Section 60(4) sets out the circumstances where the interests of justice do not permit the granting of bail, including the likelihood of the accused evading his trial.[2] Sections 60(5)-(9) elaborate which factors a court should take into consideration when considering the grounds in s 60(4).

[5] The next difficulty for the appellant is his changed status. The stark reality is that the presumption of innocence no longer operates in his favour. As stated by the court a quo:

[1] This should be distinguished from a Schedule 6 offence where an accused has to show exceptional circumstances exist which justify his or her release on bail.
[2] S 60(4)*(b).*

'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. It permits the accused to take an active part in planning his defence with his counsel, locating witnesses, proving his capability of staying free in the community without getting into trouble. This would include earning an income to maintain his financial needs as well as funding his legal expenses incurred in consequence of his trial. Underlying this important rationale is the fact that the accused enjoys the fundamental right of being presumed innocent.'

[6] On conviction other considerations come to the fore. An increased risk of abscondment once a person has been convicted and sentenced to a lengthy term of imprisonment is inevitable. The severity of the sentence imposed will be a decisive factor in the court's exercise of its discretion whether or not to grant bail. The notional temptation to abscond (which confronts every accused person) becomes a real consideration once the length of the gaol sentence is known.[3]

[7] In refusing bail pending appeal in *S v Scott-Crosley*,[4] this court 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,[5] 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, 1997.[6] 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 s 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.

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[3] *Bail* Johan van den Berg, 3ed, para 14.4.
[4] 2007 (2) SACR 470 (SCA) para 6.
[5] *S v Dlamini; S v Dladla and others* 1999 (2) SA 51 (CC).
[6] Criminal Procedure Second Amendment Act 75 of 1995 and Criminal Procedure Second Amendment Act 85 of 1997.

[8] Being granted leave to appeal a conviction is an important consideration but it is not, in and of itself, a sufficient ground to grant an accused bail. In terms s 17(1) of the Superior Courts Act 10 of 2013, leave to appeal may only be granted where the judges concerned are of the opinion that 'the appeal would have a reasonable prospect of success, or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.'[7] Because no reasons are ever provided therefor, we are unable to state categorically what were the grounds for granting leave to appeal. Even if one were to accept for present purposes that the appellant has reasonable prospects of success, this is but one of the factors to be considered.

[9] Although dealing with a Schedule 6 offence in *Masoanganye v S*,[8] this Court held 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.' This is particularly apposite in this case which has run over 57 days often with highly-charged emotions.

[10] The same sentiment was expressed in *S v Bruintjies,*[9] albeit again in respect of a Schedule 6 offence. 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,

[7] Section 17(1*)(a)* of the Superior Courts Act 10 of 2013.
[8] *Masoanganye v S* 2012 (1) SACR 292 (SCA) para 14.
[9] 2003 (2) SACR 575 (SCA) para 7.

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.'

[11] It is against this backdrop that the present bail appeal should be considered. As in the court a quo, the main thrust of the submissions on behalf of the appellant was that the grant of leave to appeal on the merits presupposes the existence of a reasonable prospect of success in the appeal. With a likely acquittal in the future it would be extremely prejudicial for the appellant to remain in custody, so it was argued. Other considerations were that there is no likelihood that he will abscond, and his financial interests and concomitant ability to provide financial support to his family would suffer. That the appellant was prevented from attending his trial and giving viva voce evidence was, quite correctly, abandoned as a ground of appeal. This is a concession well made as it had no factual basis.

[12] It is not this Court's function, nor indeed is it even possible in the face of a lengthy trial record which has not been placed before us, 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 we have before us is a judgment, spanning some 250 pages. The appellant's version is that the revelations of his infidelity drove his wife to suicide by hanging whilst the state has led medical evidence to show that the hanging occurred post mortem. Suffice to say ex facie the judgment, the conviction cannot be described as demonstrably incorrect.

[13] The pertinent question is whether the appellant is a flight risk taking into account the factors in s 60(6) of the CPA. These are:

'*(a)* the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;

(b) the assets held by the accused and where such assets are situated;

(c) the means, and travel documents held by the accused, which may enable him to leave the country;
(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
(e) the question whether the extradition of the accused can readily be effected should he or she flee the across the borders of the Republic an attempt to evade his or her trial;
(f) the nature and the gravity of the charge on which the accused is to be tried;
(g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;
(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
(j) any other factor which in the opinion of the court should be taken into account.'

[14] We know the nature and gravity of the punishment - the appellant has been found guilty and faces the prospect of 20 years in prison. There is no possibility of a non-custodial sentence should his appeal be dismissed. It is also on record how unpalatable the appellant finds conditions in prison. This must be taken together with the fact that the appellant holds three different passports. He has dual citizenship with South Africa and Australia and has British citizenship which he holds by virtue of England being his country of birth. He resided with his family in Australia for several years in the 1990's. We are informed that all three passports are in police custody and have expired. But this does not preclude the appellant from renewing his passports. What is important is that his past life has been one of international mobility. Nor can it be ignored that South Africa's borders are notoriously porous.

[15] Section 60(6)*(e)* enjoins a court to consider the ease with which extradition could be effected if the appellant were to flee. Unfortunately bitter experience has taught us in South Africa that those with financial means are often able to evade justice for years. There can be no question of this Court condoning a different set of rules for the rich and the poor.

[16] The appellant's financial situation is not entirely clear. He has equity in a property in Plettenberg Bay. An international bank account has apparently been closed. The appellant and his mother each have a 25% shareholding in one of South Africa's largest real estate companies, Lew Geffen Sothebys International Realty. According to the appellant he was the only one of the four shareholders who played an active role in the affairs of the company and without his administrative and management skills, it will continue to go downhill and 'inevitably fail'. Shortly after his arrest Mr Lew Geffen terminated the appellant's services as CEO of the company and has recently attempted to disqualify him as a director of the company due to his criminal conviction. The appellant has appointed Mr Anton Mostert, an attorney, to attend to his interests in his absence. There is further pending litigation over a valuable property owned by the King Edward Trust of which the appellant is a beneficiary. Insofar as it is argued that the appellant should be released on bail to attend to these matters, the drafting of opposing papers and legal consultations can take place in prison and, in any event, he has Mr Mostert to attend to his interests.

[17] Prior to conviction in this matter, the appellant was released on bail of R100 000 plus a bank guarantee in the sum of a million rand. We are informed that the appellant's financial circumstances have deteriorated to such an extent that he can now only afford bail in the sum of R50 000. To ask for more would be to render his right to bail nugatory. If bail is to be fixed in an amount sufficiently high to deter accused persons from failing to serve their prison sentences, it stands to reason that the amount post-conviction should be considerably higher than the amount prior to the conviction. The appellant's circle of family, friends and business acquaintances are undoubtedly wealthy and we are told have loaned him money in the past. To suggest that the appellant should now pay a significantly lesser amount in bail is absurd lends itself to the suspicion that his intention may be to forfeit the bail.

[18] As to family ties in South Africa, the appellant's three daughters reside in South Africa. They are all adults although the younger two attend university and are not self –

supporting as yet. Insofar as the appellant argues that he needs to provide material and emotional support to them, this has thus far been provided by the extended family. It is not stated what emotional support his children require from him nor is the nature of his relationship with his family set out. No evidence has been placed before court as to daughters' current attitudes towards their father. Even if it was their father's infidelity which drove their mother to suicide, as he contends, this must be the cause of great heartbreak and trauma for the children. According to the State the family of the deceased have turned against him. They are the ones supporting the children.

[19] The appellant believes he will be severely prejudiced by his further incarceration. This may be the case if his appeal were to take several years and then result in an acquittal but there is no compelling reason why the parties should not apply for an expedited date for their appeal. The State argues that the case against the appellant is strong and there is nothing to keep him in South Africa. On his own version his business is in ruins and he has no cash assets or assets 'capable of being realised in the short term'. His former partner has made a bid for a hostile takeover of his business. His family ties are tenuous at best.

[20] Bearing this in mind, and that courts are obliged to apply their minds to a panoply of factors when considering bail, I am of the view that the appellant has not discharged the onus of showing that it is the interests of justice that he be released on bail. I am not persuaded that, when one takes into account the factors set out in s 60(6), that the appellant shown that there is no likelihood of him evading his trial. In the circumstances his appeal must fail.

[21] In the result, I would make the following order:

The appeal is dismissed.

CH Nicholls

Judge of Appeal

Van der Merwe JA dissenting (Maya P concurring):

[22] I have had the benefit of reading the judgment of Nicholls JA. I find myself in respectful disagreement with its reasoning and order. As my Colleague points out, s 60(11)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA) is applicable. In my view, for the reasons briefly stated below, the appellant established on a balance of probabilities that the interests of justice permit his release on bail. In the result, he is entitled to bail on appropriate conditions and the court a quo erred in holding otherwise.

[23] First, on the facts of this matter, leave to appeal could only have been granted on the merits thereof. Therefore we have to accept that, after having specifically applied their minds to this question, our Colleagues concluded that there are reasonable prospects that the convictions may be overturned on appeal. They no doubt applied the test set out in *S v Smith* 2012 (1) SACR 567 (SCA) para 7:

'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 a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[24] Second, there is no likelihood that the appellant would abscond. All his emotional and financial ties are with South Africa. Apart from the occasion in February 2018, which was amply explained by medical evidence, the appellant at all times fully complied with his bail conditions. I fail to see how the fact that he could obtain passports from any one of three countries, makes him a flight risk. All three of his passports have expired and are in the possession of the police. The important features of the 2015 Rugby World Cup incident, relied upon by the court a quo, are that after it was discovered at the airport that his South African passport had expired, the appellant was

nevertheless permitted to leave but he was allowed re-entry into South Africa on his Australian passport. In any event, a bail condition that prohibits the appellant from applying for any passport and making the order available to the South African Department of Home Affairs and the British and Australian Embassies, should sufficiently cater for any risk of abscondment. The important point is that the respondent did not make any attempt in the answering affidavits in the bail application to show that the appellant was a flight risk and at the hearing the respondent expressly accepted that he was not.

[25] Although the appellant was convicted of serious crimes, he is not a flight risk. This Court has determined that he has real prospects of success on appeal and his convictions and sentences may well be set aside. There are no other considerations that point to the refusal of bail pending the appeal. In the result bail pending the appeal should be fixed on appropriate conditions.

[26] The appellant's initial release on bail was subject to payment of the amount of R100 000 in terms of s 60(13)*(a)* of the CPA, as well as the furnishing of a guarantee in the amount of R1 million in terms of s 60(13)*(b)* of the CPA. Logic dictates that these requirements should not be relaxed in respect of bail pending the appeal. In fact, the appellant's convictions justify an increase of the bail amount of R100 000 to R200 000.

[27] In the result the following order is issued:

1 The appeal is upheld.

2 The order of the court a quo is set aside and replaced with the following:

'The applicant's application for bail pending his appeal to the Supreme Court of Appeal is granted. The applicant's release on bail is subject to the following conditions:

(a) The payment of the amount of R200 000 in terms of s 60(13)*(a)* of the Criminal Procedure Act 51 of 1977; and

(b) The furnishing of a guarantee in the amount of R1 million to the Registrar of the Western Cape Division of the High Court in terms of s 60(13)*(b)* of the Criminal Procedure Act;

(c) The applicant shall prosecute his appeal in the manner and within the time periods as prescribed by the rules of court failing which his bail shall be cancelled forthwith;

(d) The applicant shall reside at his residential address at […], Plettenberg Bay;

(e) Should the applicant need to be in Johannesburg or Cape Town to attend court cases or conduct business, he shall reside at […], Lonehill in Johannesburg and at […], Greenpoint in Cape Town;

(f) The applicant shall notify the commanding officer of the Plettenberg Bay Police Station in person two days prior to his departure when he is travelling to Johannesburg or Cape Town and will set out the duration of such a stay, which period shall not exceed five weekdays for each such stay away from Plettenberg Bay;

(g) The applicant shall report to the Plettenberg Bay Police Station between the hours of 6 am and 6 pm on Wednesday and Saturday of each week;

(h) The applicant shall notify the Registrar of this Court in writing, of any change of his residential, Johannesburg or Cape Town addresses three days prior to any such change;

(i) The applicant shall report to the Plettenberg Bay Police Station within 48 hours of a written notice to that effect being served on his attorney of record, Mr D Witz of Witz Inc Attorneys, 1st Floor, The Conservatory, 13 Blake Street, Rosebank (Tel: (011) 0100400, e-mail Daniel@ Witzinc.co.za) should his appeal be unsuccessful or partially unsuccessful and he has to undergo a period of imprisonment; and

(j) The applicant is prohibited from applying for any passport.

3 This order must forthwith be made available to the South African Department of Home Affairs and the British and Australian Embassies in South Africa.'

CHG Van der Merwe

Judge of Appeal

APPEARANCES:

For the Appellant:	F Van Zyl SC and W King SC
Instructed by:	Witz Inc Attorneys, Rosebank
	Michael Du Plessis Attorneys, Bloemfontein
For the Respondent:	L J Van Niekerk
Instructed by:	Office of the Director of Public Prosecutions
	Cape Town