REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS216/2012

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

Date: 24 February 2021

In the matter between:

BONGINKOSI MENYUKA Applicant

and

THE STATE Respondent

JUDGMENT

STRYDOM J:

[1] This is an application for bail pending the hearing of an appeal against both conviction and sentence.

[2] The applicant was convicted by the Late Honourable Judge Maluleke sitting as a court of first instance. As a result of the death of the trial judge, this application was heard by this court. Previously, the trial judge refused leave to appeal against conviction and sentence but leave to appeal was granted on 25 August 2017 by the Supreme Court of Appeal, to the Full Court of the Gauteng Division of the High Court, Pretoria, against conviction and sentence imposed by the trial judge.

[3] During or about 2013, the applicant was convicted on a count of murder and attempted murder and was sentenced to an effective 27 years' imprisonment. The applicant has been serving his sentence since 22 August 2013.

[4] This bail application is brought pursuant to the terms of section 321 of the Criminal Procedure Act, 51 of 1977 ("the CPA") which reads as follows:

> "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 an 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.

(2) If the court orders that the accused be released on bail, the provisions of sections 66, 67 and 68 and of subsections (2), (3), (4) and (5) of section 307 shall mutatis mutandis apply with reference to bail so granted, and any reference in –

(a) section 66 to the court which may act under that section, shall be deemed to be a reference to the superior court by which the accused was released on bail

(b) section 67 to the court which may act under that section, shall be deemed to be a reference to the magistrate's court within whose area of jurisdiction the accused is to surrender himself in order that effect be given to any sentence in respect of the proceedings in question; and

(c) section 68 to a magistrate to be deemed to be a reference to a judge of the superior court in question."

[5] In terms of section 321(1)(b), the superior court from which the appeal is made has a wide discretion to consider whether bail should be granted to a sentenced prisoner. This is underpinned by the use of the words "*thinks fit to order*" that the accused be released on bail.

[6] When this matter was heard by this court I posed the question to counsel appearing for the applicant and the State whether section 60 of the CPA, and more particularly section 60(11)(a), would determine the criteria and test to be applied in the court's exercise of its discretion to either grant or refuse bail as envisaged in section 321 of the CPA.

[7] Section 60(11) determines 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 interests of justice permit his or her release;"*

[8] Upon consideration of the wording of section 60, it becomes apparent that this section deals with accused persons not yet convicted. Section 60(11) deals with an accused who has been charged with an offence and does not refer to a convicted and/or sentenced person.

[9] Turning to section 321, this section does not render section 60 applicable whilst it does so in relation to sections 66, 67 and 68 of Chapter 9 of the CPA dealing with bail. In terms of section 321(2) subsections (2), (3), (4) and (5) of section 307 apply *mutatis mutandis* with reference to bail so granted.

[10] Section 307 deals with reviews and subsection (2) cross-references to sections 59 and 60 of the same Act in the following terms:

> *"(2) If the court releases such a person on bail, the court may –*
>
> *(a) if the person concerned was released on bail under section 59 or 60, extend the bail, either on the same amount or any other amount;"*

[11] This section does not render sections 59 or 60 applicable to a bail application in terms of section 321 as it merely states that if bail was previously granted under these section, such bail may be extended.

[12] Reference should also be made to section 58 of the CPA to consider the applicability of section 60(11)(a) or (b) when bail is considered by the trial judge pending appeal. This section deals specifically with the effect of bail and makes it clear that bail endures until a verdict is given by a court in respect of the charge to which the offence in question relates. Where sentence is not imposed forthwith after the verdict and the court extends bail until sentence is imposed, it should only do so subject to the following *proviso* contained in section 58:

> *"Provided that where a court convicts an accused of an offence contemplated in Schedule 5 or 6, the court shall, in considering the question whether the accused's bail should be extended, apply the provisions of section 60(11)(a) or (b), as the case may be, and the court shall take into account –*
>
> *(a) the fact that the accused has been convicted of that offence; and*
>
> *(b) the likely sentence which the court might impose."*

[13] The relevance of this section is that the legislator specifically dealt with the applicability of section 60(11)(a) and (b) when bail is extended pending the imposition of sentence. It does not deal with a further bail application after an accused was sentences and after he or she started to serve such sentence. It is also to be noted that section 321 of the Act does not have a similar proviso as that contained in section 58.

[14] The question that arises is whether a superior court hearing a bail application pursuant to the terms of section 321 is bound by the terms of section 60(11)? More particularly so as section 321 stipulates that the superior court from which the appeal is made can grant bail to a person serving a sentence if the court thinks it fit to do so.

[15] In *S v Masoanganye*[1] Harms JP found as follows:

> *"[13] I now revert to the appeal proper. An application for bail after conviction is regulated by s 321 of the Act. It provides that the execution of the sentence of a superior court 'shall not be suspended' by reason of any appeal against a conviction unless the trial court 'thinks it fit to order' that the accused be released on bail. This requires of a sentenced accused to apply for bail to the trial court and to place the necessary facts before the court that would entitle an exercise of a discretion in favour of the accused. Compare S v Bruintjies 2003 (2) SACR 575 (SCA) para 8."*

[16] In *S v Bruintjies* the Supreme Court of Appeal also dealt with an appellant who was convicted on a count which fell within the ambit of section 60(11) of the CPA. After quoting the section, the court found as follows:

> *"[5] The section deals, on the face of it, with unconvicted persons. However, it must follow that a person who has been found guilty of a Schedule 6 offence cannot claim the benefit of a lighter test. It was conceded that the mere fact that a sentenced person has been granted leave to appeal does not automatically suspend the operation of the sentence, nor does it entitle him to bail as of right. (See R v Mthembu 1961 (3) SA 468 (D))."*

[17] This *ratio* of *Bruintjies* was accepted by the Supreme Court of Appeal in *S v Scott-Crossley.*[2] The court in *Scott-Crossley* found as follows:

> *"[4] It is thus clear that the appellant bore the onus to persuade this court that exceptional circumstances exist which in the interests of justice permit his release on bail."*

[18] The Supreme Court of Appeal in matters pertaining to bail applications pending appeal accepted that the criteria set in section 60(11) remains applicable. See

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[1] 2012 (1) SACR 292 (SCA)

[2] 2007 (2) SACR 470 (SCA)

for instance *S v Rohde.*[3] In this matter Van der Merwe JA, delivering the majority judgment, made the following comment dealing with a bail application after conviction and sentence:

> *"As my Colleague points out, s 60(11)(b) of the Criminal Procedure Act, 51 of 1977 (CPA) is applicable."*

[19] Section 321 which provides the court with a wide discretion through the use of the words "*thinks fit to order that the accused be released on bail"* was not referred to in the judgment in *Rohde.*

[20] As indicated hereinabove, the Supreme Court of Appeal in *Rohde* specifically found that section 60(11)(b) remains applicable in a bail application pending appeal after sentence was imposed. In *Bruintjies*, it was held that an applicant under such circumstances cannot claim the benefit of a lighter test than that imposed in the case of unconvicted persons by section 60(11). The court stated that exceptional circumstances must be established without reference being made to the discretion provided for in section 321.

[21] In both these cases the test applied to consider the bail applications, after sentence pending appeal, was to apply the criteria of either section 60(11) (a) or (b). In The case of *Bruintjies* the court found that the appellants bore the onus to persuade the court that exceptional circumstances exist, which in the interests of justice permit their release on bail. In *Rohde* it was specifically stated that section 60(11)(b) remains applicable.

[22] The fact that in *Bruintjies*, the court acknowledged that on the face of it, section 60(11) is applicable as far as unconvicted persons are concerned, serves as an

[3] 2020 (1) SACR 329 (SCA)

indication that the court considered that it may not be applicable in the case of convicted persons. The court nevertheless concluded that a convicted person convicted of a crime falling within the ambit of section 60(11)(a) cannot claim a lighter test to be applied when bail pending appeal is concerned. This would mean that an applicant will have to lead evidence, in a case falling within the ambit of this section, that exceptional circumstances exist which in the interest of justice permit his release. There is a difference in the approach adopted in *Rohde* and *Bruintjies.* In the case of *Rohde* the court found that section 60(1)(b) was applicable whilst the court in *Bruintjies* applied the criteria set in section 60(11)(a) as the appellant could not claim the benefit of a lighter test after conviction. I am bound by these decision and in any event, am in agreement with the finding in *Bruintjies* that exceptional circumstances will have to be shown before a person convicted of schedule 6 offences and sentenced to long term imprisonment is released on bail pending an appeal. Despite the wide discretion provided for in section 321 a starting point should be that exceptional circumstances will have to be shown to be granted bail which effectively suspends the sentence of the applicant until his appeal is dealt with.

[23] Accordingly, I will approach this matter and exercise my discretion on the basis that the applicant had to adduce evidence to persuade this court that exceptional circumstances exist which in the interests of justice permit his release on bail.

[24] The applicant made it clear in his notice of bail that he applies for bail in terms of section 321(1)(b) of the CPA. He filed an affidavit in support of his bail application. No affidavit was filed on behalf of the State. When the matter was

heard, counsel for the applicant enquired from the court whether oral evidence would be necessary and the court indicated to Mr Nobangule, that it is the applicant's choice to lead further evidence or to stand by the filed affidavit.

[25] The affidavit of the applicant on the face of it was drafted without the assistance of a legal practitioner and in prison whilst serving his sentence. The affidavit contains factual allegations and legal submissions in a somewhat disorganized fashion. To some extent the court will bear in mind that this is an affidavit of a layman who attempted to place facts before court. From this affidavit, the following facts can be discerned:

25.1 The applicant is a 49-year-old father of four and a South African citizen.

25.2 He has been incarcerated since his conviction on 22 August 2013.

25.3 The address where his children live and where he would reside if released on bail is 480 Blue Gum Street, Extension 10, Boksburg. He also has a home in Jozini, KwaZulu-Natal, where he was born.

25.4 He stated that he has a large amount of assets in his possession as an incentive for him not to abscond.

25.5 He indicated that he was previously out on bail in the amount of R3,000 and stood his bail and adhered to all bail conditions throughout the trial.

25.6 He stated that since August 2017, after he obtained leave to appeal against his conviction and sentence, he attempted to have his appeal prosecuted in the High Court but was informed that the judgment could not be found. He states that one of the grounds for his application for

bail is on the basis that the Director of Public Prosecutions has, on several occasions, failed to place the matter before an appeal court for hearing.

25.7 He pointed out that he has no previous convictions or other pending cases against him.

25.8 He indicated that he has no travel documents.

25.9 He has no links outside of this country that would make it easy for him to abscond.

25.10 He indicated that he will not abscond should his appeal not be successful. He submitted that he is not a danger to the public and that he would not place in jeopardy the functioning of the criminal justice system.

25.11 He claims that he has reasonable prospects of success that his appeal will be upheld.

25.12 Reference was also made to alleged irregularities during the course of the trial particularly as far as the trial judge's interference with the cross examination of witnesses was concerned.

[26] It was argued on his behalf that there is a high likelihood that the conviction will be overturned. To come to this conclusion, reliance was not only placed on the fact that the applicant obtained leave to appeal from the Supreme Court of Appeal but reference was made to the evidence pertaining to his identification as one of the perpetrators.

[27] It has been found many times by our courts, including by the Supreme Court of Appeal, that the mere fact that an accused obtained leave to appeal, either from the trial court or from the Supreme Court of Appeal upon petition, is not necessarily on its own a sufficient factor to entitle a convicted accused to be released on bail. This fact does not establish exceptional circumstances in favour of the granting of bail.[4]

[28] In *Masoanganye* the Supreme Court of Appeal 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 a real prospect that a non-custodial sentence may be imposed. The same sentiment was expressed in *Bruintjies* where it was found that what was required was that a court examine all relevant circumstances and determine whether these circumstances, individually and cumulatively, amounted to exceptional circumstances justifying the appellant's release on bail. The court in *Bruintjies* found as follows:

> *"[6] …The prospects 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 factors 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."*[5]

[29] Accordingly, this court will not be persuaded to grant bail merely because the applicant obtained leave to appeal from the Supreme Court of Appeal. The

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[4] See *Beetge v S* (925/12) [2013] ZASCA 1 (11 February 2013); see also my judgment *S v Zondi* 2020 (2) SACR 436 (GJ)

[5] See also *Babuile and others v S* (CC32/2014) [2015] ZAGPPHC 1110 (13 October 2015)

court will have to make an independent finding to determine the real prospects of success on conviction coupled with all other relevant circumstances of this case. Having said this, it should be mentioned that in evaluating the prospects of success, it is not a function of this court to analyse the findings of the court *a quo* in great detail. As was found in *S v Viljoen*[6], if this is done, it would become a dress rehearsal for the appeal to follow. The consideration whether bail should be granted or not should be confined to reasonable boundaries, subject to the applicable legislation and the rights of an applicant.

[30] The conviction of the applicant was premised on limited evidence. First, he was identified as a driver of a vehicle which transported the perpetrators from the crime scene by way of a dock identification by Ms Motaung, a witness who previously made a sworn statement to the effect that she would not be able to identify the perpetrators who committed this offence. This was also the reason, according to the investigating officer's evidence, why no identification parade was held. Second, the only other admissible evidence against the applicant was that the applicant was part of a group that made threats previously that they will shoot people that interfere with their taxi routes. Despite this unreliable identification of the applicant, the court *a quo* went ahead to make a finding that the applicant acted in the pursuance of a common purpose with his co-accused to commit these crimes. I am of the view that there is a likelihood that a court of appeal may set aside the conviction of the applicant. In my view, the applicant has a strong case on appeal which would mean that, in my view, the conviction is demonstrably suspect. This factor, in my mind, is the one outstanding feature why the court must consider the granting of bail.

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[6] 2002 (2) SACR 550 (SCA) at 561 G-I

[31] This finding does not mean that the applicant should be released on bail. This court must still consider whether the applicant is a flight risk or not.

[32] A strong argument was advanced on behalf of the State that the applicant has provided insufficient particularity in his affidavit to convince the court that he is not a flight risk. For instance, the applicant failed to provide the court with the particularity of his assets and the value thereof. The court was referred to the matter of *Beetge, supra.* In that matter the court concluded that insufficient information was provided about the personal circumstances of the applicant. But importantly, the court concluded as far as the strength of the State's case, that the objective elements of the evidence tended to show that the State's case was by no means weak. The corollary was that, according to the finding, the appellant's prospects of success in that matter could not be categorised as strong.[7] This finding distinguishes the application in *casu* from the *Beetge* case.

[33] The applicant was previously out on bail but the circumstances have now changed materially. He has now been convicted and has been sentenced to a long term of imprisonment. Despite this, I am of the view that the applicant has indicated that he would not abscond should his appeal not be successful. He already served more than 7 years of his sentence and may become eligible to be granted parole at some stage. He has provided the court with his address and the court accepts his evidence that he has no ties, either family or business related, outside the Republic of South Africa. He has no travel documents and in my view, has proven on a balance of probabilities that he will not abscond.

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[7] *Beetge* para [10]

[34] This is not a matter in which the conviction could possibly be altered to a conviction which will still lead to a sentence of incarceration as was the case in *S v Oosthuizen & another.*[8] In this matter, the court has concluded that before bail pending appeal can be granted, there has to be a real prospect in relation to success on conviction and that a non-custodial sentence might be imposed, before a further period of detention would be unjustified (see: paras [28] and [29]of this judgment). There is no midway as far as the the case of the applicant is concerned. Either he is going to be acquitted and his sentence set aside or his appeal is going to fail and the term of imprisonment will remain long term. I am of the view that the former is the more likely scenario, though this really remains an issue for decision by the court of appeal.

[35] I asked counsel for the applicant to establish when this appeal would be heard by the full court. This court has been provided with a document from the Registrar of Full Court Appeals, Gauteng Local Division, Johannesburg, which reads as follows:

> *"Please be advised that the reconstructed full court record has been forwarded to the Director of Public Prosecutions for enrolment on 10/12/2021 concerning the prosecution of the appeal."*

[36] Consequently, if the applicant is not granted bail he will remain in custody and he will continue to serve his sentence for a further approximately 10 months. In my view, the undue delay of this appeal for a period of approximately four years is a further factor which the court should consider when deciding whether the applicant should be release on bail. Considering this factor, together with the more than reasonable prospect of success on appeal and the applicant's

[8] 2018 (2) SACR 237 SCA

personal circumstances, this court finds that the applicant, on a balance of probabilities, established that exceptional circumstances do exist which in the interests of justice permit his release on bail. I find it fit, as contemplated in section 321, that the applicant should be released on bail and that the execution of his sentence be suspended.

[37] As far as bail conditions are concerned, the court will order that the applicant report to the Vosloorus Police Station as will be stipulated in the Order.

[38] The applicant has previously been out on bail of R3,000 but in light of the change in circumstances, I am of the view that this amount should not be increased to R10,000.

[39] In the result, the following order is issued:

(1) That bail pending the appeal to the Full Court of this Division is granted.

(2) The applicant's release on bail is subject to the following conditions:

a. Payment in the amount of R10,000;

b. 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. In this regard the date of 10 December 2021 has been provided for enrolment.

c. The applicant shall report to the Vosloorus Police Station between the hours of 6am and 6pm on Wednesday and Saturday of each week.

d. The applicant shall reside at his given residential address situated at 480 Blue Gum Street, Extension 10, Boksburg.

e. Should the applicant plan to visit his home situated in Jozini, KwaZulu-Natal, he should inform the investigating officer of his intention to do so and the duration of his stay, seven days before departure thereto.

f. The applicant shall notify the registrar of this court in writing, of any change of his residential address in Boksburg seven days prior to such change.

g. The applicant shall report to the Vosloorus Police Station within 48 hours of written notice to the effect that his appeal has been unsuccessful and he must submit himself to continue with the remaining term of imprisonment. This notice can be served on him at his residential address or changed residential address.

h. The applicant is prohibited from applying for any passport.

R STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DICISION
JOHANNESBURG

Date of hearing: 16 February 2021

Date of judgment: 24 February 2021

Appearances:

On behalf of the Applicant:	Adv. S Nobangule
On behalf of the Respondent:	Adv. VT Mushwana