

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: A108/22

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

07/11/2022
DATE


SIGNATURE

In the matter between

MNISI PHUMZILE CYNTHIA

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

JORDAAN AJ:

- [1] This is an appeal against the refusal of bail pending appeal to the Full Bench of this division, against conviction and sentence imposed on the appellant in the Kempton Park Magistrate Court.

- [2] The appellant was convicted of culpable homicide and sentenced to thirty months imprisonment on the 19th of July 2022. The conviction emanates from the motor vehicle accident which occurred on the 20th of July 2015 in which a scholar died as a result of the negligent driving of the appellant.
- [3] This appeal centres around the magistrate's reasons for refusing bail which, according to the appellant, have no merit. The only reason advanced by the magistrate was that the appellant, who was on warning throughout the trial, was no longer innocent after she was convicted and that her prospects of success on appeal are slim.
- [4] It was the Respondent's submission in opposition that in refusing bail the court *a quo* correctly considered that the appellant is no longer presumed innocent and that her prospects of success on appeal are slim as these are factors to be considered.
- [5] The issue of bail pending appeal was addressed In *Liebenberg v S*¹ as follows:
- "...When a court is approached to release a prisoner on bail pending appeal, it is required to exercise a discretion. The starting point is that the decision of the trial court is taken to be correct. At the same time, the convicted person has a right of appeal that must not be rendered nugatory by the refusal of bail for insufficient reasons. It is in the interest of justice that, wherever possible, liberty should be upheld by the release of the applicant on bail pending appeal.. "*

¹ 2022 (1) SACR 58 (NCK)

[6] In *S v Rawat*² the court said the following:

"The powers of this Court in an appeal against refusal of a magistrate to grant the appellant bail are limited – the real question being whether it can be said that the magistrate, who was vested with the discretion to grant bail, exercised that discretion wrongly."

[7] It is thus trite that the appeal court shall not set aside the decision against which the appeal is brought unless it is satisfied that the that the decision was wrong, in which event the appeal court shall then give the decision which in the court's opinion the lower court should have given³.

[8] In considering bail pending appeal, in *S v Naidoo*⁴ it was held that "the possibility of success on appeal" was sufficient to consider bail. While in *S v Hudson*⁵ it was held that the question is not whether the appeal will succeed, but on a lessor standard, whether the appeal is free from predictable failure to avoid imprisonment.

[9] In considering an application for bail pending a petition for leave to appeal on conviction, the magistrate was obliged to balance the liberty of the individual against the interests of the good administration of justice, and in doing so, to consider the prospects of success on appeal.⁶

[10] It was submitted on behalf of the appellant that she is not a flight risk and will

² 1999 (2) SACR 398 (W)

³ *S v Green & Another* [2006] ZA SCA 3; 2006 (1) SACR 603 SCA at 609 i-j

⁴ 1996 (2) SACR 250 (W)

⁵ 1996 (1) SACR 431 (W) at 43c

⁶ *Smith v S* (CA&R150/09) [2009] ZAECGHC (18 August 2009)

serve her sentence should her appeal be unsuccessful. She has diligently attended court and has four minor children who are dependent on her as the sole breadwinner.

[11] This court had regard to the record. The judgment on the application for bail pending appeal consisted of two reasons:

12.1 the applicant is no longer presumed innocent, she is convicted.

12.2 the prospects of success on appeal are slim

[12] The refusal of bail pending appeal is devoid of the required balancing of the applicant's liberty, by considering her personal interests, against the interests of justice. There is no indication on the record that the court *a quo* considered the factors submitted by the applicant.

[13] In the circumstances it is clear that the requirements in section 65(4) of the Act has been met.

[14] This court considered the provisions of section 60(4) to (9) of the Act.

[15] The appellant diligently attended court throughout her trial proceedings. Appellant was convicted of culpable homicide, however the evidence on record shows a complete absence of excessive speed. The appellant has no previous convictions, she was a first offender and between the year 2015 till 2022 was not implicated in any offences. The appellant has fixed employment and is the sole breadwinner of four minor dependants. The

appellant is a South African citizen and has roots in the country. It was also submitted that she will serve her sentence should her appeal be unsuccessful. I received no evidence or submissions to the contrary.

[16] The court had regard to the grounds of appeal on conviction and sentence. It is not the function of this Court to analyse the evidence in the court *a quo* or the reasons for sentence, as that may amount to a dress rehearsal for the appeal to follow. However, after a perusal of the record of the court *a quo*, this Court finds that the court *a quo* was correct in granting leave to appeal.

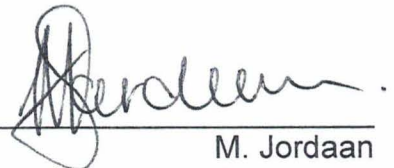
[17] The prospects of success do not in itself amount to 'in the interests of justice' as envisaged by the Act 51 of 1977. The fact that the court *a quo* considered that another court might come to a different finding in the circumstances of this case, cumulatively weighed in the balance with the factors stated above does amount to "in the interest of justice".

[18] In my view, the interests of justice, given the appellant's right to liberty and the clear misdirection of the court *a quo*, moves me to grant the applicant bail.

[19] **I make the following order:**

1. The appeal is upheld.
2. The court *a quo*'s order refusing bail pending appeal is set aside.

3. Bail is granted to the appellant pending her appeal to the Full Bench of this Division in the amount of R1 000.00 subject to the following conditions:
- a. The appellant must prosecute her appeal within one month of this order.
 - b. Should the appellant fail to prosecute her appeal within one month of this order, her bail is revoked and she must forthwith report to the Correctional Service Centre, Johannesburg and serve her sentence.



M. Jordaan
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

APPEARANCES

FOR THE APPELLANT: Advocate S. Hlazo

INSTRUCTED BY: Legal Aid South Africa

FOR THE RESPONDENT: Advocate D. Molokomme

INSTRUCTED BY: Director of Public Prosecutions, Johannesburg

DATE HEARD: 17 October 2022

DATE OF JUDGMENT: 07 November 2022