IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER CC168/15

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

07 / 12/ 2016
DATE

SIGNATURE

7/12/2016

In the matter between:

THE STATE

And

MBONGENI SHABANGU	1st APPLICANT
GIVEN SHABANGU	2ND APPLICANT
THABO SIBIYA	3RD APPLICANT
MUZI MAHLANGU	4TH APPLICANT
GIVEN MOTAU	5TH APPLICANT

JUDGMENT

MAVUNDLA, J,

[1] The applicants were each convicted and sentenced by this Court on the 25 July 2016 as follows:

1.1: The **1st, 2nd, 3rd and 5th** appellants on **count 1, murder on *dolus eventualis*** and **count 2 kidnapping** and each sentenced respectively to 14 years imprisonment and 10 years imprisonment, 5 years of the latter sentence was ordered to run concurrently with the sentence of 14 years, **effective sentence is 19 years imprisonment;**

1.2 The **4th** applicant on **count 2 kidnapping** and sentenced to 10 years imprisonment, 4 years of which was suspended for 5 years on condition that he is not convicted of a similar offence committed during the period of suspension.

[2] On finalization of their trial this Court *mero motu* granted the applicants leave to appeal against both the convictions and sentences. The applicants have since lodged their notice of appeal against both the convictions and the sentences. They also approached this court with an application to be admitted on bail pending the finalization of their appeal, which is what serves before this Court.

[3] It is common cause that during the trial the applicants were out on bail and religiously attended Court without failure. However, upon conviction, the court withdrew their bail, consequently they were in custody on finalization of their sentencing. In the present bail application pending appeal, the applicants did not testify and relied on their respective affidavits filed in court by their counsel. The

applicants in their affidavits have, *inter alia*, disclosed their respective ages, residential addresses and personal circumstances which are as follows:

3.1 The first applicant is 21 years old, single; passed grade 12 and unemployed;

3.2 The second applicant is 27 years old, single has passed N4 Machenical Engineering but unemployed. He is a member of The Holy Catholic Church in Zion Ekhuanyeni.He was a student at Denver Technical College from November 2014 to August 2016 where he had registered Mechanical Engineering course N4/N5;

3.3 The third applicant is 24 years old, single, employed as a carpenter and plumber earning R2000. 00 per month;

3.4 The fourth applicant is 24 years old, single, with N5 (Mechanical Engineering qualification and earning R3000. 00 per month. He was also doing internship;

3.5 The fifth applicant is28 years old, single, has a diploma in Education and earning R4 500. 00 per month.

[4] In their affidavits the applicants contended that they have been advised of the provisions of the relevant sections pertaining to bail applications, in particular s60(4)(a) read with s60(5), s60(4(b) with s60(6), s60(v)(c) with s60(7), s60(4)(d) with s60(8) and s60(4)(e) with s60(8)(A); their right to personal freedom as set out in s35 (1) of the Constitution. They also stated that they will not abscond.

[5] Legal submissions were made on their behalf by their counsel. The main thrust of the submission why bail should be granted to the applicants is that they have reasonable prospects of success on appeal on conviction. The main motivation for this submission was that the trial Court in convicting the appellants relied on common purpose without singling each applicant's role as advocated in *Mgedezi* matter. In respect of sentence, it was submitted that the applicants have a reasonable prospects of success and lighter sentences might be imposed.

[6] The respective convictions and sentences of the applicants was a sequel to the kidnapping of the deceased from his home, by a group of people which the applicants were part of. The reason advanced for the kidnapping of the deceased was supposedly to question him about goods allegedly stolen from the Shabangu family so that the deceased can disclose who all the culprits were. The applicants, together with unknown other people, took the deceased to the Shabangus' parental home where he was severely assaulted inside the garage. The deceased with his legs and hands tied with a rope to prevent his escape, was bundled in the back of the Shabangus' bakkie and taken to a rivulet where he was further assaulted and dipped in the rivulet. From there the deceased was then taken to where he was supposedly to point out the people he was allegedly with during the theft of the Shabangu's goods. Along the way, the applicants with the group came across one Stocks. It was alleged, under cross examination, that Stocks also assaulted the deceased. This alleged further assault, in my view, took place while the deceased was in the custody of the applicants. The deceased was eventually taken to a local clinic where he was pronounced dead on arrival.

[7] It was submitted on behalf of the applicants that from the rivulet the group came across one Stocks who further severely assaulted the deceased and it is this assault which caused the death of the deceased. It was submitted further that in the circumstances the trial court misdirected itself in convicting the applicants on the murder count, bearing in mind the principles of *S v Mgedezi and Other*[1] on common purpose.

[8] In my view, it is not necessary for this Court, for purposes of the bail application pending appeal to deal in detail with the question of common purpose, least I traverse the appeal itself, which is now the preserve of the Court of appeal. However, I do bear in mind the fact that in the matter of *Ruiters v S*[2] it was held

[1] 1989 (1) SA 687(A).
[2] [2014] JOL 32598 (ECG).

that: "a finding that a person acted together with one or more persons in a common purpose may be based upon the first mentioned person's active association in the execution of the common purpose. The essence of the common purposes doctrine is that if two or more people, having a common purpose to commit a crime, act in concert towards the accomplishment of that common aim, then the conduct of each of them (not their separate culpability) is, as a matter of law, imputed to the other. There need not necessarily be a prior conspiracy to commit the criminal act. In order to satisfy the requirements of the doctrine of common purpose in respect of murder, the active association must take place while the deceased is still alive and before a mortal wound or wounds have been inflicted by the person or persons with whose conduct the first mentioned person associated himself."

[9] I must hasten to point out that the applicants failed to take the stand and therefore the above submission that Stocks is the person who caused the death of the deceased remains pure speculation, if not conjecture and does not, in my view, bolster the prospect of success on appeal on conviction on both counts. I further bear in mind that in the matter of *Banda and Others*[3] it was held that: "The term common purposes must not be regarded as a magical incantation, nor as a panacea for determining guilt. It is a convenient and useful descriptive appellation of a concept, that, if one or more persons agree or conspire to achieve a collective unlawful purpose, the acts of each one of them in execution of this purpose are attributable to the others."

[10] In the matter of *Yvonne Beetge v The State*[4] Maya JA, (with Shongwe and Majiedt JJA concurring), held that:

"[4] an application to be admitted to bail after conviction is governed by section 321 of the Criminal Procedure Act 51 of 1977. These provisions prohibit the suspension of a sentence imposed by a superior court by reason of an appeal against conviction unless the trial court thinks it fit to order the sentenced accused's release on bail. Therefore, it behoves the sentenced accused to seek bail from the trial court. In so

[3] [1990] 4 ALL SA 152 (BG).
[4] (925/12 [2013] ZASCA 1 (11 February 2013).

doing, he or she must place before the court the necessary facts that would allow it to exercise its discretion in his or her favour and grant bail...

[5] The mere grant of leave to appeal against conviction, which presupposes the existence of prospects of success, is not on its own sufficient to entitle a convicted accused to release on bail pending appeal(*R v Milne & Erleigh* (4) 1950 (4) SA 601 (W) at 603; *R v Mthembu* 1961 (3) SA 468 (D) at 471A; *S v Bruintjies* 2003 (2) SCAR 575 (SCA) para 6). The seriousness of the offence involved, the risk of absconding and the likelihood that a non-custodial sentence might be imposed are factors which the court must also weigh in the balance (*S v Masoanganye* para 2012 (1) SCAR 292 (SCA) at para 14.)"

[11] In the matter of *S v Bruintjies*[5] the Supreme Court of Appeal held that a person who has been found guilty of a schedule 6 offence and been sentenced cannot claim the benefit of a lighter test than that of an unconvinced person (60(11)(a)). The latter section demands of the applicant to persuade the Court that there exists exceptional circumstances warranting that the applicant, in the interest of justice, be admitted to bail. *In casu*, the applicants must persuade the Court that, *inter alia*, there is a reasonable prospect of success on appeal on conviction, and on sentence. Where there is no reasonable prospect of a non-custodial sentence being imposed, then the application must fail.[6]

[12] Kidnapping is a serious offence which violates the victim's right to freedom in terms of s35 of the Constitution. Such an offence lends itself squarely within schedule 6 offences, just like the count of murder does. Both counts individually, attract a long imprisonment sentence. The applicants were convicted of serious offences which fall within the purview of schedule 6 of the Criminal Procedure Act. There is no doubt in my mind that, society expects offenders of serious violent crimes to be sentenced to long imprisonment term, otherwise its confidence in the justice system might be

[5] *Supra*.
[6] V,lde Rawat 1999 (2) SACR 398 (W) where the Court at 401 g-h.

lost. I am inclined to agree with Jozana AJ in *Khawuleza v S*[7] where he opined that the courts in considering the release of a person on bail pending appeal should also have regard to the interest of society. This, indeed accords with s60 (5) (h) of Act 51 of 1977. The applicants have not placed any evidence which demonstrate that their release would be in the interest of justice.

[13] Besides, it is trite that the question of imposition of sentence is a matter of the discretion of the trial court. The court of appeal will not lightly interfere with the exercise of a court's discretion, unless it is shown that such discretion was capriciously exercised, or the sentence imposed is vitiated by irregularity or disturbingly inappropriate; *vide S v Rabie*[8]*; S v Kgosemore*[9]. There is no foundation laid by the applicants which would warrant the intervention of the court of appeal in this regard. In my view, the sentences imposed are not extra ordinarily severe as to induce a sense of shock. I am therefore not persuaded that the applicants have a reasonable prospect of success on both convictions and sentence on appeal, or a non-custodial sentence might be imposed.

[14] In the result all the applicants' applications to be admitted to bail pending appeal are dismissed.

N. M. MAVUNDLA

JUDGE OF THE HIGH COURT

[7] [2005] jol 14239 (TK) at page 4
[8] 1975 (4) SA (A) 855 at 857D-E.
[9] 1999 (2) SACR 238 (SCA) at 241 para [10].

DATE OF HEARING	:	08 NOVEMBER 2016
DATE OF JUDGMENT	:	07 DECEMBER 2016
APPLICANTS' ADV	:	ADV A. C. KLOPPER
INSTRUCTED BY	:	DU TOIT ATTORNEYS.
RESPONDENTS` ADV	:	ADV R MOLOKOANE
INSTRUCTED BY	:	DIRECTOR OF PUBLIC PROSECUTIONS: PRETORIA TOWERS