REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No A 38/2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE; **25/04/2022**

SIGNATURE:

In the matter of:

In the matter between:

Emmanuel Ndou Applicant

and

The State Respondent

JUDGMENT

Maumela J.

1. This is an appeal against the refusal of bail made by the Magistrate's Court for the Regional Division of Tshwane, the court *a quo,* held at Pretoria under case number 42/829/2013*.* The dismissal of the application for admittance to bail was on the 7th December 2021. The appeal is opposed by the State. Before the court *a quo*, the Appellant; Emmanuel Ndou, a male who was 35 years of age at the time he was arrested, applied to be admitted to bail. He was convicted of the following charges:
    1.1. Count 1: Contravening Section 1, 103, 117, 120 (1) (a), and section 121, read with Schedule 4 of the Firearms Control Act 2000, (Act No 60 of 2000, and further read with 250 of the "Criminal Procedure Act" - CPA, and also read with section 51 (2) of the Criminal Law Amendment Act – CLAA;

    1.2. Count 2; Contravening section 90, read with section 1, 103, 117, 120 (1) (a), and section 121, read with Schedule 4 of the Firearms Control Act 2000, (Act No 60 of 2000, and further read with 250 of the "CPA", and also read with section 51 (2) of the CLAA". Unlawful Possession of 8x 9mm parabellum calibre cartridges.

    1.3. Count 3: Contravening Section 1, 103, 117, 120 (1) (a), and section 121, read with Schedule 4 of the Firearms Control Act 2000, (Act No 60 of 2000, and further read with 250 of the "CPA", and also read with section 51 (2) of the "CLAA". Unlawful Possession 1 x 357 magnum calibre Ruger Model security revolver.

    1.4. Count 4; Contravening section 90, read with section 1, 103, 117, 120 (1) (a), and section 121, read with Schedule 4 of the Firearms Control Act 2000, (Act No 60 of 2000, and further read with 250 of the CPA, and also read with section 51 (2) of the CLAA. Unlawful Possession of 6x 38 special calibre cartridges.
    1.5. Count 5; Contravening section 28 of Act No 26 of 1955: Possession of explosives.
    1.6. Count 6; Contravening section 82 of Act No 29 of 1992: Possession of Car-Breaking or House-Breaking implements.

BACKGROUND.

2. The Appellant was charged with the offences listed under paragraph 1.1 to 1.6 above. Before the court *a quo*, he successfully applied for admittance to bail pending trial. Bail was set at an amount of

R5 000-00. Trial commenced on the 27th of July 2015. When the charges were put, he pleaded Not Guilty thus putting the state to the proof of the offences alleged.

3. On the 7th of October 2019, Appellant was convicted of the offences listed above. On the same day, he was sentenced. He again successfully applied before the court *a quo* and his bail was extended pending sentence. On the 7th December 2021, the Appellant was sentenced as follows:
   3.1. Count 1 and 2; Unlawful Possession of a Semi-Automatic Pistol and Unlawful Possession of ammunition; were taken as one for purposes of sentence. For the two offences, each of the accused was sentenced to undergo three (3) years imprisonment.

   3.2. Count 3 and 4; Unlawful Possession of a Semi-Automatic Pistol and Unlawful Possession of ammunition; were taken as one for purposes of sentence. For them, each of the accused was sentenced to undergo three (3) years imprisonment.

   3.3. Count 5, Possession of explosives, each of the accused was sentenced to undergo ten (10) years imprisonment.

   3.4. Count 6, Possession of Car-Breaking or House-Breaking implements.

4. The Appellant applied and was denied leave to appeal on the 25th of October 2021. Subsequent to petition, he was granted leave to appeal. He was sentenced on the the 7th December 2021. Upon being sentenced, he applied before the court *a quo* for bail pending appeal. His application for bail pending appeal was dismissed. On petition, he successfully applied to the Judge President of the Gauteng Division for leave to appeal against the conviction.

5. He also applied for a further extension of his bail pending appeal. This application was dismissed by court *a quo*. It is against the refusal of his application for the extension of bail pending appeal that the Appellant brought this appeal. The charges of which the Appellant was charged fall under Schedule 5 of the Criminal Procedure Act 51 of 1977: ("Act 51 of 1977").

6. Through Section 60 (11) (b) of the Criminal Procedure Act 1977: (Act No 51 of 1977) – CPA; our legislature determined the

approach to a consideration of an application for bail as follows:

(11). Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(b). in Schedule 5, but not 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 the interests of justice permit his or her release.

7. The determination under Schedule 5 of the CPA and through Section 60 (11) (b) of the CPA notwithstanding, the court *a quo* saw its way through towards admitting the Appellant to bail after he was convicted as indicated above.

8. It is trite that the primary consideration in an application for bail pending appeal should be whether the Appellant will serve his sentence if released on bail if his appeal against sentence fails. It can only be logical that the court takes into account the increased chances of the Appellant absconding now that he stands convicted, much as he stands sentenced to a term of imprisonment as compared to the situation where he was merely awaiting the outcome of the trial or for sentence to be imposed.

9. It is more than notable that at this stage, the accused, who is the Appellant *in casu*, stands no longer covered by the presumption of innocence as provided by the Constitution of this country. This is because he now stands convicted and sentenced. The Respondent submits that the severity of the sentence imposed should serve as a decisive factor in the court's exercise of its discretion whether or not to admit an accused to bail. It was submitted that once it is known what the Appellant's punishment entails, the temptation to abscond becomes a real consideration. It was further submitted that the court should consider the likelihood of the Appellant considering it worthwhile to abscond rather than to serve his sentence. It was therefore submitted that bail ought to be refused where the sentence imposed is a term of imprisonment.

10. Prospects of success on appeal do play a role in determining whether or not bail ought to have been granted. It was submitted that the fact that leave to appeal was granted on petition on its own does not constitute sufficient ground for granting bail pending appeal. It was further submitted that given the offences of which

the Appellant stands convicted, imprisonment is the only suitable sentence to be imposed. However, granting leave to appeal may be based on the consideration that the sentences to be imposed, or part thereof ought to run concurrently. In granting leave to appeal, the judges concerned reviewed that the Appellant has reasonable chances of success on appeal.

11. In the case of *Masoanganye v S*[1] paragraph 15, the following was held: *"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 equipped to deal with the issue, having been steeped in the atmosphere of the case."* It was submitted further that the trial court will have had the opportunity to hear the evidence on the merits of the case and its decision to refuse the application for Appellant to be admitted to bail pending appeal is much likely to be based on such observations.

12. The Respondent submits that this court has a limited basis on which it may interfere with the decision of the magistrate who presided in the court *a quo* when the application for admittance to bail was refused. In that regard, the case of *Masoanganye v S* was quoted further where the court it is ordered that&stated the following: "*The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given."*

13. The Respondent also points out that in the case of *S v Barber*[2]*,* the approach to be followed upon appeal was held to be the following: *"It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion, which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly."*

14. Based on the above, the Respondent argues that there is no basis upon which this court can interfere with the decision of the court *a*

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[1]. 2012 (1) SACR 292 (SCA).
[2]. 1979 (4) SA 218 (D).

quo where it refused the application by the Appellant for admittance to bail. Regardless of the consideration of the nature of the crimes of which the Appellant stands convicted, the court *a quo* nonetheless still saw its way through to granting the application for admittance to bail pending trial and pending sentence.

15. The Appellant relied on a sworn affidavit, together with a confirmatory affidavit from his common law wife confirming his personal circumstances. In addition, the Appellant stated in his founding affidavit in this application for bail that he is not a flight risk, that he has strong personal, emotional and financial ties to the community and is resident in the jurisdiction of the court.

16. It was argued on behalf of the Appellant that the magistrate in the court *a quo* erred by holding that the Applicant has no prospects of success on appeal. Whereas the magistrate in the court *a quo* found that the Appellant has "*no chances of success on the merits of his appeal*"; two judges of the High Court held differently. They went on to favourably consider his petition to appeal. It is argued that this should be considered to be an indication that Appellant is entitled to admittance to bail pending appeal. It was therefore pointed out that the magistrate should have considered the Appellant's application for bail with an open mind. It is also argued that the magistrate should have taken into consideration the fact that Appellant has been granted leave to appeal.

17. It was also pointed out that two cases on which the court *a quo* relied in arriving at its decision to refuse Appellant's application to be admitted to bail are distinguishable on the facts. It was pointed out that more particularly, the magistrate in the court *a quo* disregarded the personal circumstances of the Applicant; as well as the specific and pertinent question in any bail application namely; whether the Appellant is or isn't a bail flight risk. It was pointed out that the court *a quo* ought to have attached weight to the fact that the Applicant relied on a sworn affidavit, together with a confirmatory affidavit from his common law wife confirming his personal circumstances.

18. In addition, the Appellant stated in his founding affidavit when he applied for admittance to bail that he is not a flight risk and that he has strong personal, emotional and financial ties to the community, much as he is resident in the jurisdiction of this court. He also indicated that the court *a quo* should have attached considerable

weight to the fact that he was out on bail for the whole duration of the trial, which should serve as an indication that he is not a flight risk since he attended court even after he had been convicted and sentence was pending; factors which the state also conceded.

19. In the case of *State v Masoanganye & Another*[3], the SCA held that in considering an application for bail pending appeal, the court should not only consider the assets of the convicted person, but also his or her personal circumstances in order to determine whether he or she is a flight risk or not. In this case, the Appellant's application for bail pending appeal was upheld, despite the fact that the charges he was facing were very serious.

20. *In casu*; the Appellant is also laden with poor health. It is submitted that his unblemished record of attendance in court for purposes of standing trial whenever cases against him came up is indication enough that the refusal of his application for bail was wrong and that his appeal ought to be upheld. In this regard, the Applicant also referred court to the case of *S v Essop*[4] where the court on page 106, quoted with approval the distinguishing factors and remarked that the court has to take into account the very important considerations that the Appellant made out a case to be released on bail pending appeal.

21. The Appellant takes issue with the fact that while it was correctly pointed out by the court *a quo*, that two judges granted the him leave to appeal against his conviction yet, the court *a quo* did not automatically determine that he qualifies for admittance to bail[5]. It is argued that *in casu*, the Appellant has already proven that his appeal is not manifestly doomed to failure and that a real prospect of success on appeal exists on the merits of his convictions.[6]

22. It was submitted that *in casu,* there is no concern whatsoever that the Appellant will abscond and not serve his sentence should the appeal against the convictions be unsuccessful. It is therefore

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[3]. 2012 (1) SACR 292 (SCA).
[4]. 2018 (1) SACR 99 (GP).
[5]. See: *S v Bruintjies* 2003 (2) SACR 575 (SCA) at 577D-I.

[6]. See: *S v Anderson* 1990 (1) SACR 525 (C) at 525E-F; S v Katlego 2007 (2) SACR 470 (SCA) at paras 5 and 7 where the court dealt with the prospects of success in cases not covered by section 60(11) of the CPA.

submitted that the court *a quo* misdirected itself by not considering the merits of the application for bail and by erroneously focusing on the prospects of success on appeal, whereas that was not the evidential yardstick that the Appellant had to meet.

23. The Appellant makes the point that a high amount of bail. coupled with any condition should eliminate any fear that the State may harbour. The Appellant was convicted in the Magistrate's Court for the Regional Division of Tshwane, held at Pretoria under case number 42/829/2013 on the 7th of October 2019. He was convicted on various charges as indicated above. the said charges included *inter alia*, the contravention of the Firearms Control Act, Act 30 of 2000.

24. The Appellant was on bail pending trial and was also released on bail pending sentence proceedings by the trial magistrate. He religiously attended his trial. As a result, it was submitted that the appeal should succeed and that the Appellant ought to be admitted to bail at an amount to be decided by the court and that bail conditions be set by the court.

25. In the case of *S v Williams*[7] the court said: *"Different considerations do, of course, arise in granting bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that it is putting it too highly to say that before bail can be granted to an applicant on appeal against conviction there must always be a reasonable prospect of success on appeal. On the other hand, even where there is a reasonable prospect of success on appeal bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding. Such cases as R v Milne and Erleigh (4) 1950(4) SA 601 (W) and R v Mthembu 1961 (3) SA 468 (D) stress the discretion that lies with the Judge and indicate that the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. In my view, to apply this test properly, it is necessary to put in the balance both the likelihood of the applicant absconding and the prospects of success. Clearly, the two factors are inter- connected because the less likely the prospects of success are the more inducement there is on an applicant to abscond. In every case where bail after conviction is sought the onus is on the applicant to show why justice requires; that he should be granted bail."*

26. It appears that while considerations of prospects of success on appeal have to come into play in determining the success or otherwise of an application for admittance to bail pending appeal, the facts at play in each case should also play a notable hand in

[7]. 1981 (1) SA 1170 (A).

the determination of that application for bail. As such, even where no prospect of success on appeal are apparent, the court may still grant an application for bail pending appeal. On the other hand, the facts prevailing in the individual case may dictate that the application for admittance to bail be refused even where it appears that there are prospect of success on appeal.

27. In this case, the Appellant has demonstrated sufficient willingness to be in attendance at instances where the cases against him served before court. Considering that prospects of the accused person attending trial or submitting himself in order to serve the sentence imposed have to play a prominent role, the court *a quo* ought to have taken the history regarding the conduct of the Appellant from time to time when attending trial or awaiting sentence into consideration. Such considerations ought to have played a prominent role in influencing the court to decide towards a particular direction. Had this been done, the court *a quo* would have favourably considered his application for bail pending appeal.

28. Based on the above, this court views that the court a quo erred in deciding to dismiss the Appellant's application for admission to bail pending appeal. Consequently, the court finds that there is cause for interference with the decision of the court *a quo* and to permit admittance of the Appellant to bail pending appeal.

29. In the result, the following order is made:

HAVING read the documents filed of record; having heard counsel and considered the matter:

IT IS ORDERED THAT:

29.1. The Appeal is upheld.
29.2. The Appellant is admitted to bail at an amount of R10 000,00 (Ten Thousand Rand), on the following conditions:
29.2.1. That before release, the Appellant must surrender his passport to the Investigating Officer in this case.
29.2.2. That he may not leave the Province of Gauteng, without informing the Investigating Officer in this case,

29.2.3. That directly or indirectly, the Appellant may not make contact with any of the state witnesses in this case.

29.2.4. That the Appellant must report twice per week to the officer in charge at his local Police Station from time to time between 6h00 am. and 6h00 pm. (18h00).

29.2.5. That the Appellant must not apply for any passport/s for himself without informing the Investigating Officer in this case.

29.2.6. That before release, the Appellant must surrender his passport/s to the Investigating Officer in this case.

29.2.7. That directly or indirectly, and on any private or public platform the Appellant may not post or publish any article, status or any material which may have any bearing to any issue or persons/ which or who is relevant in any capacity for purposes of this case;

29.2.8. Without fail, the Appellant shall be in prompt attendance at any instance to which the case against him shall be postponed from time and

29.2.9. That the appellant must report to the clerk of the Court 7 days After his appeal hearing, in the event that his appeal is dismissed in the High Court Gauteng Division Pretoria.

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T.A. Maumela.
Judge of the High Court of South Africa.

RERERENCES

For the Appellant:	Adv. Pistorius SC
Instructed by:	
For the State:	Adv. Mashile
Instructed by:	NDPP
Judgment heard:	25 April 2022
Judgment delivered:	03 May 2022