IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. CC29/2014P

In the matter between:

RAJIVEE SONI **APPLICANT**

and

THE STATE

ORDER

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1. In respect of the applications for leave to appeal all the convictions (counts 1 to 6) and the sentences imposed, the applicant is granted leave to appeal to the Supreme Court of Appeal.

2. The application to be admitted to bail pending leave to appeal is refused.

JUDGMENT

HENRIQUES J

Introduction

[1] The applicant seeks leave to appeal to the Supreme Court of Appeal (the SCA), alternatively the Full Court, Pietermaritzburg, against the convictions on all counts and sentences imposed on 19 September and 26 October 2018 respectively.

In the event of leave to appeal being granted, the applicant seeks to be admitted to bail pending finalisation of the appeal.

[2] A formal application for leave to appeal was filed, albeit incomplete, on 26 October 2018, after the sentencing proceedings had been finalised. Annexure "A" contained the grounds of appeal on conviction, the applicant's affidavit and annexures in support of the application to be admitted to bail pending appeal as annexure "B". The grounds of appeal[1] in respect of the sentences imposed, annexure "C", were subsequently filed after the matter had been enrolled for hearing provisionally on 21 November 2018.

[3] At the outset I must mention that it was extremely difficult to follow the grounds of appeal referred to in the substantial written application for leave to appeal submitted by the applicant. There were often no references to specific paragraphs in the written judgment and the unedited transcript of proceedings, which made preparation for the application extremely time consuming, difficult and protracted the argument, which resulted in the matter having to proceed over two days.

[4] Although the applicant's legal representatives had undertaken to provide written heads of argument on 21 November 2018, none were filed. Had heads of argument been filed and the grounds of appeal cross-referenced with the judgment and unedited transcript, it would have facilitated the speedy conduct of the proceedings and the preparation of this judgment.

The grounds of appeal in respect of conviction and sentence

[5] The comprehensive grounds on which the applicant relies to appeal the convictions are contained in paras 1 to 76.11, pages 3 to 41 of the application. The grounds on which he seeks leave to appeal the sentences imposed are contained in paras 1 to 5.3, pages 59 to 62 of the application. In light of the aforegoing, it is not necessary to repeat them for purposes of this judgment.

[1] Although the grounds of appeal bear a court stamp of 2 November 2018, the application filed in court contained missing pages in the grounds of appeal on sentence. An indexed bundle containing the missing pages was filed at the hearing on 21 November 2018.

Summary of submissions of the applicant

[6] At the hearing of the matter, Mr *Howse* who appeared for the applicant, in summary submitted the following:

(a) Leave to appeal is sought to the SCA on the basis that a number of 'controversial propositions of fact and law' arose during the trial, which merit the attention of the SCA.

(b) The State relied on the evidence of a single accomplice witness, Sugen Naidoo (Naidoo), in the main in respect of counts 1 to 5. Naidoo was a self-confessed liar, thief, drug addict, extortionist etc. This court failed to adequately apply the cautionary rules when accepting such evidence and should have rejected same as inter alia:

  (i) there was no corroboration for his evidence.

  (ii) the evidence of the witnesses Mariamma Kisten (Kisten), Sonali Sookraj (Sookraj), Morné Emersleben (Emersleben) and Hoosen Shaik-Cassim (Shaik-Cassim) did not serve as corroboration for Naidoo's evidence;

  (iii) the State failed to lead the evidence of witnesses who were available and who could corroborate his evidence.

  (iv) these were Brian Treasurer (Treasurer), Darryl Gounder (Gounder), Zaheer Khan (Khan), the police officer who recorded the applicant's witness statement in count 3, Mfaniseni Wiseman Nxumalo (Nxumalo), Captain Pipes Hafejee (Hafejee), Siyabonga Zondi (Zondi), attorney Nersen Naicker (Naicker), Nishal Maharaj (Maharaj) and Ricky Naidoo;

  (v) similarly, knowing that these witnesses were available, the court a quo 'did not exercise its power' and failed to call these witnesses to testify as they would contradict Naidoo's evidence, and drew an adverse inference from the applicant's failure to call them, notwithstanding that the applicant did not bear any onus in that regard;

  (vi) the court a quo failed to draw an adverse inference from the State's failure to call these witnesses; and

  (vii) at para 4 of the application for leave to appeal, reference is made to the 'admission' by Naidoo that he was diagnosed with a bipolar

disorder 'with the result that one minute he would be honest and the next minute he would be dishonest and act irrationally'.

(c) The court a quo misdirected itself in accepting the evidence of Naidoo and the State's witnesses given the contradictions in their evidence in court when compared with their statements and the contradictions in their evidence with each other.

(d) In respect of count 1, this court erred in the application of the doctrine of common purpose and erred in finding that the applicant had conspired with others (like Naidoo, Dlamini, Nxumalo and Treasurer) in furtherance of a common purpose which resulted in the death of the deceased. The court erred in accepting the evidence of Dlamini and rejecting the evidence of Anesh Premchund regarding the cellphone call that was made by Treasurer.

(e) In respect of count 2, there was no evidence to sustain the conviction as the State relied on the evidence of Naidoo and Kisten who did not corroborate each other and Gounder was not called to corroborate Naidoo given that Kisten testified she had no contact with Naidoo.

(f) In respect of count 3, there was no evidence to sustain the conviction as the State relied on the evidence of Naidoo, the contents of the docket which contained the statement of the applicant which was never proved and the diary entries in the docket. In addition, the court a quo ignored the concession by Naidoo that the '[a]pplicant may have been genuinely assaulted by the deceased'.

(g) In respect of count 4, there was no evidence to sustain the conviction as the State relied on the evidence of Naidoo and Sookraj only where their evidence corroborated each other's and failed to have regard to the contradictions in their evidence. The court did not draw an adverse inference from the State's failure to call Sookraj's step-father Khan and attorney Nersen Naicker. The court erred in not accepting the evidence of Devan Panday who corroborated the evidence of the applicant that Naidoo extorted the sum of R20 000 from him in relation to the false charge of sexual assault laid by Sookraj.

(h) In respect of count 5, the court erred in convicting the applicant as:

(i) it relied solely on the evidence of Naidoo and rejected the applicant's 'solid alibi' that he was in Pietermaritzburg for the entire day;

(ii) it ignored the statements of Maharaj and Ricky Naidoo; and

(iii) it ignored the evidence of Colonel Jones that Maharaj and Ricky Naidoo complained about the manner in which their initial statements were obtained.

(i) In respect of count 6, this court misdirected itself in:

(i) allowing the evidence of Professor Mlungisi Sithebe (Sithebe) to form part of the admissible evidence sustaining the conviction as his cross-examination was incomplete. The applicant submits that he has been prejudiced as this witness died before he could recall Sithebe and further cross-examine him;

(ii) admitting the video recording made by Sithebe on his cellular telephone as Sithebe was 'not fully cross examined on the vitally important veracity issues regarding the occasion and circumstances in which the video was recorded'. The applicant maintains that these issues were not fully canvassed with Sithebe as there was an 'understanding' that the veracity issues would stand over;

(iii) not ruling the evidence of Sithebe inadmissible in its entirety and in finding that the cellphone video recording corroborated Sithebe's version;

(iv) not applying the legal requirements to prove the offence of conspiracy to commit murder correctly and ought to have found that there was not a concurrence of minds to commit the offence in question.

(j) The court misdirected itself in rejecting the evidence of the applicant, his witnesses Ricky Ganhes, Devan Panday, Anesh Premchand and Colonel Jones, the photographic evidence and the applicant's evidence in relation to the cellphone video recording.

[7] Mr Howse submitted that the SCA will in light of the above re-assess the evidence and there are reasonable prospects it will set aside the court a quo's findings of fact and law and the convictions.

[8] In respect of the sentences imposed, the grounds on which leave to appeal is sought in summary are the following:

In respect of count 1, this court:

(a) misdirected itself in finding that a 'crime of passion committed in circumstances where a love triangle exists can only serve as a mitigating feature if it is committed on the spur of the moment or as a result of "emotional storming"'; and

(b) erred in not following the decision in *S v Ferreira & others*.[2]

In respect of count 6, this court:

(a) misdirected itself in finding that count 6 stands on its own despite the fact that counts 2 to 5 are closely related to count 1 and treating count 6 differently for purposes of sentence from counts 2 to 5 having regard to the summary of substantial facts;

(b) imposed a startlingly inappropriate sentence by ordering that the sentence on count 6 should run consecutively with that imposed on count 1; and

(c) failed to consider that 'if Sithebe carried out the instructions in count 6, count 1 would not have materialised'.

Summary of submissions by the State

[9] Mr *du Toit*, in quoting from *S v Smith*,[3] reminded the court that leave to appeal ought to only be granted if the applicant has reasonable prospects of success on appeal. He submitted that the applicant is required to show more than that there is 'a mere possibility of success' and that the case is arguable on appeal. There must be a sound rational basis for the conclusion that there are prospects of success on appeal before a court grants leave to appeal.

[10] In relation to the grounds of appeal, he submitted that the applicant has adopted a 'scatter-gun' approach. The applicant has 'nit-picked' and focused on minutiae in making his submissions for leave to appeal and this is borne out by the voluminous grounds of appeal which are contained in the application for leave to appeal which run to some 44 pages.

[11] Mr *du Toit* reminded the court that when deciding on the guilt of the applicant, the court considered the totality of the evidence. Similarly, when determining the

[2] *S v Ferreira & others* 2004 (2) SACR 454 (SCA).
[3] *S v Smith* 2012 (1) SACR 567 (SCA).

application for leave to appeal the court must likewise consider the totality of the evidence presented.

[12] Regarding the evidence of Naidoo, the s 204 witness and the accomplice witnesses, Mr *du Toit* indicated that the court was aware of the cautionary rules applicable and carefully examined the evidence of both Naidoo and the accomplice witnesses. The dangers apparent when accepting the evidence of accomplice witnesses were taken into account by the court. He submitted that if one considers the evidence in totality a different picture is created as opposed to where one considers every minute detail of these witnesses' evidence.

[13] At trial, Mr Sangham indicated that the applicant's version was that the evidence against him was manufactured and that the State fabricated all the evidence against the applicant. Mr *Du Toit* acknowledged that should the court be of the view that there is cause to question the evidence of Sugen Naidoo, then the court ought to grant leave to appeal.

[14] The second aspect Mr *du Toit* dealt with was the alleged failure by the State to call the witnesses referred to in the grounds of appeal, especially Treasurer and the witnesses referred to in para 6(b)(iv) of this judgment who made statements. He submitted that in relation to Treasurer, both Mr *Howse* and Mr *van Schalkwyk SC* are experienced counsel, and they too were aware that these witnesses were available and elected not to call them.

[15] During the early stages of the trial Mr Sangham made mention of the fact that Treasurer was a possible witness for the defence. The witnesses who the State would not be calling were made available to the defence prior to the trial commencing.

[16] Mr *du Toit* submitted that the applicant was free to call these persons to testify yet elected not to do so despite it being pertinently put to the State witnesses that they would be called to give evidence. It was suggested to the State witnesses that their evidence was untrue as the witnesses made available to the defence would attend at court and testify about what was contained in their statements, contrary to the State witnesses' evidence.

[17] Mr *du Toit* also pointed out that in respect of Officer Gounder, it is common cause that a trap was set for him based on the information provided by Mr Sangham and the applicant and Colonel Jones confirmed this when he testified. All of the witnesses made available to the defence, all made two statements, namely statements in terms of s 204 of the Criminal Procedure Act 51 of 1977 (the CPA) and retraction statements. These were not prosecution statements and these statements were provided to the State by the investigating officer and were contained in the police docket. It is inconceivable that the State would have called the various individuals as witnesses after they had made retraction statements, especially Officer Gounder, given the fact that it was common cause a trap was set for him. It was for this reason they were made available to the defence at the outset.

[18] In respect of the evidence of Sithebe, Mr *du Toit* reminded the court of the timeline in which he gave his evidence and was cross-examined and submitted that he was thoroughly cross-examined both in the main trial and the trial-within-a-trial. He acknowledged however, that in respect of count 6, the 'evidence was 50/50 and count 6 is probably their strongest argument'. He submitted that on appeal, given the evidence, the court could find an attempt to conspire or the requirements for the alternative count of incitement proved.

[19] As regards the sentences imposed, Mr *du Toit* submitted that the court properly considered the factors when sentencing the applicant and given the facts, correctly found that this was not a crime of passion. It deviated from imposing the prescribed minimum sentence and correctly found that counts 1 to 5 ought not to run concurrently with count 6.

Analysis

[20] The detailed written judgment on conviction summarises the evidence, analyses such evidence and the legal principles applied. In addition, the judgment on sentence sets out the detailed reasons for the sentences imposed. It is however necessary to make certain preliminary remarks concerning aspects which arose during argument at the hearing of the application for leave to appeal.

[21] The applicant indicated that when analysing the evidence of the witnesses who testified for the State, this court did not reject the evidence of these witnesses

despite the fact that they did not corroborate each other and often contradicted each other. Although the judgment does not refer to each and every one of these contradictions and inconsistencies, it does not mean that they were not all considered and taken into account.

[22] As mentioned in the written judgment several times, all these contradictions and inconsistencies were considered. In *R v Levy*[4] the court when dealing with corroborative evidence held the following:

'It is quite true that in the case quoted it was said that the corroborative evidence must show "that the accomplice is a reliable witness." But if the judgments be read it will be seen that the meaning of those words is not that the corroborative evidence must show that credence can be attached to everything which the accomplice says in the witness box: it is enough if the corroborative evidence satisfies the Court that certain particular statements which the accomplice made in the witness box can safely be accepted as true, and as regards those statements he is a reliable witness.'

[23] In addition, this court was alive to the fact that in respect of certain counts in the indictment the State relied on the evidence of a single witness, Naidoo, a self-confessed liar etc. This too has been canvassed in detail in the written judgment.

[24] A further criticism which emerged during the course of argument by Mr *Howse* related to the fact that this court in its judgment did not deal with all the evidence presented, and that there were 'glaring omissions' as the judgment did not refer to all the evidence, consequently the court committed several misdirections.

[25] At the outset, this court placed on record in the judgment that all the evidence was considered and that it was aware of the contradictions, omissions and inconsistencies in the evidence of the various witnesses. Given the duration of the trial and the sheer volume of the evidence presented, it was simply impossible to deal with each and every minute detail of the evidence. To quote from *R v Dhlumayo & another*:[5]

'(12) An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it

[4] *R v Levy* 1943 AD 558 at 561.
[5] *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 678.

does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.

[26] It is perhaps apposite to recall the words of Greenberg JA where he opined as follows:[6]

'I do not propose to seek to define what is meant by a misdirection on a question of fact; it is sufficient for purposes of this case to say that an omission by a trial court to refer to some fact which is relevant to the question of the guilt of the accused is not necessarily a circumstance which will entitle an appeal court to disregard entirely the findings of the trial court and to seek to retry the case independently of such findings. It is said that in this case there have been such omissions by the trial court as to require us entirely to disregard its findings; as the importance of these omissions can only be appreciated by a consideration of the case as a whole, it is necessary so to consider it.'

The test in respect of leave to appeal

[27] It is useful at this juncture to remind oneself of the test to be applied when dealing with an application for leave to appeal in a criminal matter. In *Smith v S*[7] the SCA held that the test is whether an applicant has reasonable prospects of success on appeal.

[28] At para 7 of the judgment, the court per Plasket AJA records the following:

'What the test of reasonable prospects of success postulate 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 had prospects of success on appeal and that 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 such 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.'

[29] In *S v Kruger*[8] the court was of the view that a possibility that another court could come to a different conclusion and that leave to appeal should not be lightly refused, embodied an incorrect test. The court also expressed that it was

[6] *R v Dhlumayo* above at 681.
[7] *S v Smith* 2012 (1) SACR 567 (SCA).
[8] *S v Kruger* 2014 (1) SACR 647 (SCA) para 2.

undesirable for leave to appeal to be granted against conviction but refused against sentence.

[30] I have considered the detailed grounds of appeal in the written application in making a decision. In doing so, I have had regard to the unedited transcript of the proceedings, my bench books containing my hand written notes of the proceedings as the unedited transcript contains many inaudible portions, the various exhibits and all the written heads of argument submitted during the course of the trial.

[31] I do not propose to deal with each and every ground of appeal advanced in the written application for leave to appeal but wish only to highlight certain aspects relating to some of the grounds advanced. This ought not to be construed as an acceptance that the applicant has reasonable prospects of success on every ground of appeal advanced.

Re the evidence of Sugen Naidoo and counts 1 to 5

[32] In the detailed written judgment the court dealt with the evidence of Naidoo as well as the other witnesses in respect of the different counts. The court recognised that he was an accomplice, a self-confessed liar, extortionist, drug addict and thief. Whilst Naidoo acknowledged that he was diagnosed as suffering with a bipolar disorder such disorder is one in which sufferers experience a high and then a low.

[33] The judgment on conviction acknowledges that there were contradictions in what Naidoo testified to in court, his s 204 statement (exhibit “C”) and what was elicited during the course of cross-examination and when he was recalled as a witness. Naidoo at the outset when he testified indicated that he had no clear recollection of dates, times and amounts. He testified about incidents which occurred several years prior to his evidence in court and it certainly cannot be expected of him to remember each one of these incidents with the accuracy demanded by the applicant and his legal representatives. In addition, although there may be contradictions between the amounts paid and when this occurred, there is corroboration for his version that moneys were paid over albeit under different circumstances as alleged by the applicant.

[34] The applicant alleges that the court committed a misdirection when it relied on the evidence of Shaik-Cassim and Emersleben as corroboration for Naidoo’s

evidence. The written judgment deals with the evidence of these witnesses and also contains the analysis of their evidence. The importance of the evidence of Shaik-Cassim and Emersleben was to confirm that a relationship existed between Naidoo and the applicant. In addition, Emersleben confirmed that the applicant had approached him to ask his wife to lay a false complaint of sexual assault against the deceased. When Emersleben refused, it was then that Kisten and Sookraj were approached.

[35] In addition, Emersleben was approached to commit an assault and was tasked with finding two persons who would ultimately commit or attempt to commit the assault on the deceased on the applicant's instructions. The link between Emersleben and Shaik-Cassim is clear and thus serves as corroboration for the pattern of activity followed by the applicant and Naidoo, the applicant's friendship with Naidoo and some of the planning which occurred between the applicant and Naidoo which they both had knowledge of.

[36] In respect of count 1, the corroboration for Naidoo's evidence that the applicant engaged Treasurer exists in the phone call made by Treasurer in Dlamini's presence, as well as Dlamini's evidence that Treasurer was present in the vehicle when the conversation in relation to the manner in which the deceased would be killed took place. Treasurer not only transported Nxumalo and Dlamini to and from the scene of the shooting but also provided the firearm used. In addition, Treasurer was the one who handed the moneys over to them after the deceased had been killed.

[37] At para 13.2.9 of the grounds of appeal, the applicant submits that this court erred in 'holding that it was Dlamini's evidence that Nxumalo informed Treasurer: here is the man who is going to do the job' as the 'official transcript' did not support such a finding. The unedited transcript (page 990) reflects '[a]s Treasurer was still greeting me then Nxumalo said, this is the man that….(indistinct)'. My contemporaneous notes in my bench book reflected what is summarised and referred to in the written judgment. It is disingenuous of the applicant to suggest otherwise especially when the transcript is unedited.

Failure by the State and the court to call certain witnesses

[38] At the early stages of the trial Mr Sangham advised the court that Treasurer would be a defence witness and further, that Mr Chetty of his offices had received instructions to petition the SCA in respect of Treasurer's conviction and sentence for the deceased's murder. In fact, throughout the course of cross-examination, it was pertinently put to the State witnesses by Mr Sangham that Treasurer would be called as a witness.

[39] It was on this basis that Dlamini, the shottist, was cross-examined and an objection was raised as to the admissibility of his evidence in respect of what transpired in the motor vehicle when Treasurer made a telephone call. In addition, Treasurer had formally been a co-accused of the applicant and had been convicted together with Nxumalo prior to the commencement of the applicant's trial.

[40] Mr Sangham confirmed that State witnesses were made available to him as the State would not be leading their evidence. This is evident having regard to the judgment (para 36, page 11) and the unedited transcript of the proceedings (page 328). The witnesses were identified and the dates on which statements were obtained from them was also placed on record.

[41] In fact, throughout Mr Sangham's cross-examination of certain of the State witnesses, the contents of the statements of the witnesses made available to the defence were put to them. Their statements were however never handed in during the course of the trial. Mr Sangham also placed on record that he had obtained statements from Brigadier Bantam as well as Officer Gounder.

[42] It must be noted that although the CPA[9] enables a court to subpoena witnesses, the exercise of its discretion is exercised judicially and in a limited manner. The court in the exercise of its discretion must be cautious not to "…descend into the arena.' In my view this was not a matter in which it was appropriate for the court to exercise such discretion to call witnesses.

[43] The applicant submits that the court misdirected itself in not considering the absence of corroboration for Naidoo's evidence from available witnesses and the

[9] Section 186 refers to a court subpoenaing witnesses if it would result in a just decision. *R v Gani* 1958(1) SA 102 (A)

impact of this on the evidence of the State overall. A reading of the detailed written judgment reflects corroboration in the form of the evidence of Emersleben and Shaik-Cassim.

[44] In respect of count 2, in as much as Gounder could have corroborated Naidoo's evidence, the defence placed on record that Gounder would be a witness for the defence. It is common cause that during the course of the applicant's trial a 'sting' operation involving Gounder initiated by the applicant and Mr Sangham was held during which time Gounder was arrested. Colonel Jones confirms this. At the outset of the trial, even prior to the 'sting' operation taking place, the State made Gounder available to the defence. Inasmuch as the witness statements of Gounder were handed in, the contents of these statements were not proved as Gounder was not called as a witness by the defence.

[45] The submission in the grounds for leave to appeal that the court failed to take into account that Gounder was not called because he would contradict Naidoo's evidence is an incorrect one. Kisten confirmed that she did not have any contact with Naidoo, her contact was with Gounder.

[46] What the submission ignores is the fact that Kisten testified that her contact was with Gounder and that he was the one who approached her. She had no contact with Naidoo. In addition, although there is a difference between her evidence and Naidoo's as to exactly what transpired, she would not be in a position to testify in relation to the instructions which Naidoo received from the applicant. Her evidence corroborates Naidoo's that she was approached by Gounder to lay a false complaint against the deceased and in fact did so.

[47] In respect of count 3, the fact that the applicant had made a witness statement was never an issue in dispute. It can hardly be said that an adverse inference must be drawn against the State and Naidoo based on the failure to call the officer who recorded the applicant's witness statement and consequently the inference is that there would be no corroboration or support for Naidoo's evidence. Naidoo testified that he took Roshan Jainath's statement and this was confirmed by him during his evidence when the statement was handed in as an exhibit before

court. The applicant's defence was also canvassed with Naidoo and a version put to him by Mr Sangham.

[48] In respect of count 4, the submission that the court committed a misdirection in not drawing an adverse inference that Khan was not called as he would contradict Naidoo, completely ignores the fact that Sookraj confirmed that she was approached by her step-father, Khan to assist Naidoo. She testified how the instructions were given to her by her step-father on the day of the incident and what transpired. It is not disputed that a criminal charge of sexual assault was laid against the deceased. The fact that there is a contradiction in respect of whether a discussion took place in the lounge does not justify the rejection of Naidoo's evidence or that of Sookraj.

[49] In the grounds of appeal, the applicant also criticises the court and the State in not calling attorney Nersen Naicker to testify. One of the difficulties in calling an attorney like Nersen Naicker to testify is that such attorney is bound by attorney client privilege. Sookraj could not remember the name of the attorney and it was never placed on record that whomever had instructed him had waived privilege.

[50] In relation to count 5, as indicated Maharaj and Ricky Naidoo had been made available to the defence as defence witnesses. In relation to the assault on the deceased, Naidoo testified relating to the planning of this and also indicated that he was present when the deceased attended at the charge office to report the incident of the assault. This was never challenged. In this regard he is a single witness.

[51] At para 55 of the written grounds of appeal the applicant submits that the court failed to take into account that the State did not call for the conviction of the applicant on count 5. I am not in possession of the unedited transcript of the submissions made during the final argument presented on 28 February and 1 March 2018. I have had regard to the written heads of argument submitted by Mr *du Toit* and the notes in my bench book. The written heads of the State (para 203) request the court to find the applicant guilty on all six counts. In addition, at the hearing of the s 174 application, although he acknowledged that the State was on 'slim grounds' in respect of count 5, Mr *du Toit* requested the court to refuse the application for the discharge of the applicant on count 5 as there was a case to answer.

Count 6 and the evidence of Professor Mlungisi Sithebe

[52] There are several aspects in relation to this witness's evidence in respect of count 6 which are challenged in the grounds of appeal. The first relates to the failure by the court to disregard Sithebe's evidence in its entirety as the applicant was unable to further cross-examine Sithebe. The applicant submits that the court committed a misdirection in not applying the correct legal principles pertaining to the evidence of a deceased witness who could not be fully cross-examined.

[53] One must bear in mind the sequence in which the trial and the interlocutory applications proceeded in relation to the evidence of Sithebe. He completed his evidence and his cross-examination both in the main trial and the trial-with-a-trial.

[54] The applicant's representatives, Mr *van Schalkwyk* and *Howse* were at pains during the course of their submissions when bringing the application to recall and further cross-examine Mr Sithebe, to place on record that this would be limited to certain aspects. In addition, it was indicated that this was not because Mr Sangham had failed to put the applicant's version to Sithebe but rather that this was a matter of style and the applicant was not happy with the manner in which certain issues were canvassed with the witness. The unedited transcript of the submissions made in the application to recall bears this out.

[55] In addition, the unedited transcript indicates that there was a concession by the applicant's representatives that the applicant's version '. . .has been put in its bare bones' (page 1874). One must bear in mind that the reasons for the court granting the application to recall Sithebe are contained in the written judgment and the limited areas on which further cross-examination was allowed were defined in the order which forms part of the record of proceedings.

[56] It must be emphasised that in granting an application of this nature, the ultimate requirement is whether or not the applicant would have a fair trial. My reasons for allowing the further cross-examination of Sithebe are on record and I do not propose to repeat these here save to say that it was in keeping with the principles of the applicant's right to a fair trial.

[57] In relation to the cellphone video recording which Sithebe made on his cellular phone, that evidence stood over for purposes of a trial-within-a-trial. Sithebe testified

and was thoroughly cross-examined and re-examined in the main trial and thus the applicant's version was put to him during the course of the main trial. In addition, the applicant's defence in relation to the cellphone video recording was at that stage already known.

[58] All the witnesses testified in relation to count 6 in the main trial being Sithebe, the employees of Cash Crusaders as well as the owner, Wayne Beaumont, and thereafter the trial-within-a-trial in relation to the admissibility of the cellphone recording then ensued. Once again Sithebe testified during the course of these proceedings and a version was put to him. The thrust of the attack on the admissibility of the cellphone recording was to deal with the aspects of authenticity and originality.

[59] The applicant elected not to testify in the trial-within-a-trial and thus the challenge to the evidence in the trial-within-a-trial was limited to those witnesses who testified in the course of the trial-within-a-trial. There was certainly no bar to Mr Sangham placing the applicant's defence in 'it's bare bones' on record and his version as to the circumstances under which such recording was made to the witnesses in the trial-within-a-trial.

[60] The unedited transcript of evidence reveals that in fact what was placed in issue by the applicant in the trial-within-a-trial was the originality and the authenticity as well as the veracity of such cellphone recording, the date on which same was made and the circumstances in which the recording was made. It was the applicant's version that the cellphone recording was taken in March 2013 sometime after the incident involving the theft of the window panes at the Mkondeni premises of the applicant had occurred. Such version was canvassed with Sithebe as were the circumstances under which he and the applicant travelled together in the applicant's vehicle.

[61] It is incorrect to say that no cross-examination in respect of this aspect occurred in respect of Sithebe. Mr *Howse* during the course of the argument in the application for leave to appeal conceded that cross-examination occurred to a limited extent.

[62] The second aspect in relation to count 6 and Sithebe's evidence relates to the admissibility of the cellphone video recording and the procedure followed by the court in holding the trial-within-a-trial. Mr *Howse* dealt with this aspect on behalf of the applicant and indicated that the ruling was not clear and it was for this reason that the appeal court could possibly change the finding and indicate that this court ought to have followed the procedure as set out in the Transvaal line of cases such as *S v Baleka & others*[10] as opposed to that followed by the court as set out in *S v Ramgobin*[11] and *S v Singh & another*[12] in this division.

[63] What these submissions in my view fail to appreciate is the fact that Sithebe testified and was cross-examined on the reasons for him making the cellphone recording. The cellphone video recording was not independent evidence to bolster his evidence but rather served as 'self-corroboration'. The applicant had sufficient opportunity to challenge Sithebe's evidence during the course of cross-examination in the main trial and the trial-within-a-trial. The applicant elected not to testify in the trial-within-a-trial and place his full version before the court. He cannot now complain about this in light of the fact that Sithebe died during the course of the proceedings.

[64] A crucial aspect to be born in mind is that during the course of the main trial at the time Sithebe testified and at the commencement of the trial-within-a-trial, the contents of the cellphone video recording were made available to the applicant and his then defence team and was considered by them and their experts in the preparation of his defence in the trial-within-a-trial.

[65] At the commencement of the main trial and the proceedings in the trial-within-a-trial when the evidence in relation to the cellphone video recording was being given, the applicant would have known, on his version, the circumstances under which he met with Sithebe in relation to what he said was the March 2013 incident in relation to the theft of the window frames.

[66] Sithebe's evidence in the main trial was that after being approached by the applicant to effect the assault on the deceased, as he did not know who the deceased was, he accompanied the applicant in his vehicle who showed him the two

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[10] *S v Baleka & others (1)* 1986 (4) SA 192 (T).
[11] *S v Ramgobin & others* 1986 (4) SA 117 (N).
[12] *S v Singh & another* 1975 (1) SA 330 (N).

surgeries which the deceased operated from. This was the purpose of him being in the applicant's vehicle on the day in question. Sithebe's evidence in this regard is corroborated by the cellphone records.

[67] This evidence was known to the applicant during the course of the main trial. It would thus have been known to him at the commencement of the trial-within-a-trial. At no stage during the course of the State's evidence in the trial-within-a-trial and during the course of Sithebe's evidence in the main trial was it placed in issue that this conversation took place whilst travelling in the applicant's vehicle and nor was it ever placed on record that a witness would testify and corroborate the applicant's version in relation to when he travelled with the applicant in his vehicle, being Ricky Ganhes. At that stage the applicant would have known of Ricky Ganhes and that there was a witness to corroborate his version of the circumstances under which the cellphone video recording was taken.

[68] The weather map for the day in question both 20 February 2013 as well as 19 March 2013 reflect that there was slight rain on both days thus corroborating both the State and the applicant's versions.

The legal requirements to prove the offence of conspiracy to commit murder

[69] The third aspect in relation to the challenge to Sithebe's evidence relates to the conviction of conspiracy to commit murder. Mr *Howse* was at pains to point out that this conviction was not a competent conviction. The legal requirements to sustain a conviction for conspiracy to commit murder are dealt with in the written judgment (page 243, para 907).

[70] Count 6 relates to the conviction in respect of conspiracy to commit murder. Section 18(2)(*a*) of the Riotous Assemblies Act 17 of 1956 describes conspiracy to commit a crime as follows:

'(2) Any person who –

(a) conspires with any other person to aid or procure the commission of or to commit; or

…

any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.'

[71] The authors Snyman, Burchell and Hunt deal with the requirements for the commission of the offence within the meaning of the Act. The offence requires that there should at least be two people for the crime of conspiracy to be committed. In other words, X and Y or more people must agree with one another to commit the crime. The act consists of entering into an agreement, in other words a meeting of minds. The conspiracy need not be express it may be tacit and a court may infer a conspiracy from a person's conduct provided that the inference is the only reasonable one to be drawn from the proven facts. The conspirators need not also agree about the exact manner in which the crime or crimes are to be committed.

[72] In respect of the intention, a co-conspirator must intend to conspire with another and must intend to commit that crime or to assist in its commission. A conspiracy may only be construed once a court is satisfied that a conspirator was also aware of his/her co-conspirators' knowledge of the conspiracy. Only then will there be talk of 'a meeting of minds' (see in this regard *S v Agliotti*).[13]

[73] Section 18(2)(*a*) does not differentiate between a successful and unsuccessful conspiracy, namely one followed by the actual commission of the crime and one not followed by any further steps towards the commission of the crime.

[74] Mr *Howse* submitted that the legal requirements to sustain a conviction in terms of s 18(2)*(a)* of the Riotous Assemblies Act have not been met. The submission is that as Sithebe pretended to agree, there was no meeting of the minds and consequently, there was no 'true agreement between at least two persons to commit a crime'. In this regard he relied on C R Snyman *Criminal Law*. I have had regard to the relevant passage from Snyman quoted by Mr *Howse*. It is correct that Snyman refers to this and it would appear that if a party pretends to agree but in fact secretly intends to inform the police of another party's plans to enable that person to be apprehended then there is no conspiracy. Snyman indicates that a trap can therefore not be convicted of conspiracy.

[75] When preparing the judgment I had regard to the extract from Snyman as well as the decision of *Agliotti* referred to hereinabove. In addition the quote from Snyman

[13] *S v Agliotti* 2011 (2) SACR 437 at 442b–h.

relies heavily on the decision in *Harris v Rex.*[14] The facts of *Harris* are distinguishable from the present situation. Based on *Harris*, the applicant could still be guilty of an attempt to conspire.

[76] There are several decisions relating to the aspect of conspiracy which raise some doubt as to whether or not *Harris* is still good law. The matter of *S v D S Ngobese & others*[15] suggests and provides support for the submission by Mr *du Toit* that even if *Harris* is still good law, the legislature has resolved the problem by enacting the provisions of s 18(2)(*b*) of the Riotous Assemblies Act. Section 18(2)*(b)* provides that:

'(2) Any person who –

. . .

(b) incites, instigates, commands, or procures any other person to commit, any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.'

[77] In this division in the matter of *State v Mbatha & others*,[16] the court also considered the issue in relation to conspiracy to commit murder.

[78] A further decision which considered the offence of contravening s 18(2)(*a*) of the Riotous Assemblies Act was a Full Court decision in *Ngobese v S.*[17] The court considered the evidence to sustain a conviction for the offence of conspiracy in contravention of s 18(2)(*a*). It expressed a view that *Harris* may not be good law and that possibly one needs to consider facts similar to the present case. At para 18 the court per Spilg J opined:

'If regard is had to the present onslaught our society faces in relation to serious crime I consider it appropriate to express my reservations regarding the correctness of *Harris* and an interpretation of section 18(2)(a) which requires the prosecution to prove subjective intent on the part of any co-conspirator beyond a reasonable doubt, even if not all the alleged conspirators are before the Court.'

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[14] *Harris v Rex* (1927) 48 NPD 330.
[15] *S v D S Ngobese & others,* Benoni Regional Court case number SH30/2010 delivered on 3 March 2010.
[16] *State v Mbatha & others*, unreported decision of the late Msimang JP, KwaZulu-Natal High Court, case number CC21/2008, delivered on 27 September 2010.
[17] *Ngobese v S* [2019] 1 All SA 517 (GJ).

[79] In *Ngobese* there was no express agreement to conspire and the court considered the acts of the accused and the co-conspirator in furtherance of the crime. Given the differing view expressed by the courts and academic writers, it appears that this issue and the requirements to sustain a conviction for a contravention of s 18(2)*(a)* of the Riotous Assemblies Act warrant the attention of an appeal court.

The evidence of Ricky Ganhes

[80] The reasons for rejecting the evidence of Ganhes are to be found in the written judgment (paras 963 to 971, pages 257 to 259). The accused must have provided Mr Sangham instructions in relation to Sithebe's evidence. The criticism in the judgment regarding the failure to put the applicant's entire version of his defence was justified in that although cross-examination of Sithebe occurred on 22 October and 2 and 3 November 2015 respectively, the applicant was and must have been aware of his defence in relation to Sithebe's evidence at the outset.

[81] There is no explanation as to why this version of events was not canvassed with Sithebe during the course of the main trial. In addition, even though the applicant's present counsel may not have consulted with Ganhes at the time of bringing the application to recall Sithebe, he must have provided instructions to Mr Sangham as the events of 20 March 2013 were put to Sithebe by Mr Sangham.

The defence's case generally and the evidence of the applicant

[82] The grounds upon which the court rejected the evidence of the applicant and the defence witnesses has already been canvassed in detail in the written judgment (pages 252 to 259, paras 939 to 972).

Sentence

[83] The reasons for imposing the sentences is apparent from the judgment on sentence delivered on 26 October 2018. I refer to the judgment in its entirety.

[84] Among the submissions of Mr *Howse* and raised in the grounds of appeal was that the court erred or misdirected itself in treating count 6 differently from counts 1 to 5. The submission being that having regard to the summary of substantial facts in the indictment, this court ought to have found that it was closely related to counts 1 to 5 and ought to have ordered it to run concurrently with count 1.

[85] The written judgment on conviction contained a timeline based on the evidence presented. The judgment on sentence set out the reasons why count 6 was treated differently and why it was ordered to run consecutively inter alia as the role players were not the same.

[86] In addition, the summary of substantial facts is not evidence nor admitted facts. In this regard see *S v Fhetani*[18] where the court said the following:

'The summary does not constitute evidence nor admitted facts. Its sole purpose is to inform an accused about the nature of the case he or she is facing by setting out material facts on which the prosecution relies. . . .'

This is confirmed by the provisions of s 144(3)(*a*) of the CPA.

[87] A further criticism relates to the court not following the decision in *Ferreira* as alluded to in para 8 hereinbefore. There are differing views as to whether the circumstances like in the present matter amount to 'diminished responsibility', 'emotional storming' or 'vengeance' (see in this regard *S v Di Blasi*;[19] *Director of Public Prosecutions: Transvaal v Venter*;[20] *S v Mgibelo*[21]).

[88] I am further mindful of the view that if one grants leave to appeal on the convictions one should likewise grant leave to appeal on sentence.

The application for bail pending appeal

[89] In support of his application for bail pending appeal the applicant in his affidavit submits the following:

(a) The primary issue for determination is whether or not he will honour his bail conditions pending the outcome of his appeal. He submits and acknowledges that he has the onus to establish exceptional circumstances which permit his release on bail in the interests of justice.

(b) He is not a flight risk. When he was arrested on 12 August 2013 and released on bail, which was unopposed, it was accepted that he satisfied the test for exceptional circumstances as required by s 60(11)*(a)* of the CPA.

(c) He was granted bail in the sum of R100 000 subject to certain bail conditions including that he surrender his passport and not leave the country. He has

[18] *S v Fhetani* 2007 (2) SACR 590 (SCA) para 4.
[19] *S v Di Blasi* 1996 (1) SACR 1 (A).
[20] *Director of Public Prosecutions: Transvaal v Venter* [2208] 4 All SA 132 (SCA).
[21] *S v Mgibelo* 2013 (2) SACR 559 (GSJ).

since bail was granted in 2013, honoured his bail conditions for a period in excess of five years and consequently he can be trusted to continue to do so as he takes the institution of bail seriously.

(d) Since bail was granted he has conducted himself responsibly and maintained his obligations to his children and continued to operate his business. He supports his children financially and is the primary caregiver to his daughter Sonali. He relies in this regard on exhibit “MMMM” which is the settlement agreement concluded between his ex-wife Kerusha Soni (Kerusha) and the reports by educational psychologist Tarryn Blake and counselling psychologist Floss Mitchell.

(e) Both children have since his incarceration on 19 September 2018, resided with Kerusha, and his sister Sherasthie Premchund, has been liaising with Kerusha on a daily basis to ensure the wellbeing of his children.

(f) Sherasthie facilitates payment of maintenance to keep both children at the school they are presently attending and for what is described as their ‘general maintenance’. He submits he is unable to continue making significant financial contributions to their maintenance unless he is granted bail and is able to continue generating an income.

(g) Kerusha has, through her attorneys of record, Carlos Miranda, provided an affidavit, “RS1”, in which she supports the applicant’s release on bail pending appeal. Her reason for doing so is that she cannot maintain their children at the ‘current standard of education to which they are accustomed and to immediately change their current support structure will add to their emotional distress’.

(h) Sonali has suffered significantly since he has been incarcerated and it is in Sonali’s best interests that he be granted bail. Kerusha further indicates it is necessary for the applicant to organise his business matters to make the best arrangements to care for their children and to continue providing for them at least until his appeal is decided. She indicates, that ‘he did not plan for the scenario of bail being denied’.

(i) In addition, when Sonali visited the applicant in prison on 18 October 2018, it caused them both emotional trauma as they were not able to hug each other through the glass. The applicant places much emphasis on the report of Dr Floss Mitchell indicating that Sonali is distressed and expresses anxiety at the

uncertainty of his present position. He submits that Sonali's days are characterised by the hope that he will be released on bail.

(j) The applicant denies that he is a flight risk as he has adhered to his bail conditions for the past five years, has exceptionally strong family ties and will not abandon his children or give up his extensive business interests which he shares with his family and extended family.

(k) In addition, he has surrendered his passport and does not have the means to leave the country. His mother who is 73 years old lives next door to him to enable him to assist in taking care of her.

(l) He submits that he has proved exceptional circumstances warranting his release on bail pending appeal and that the sum of R100 000 is presently still with the registrar. Such amount can be increased by the court should the court be amenable to granting him bail pending appeal in the sum of R200 000.

(m) He has prospects of success on appeal and there are reasonable prospects of another court coming to a different decision.

Legal principles in respect of bail pending appeal

[90] The noting of an appeal does not automatically suspend the implementation of the sentence unless there is a special application to court to suspend the sentence until the appeal has been disposed of.[22]

[91] In deciding on bail pending appeal, our courts have held[23] that the question is whether the court of appeal might possibly set aside the imprisonment, the test being no higher than 'a possibility'.

[92] Different courts have adopted different approaches in respect of bail pending appeal, as a consequence of which our courts have held that when an accused has been convicted of a schedule 6 offence,[24] the fact that leave to appeal has been granted does not in itself amount to an 'exceptional circumstance'.

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[22] See s 231 of the Criminal Procedure Act.
[23] *S v Hudson* 1996 (1) SACR 431 (W)*; S v Naidoo* 1996 (2) SACR 250 (W).
[24] For bail to be granted an accused person must establish exceptional circumstances showing it is in the interests of justice to warrant his/her release.

[93] In *S v Bruintjies*[25] the SCA considered the provisions of s 60(11)(*a)* of the CPA in respect of a schedule 6 offence. Paragraph 5 of the judgment reads:

'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 his sentence, nor does it entitle him to bail as of right. (See *R v Mthembu* 1961 (3) SA 468 (D).)'

[94] The SCA also considered whether or not the granting of leave to appeal amounts to an exceptional circumstance warranting bail pending appeal being granted. At para 6 the court held the following:

'The main thrust of the appellant's counsel's submissions before us was that the grant of leave to appeal on the merits presupposed the existence of a reasonable prospect of success in the appeal. Such a prospect, said counsel, of itself constituted an exceptional circumstance within the meaning of the section. If that was so, however, the great majority of persons facing charges involving Schedule 6 offences would have to be released on bail pending their trial without regard to other important considerations, such as, for example, the public safety. The mere fact that the trial court considers that the appellant has a reasonable prospect of succeeding on appeal does not of itself amount to an exceptional circumstance. What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the Legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the Legislature has attached to the commission of a Schedule 6 offence. 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, there are other facts which persuade the court that society will probably be endangered by the appellant's release or there is 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. Such matters, together with all other negative factors, will be cast into the scale with factors favourable to the accused, such as stable home and work circumstances, strict adherence to bail conditions over a long period, a previously clear record and so on. If, upon an overall assessment, the court is satisfied that circumstances

[25] *S v Bruintjies* 2003 (2) SACR 575 (SCA).

sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail.'

[95] In *Crossberg v S*[26] the court had to consider an appeal against the refusal to grant bail pending appeal. Amongst the factors which the court considered was the prospects of success on appeal. In deciding on same the court took note of the fact that the appellant had been convicted of murder which in the ordinary course attracted a heavy sentence and that there was a different emphasis in respect of bail pending finalisation of a trial as opposed to bail pending finalisation of an appeal.

[96] At para 13 of the judgment the court held the following:

'It is so that there is a different emphasis in respect of bail pending finalisation of a trial as against bail pending finalisation of an appeal. The presumption of innocence operates in favour of an accused person until his guilt has been established in court.' (Footnote omitted)

[97] Our courts have not attempted to define what is meant by the term 'exceptional circumstances'. Consequently, it requires some consideration having regard to relevant case authorities. In *S v Jonas & others*[27] the court held the following:

'The term "exceptional circumstances" is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused's absence is one that springs to mind. A terminal illness may be another. It would be futile to attempt to provide a list of possibilities which would constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with the commission of a Schedule 6 offence when everything points to the fact that he could not have committed the offence because, eg he has a cast-iron alibi, this would likewise constitute an exceptional circumstance.'

[98] In *S v Scott-Crossley*[28] the court held that the personal circumstances of the appellant were 'commonplace' and did not together with other factors constitute exceptional circumstances for purposes of s 60(11)*(a)*.

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[26] *Crossberg v S* [2007] SCA 93 (RSA).
[27] *S v Jonas & others* 1998 (2) SACR 677 (SE) at 678e-g.
[28] *S v Scott-Crossley* 2007 (2) SACR 470 (SCA) para 12.

[99] In *S v Pietersen*[29] the court remarked that '"exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different'. A further factor to be considered is whether an appellant will abscond. In *S v Hudson*[30] the court held the following:

'Where an accused applies for bail and confirms on oath that he has no intention of absconding due weight has of course to be given to this statement on oath. However, since an accused who does have such an intention is hardly likely to admit it, implicit reliance cannot be placed on the mere say-so of the accused. The court should examine the circumstances.'

[100] Having regard to the authorities, the central issue which the court is required to decide, is whether or not the interests of justice permit the release on bail of the applicant?[31]

Analysis

[101] The applicant bears the onus to establish exceptional circumstances which permit his release in the interests of justice. The submissions made by Mr *Howse* in this regard are a matter of record. The applicant submits that his circumstances are exceptional in nature for the following reasons, namely:

(a) that he complied with all his bail conditions whilst awaiting trial; and

(b) that he is not a flight risk as he surrendered his passport and did not leave the country. He has strong ties to the community specifically his mother and his children and the purposes of being released on bail pending appeal is to provide for them financially as he is the primary caregiver of his daughter, Sonali.

[102] The main grounds upon which the applicant seeks bail pending appeal is to provide for the financial wellbeing of his children. He is unable to continue making the significant financial contributions they require unless he is granted bail and is able to continue generating an income. In addition, a further factor is the fact that his daughter is battling to come to terms emotionally with his incarceration. He indicates in his affidavit that his sister has been liaising with his ex-wife on a daily basis to ensure the wellbeing of his children and to facilitate payment of the maintenance

[29] *S v Pietersen* 2008 (2) SACR 355 (C) para 55.
[30] *S v Hudson* [1980] 1 All SA 1305 (D) at 133.
[31] *S v Malumo & 111 others (2)* 2012 (1) NR 244 (HC) para 30.

required to keep the children at the standard of living they are accustomed to. He indicates that his ex-wife cannot maintain the children at the same level they are accustomed to unless he assists her financially and emotionally. He alludes to the fact that Sonali is receiving treatment from Floss Mitchell.

[103] The evidence in relation to the counselling which Sonali has received is a matter of record and this was dealt with when this court deviated from the prescribed minimum sentence at the time of sentencing the applicant. Ms Floss Mitchell confirmed that Sonali had been undergoing therapy for a long period of time.

[104] Mr *du Toit* submits that there are no exceptional circumstances or extraordinary circumstances warranting the applicant being admitted to bail pending leave to appeal, and even if leave to appeal is granted, it does not necessarily mean that the applicant must be admitted to bail.

[105] Mr *Howse* submitted that the enquiry in respect of bail pending appeal is twofold, namely:

(a) will the applicant honour his bail; and

(b) does he have reasonable prospects of success on appeal?

[106] As regards the first enquiry, Mr *Howse* submits that the applicant is an 'exceptional person' and has proved at a 'really exceptional level that he is not a flight risk.

[107] I have had regard to the authorities referred to in respect of bail pending appeal.[32] The personal circumstances of the applicant are not exceptional nor extra-ordinary. Furthermore, the circumstances of the applicant are not unlike those which the court considered in *Babuile* above and refused the application for bail pending appeal after considering all the relevant factors.

[108] Inasmuch as the applicant is supported in his quest for bail by his ex-wife, this is based on the incorrect premise that he 'did not foresee bail being denied on conviction'. In addition she wants the applicant to generate an income so that their children's lives will not be disrupted.

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[32] *S v Bruintjies* 2003 (2) SACR 575 (SCA); *Babuile & others v S* (CC32/2014) [2015] ZAGPPHC 110 (13 October 2015); *Beetge v The State* (925/12) [2013] ZASCA 1 (11 February 2013) and *S v Scott-Crossley* 2007 (2) SACR 470 (SCA).

[109] Firstly, the applicant must have been advised of the consequences of bail being revoked on conviction. He submits that his sister Sherasthie has been attending to the needs of his children and liaising on a daily basis with his ex-wife. This is not an 'exceptional circumstance' in my view.

[110] In addition, the fact that the applicant wants to generate an income pending an appeal has been held not to constitute an exceptional circumstance which in the interests of justice warrant his release on bail, see *Sewnarain v S*.[33] In his own affidavit, his family have been and can assist in supporting his children.

[111] Having regard to the personal circumstances of the applicant, coupled with the contents of the affidavit and annexures submitted in support of the application to be admitted to bail pending appeal, I am not satisfied he has shown exceptional circumstances which in the interests of justice warrant his release on bail.

[112] That he did not abscond when facing trial does not mean that as a convicted person he will not. Different considerations apply now. In addition in his oral submissions Mr *Howse*, acknowledged that the court had imposed a determinate sentence which if confirmed on appeal, the applicant would serve a substantial period of incarceration.

[113] Having carefully considered the grounds of appeal, even if the applicant were to succeed on appeal in having the conviction on count 5 set aside, that still leaves the remainder of the counts, specifically counts 1, 2, 3, 4 and 6. In respect of count 6, should the court accept the evidence of Sithebe it can still alter the conviction on count 6 to one of incitement or an attempt to conspire. If the applicant succeeds in having the convictions on counts 5 and 6 set aside he still faces terms of imprisonment for the other counts.

[114] That the offences are serious and the applicant faces a lengthy term of imprisonment cannot be denied by him.

[115] I have dealt with in some detail the grounds of appeal advanced by the applicant and the prospects of success. In respect of count 1 apart from the evidence of Naidoo, there is the evidence of Dlamini and the cellphone call made by

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[33] *Sewnarain v S* (877/12) [2013] ZASCA 27 (25 March 2013).

Treasurer which ties in with the cellphone records. That this call was made by Treasurer in Dlamini's presence in the vehicle whilst travelling away from the scene after the shooting cannot be wished away. The applicant on his own admission knew Treasurer, and the cellphone records likewise confirm they communicated with each other over the time period in which the offences were committed. Apart from this evidence is the circumstantial evidence and that of the executive statements to show how the role players conspired to have the deceased killed.

[116] The applicant denied that he was friends with Naidoo and that the cellphone records substantiated and corroborated Naidoo's evidence in respect of the contact between them over a period of time. These records relating to their contact via cellphone were not seriously challenged by the applicant. It was never suggested to Naidoo that these were calls exchanged with his ex-wife Chantel Norman. This explanation was raised rather belatedly by the applicant.

[117] In respect of counts 2, 3 and 4, the evidence led by the respondent was that false complaints were laid and dockets opened. There is the evidence of Kisten that she laid the false complaint having been approached by Gounder. Although she acknowledged that she did not meet Naidoo we know from Naidoo's evidence that he approached Gounder. In count 3 a police docket was opened and Naidoo took the statement of Roshan Jainath. Sookraj confirmed in count 4, that when she was approached by her step-father Zaheer Khan, on the day in question she observed the applicant and Naidoo seated in the double cab bakkie. Similarly a false complaint was lodged and a docket opened and investigated.

[118] Our courts have held that the grant of leave to appeal against convictions, although presupposing prospects of success, on its own is not sufficient to result in an applicant being admitted to bail pending appeal. Apart from the personal circumstances of the applicant, the seriousness of the offences involved, the risk that he will abscond and the likelihood of a non-custodial sentence being imposed are other factors which a court must consider.[34]

[119] For reasons already stated herein, even if the applicant were to be successful in having counts 5 and 6 upheld on appeal, I am not satisfied that a substantial

[34] *S v Masoanganye & another* 2012 (1) SACR 292 (SCA) para 14.

period of imprisonment will not have to be served. In *S v Oosthuizen & another*[35] the court referred to *S v Masoanganye & another* and at para 29 held:

'In *S v Masoanganye and Another* 2012 (1) SACR 292 (SCA) ([2011] ZASCA 119) this court held that the granting of an application for leave to appeal does not, per se, entitle a person to be released on bail. There has to be a real prospect in relation to success on convictions and that a non-custodial sentence might be imposed, such that any further period of detention before the appeal is heard would be unjustified.' (Footnote omitted)

[120] It must be noted that whilst on bail, even before the trial commenced, the applicant applied for a relaxation of his bail conditions to be allowed to have access to his passport and travel overseas for purposes of conducting a prayer relating the death of his father. He was not successful in obtaining permission for the return of his passport to travel overseas.

[121] As a convicted person I am not convinced that the applicant is not a flight risk. The emotional impact which the trial and his subsequent incarceration has had on the applicant and on his daughter is alluded to in his application to be admitted to bail. Sonali played a substantial part in the submissions made at sentencing stage as to why the prescribed minimum sentence ought not to be imposed and why substantial and compelling circumstances exist. This in my view serves as a strong impetus for the possibility of him absconding pending his appeal being finalised.

[122] Further in the letter from Floss Mitchell annexed to the applicant's affidavit in this application, she indicates that Sonali is aware that her father may not be released on bail and that she understood after her session with her on 24 October 2018, that bail is not "a permanent release". She also opines that Sonali has demonstrated extraordinary resilience.'

[123] His family especially his sister Sherasthie has been actively involved in not only the trial (she took the photographs for one of the defence exhibits) but also in prosecuting the application for leave to appeal. She has been actively liaising with Sneller Recordings for the transcript to be made available for purposes of the appeal record. This is apparent from my exchange with Mr *Howse* at the last hearing of the application for leave to appeal. I have no doubt that all necessary steps will be taken

[35] *S v Oosthuizen & another* 2018 (2) SACR 237 (SCA).

to ensure that the appeal is prosecuted with haste and that there will be no undue delay on the part of the applicant.

[124] The applicant's personal circumstances are not out of the ordinary and I do not agree that he is 'an extraordinary person' or that his circumstances are exceptional to quote Mr *Howse.* From the evidence presented during the trial, the applicant is a man of substantial means as well as his family. Although he indicates that he has been incarcerated and not been able to generate in income, one must consider the bank statements put up in the course of the sentencing proceedings. In this application he has elected not to put up any supporting evidence relating to his financial position to substantiate that the business has not been generating an income.

[125] That the applicant has access to substantial amounts of money also cannot be ignored. He testified that he was able to borrow the sum of R10 000 in cash from his brother-in-law who runs his own business and not forgetting the Shakile Family Trust. His mother on his evidence also has the means to assist him financially. The R200 000 tendered for bail pending appeal is not in my view a substantial enough inducement to prevent him from absconding, due consideration being had to his family's access to moneys and given that he was released on bail on R100 000 when he was arrested.

[126] In the result I am of the view that for all the reasons canvassed and having considered all relevant factors, the applicant has not crossed the threshold and discharged the onus to show exceptional circumstances which in the interests of justice warrant him being admitted to bail pending appeal.

Conclusion

[127] In the result, although I am not convinced that there is merit in all the grounds of appeal advanced by the applicant in respect of conviction and sentence for reasons dealt with hereinbefore, the applicant has reasonable prospects of success as envisaged in *Smith v S.* This is despite the fact that I have indicated that I adhere to the written judgment delivered in respect of the convictions and the judgment on sentence.

[128] In respect of the sentences imposed an appeal court may hold the view that this was a crime of passion warranting interference on appeal. I am also mindful of the view expressed by the SCA in *Kruger* above that once leave to appeal is granted in respect of the conviction one ought to also grant leave to appeal against the sentences imposed.

Order

[129] In the result the following orders do issue:

1. In respect of the applications for leave to appeal all the convictions (counts 1 to 6) and the sentences imposed, the applicant is granted leave to appeal to the Supreme Court of Appeal.
2. The application to be admitted to bail pending leave to appeal is refused.

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HENRIQUES J

11 April 2019

CASE INFORMATION

Date of argument	:	12 December 2018 & 7 March 2019
Judgment delivered	:	11 April 2019

APPEARANCES

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