IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. CC29/2014P

In the matter between:

RAJIVEE SONI APPELLANT/APPLICANT

and

THE STATE RESPONDENT

ORDER

The application for leave to appeal against the refusal to admit the appellant/applicant to bail pending his appeal to the Supreme Court of Appeal in respect of his convictions and sentences is dismissed.

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL AGAINST THE REFUSAL TO ADMIT THE APPELLANT TO BAIL PENDING APPEAL

HENRIQUES J

Introduction

[1] The appellant seeks leave to appeal to the full court, KwaZulu-Natal Division, Pietermaritzburg, against the refusal to admit him to bail pending the hearing of his

appeal against his convictions and sentences imposed.

[2] A formal application to be admitted to bail pending appeal was filed on 26 October 2018 simultaneously with the application for leave to appeal the convictions imposed. Such application was heard together with the application for leave to appeal the convictions and sentences imposed. It is common cause that a properly completed application for leave to appeal the sentences imposed was filed on 21 November 2018 and argument in these applications was heard on 12 December 2018 and 7 March 2019.

[3] The respondent opposed all the applications although it did not file answering affidavits. On 11 April 2019, the appellant was granted leave to appeal to the Supreme Court of Appeal (SCA) against all the convictions and sentences imposed, however, his application to be admitted to bail pending appeal was dismissed.

[4] The grounds upon which the appellant sought to be released on bail pending appeal were set out in his founding affidavit and supporting annexures. These were summarised in the judgment delivered on 11 April 2019 at para 89. The legal principles which this court considered in respect of bail pending appeal were also likewise considered and dealt with in the written judgment.

[5] In the written judgment at paras 101 to 126, the legal principles applied, the personal circumstances of the appellant, the facts considered and the appellant's prospects of success on appeal were all canvassed. As these were both schedule 5 and 6 offences, the appellant bore the onus to show exceptional circumstances which in the interests of justice warranted him being admitted to bail pending appeal in respect of count 1, and in respect of counts 2 to 6, whether the interests of justice permitted his release on bail pending appeal. As the appellant had not discharged the onus, the application to be admitted to bail pending appeal was refused.

[6] The reasons for this conclusion were canvassed extensively in the written judgment and summary delivered on 11 April 2019.

Grounds of appeal

[7] The grounds upon which the appellant seeks leave to appeal against the refusal of bail pending appeal are the following:

‘1. The Learned Judge erred fundamentally in requiring the Applicant to prove exceptional circumstances in the true sense of the word and failing to follow the dicta in **S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat 1999 (2) SACR 51 (CC) at page 89c paragraph [76]; S v Vanqa 2000 (2) SACR 371 (TKHC) at paragraph [14] (h – j) page 376; S v M.G.S. Shange and others unreported (copy attached) at page 4 to 5**.

2. The Learned Judge ought to have found that the combination of ordinary circumstances referred to in Section 60(4)(a) to (e) of the Criminal Procedure Act 51 of 1977 constitute exceptional circumstances (**S v Dlamini and Others supra at page 89c paragraph [76]**).

3. The Learned Judge was wrong when finding that the main grounds upon which the Applicant seeks bail pending appeal is to provide for the financial wellbeing of his children and to continue operating his business (Ruling para [102]).

4. The Applicant’s grounds in support of his release on bail extend far beyond the grounds referred to by the Learned Judge and include the emotional wellbeing of his children, his duty as primary caregiver, his personal liberty, his health (he is presently incarcerated permanently in the prison hospital) and his close ties with his family other than his children.

5. When considering whether exceptional circumstances had been established, the Learned Judge misdirected herself in failing to appreciate that the following circumstances, in combination, fully satisfy the requirements of Section 60(4)(a) to (e) at an exceptional level and permit the Applicant’s release on bail in the interests of justice:

    5.1 The Applicant has no previous convictions or pending cases.

    5.2 The Applicant has been industrious from a very young age and has lived a crime free life apart from the findings in the present matter.

    5.3 The Applicant has lived in the same house his entire life (apart from a short period when he was doing business in Durban) and he now owns the house. (Compare **S v M.S.G Shange and others pages 7 to 9**).

5.4 The Applicant is a successful businessman who has established a business which he will not readily abandon.

5.5 In addition to his own property and business, the Applicant manages a commercial property on behalf of his mother.

5.6 The Applicant's mother resides next door to him and relies heavily on the Applicant as she is of poor health.

5.7 When the Applicant was arrested in the present matter on 12 August 2013, he was required to establish exceptional circumstances permitting his release in the interests of justice.

5.8 The Applicant's release on bail was unopposed as the State accepted, based on his exceptionally favourable personal circumstances together with all other relevant considerations, that the required exceptional circumstances had been established.

5.9 The Applicant honoured his bail from 12 August 2013 until the conclusion of his trial and never defaulted.

5.10 The Applicant surrendered his passport which is still in possession of the police and may remain so pending the outcome of his appeal.

5.11 The Applicant has convincingly established that he does not have the means to flee the country illegally nor a place where he can take up residence as a fugitive from justice.

5.12 The Learned Judge found the existence of substantial and compelling circumstances when imposing sentence on the Applicant which simultaneously amount to exceptional circumstances in the following respects:

5.12.1 The Applicant is a first offender.

5.12.2 The Applicant is a useful member of society.

5.12.3 The Applicant operates a successful business.

5.12.4 The report in Exhibit MMMM indicates that the Applicant is the primary caregiver to his daughter.

5.13 The Applicant has proved that he is not a danger to society nor to any particular person if released on bail.

5.14 Whereas the Applicant has been convicted of murder, his involvement was non violent and there is no likelihood whatsoever that he will reoffend while out on bail (Section 60(4)(a)).

5.15 The circumstances which led to the commission of the offences no longer exist which renders it safe to release the Applicant on bail.

5.16 The Applicant has satisfied all of the requirements of Section 60(4)(a) to (e) at an exceptional level which indicates that he has discharged the onus (see **S v Dladla and others supra at para [76]**).

5.17 The psychologist's reports by Tarryn Blake and Floss Mitchell as contained in Exhibit MMMM favour the release of the Applicant.

5.18 The Affidavit of Kerusha Soni provides compelling reasons to release the Applicant on bail in the interests of justice.

5.19 The Applicant's poor health as contained in the undisputed medical report of Dr Sanjay Maharaj referred to in Exhibit MMMM.

6. The aforementioned circumstances establish, at an exceptional level, that the Applicant will not give up the advantages of his position in order to evade justice.

7. The Applicant has reasonable prospects of success on appeal against both conviction and sentence.

8. The Learned Judge was wrong when reasoning that, the emotional impact of the trial and subsequent incarceration on the Applicant and his daughter Sonali, serves as a strong impetus for the possibility of him absconding pending the finalization of his

appeal (Ruling para [121]).

8.1 The opposite is true in that compelling evidence has been provided that the Applicant will never abandon Sonali and his emotional ties to her serve as an additional guarantee that he will honour his bail.

9. The Learned Judge was wrong when finding that the personal circumstances of the Applicant are comparable with those in **Babuile and Others v S [2015] ZAGPPHC** as the Applicant's personal circumstances are considerably more compelling (Ruling para [107]).

10. The Learned Judge did not give sufficient attention to the best interests of the Applicant's minor children in circumstances where the evidence is clear that the Applicant is the primary caregiver to Sonali and his release will be in the best interests of his children (**S v M 2007 (2) SACR 539 (CC); S v Stokes case no.: CC233/2005 – previously submitted**).

11. The Learned Judge erred when failing to acknowledge that the sentences imposed on counts 2 to 6 do not justify the refusal of bail for the following reasons:

11.1 In relation to counts 2 to 6 the Applicant does not have to establish exceptional circumstances as these charges do not fall within Schedule 6 to the Criminal Procedure Act and materially different considerations apply.

11.2 Relatively short terms of imprisonment were imposed on each of counts 2 to 6 which means that the Applicant will be prejudiced if he is not granted bail pending appeal (See **S v Hudson 1996 (1) SACR 431 (W); S v Anderson 1991 (1) SACR 525 (C); S v Mabapa 2003 (2) SACR 579 (T)**).

11.3 The combination of the Applicant's favourable personal circumstances and the fact that he has reasonable prospects of success provide more than sufficient grounds to grant bail in respect of counts 2 to 6 and further exceptional circumstances are not required.

12. In relation to **count 1** the Learned Judge was wrong when concluding that the Applicant's prospects of success are inadequate to exclude the possibility of abscondment and that he did not satisfy the test for exceptional circumstances

(Ruling paras [115] [116] [119]). The evidence in count 1 is particularly thin in that:

12.1 There is no direct evidence against the Applicant.

12.2 The evidence of Sugen Naidoo did not implicate the Applicant in the murder and contributes little or nothing to his conviction.

12.3 The evidence of Sugen Naidoo, for what it is worth, is self-contradictory and patently unsatisfactory to the point where it is unlikely to pass scrutiny on appeal.

12.4 The main witness for the State on count 1 was Sabelo Dlamini, the actual murderer, who testified that he did not know the Applicant at all, did not receive instructions from the Applicant and did not form a common purpose with the Applicant.

12.5 Importantly, Sabelo Dlamini testified that his motive or reason for murdering the deceased was that his friend, Wiseman Nxumalo, was not paid by the deceased for grass cutting work which was completely unrelated to the Applicant.

12.6 Sabelo Dlamini was never informed that the Applicant wanted the deceased murdered and that this was the reason for the murder.

12.7 The highwatermark of the State case on count 1 is the evidence of Dlamini that, shortly after the murder, he overheard Brian Treasurer saying during a phone call to an unknown recipient that "*the job is done*".

12.8 The evidence proves that, shortly after the murder, there were **three communications** on Treasurer's phone within a short space of time, one of which was to the Applicant's cell phone and only lasted 12 seconds.

12.9 It is common cause that the communication to the Applicant's cell phone was through voicemail and that the Applicant did not answer the call or return the call.

12.10 The duration of the call to the Applicant's phone raises a reasonable doubt

whether there would have been a sufficient time for Treasurer to have left a message saying "*the job is done*".

12.11 The available evidence did not sufficiently tie the words spoken by Treasurer to the call to the Applicant's phone and permits the reasonable inference that these words could have been spoken during any of the other calls made around that time.

12.12 The State case is particularly thin in count 1 and permits reasonable inferences other than the one drawn by the Learned Judge.

12.13 The Applicant emphatically denied any common purpose with Treasurer or anyone else to murder the deceased and denied that Treasurer left a message on his phone saying "*the job is done*".

12.14 There is every prospect of success on appeal against the conviction on count 1 and the weight of the evidence certainly does not provide an inducement to the Applicant to abscond in order to avoid the consequences of his appeal.

13. The sentence of 25 years imprisonment imposed on count 1 is not so severe that it will cause the Applicant to give up all the advantages of his position and evade the appeal.

14. It is wrong to adopt the approach that, simply because a lengthy term of imprisonment has been imposed, bail pending appeal should be denied (reference will be made during argument to **S v Priyen Naidu** where bail pending appeal was granted by the Honourable Madam Justice Moodley where life imprisonment was imposed and this bail was honoured until the appeal was finally decided and **S v Stokes** where bail pending appeal was granted by the Honourable Madam Justice Steyn where an effective 8 years imprisonment was imposed and the bail is presently being honoured. Copies of the relevant orders will be provided).

15. The implication of the finding by the Learned Judge in paragraph [126] of her ruling (that the sum of R200 000.00 tendered is not substantial enough inducement to prevent the Applicant from absconding) is that a higher amount may provide the necessary inducement. In this regard:

15.1 The Learned Judge ought at the very least have enquired whether the Applicant was able to pay a higher amount which would provide sufficient inducement to prevent him from absconding.

15.2 The Learned Judge ought to have imposed an increased amount of bail which will provide the necessary inducement to prevent him from absconding.

16. The Learned Judge further erred in failing to consider whether the imposition of strict bail conditions will adequately address the issue of abscondment including, but not limited to:

16.1 Requiring the Applicant to report to a suitable police station twice daily.

16.2 Fitting a monitoring device to the Applicant which tracks his every move.

16.3 Preventing the Applicant from applying for travel documents.

16.4 Prohibiting the Applicant from being present at any point of departure from the country.'

The test to be applied in the present application for leave to appeal

[8] Before dealing with the merits of the application for leave to appeal it is necessary to determine the test applicable to these proceedings.

[9] Prior to the enactment of the Superior Courts Act 10 of 2013 (the Superior Courts Act), the appellant had an automatic right of appeal.[1] However, under the Superior Courts Act, in respect of appeals against the refusal of bail by the high court sitting as a court of first instance, such application for leave to appeal must be made to the high court.[2]

[10] In *S v Masoanganye & another*[3] Harms AP records the following:

'It is important to bear in mind that the decision whether or not to grant bail is one entrusted

[1] *S v Botha en 'n Ander* 2002 (2) SA 680 (SCA) paras 13-14.
[2] *S v Banger* 2016 (1) SACR 115 (SCA) para 12.
[3] *S v Masoanganye & another* 2012 (1) SACR 292 (SCA) para 15.

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. Through legislative oversight, something this court has complained about for more than two decades, and ignored by the Executive, a convicted person has an automatic right of appeal to this court against a refusal of bail. But there is a limit to what this court may do. It has to defer to the exercise of the trial court's decision unless that court failed to bring an unbiased judgment to bear on the issue, did not act for substantial reasons, or exercised its discretion capriciously or upon a wrong principle.'

[11] In *S v Banger*[4] the court noted that the courts requests to correct the legislative oversight which resulted in the automatic right of appeal had been ignored for more than two decades. The court held that the complaint referred to by Harms AP had been addressed in the Superior Courts Act. The court further noted that as the Criminal Procedure Act 51 of 1977 (the CPA) did not provide for an appeal against the refusal of bail by the high court sitting as a court of first instance, and as it was not provided for in any other criminal procedural law, such appeal was regulated by the Superior Courts Act.

[12] Referring to the provisions of s 16(1) of the Superior Courts Act the court held the following at para 12 of the judgment:

'Thus, it is clear that, in respect of all appeals against the refusal of bail by the High Court sitting as a court of first instance, application for leave to appeal must be made to that court. If that court refuses leave to appeal, it may be granted by this court in terms of s 17(2)(*b*) of the Superior Courts Act. If the High Court consisted of a single judge, the appeal lies to a full court, unless a direction is given in terms of s 17(6) that the matter requires the attention of this court. If, as is the case here, the High Court of first instance consisted of more than one judge, the appeal lies directly to this court.'

The applicable test in the current application for leave to appeal

[13] Section 17(1) of the Superior Courts Act reads as follows:

'Leave to appeal may only be given where the judge or judges concerned are of the opinion that —

(*a*) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

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[4] 2016 (1) SACR 115 (SCA).

(*b*) the decision sought on appeal does not fall within the ambit of section 16 (2) *(a)*; and

(*c*) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

[14] The appellant submits that there are reasonable prospects of success within the meaning of s 17(1)(*a*)(i) of the Superior Courts Act. The phrase "reasonable prospects of success" has previously been held to mean there is a reasonable possibility that another court might come to a different decision.[5]

[15] However, with the enactment of s 17 of the Superior Courts Act, the test has obtained statutory force. The test to be applied is to use the word "would" in deciding whether to grant leave to appeal. In other words, "would" another court come to a different decision? In the unreported decision of *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen & 18 others,*[6] the Land Claims Court held, albeit obiter, that the wording of the subsection raised the bar for the test that now has to be applied to an application for leave to appeal. In *Notshokovu v S*[7] it was held that an appellant faces a 'higher and stringent threshold' in terms of the Superior Courts Act.

[16] In *Acting National Director of Public Prosecutions & others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions & others,*[8] Ledwaba DJP writing for the full court considered the test as envisaged in s 17 of the Superior Courts Act. At para 25 of the judgment he dealt with the test set out in para 6 of *The Mont Chevaux Trust* judgment above where Bertelsmann J held the following:

'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'

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[5] *Van Heerden v Cronwright & others* 1985 (2) SA 342 (T) at 343H-I.
[6] *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen & 18 others* LCC14R/2014 dated 3 November 2014.
[7] *Notshokovu v S* (157/15) [2016] ZASCA 112 (7 September 2016) para 2.
[8] *Acting National Director of Public Prosecutions & others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions & others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

[17] Thus, in relation to the provisions of s 17 of the Superior Courts Act, the test in respect of an application for leave to appeal is not whether another court "may" come to a different decision but the test is "would" another court come to a different decision. I thus have to determine whether the appellant has succeeded in establishing whether there are reasonable prospects that another court **would** come to a different decision in respect of the application for bail pending appeal.

The applicant's submissions

[18] The first aspect dealt with by Mr *Howse* at the hearing related to the test to be applied at this stage of the proceedings. He acknowledged that the decision in *Banger* above did not deal with the applicable test and submitted that the provisions of s 17 of the Superior Courts Act applied. The test is whether or not the appellant has reasonable prospects of success and in this regard, he referred to para 33 of the judgment in *S v Essop.*[9] In dealing with this application, he indicated that this court would have to decide whether another court would find the appellant had reasonable prospects of success and was not a flight risk.

[19] In summary Mr *Howse* submitted that this court committed a misdirection when refusing bail pending appeal as:

(a) it applied an incorrect test in defining whether exceptional circumstances existed and fell foul of the decision in *S v Dlamini*; *S v Dladla & others*; *S v Joubert*; *S v Schietekat*[10] as at para 107 of my judgment, I expressed a view that '[t]he personal circumstances of the applicant are not exceptional nor extra-ordinary';

(b) I erred in finding that the circumstances of the appellant were not unlike those which the court considered in *Babuile & others v S.*[11] His submission was that it is on this aspect alone that the appellant has reasonable prospects of success as a full court, will find that this court applied an incorrect test in respect of bail pending appeal;

(c) the court applied an incorrect test when deciding on bail pending appeal, as different tests applied in respect of the offence in count 1, when compared with the lesser test which applied to counts 2 to 6;

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[9] *S v Essop* 2018 (1) SACR 99 (GP).
[10] *S v Dlamini*; *S v Dladla & others*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC).
[11] *Babuile & others v S* (CC32/2014) [2015] ZAGPPHC 110 (13 October 2015).

(d) the appellant presented emphatic proof on record that he was not a flight risk and there was no evidence gainsaying the submissions and the evidence which he placed before the court. The court was not mindful that the respondent elected not to file affidavits nor present any evidence in opposing bail pending appeal;

(e) the appellant has for the last 10 years suffered from various chronic illnesses, and has been in the prison hospital since his conviction;

(f) the court failed to consider the evidence presented in Exhibit "MMMM", namely, reports of the experts Tarryn Blake and Floss Mitchell in regard to his minor daughter, Sonali and the emotional trauma she suffers from;

(g) the court failed to correctly find that the paramountcy principle as enunciated in *S v M*[12] superseded all considerations and weighed heavily in favour of a finding that the appellant had shown exceptional circumstances as envisaged in *Dlamini's* decision referred to in para 19(a) above as he was the primary caregiver. It was in the best interests of Sonali for him to be admitted to bail;

(h) the court misdirected itself in finding that the decision in *Babuile* above was similar to that of the appellant and consequently did not set his case apart from *Babuile,* as in such decision, the applicants did not, unlike the appellant, establish on an exceptional level that they were not a flight risk;

(i) the court engaged in speculation at para 12 of the ruling that the appellant would flee given his emotional ties to Sonali, whereas the contrary is true;

(j) that para 126 of the ruling in this matter permits an inference that the court ought to have enquired whether or not the appellant could afford a higher amount and there was a duty on the court, if it was of the view that the amount was insufficient, to make further inquiries as to whether or not the appellant's family could raise more funds. In this regard, he relied on the decision in *S v Visser.*[13] He submitted that the court had a duty to investigate fully the capacity of an accused to pay bail. A court must go further than this court did in that inquiry and find out if a higher amount is available for bail. Even if the amount is not readily available, this court must inquire as to whether appropriate arrangements can be made for the amount to be paid. In

[12] *S v M* 2007 (2) SACR 539 (CC).
[13] *S v Visser* 1975 (2) SA 342 (C).

light of the fact that the court did not conduct such inquiry, the appellant may have tendered a higher amount;

(k) the court failed to consider whether the imposition of strict bail conditions would address the issue of abscondment such as requiring the appellant to report to a suitable police station twice daily, fitting a monitoring device which tracks his every move, preventing him from applying for travel documents, and prohibiting him from being present at any point of departure from the country; and

(l) it was wrong of the court to adopt the approach that because a lengthy term of imprisonment had been imposed, bail pending appeal should be denied, and in this regard the court failed to consider the decision in the matters of *S v Priyen Naidu*[14] and *S v Stokes*.[15]

The respondent's submissions

[20] Mr *Sankar* who appeared for the respondent submitted that the test to be applied by the court at this stage of the proceedings is as set out in the decision of *S v Masoanganye*[16] quoted in paragraph 10 above.

[21] He submitted that there was no suggestion that the court acted injudiciously or capriciously and the ultimate discretion falls to the trial court to decide. He indicated that what must be borne in mind is that the appellant has to discharge the onus, one cannot lay criticism at the door of the court for failing to make the necessary inquiries. In addition, he indicated that ultimately the onus rests on the appellant to show that exceptional circumstances exist and/or that it is in the interests of justice that he be admitted to bail pending appeal. The fact that he has prospects of success or that the appeal is arguable does not necessarily mean he must be admitted to bail.

[22] In addition, Mr *Sankar* submitted that all the authorities and the cases which Mr *Howse* referred to were matters that had dealt with bail pending trial. The appellant is a convicted person and there is always a risk of abscondment

[14] *S v Priyen Naidu* unreported decision of the High Court of South Africa, KwaZulu-Natal Local Division, Durban case number CC9/2011.
[15] *S v Stokes* unreported decision of the High Court of South Africa, KwaZulu-Natal Local Division, Durban case number CC233/05.
[16] *S v Masoanganye & another* 2012 (1) SACR 292 (SCA).

irrespective of his behaviour prior to conviction. He indicated that for every one of the cases and examples which Mr *Howse* referred to in his submissions, there were cases which pointed in the other direction, namely, where an applicant, when released on bail pending appeal, absconded. The court will engage in a certain amount of speculation and 'play Nostradamus' and decide the matter by weighing up various factors.

[23] Further, the appellant is a man of means and one cannot treat him as one would treat other appellants when dealing with bail pending appeal. He submitted that the appellant being a man of means given the prospect of facing a long term of imprisonment, could take his daughter and flee.

[24] Even though courts impose bail conditions that an accused person must not be at any international borders or apply for any travel documents, and although he is in possession of the appellant's passport, it is common knowledge that people in the position of the appellant are able to flee and travel and have access to international borders.

[25] In relation to the submission that the appellant has a serious medical condition, Mr *Sankar* indicated that it was noteworthy that for the four years during which the trial proceeded and save for being sick for three days suffering from irritable bowel syndrome, the appellant was never hospitalised for his so called serious or chronic illnesses as described by Mr *Howse*.

[26] He further indicated that the use of the words "exceptional" and "extra-ordinary" as referred to in the court's judgment did not mean, and he certainly did not interpret it to mean that the court did not apply the correct test, but having regard to the transcript of the proceedings, it would appear that the court was quoting Mr *Howse*'s words. The appeal court will certainly not treat the use of those words as being that the court incorrectly applied the legal principles and/or incorrectly applied the test.

[27] In so far as the appellant's submissions in relation to Sonali were concerned, he submitted that it would be more emotionally traumatic to return the appellant to her on bail pending appeal and thereafter if he is unsuccessful on appeal, to then remove him from her and place him in custody.

[28] He indicated that the court must be mindful of the fact that, regarding bail pending appeal, the courts are, 'less lenient and less liberty oriented'. In the result Mr *Sankar* submitted that the appellant had not discharged the onus to show either that exceptional circumstances existed and that it was in the interests of justice for him to be released on bail pending appeal and consequently, there were no reasonable prospects another court would come to a different decision.

Analysis

[29] In deciding whether another court would come to a different decision, I have to not only consider the judgment and reasons for refusing to admit the appellant to bail, but also consider the grounds of appeal advanced. The appellant has in the grounds of appeal expanded on those advanced at the hearing of the initial application for bail pending appeal and has also attempted to introduce new grounds. As these were not raised when the application for bail pending appeal served before me it is not necessary for me to deal with them.

[30] This application must thus consider all the factors alluded to by the appellant and determine whether there are reasonable prospects another court would find individually or cumulatively that he had shown exceptional circumstances which in the interests of justice warranted his release on bail pending appeal and whether it was in the interests of justice that he be released on bail pending appeal.

[31] I do not propose to revisit the judgment for purposes of this application and propose to only consider certain of the grounds of appeal advanced at the hearing of this application.

[32] In respect of paras 1 and 2 of the grounds of appeal, having regard to the transcript of the proceedings for 7 March 2019 at page 28, Mr *Howse* submitted in respect of the onus to be discharged by the appellant, he would have to establish exceptional circumstances which in the interests of justice permitted his release on bail pending appeal. The inquiry which the court had to embark on were likewise canvassed by him and are summarised on page 28 as well. In his submissions however, he did not draw a distinction between the various offences for the purpose of the application for bail pending appeal. Despite this, the different onus which the appellant had to discharge in respect of the schedule 5 and 6 offences, were

considered by this court.

[33] In addition, if one considers the judgment in its entirety, the personal circumstances of the appellant and his reasons for seeking to be admitted to bail were considered holistically when determining whether or not he discharged the onus. This court was at pains to indicate that there is no "universal definition" applicable to the definition of "exceptional circumstances" and that the court exercises a discretion based on the facts of each individual matter.

[34] During the course of his submissions it was Mr *Howse* who continuously made reference to the appellant as 'establishing truly exceptional circumstances', being 'an exceptional person', who fell into the 'category of one of these extraordinary stable individuals' who had proven 'at a really exceptional level that he is not a flight risk'. This is evident throughout the transcript of the proceedings for 7 March 2019. It was in reference to this that the court quoted him and recorded such finding at para 107 of the judgment in reference to his personal circumstances.

[35] In regard to paras 3 and 4 of the grounds of appeal, the judgment deals with all of these considerations and references the main grounds as including the financial and emotional well-being of his children, specifically Sonali. The appellant's health was considered at the time of sentencing and when considering the application for bail pending appeal. The letter included in Exhibit "MMMM" dealt with the appellant's diagnosis. There was no reference to him suffering from any chronic illness.

[36] At the hearing of the application on 28 May 2019, Mr *Howse* conceded that what is recorded in the letter is that the appellant suffers from non-occlusive coronary disease and blood pressure and that he referred to it as being "chronic". In addition he conceded that it was never brought to this court's attention until the application for leave to appeal against the refusal to admit the appellant to bail had been filed, that the appellant had been incarcerated in the prison hospital. The affidavit in support of the application for bail pending appeal did not deal with this nor was it ever canvassed during the submissions in December 2018 or on 7 March 2019. Mr *Howse* could also not advance any reasons as to why the appellant did not bring any application to bring new facts to light in support of bail pending appeal nor

file any supplementary doctors' reports. This is what Mr *Howse* was instructed to do in both the *Stokes* and *Naidu* matters he referred to in the course of argument. One would have thought that if the appellant's health condition was so serious he would have taken steps to bring this to the court's attention for consideration when deciding the application.

[37] As regards para 5 of the grounds of appeal, it is correct that the appellant has no pending cases and only the six convictions in the current matter. In the judgment on sentence, this court commended the appellant on his success as a businessman despite the odds. It has never been brought to the court's attention that the appellant resided in Durban for a short period of time. The evidence of the appellant at trial was that his father gave him the home he occupied at the time of his marriage to his former wife, Kerusha.

[38] In mitigation of sentence it was submitted that his nephews would have to abandon their studies and assist in the running of his business and that of managing his mother's commercial property. The evidence presented at trial, was that although the appellant resided next door to his mother, one of his sisters and her children reside in the same home as his mother and there is someone to take care of his mother.

[39] As regards the reference to bail pending trial, different considerations applied at that stage of the proceedings as opposed to bail pending appeal. In *S v Bailey*[17] Seegobin J alluded to this in reference to *S v Williams*:[18]

'Generally while courts would always lean in favour of granting bail to an accused person pending his/her trial, different considerations apply after conviction and sentence. This was pointed out by the court in *S v Williams* where the following was stated:

"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*

[17] *S v Bailey* 2015 JDR 1117 (KZP) para 26.
[18] *S v Williams* 1981 (1) SA 1170 (ZA).

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."' (Footnote omitted)

[40] In the course of the judgment I dealt with the risk of abscondment and the relevance of the appellant adhering to his bail conditions pre-conviction. The authorities are clear. Post-conviction there is however a greater risk of abscondment. The appellant's personal circumstances serve to guide the court as to whether there is an incentive to flee. In *S v Masoanganye*[19] Harms AP observed that 'the personal circumstances of an accused - much more than assets - determine whether the accused is a flight risk'. Consequently, I disagree with Mr *Howse's* submission that I engaged in speculation when referring to the appellant's emotional ties to Sonali.

[41] The appellant's passport has been in the possession of Mr *Sankar*, and not the police. Neither in the affidavit in support of bail pending appeal nor in the oral submissions by Mr *Howse,* were the grounds in para 5.11 canvassed in the application for bail pending appeal.

[42] In respect of the grounds of appeal contained in paras 5.13 and 5.14, the appellant did not directly involve himself in the commission of the offences but hired others to do so. In addition, given that he hired persons to murder the deceased and engaged in the pattern of activity alleged, I do not believe that it can be said that he does not pose a danger to society nor that he will not re-offend. In *S v Mabapa*[20] Van Rooyen AJ observed as follows with reference to a bail application pending appeal against conviction:

'Although the opportunity for interfering with evidence is not that real at this stage, the possibility that a convicted person may abscond when on bail pending the appeal, is increased.'

Most importantly, this aspect was not canvassed in the submissions in the

[19] *S v Masoanganye & another* 2012 (1) SACR 292 (SCA) para 19.
[20] *S v Mabapa* 2003 (2) SACR 579 (T) para 8.

application for bail pending appeal which served before me.

[43] A proper reading of the report of Tarryn Blake does not favour the release of the appellant at all. This was dealt with extensively at the sentencing stage of the proceedings. In fact, what the respective reports submitted do indicate is that although he refers to himself as 'primary caregiver', Mrs Soni was an active participant when it came to Sonali and continues to be.

[44] The letter from Floss Mitchell referred to in the application for bail pending appeal, indicates that Sonali misunderstood the nature of the bail proceedings and indicated that should the appellant not be granted bail and the appellant be further incarcerated, contact visits should occur. At the time of sentencing an order to that effect was issued based on the report which formed part of exhibit 'MMMM". Correctional services appears to be complying with such order. I have no doubt that if the court order was not being complied with, a complaint regarding same would have formed part of the application for bail pending appeal, as it did in the *Stokes* matter. It is a matter of fact that Kerusha Soni has been the primary caregiver of Sonali and Ariv since the appellant's incarceration on 18 September 2018, some nine months.

[45] In respect of para 10 of the grounds of appeal this has already been canvassed in the judgement. In any event, that someone is a primary caregiver does not mean a term of imprisonment will not be imposed. In addition, the children have been residing with Mrs Soni since 18 September 2018. Ms Floss Mitchell's report also confirms this and does not record any difficulties with this arrangement.

[46] Insofar as para 11 of the grounds of appeal are concerned, the sentences on counts 2 to 5 were ordered to run concurrently with the sentence imposed on count 1. Whilst I accept these are relatively short periods of imprisonment, the prospects of the appellant succeeding in his appeal against counts 2 to 5 are unlikely. In addition, in respect of the merits of the appeal on count 6 the judgment delivered on 11 April 2019 canvassed this in detail.

[47] In the judgment the prospects of success on appeal in respect of all the convictions were canvassed. In doing so, I was mindful of the caution issued by the

SCA that the application for leave to appeal and bail pending appeal is 'not a dress rehearsal' for the court ultimately hearing the appeal.

[48] Among the criticisms levelled during the submissions made by Mr *Howse* was that the court did not sufficiently canvass the aspect of the bail amount and conditions. He submitted that the court had a duty to hold an inquiry in relation to the amount of bail which the appellant could afford. In this regard he relied on the provisions of s 60 of the CPA which deals with bail generally but specifically relied on the provisions of s 60(2B) for his submission that the court ought to have made more inquiries than it did as reflected in the transcript at page 111. Section 60(2B) reads as follows:

'*(a)* If the court is satisfied that the interest of justice permit the release of an accused on bail as provided for in subsection (1), and if the payment of a sum of money is to be considered as a condition of bail, the court must hold a separate inquiry into the ability of the accused to pay the sum of money being considered or any other appropriate sum.

(b) If, after an inquiry referred to in paragraph *(a)*, it is found that the accused is –

(i) unable to pay any sum of money, the court must consider setting appropriate conditions that do not include an amount of money for the release of the accused on bail or must consider the release of the accused in terms of a guarantee as provided for in subsection (13) (*b*); or

(ii) able to pay a sum of money, the court must consider setting conditions for the release of the accused on bail and a sum of money which is appropriate in the circumstances.'

[49] The provisions of s 60(1)*(a)* which precedes the section Mr *Howse* relied on reads as follows:

'An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage <u>preceding</u> his or her conviction in respect of such offence, if the court is satisfied the interests of justice so permit.' (My emphasis.)

[50] I have had regard to the submissions in the application for bail pending appeal on 7 March 2019, in which Mr *Howse* indicated that should the court be disposed to granting bail pending appeal, to ensure the appellant did not abscond, the amount of bail could be increased and bail conditions could be imposed. The transcript for 7 March 2019 at pages 60 to 61 records the exchange between the court and Mr

Howse in relation to the increase in the amount of bail as well as issues in relation to bail conditions. The submission of Mr *Howse* was for the court to increase the bail amount 'within reason, bearing in mind that the applicant's earning capacity had been considerably reduced'. The court asked the following question 'Okay, so what is within reason then?'. Mr *Howse* after taking instructions reverted and indicated that the bail amount could be doubled to R200 000.

[51] His submission was that this was 'appropriate and commensurate in the circumstances'. In regard to the bail conditions the court raised the suitability of Mountain Rise Police Station as an appropriate police station for him to report at given the appellant's defence. This was also dealt with in the transcript at page 61. I have considered the authorities in respect of the imposition of bail conditions. Ultimately what must be borne in mind is that in relation to amount of bail and the conditions to be imposed, the court is often guided by the submissions of the appellant and his legal representative.

[52] Mr *Howse* also referred to the decision in *S v Visser*[21] as authority for the proposition that the court needs to go further than merely rely on the submissions of the appellant and that the court has a duty to delve into the ability of an applicant to afford a higher amount if it is not satisfied that the amount tendered is a sufficient inducement to discourage the applicant from absconding. In *Visser*, reading from the headnote, the court held that:

'. . .it is the duty of the magistrate in the fixing the amount of bail, not only to take into consideration the offence which has been committed but also, *inter alia*, the capacity of the accused to find bail.'

[53] Having regard to the decision in *Visser* it would appear that a court must make inquiries in relation to the ability of an applicant to afford an amount of bail. The amount to be fixed must not be so high as to constitute a refusal of bail. In my view, if one has regard to the exchange between the court and Mr *Howse* in relation to the amount of bail to be fixed the questions raised were sufficient to inquire into the affordability of the appellant and his family to afford an amount higher than the original amount of R100 000 paid.

[21] *S v Visser* 1975 (2) SA 342 (C).

[54] In addition, the aspect of the imposition of bail conditions was also canvassed with Mr *Howse*. I am of the view that these were canvassed sufficiently with the appellant who it must be borne in mind ultimately bears the onus.

[55] *S v Essop*[22] the court also dealt with the amount of bail payable by a convicted and sentenced appellant. The court was mindful of the fact that the presumption of innocence no longer applied. Prior to his trial the appellant in that matter was released on R10 000 bail but at the time of bringing the application for bail pending appeal an amount of R20 000 was suggested. The court in taking the view that the amount was too low took into account the appellant's current status and that the amount ought not to be so high as to be out of reach of the appellant. The court held 'the amount has to be fair and serve as an incentive'.[23]

[56] During the course of the submissions Mr *Howse* made much of the fact that the appellant had succeeded in showing there were reasonable prospects of success within the context of establishing exceptional circumstances and establishing the interests of justice permitted his release on bail pending his appeals. This aspect and the fact that an applicant has been granted leave to appeal is not an exceptional circumstance on its own and was canvassed in detail in the judgment and extensive reference was made to the decision of *S v Bruintjies.*[24]

[57] During the course of his submissions Mr *Howse* conceded that the appeal was arguable and 'could go either way'. Under those circumstances and in my view this is a neutral factor for purposes of the application for leave to appeal the refusal of bail pending appeal. There are reasonable prospects either way and consequently, this did not and ought not to have played a major factor in deciding whether the appellant had discharged the overall onus resting on him.

[58] In *S v Scott–Crossley*[25] the court referred to the relevance of prospects of success in cases not canvassed by s 60(11) of the CPA. In matters covered by the provisions of s 60(11) where a conviction has occurred for a serious offence the consideration of prospects of success in itself does not constitute an exceptional

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[22] *S v Essop* 2018 (1) SACR 99 (GP).
[23] Ibid para 40.
[24] *S v Bruintjies* 2003 (2) SACR 575 (SCA) para 6.
[25] *S v Scott–Crossley* 2007 (2) SACR 470 (SCA) paras 5-7.

circumstance but is certainly one of the considerations that a court must consider in determining whether exceptional circumstances exist. At para 7 of the judgment the court dealt with the level of the examination of prospects of success required of the court hearing the bail application. It held:

'The prospects of success do not in itself amount to exceptional circumstances as envisaged by the Act – the Court must consider all relevant factors and determine whether individually or cumulatively they constitute exceptional circumstances which would justify his release. . . . In evaluating the prospects of success it is not the function of this Court to analyse the evidence in the Court *a quo* in great detail. If the evidence is extensively analysed it would become a dress rehearsal for the appeal to follow: cf *S v Viljoen* 2002 (2) SACR 550 (SCA) . . .at 561*g – i*. Findings made at this stage might also create an untenable situation for the court hearing the appeal on the merits.'

[59] Insofar as the aspect in relation to imposing bail conditions is concerned, the court only decides on this aspect once it is satisfied that the appellant has discharged the onus upon him to show either that exceptional circumstances exist, alternatively, that it is in the interests of justice for him to be released on bail pending appeal.

[60] During the course of submissions, I was referred to the application for bail pending appeal instituted by *Priyen Naidu*[26] as well as the decision in *S v Stokes*[27] similarly an application for bail pending appeal.

[61] Only copies of the orders in these two matters were annexed to the application for leave to appeal. Submissions were made by Mr *Howse,* specifically in the matter of *Priyen Naidu*, that he was facing a lengthy term of imprisonment after being convicted for murder. As a consequence of the fact that the reasons for the issuing of these orders and the granting of bail pending appeal was not made available by the appellant, despite a request for same, and as I was unfamiliar with the basis for these orders, I requested copies of the application papers submitted by both appellants in those matters as Mr *Howse* was significantly involved in both of them.

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[26] *S v Priyen Naidu* unreported decision of the High Court of South Africa, KwaZulu-Natal Local Division, Durban case number CC9/2011.

[27] *S v Stokes* unreported decision of the High Court of South Africa, KwaZulu-Natal Local Division, Durban case number CC233/05.

[62] Mr *Sankar* was also invited to submit any further submissions on receipt of the applications. A reading of the affidavit in the *Priyen Naidu* matter is instructive and I may add Mr *Howse* failed to place these facts before me in making submissions that a court has granted bail pending appeal, most notably that these were applications for bail pending appeal based on new facts.

[63] The facts of the *Priyen Naidu* matter were the following. He was incarcerated in Westville Prison serving a sentence of life imprisonment. He was arrested and charged in 2009 and released on bail of R25 000 subject to conditions on 3 August 2009. He was convicted on 4 July 2014 and his bail lapsed. An application for leave to appeal his conviction was refused and an application for leave to appeal against the sentence was granted on 6 August 2014. At the time these orders were granted he simultaneously sought bail pending appeal which was refused.

[64] Subsequent to the refusal of leave to appeal his conviction on 6 August 2014, he petitioned the SCA for leave to appeal his conviction. On 9 February 2015, the SCA granted leave to appeal to the full bench against his conviction. As a consequence, he renewed his application for bail pending appeal on the basis that there were new facts and circumstances which arose subsequent to bail pending appeal being refused.

[65] In summary these were that he was granted leave to appeal the conviction by the SCA and consequently he had reasonable prospects of his conviction being set aside. That his medical condition, he being diagnosed with Haemangioma, had worsened and had been exacerbated as a consequence of an assault to that side of his face whilst incarcerated in a cell at Westville Prison. In support of his medical condition, a medical report was put up confirming this which also indicated that his blood pressure needed to be kept under control and also that the right side of his face needed to be protected and that his condition had worsened.

[66] In respect of the matter of *S v Stokes*, the facts in that matter were similar to that of *Priyen Naidu* save that *Stokes* was convicted for a white collar crime, namely fraud and theft. Pending sentencing proceedings he was released on bail in the sum of R250 000 which had been secured by a guarantee from his brother. On the date of his conviction, being 2 August 2016, his bail lapsed by operation of law.

[67] Following his conviction he brought his substantive application for the extension of his bail pending sentencing. Such was granted for a period of seven and a half months and on 22 March 2017 he was sentenced. He applied for leave to appeal the conviction and sentence and simultaneously applied for the extension of his bail pending the petition for leave to appeal to the SCA. His application for leave to appeal against his conviction and sentence as well as bail pending the petition were refused on the same day. After commencing serving his sentence, he lodged his petition and on 20 September 2017 the SCA granted him leave to appeal to the full court of the KZN division against his conviction and sentence. He thereafter instituted an application for bail pending appeal after leave to appeal was granted by the SCA.

[68] In summary what formed the basis for *Stokes'* application for bail pending the appeal were a number of factors being:

(a) a new fact had come to light, namely the SCA had granted him leave to appeal his conviction and sentence;

(b) the circumstances of his wife Carla and his daughter T had deteriorated since his sentence and he was the primary caregiver not only to T but also to his wife Carla; and

(c) his health condition being his epilepsy had deteriorated significantly as his seizures increased and he was experiencing constant epileptic auras.

[69] In the affidavit in support of bail pending appeal Stokes dealt extensively with his medical condition, his epilepsy and the inadequacy of the treatment that he had received and not received since he commenced serving his sentence. Part of the order on sentence related to the Department of Social Development and Health investigating the medical circumstances of his wife Carla and taking steps to assist with her psychiatric evaluation and assistance. No steps had been taken by the Department of Social Development and Health from the time of sentencing being 22 March 2017 until the time he deposed to the affidavit in October 2017. There had thus been no compliance with the order.

[70] In addition, in terms of the order, his daughter T was required to be assessed by the Department of Social Development and a designated social worker was to be appointed to assist and to establish whether she was a minor child in need of care

and for educational support and proper care to be given to her. This order likewise was not complied with from the time of sentencing until the time of him deposing to the affidavit.

[71] His wife's condition had deteriorated significantly since his incarceration and furthermore his businesses were suffering. As a result and as a consequence Stokes was unable to pay for her institutionalised care.

[72] To the affidavit Stokes annexed two job offers which he had received from Southerly's and SA Vehicle Security indicating that he would be able to operate his business but also earn a salary to pay for his wife's institutionalisation as well as T's maintenance. It would appear that since the early stages of her development, T was cared for by her father given her mother's condition. At the time of his incarceration her 77 year old grandmother moved in and temporarily lived with her but was unable to care for her.

[73] In addition, her home schooling stopped as there were insufficient funds to pay for her tutor and available funds were used to pay for food and his wife's accommodation at Waynol. Consequently, T had not received any school tutoring. In addition, her step-brother moved in to the home to care for her as best he could but she was alone during the day as he worked and at night studied part time for a B-Com degree.

[74] I have had regard to these orders and the affidavits and annexures. At the outset, I must place on record that I was not referred to these orders nor these papers when the application for bail pending appeal was heard. In my view I ought not to consider these further. However, as it was pertinently raised in the grounds of appeal and lest I be criticised for not dealing with these I place the following on record.

[75] As with all matters of this nature, when deciding on bail pending appeal, the facts of each individual case will determine whether singularly or cumulatively exceptional circumstances exist or if the interests of justice permit the release of an applicant on bail pending appeal.

[76] The facts of the *Naidu* and *Stokes* matters above appear to differ factually

from that of the appellant. In addition, both these persons were initially denied bail pending appeal. These two applications were brought on new facts and substantiated by documentary evidence. In the absence of both courts reasons for granting bail pending appeal I would be speculating as to the reasons for such decisions and I refrain from doing so.

Concluding remarks

[77] In conclusion a number of aspects need to be addressed which were dealt with in an exchange of correspondence which does not form part of the record of these proceedings. The first relates to the aspect of condonation, the allocation of a date for the hearing of the appeal and the presence of Mr *Sankar* at the hearing of the application.

[78] On 11 April 2019, prior to being handed a copy of the written judgment in the application for leave to appeal, and after the summary of the judgment had been read into the record, Mr *Howse* indicated that he had received instructions to note an appeal against the refusal of bail.

[79] Such intention was recorded and I suggested that he read the written judgment, prepare the necessary notice and serve and file same. As it was the last Thursday of recess, and I was scheduled to commence circuit court in Ramsgate, I proposed that he liaise with my registrar via email and a date could be arranged for the hearing of such application for leave to appeal in consultation with the Judge President.

[80] Immediately after court had adjourned, the applicant's attorney of record, Mr Ayoob attended at my registrar's office in my presence. He requested that the matter be dealt with on 18 April 2019. I once again reiterated that I would be on circuit and could not allocate any date until such time as a formal application had been served and filed and dates had been arranged in consultation with the Judge President and also with the DPP's offices. I once against advised Mr Ayoob to liaise with the DPP's office as well as my registrar so that I could enquire from the Judge President when the matter could be accommodated.

[81] The application minus all the annexures was received from the clerk of court, Izingolweni on 7 May 2019. Attempts had been made to email this through to my registrar, Ms Matthewson, however problems have been experienced with the judiciary emails.

[82] Prior to receipt of the application, telephonic enquiries were made with my registrar on 25 April 2019 when she conveyed to Mr Ayoob that we were having difficulty accessing our emails at the judiciary address but that he should continue in his attempts to send the emails. She informed him that the matter could be dealt with on our return to Durban in May at the commencement of the next session.

[83] In the interim, Mr *Sankar* of the DPP's offices had been in telephonic contact with my registrar. He indicated that he was under pressure from the applicant's attorney of record to deal with the application for leave to appeal. He was aware that the court was experiencing infrastructural challenges at Izingolweni and it would be near impossible to accommodate the matter on the court roll and it could not be accommodated sooner.

[84] I may add that given these infrastructural difficulties the trial which I was engaged with took longer than expected and the remainder of the matters on the calendar had to be adjourned. I have noted the request from Mr Ayoob's letter that the matter be accommodated before court hours or after court hours. The matter could not be accommodated in the manner suggested as the court staff would not be available, most importantly the stenographer. Special travel arrangements had to be made for the stenographer to be present during court hours in the trial matter that I was busy with. It was simply not possible to make alternative arrangements to accommodate the matter on the roll and arrange for the necessary court staff to be in attendance. I may also add for the most part of the months of April and May there were several holidays which resulted in shortened weeks. This is apart from the Easter weekend.

[85] As the application for leave to appeal was noted on 11 April 2019, the issue of condonation did not arise. Although an incomplete application was filed in April 2019, the matter was accommodated at the earliest available date and on receipt of a properly completed set of applications papers. Mr *Howse* acknowledged at the

commencement of the argument that the completed set was filed on 15 May 2019. In addition a further bundle of authorities was delivered to my registrar in Durban on 20 May 2019.

[86] A preliminary issue which arose related to the attendance of Mr *Sankar* at the hearing of the matter. Prior to the trial commencing at the pre-trial procedures, the appellant had noted an objection to Mr *Sankar* dealing with the matter and had bought an application for his recusal. This has been canvassed in the main judgment.

[87] Prior to the hearing of the application for leave to appeal against the refusal to grant bail, I raised this aspect with counsel and confirmed that the appellant had no objection to Mr *Sankar* now dealing with the matter in light of the fact that all future proceedings will be governed by the record of proceedings. Mr *Howse* placed on record that as Mr *du Toit* had retired, the alternative will be to wait for someone other than Mr *Sankar* to familiarise themselves with the entire record of proceedings, transcripts, exhibits, and various judgments. This would delay this application considerably and consequently the appellant's instructions were not to object to Mr *Sankar's* further involvement in the matter.

[88] Given that the appellant had withdrawn his objection to Mr *Sankar's* involvement in the matter, he placed himself on record for the respondent in these proceedings.

[89] On receipt of the application for leave to appeal, it was noted that the annexures had been omitted. Correspondence was exchanged with the appellant's attorney of record, Ayoob Attorneys, to request same.

[90] At the hearing of the matter, Mr *Howse* made reference to these orders and these cases and submitted that the judges in these matters were of the view that bail pending appeal ought to be granted despite the seriousness of the offences and that I should be guided by the orders and similarly grant leave to appeal to the appellant in this matter.

[91] The affidavits in these matters were requested at the hearing of the application, to enable me to familiarise myself with the facts which informed the

orders as I was not provided with the respective judges' reasons for the orders, despite a prior request for same. These were subsequently supplied after the hearing of the matter, the last set of papers being received on 31 May 2019. Although I indicated that Mr *Sankar* could make further written submissions on receipt thereof he has elected not to do so.

[92] I have considered the grounds of appeal, the authorities referred to and having regard to the submissions of both Mr *Howse* and Mr *Sankar,* I am of the view that the appellant has not shown that there are reasonable prospects another court would come to a different decision in respect of the application to be admitted to bail pending his appeals to the SCA.

Order

[93] In the result, the application for leave to appeal against the refusal to admit the appellant to bail pending his appeals to the SCA in respect of his convictions and sentences is dismissed.

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HENRIQUES J

CASE INFORMATION

Date of argument	:	28 May 2019
Judgment delivered	:	4 June 2019

APPEARANCES

Counsel for the State	:	Mr Sankar
Instructed by	:	The Director of Public Prosecutions
Counsel for the Applicant	:	Mr Howse
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