IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. CA&R 159/2018

Date heard: 21 September 2020
Date delivered: 25 September 2020

In the matter between:

ANDILE LUNGISA Applicant

and

THE STATE Respondent

JUDGMENT

RUGUNANAN, J

[1] The time line of events concerning this matter commenced with an incident that occurred on 27 October 2016 in the council chamber of the Nelson Mandela Bay Metropolitan Municipality. During a council meeting, the applicant struck Mr Rayno Kayser on the head with a glass jug filled with water. At the time the applicant was the leader of the African National Congress caucus in the council chamber and Mr Kayser was a Democratic Alliance councillor.

[2] What followed was the applicant's prosecution in the Port Elizabeth Magistrates' Court on a charge of assault with intent to do grievous bodily harm

for which he was convicted and sentenced during May 2018 to 3 years' imprisonment, 1 year of which was conditionally suspended for 5 years.

[3] Following the trial Magistrate's refusal of the applicant's application for leave to appeal against both his conviction and sentence, the applicant obtained such leave on petition to this Court. In a judgment handed down on 2 April 2019 in this division, the applicant's appeal against his conviction was dismissed; his sentence remained intact except for an adjustment to the condition attached to its suspended component.

[4] The applicant subsequently lodged a petition to the Supreme Court of Appeal in which he sought special leave to appeal against the High Court judgment given on appeal. The petition was partially successful. On 27 May 2019 leave to appeal to the Supreme Court of Appeal was granted against sentence only. In a judgment delivered on 9 September 2020, the Supreme Court of Appeal dismissed the appeal against sentence thereby confirming the applicant's sentence of 3 years' imprisonment (of which 1 year was conditionally suspended). For the applicant what this means is that 2 years' imprisonment is the effective sentence.

[5] As of 17 September 2020, the applicant commenced serving his sentence. He has, a few days prior thereto, lodged an application in the Constitutional Court in which he seeks leave to appeal against the judgment of the Supreme Court of Appeal on the issue of sentence.

[6] The matter before this Court involves a substantive application by way of urgency in which the applicant essentially seeks an order for his release on bail pending the determination by the Constitutional Court of his application for leave to appeal.

[7] In the application before the Constitutional Court the applicant seeks leave to appeal on various grounds. In the main these include, firstly, that his right to a fair hearing was infringed because the Supreme Court of Appeal ought to have considered his sentence - not on the basis that he is a councillor - but rather on the basis that he is an ordinary offender; and secondly, that the effective short term of 2 years' imprisonment conflicts with the Constitution in that it is tantamount to a cruel and degrading sentence and an arbitrary deprivation of his freedom.

[8] Those are the broad terms of the issues, which under section 167 of the Constitution, the applicant wishes to engage the jurisdiction of the Constitutional Court on the premise that they are Constitutional issues.

[9] Referring to these issues I do not think it is appropriate for this Court to engage with them. The Constitution is clear.[1] Only the Constitutional Court can finally determine whether a matter is within its jurisdiction; and it is only that court that has the exclusive right to decide whether to grant leave to appeal or not.[2]

[10] The present application is about bail. This Court must determine:

---

[1] Section 167(3)(c)
[2] ***S v Nel*** *2002 (1) SACR 425 (TPD) at 427f-g;* ***Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others*** *2017 (5) SA 9 (CC) at paragraph [22]*

(i) whether it is in the interests of justice for the applicant to be released on bail, and;

(ii) whether he has reasonable prospects of success in appealing against his sentence.

[11] In this judgment these aspects are dealt with under separate headings - but before doing so it is considered necessary to state that the issue of bail is governed by the multitude of factors in section 60 of the Criminal Procedure Act [3] and the decision whether or not to grant bail is subject to the discretion of the court, to be judicially exercised, taking into account all relevant factors.[4] A court will always grant bail where possible provided it is clear that the interests of justice will not be prejudiced.[5] In every case where bail after conviction and sentence is sought the *onus* is on the applicant to show why the interests of justice requires that he should be granted bail.[6]

THE INTERESTS OF JUSTICE

[12] In sub-sections 4 and 5 of section 60 of the Criminal Procedure Act the legislature determined the factors a court must consider in deciding whether or not bail should be granted. In summary, the interests of justice will preclude the granting of bail where there is the likelihood that the applicant will endanger public safety; or will attempt to evade his trial; or will, in the event that bail is

---

[3] Act No. 51 of 1977, as amended
[4] ***Rohde v The State*** *(483/2019) [2019] ZAWCHC 100 at paragraph [52] -* http://www.saflii.org/za/cases/ZAWCHC/2019/100.html accessed 24 September 2020
[5] ***S v Barber*** *1979 (4) SA 218 (D&CLD) at 219G-H*
[6] ***S v Williams*** *1981 (1) 1170 (AD) at 1171H-1172B*

granted, attempt to intimidate witnesses or conceal evidence or undermine the criminal justice system or disturb public order.

[13] In addition, sub-section 10 of section 60 of the Act assumes relevance for the reason that it enjoins the court to consider the personal interests of the applicant in the context of assessing the interests of justice.

[14] I should immediately state that the factors pertaining to the applicant evading trial or attempting to conceal or destroy evidence are inconsequential since his criminal prosecution has already been finalised.

[15] It has never been suggested in argument, nor is there evidence in the papers before me, that the applicant is an inherently violent person, or that he is a flight risk or poses a danger to public safety. He was previously granted bail on fairly stringent conditions and has not breached any of them, and when required to report for the purpose of serving his sentence, he did so on 17 September 2020. In these facts, I accept that nothing had changed to justify their reconsideration and hence the risk assessment undertaken by this Court indicates that there is no likelihood that the applicant will undermine the criminal justice system.

[16] Relevant to the applicants' personal circumstances, these generally turn upon extant facts and intentions: He is married, he has seven children and both his parents are alive and in respect of whom he contributes to their support. He is employed in Port Elizabeth where he permanently resides. He has ties to the community through his involvement in civic affairs as a councillor. To this

accumulation of his personal circumstances, I must add, that he is also a convicted offender for whom the presumption of innocence is spent.

[17] To sum up, in assessing the evidence attendant on the factors determined by section 60 of the Criminal Procedure Act, I am of the view that the applicant has crossed the first hurdle.

REASONABLE PROSPECTS OF SUCCESS

[18] In argument this was the subject of fierce debate between the parties. Having regard to the applicant's previous attempts, it was submitted by the State that this matter has advanced to the point that two consecutive appeal courts have confirmed his conviction, and confirmed his sentence for different reasons. Accordingly, it was submitted that the applicant enjoys no prospects of success in his approach to the Constitutional Court as that court will be reluctant to usurp the sentencing discretion of the trial court where there was no material misdirection, and where two appeal courts having applied their minds and expertise, found no grounds to interfere.[7]

[19] For the applicant it was contended that his prospects of success should not be assessed on the basis of his history in the appeal courts. It was submitted that the Constitution [8] recognises a right of access to the courts and entitles a

[7] The argument being that the Constitutional Court will apply the same approach stated in ***S v Malgas*** *2001 (2) SA 1222 (SCA) at paragraph [12]*: *"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…".*

[8] Section 35(3)(o)

person to approach the courts on appeal - and in the case of the applicant - to apply for leave to appeal to any court, and this includes the Constitutional Court.

[20] When evaluating the question of reasonable prospects of success, I recognise that this Court is not required to make a decision on the merits of the application for leave to appeal. Leave to appeal to the Constitutional Court is a matter to be decided exclusively by the Constitutional Court.[9] The decision of this Court is to determine whether, at a minimum, there is a reasonable prospect of success of that application.[10]

[21] However low the threshold may be, frankly, this is the question that has troubled this Court. It has added to the proverbial grey hair and contributed to a sleepless night or two.[11] There may very well be a perception, rightly or wrongly, that the applicant's approach to the Constitutional Court is an undue elongation of the judicial process and is intended by him to postpone the commencement of his punishment.[12] Finality is an important consideration in a matter such as this where two courts of appeal have had occasion, with the benefit of a full record of the trial proceedings, to determine both the merits and sentence of the applicant's appeal. To this end, the State's opposition to this application was not unreasonable.

---

[9] ***S v Nel*** *supra* at 427e

[10] See ***Bailey and Others v The State*** *(AR371/13) [2013] ZAKSPHC 72 (28 November 2013) paragraphs [26]-[33]* for a comprehensive treatment on the appropriate test to be applied in cases where bail is sought after conviction and sentence.

[11] *per* Lombard J in his words: *"… to arrive at a conclusion which would ensure that justice is done has added to the proverbial grey hair and contributed to a sleepless night or two".* See ***S v Kyriacou*** *2000 (2) SACR 704 (OPD) at 713i*

[12] In ***S v Hudson*** *1996 (1) SACR 431 (W) at 432F* it is stated: *"If it is so that the appellant has no prospect of avoiding imprisonment, the only value of bail is to the appellant. He would gain postponement and not avoidance (A chance to take flight is not a legitimate advantage). A court will not allow bail procedures to frustrate punishment procedures which have been duly formalised."*

[22] Having established that there can be no concern about whether the applicant will abscond, and where the criteria for bail in section 60 of the Criminal Procedure Act have been met, it seems to me - without seeking to comment in any particular depth on the merits of the application for leave to appeal - that the issues raised by the applicant can be said to be reasonably arguable and are not manifestly doomed to failure.[13] If I err in coming to this conclusion then it must be on the side of the constitutional right to liberty.

[23] In the circumstances, and having given careful consideration to the matter, I think this is an instance where, as an alternative to imprisonment, bail has to be granted but subject to conditions.

[24] It is not in dispute that conditions were imposed previously and the applicant complied with same.

[25] If I were to refuse bail and the application for leave to appeal is successful - whenever that might be - then the applicant will be deprived of his freedom unnecessarily and the interests of justice will not be served.

[26] If, however, bail is granted and the applicant's application for leave to appeal fails, then he will inevitably proceed to serve his sentence in which event there can be no adverse consequences or prejudice to the interests of justice.

[27] Before concluding, it must be stated that the applicant should not be under any pretention that this judgment cloaks him with any heroic attributes. The

[13] see ***S v Hudson*** *supra* at 434a-d referred to in ***Bailey and Others v The State*** at paragraph [29]

judgment quite simply is the product of an impartial application of the law to the facts and it should properly be understood in that context.

[28] For these reasons the following order issues:

(1) The applicant, Mr Andile Lungisa, is granted bail in the amount of R10 000 (ten thousand Rand) on the following conditions:

(a) He will remain resident at his address specified as 24 Thriftwood Complex, Walker Drive, Port Elizabeth until such time as his application for leave to appeal to the Constitutional Court has been determined;

(b) He will hand over to the Clerk of the Court at the New Law Courts, Port Elizabeth, any travel document of his, whether temporary or permanent by Wednesday 30 September 2020 before close of business;

(c) He will report in person at the Kabega Park Police Station on Mondays and Fridays between the hours 08h00 in the morning and 18h00 in the evening;

(d) If the application to the Constitutional Court is refused, the applicant will hand himself over to the relevant authorities, such authority being the Clerk of the Court at the New Law Courts, Port Elizabeth, within 72 (seventy-two) hours of the refusal

being communicated to the offices of his attorneys Messrs Griebenow Incorporated.

_____

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:	Advocate T. N. Price SC Instructed by: A. Griebenow Inc. c/o Netteltons Attorneys Attorneys for Applicant 118A High Street Makhanda / Grahamstown (Ref: Mr Nettelton) Tel: 046-622 7149 Email: liza@netteltons.co.za
For the State:	Advocate N.C. Turner Instructed by: The Office of The National Director Of Public Prosecutions 94 High Street Makhanda / Grahamstown Tel: 046-602 3007 Email: ncturner@npa.gov.za