HIGH COURT
(BISHO)

CASE NO. 329/99

In the matter between

AYANDA RUNGQU 1ST Appellant

LUNGISA KULATI 2nd Appellant

and

THE STATE Respondent

JUDGMENT

EBRAHIM J: This is an appeal against the refusal of the regional magistrate, who presided at the trial of the appellants, to grant them bail pending their appeal. The appellants, and six others, stood trial in the Regional Court for the Division of the Eastern Cape on one count of robbery. The second appellant (accused no. 3 in the trial *a quo)* and accused nos. 2, 4, 5, 6, 7 and 8 were convicted of this offence while the first appellant (accused no.1 in the trial *a quo)* was convicted of the offence of theft. Both the appellants and their co-accused were each sentenced to a period of imprisonment of 15 years.

In terms of the provisions of s309B of the Criminal Procedure Act 51 of 1977 the appellants applied to the learned regional magistrate for leave to appeal to this Court against their convictions and sentences. The appellants also applied for bail pending

their appeals. The regional magistrate granted leave to appeal, as aforesaid, but refused to grant bail for any of the accused. The appellants now come on appeal against the decision of the regional magistrate not to grant them bail.

Mr Pillay, who appears for both the appellants, has outlined in his submissions that this appeal is to be dealt with as an ordinary appeal. Also, the question which falls to be determined is whether the decision of the regional magistrate to refuse to grant the appellants bail, is incorrect. Should this Court conclude that the decision is indeed wrong then it is to be set aside and replaced by the decision, which in the opinion of this Court, the court *a quo* should have given. I am in agreement with the approach as postulated by Mr Pillay and further that the *onus* was on the appellants to show that they should be granted bail. While ordinarily in a bail application, prior to conviction, the accused is not burdened with an *onus* the position after conviction and sentence is different. Similarly, the factors which are to be taken into account also differ from those which apply in the case of bail prior to sentence being imposed.

The question whether there are reasonable prospects of success on appeal against the conviction and sentence is one of the factors to be considered by the court. Counsel's submission in this regard is that, while this is so, the court must guard against elevating this criterion to the level where it excludes the granting of bail once the court is of the view that such prospects do not exist. The real test to be applied, he contends, is of a lesser standard and this is whether the appeal is reasonably arguable. It is only where the appeal is doomed to failure that a court is likely not to grant bail. In substantiation of this counsel refers to *S v Hudson* 1996 (1) SACR 431 (W).

At the commencement of argument counsel was permitted to file additional grounds of appeal. In one of these grounds the appellants allege that the court erred in drawing an adverse inference against them by reason of their failure to testify at the trial. The contention is that in so doing the court violated their fundamental right to remain silent which is entrenched in s 35(1)(h) of the Constitution of South Africa Act 108 of 1996. Counsel submits that the regional magistrate concluded incorrectly that the appeal did not have any prospects of success as the appellants had not testified in the main trial.

I do not find myself in agreement with the contentions of the appellants in so far as this ground of appeal is concerned. The statement that the appellants did not testify is, in the first instance, a statement of fact. Secondly, the regional magistrate found that the state had made out a very strong case against the appellants which called for a reply. In these circumstances the failure of the appellants to testify justified a conclusion, and not merely the inference, that the appellants were either unable to or deliberately chose not to answer the state case. There is manifestly no question of this being a violation of their right to remain silent.

It is clear to me that the appellants have misconstrued the circumstances under which their right to remain silent may be invoked without such silence operating to their detriment. In my view the regional magistrate was correct in holding that the evidence presented by the state was such that it required an answer from the appellants. This was by no means an instance where it was to the benefit of the appellants to remain silent and not answer the state case. This ground of appeal is without merit and fails.

While the threat of an accused evading trial is obviously no longer a consideration there is the threat that an accused may abscond in an attempt to avoid serving a term of imprisonment. Even though an appeal is pending this in itself is not a guarantee that the accused will not decide to flee because he has little confidence that the appeal will succeed.

Counsel criticises the regional magistrate for concluding that there was a grave risk of the appellants absconding and that they would not be found and in so doing escape serving the period of imprisonment imposed by the court. He says the regional magistrate did not have evidence before him to justify this conclusion. Moreover, the first appellant, when she was released on bail during the trial, had not failed to honour the conditions of her bail and had attended court when required to do so. This, in broad summary is, as I understand, the argument which Mr Pillay has presented in attacking the correctness of the regional magistrate's decision.

Counsel has also submitted that where there is a possibility that the Court of appeal will interfere with the sentence to the extent that the appellant may not even go to prison then the refusal of bail renders the right of appeal nugatory. In this regard counsel refers to *S v Naidoo* 1996 (2) SACR 250 (W). He submits that the imposition of a severe sentence is not in itself reason to refuse bail pending the appeal and in support of this relies on the decision in *S v C* 1995 (1) SACR 639 (C).

Counsel contends, therefore, that the regional magistrate was wrong in refusing bail and asks this Court to replace his decision with that of its own in terms of s 105(4) of

the Criminal Procedure Act 51 of 1977 and to grant the appellants bail.

Mr Twane, who appears for the state, has made rather limited submissions. He contends that the decision of the regional magistrate is correct. He has focussed primarily on the reasons which the regional magistrate has furnished and asserts that the learned magistrate exercised his discretion properly. His contention is that a balance has to be struck between the liberty of the individual and the safeguarding of the administration of justice. The interests of justice require that the appellants be deprived of their liberty and that they should not be granted bail. He contends, therefore, that the regional magistrate's decision should not be set aside. These in sum total are his submissions.

The basis upon which this Court may interfere with the decision of the court *a quo* is limited. In this regard the Court is called upon to determine whether the learned regional magistrate misdirected himself in reaching his decision to refuse to grant the appellants bail. However, it is not open to this Court to replace the decision of the regional magistrate with that of its own merely because it differs with his decision. See *S v Barber* 1979 (4) SA 218 (D) 220E-H.

The learned regional magistrate, in convicting the appellants, has set out in his judgment his reasons for doing so in a cogent and reasoned manner. It is evident that he evaluated the evidence properly and accorded due weight to the probative value of all the relevant facts. It is clear that certain material aspects of the evidence presented by the state was not challenged by the appellants and consequently stood uncontradicted. In the face of incriminating evidence, which called for a reply on the

part of the appellants, they elected not to testify, nor to present any other evidence.

The decision by the regional magistrate to refuse the appellant's bail was not taken capriciously. It is apparent from the reasons that he has furnished that he has taken account of the relevant factors and given due consideration to each. He was clearly alive to the import of the test enunciated in *S v Hudson (supra)* as is evidenced by his observation that what had to be considered was whether the appeal was *'free from predictable failure to avoid imprisonment'.* At the same time he has recognised that even if the prospects of success were good that there were other factors that had to be considered as well. Mr Pillay's submission that the regional magistrate has misconceived the test that is applicable and applied a higher standard, is in the circumstances not well-founded. It follows that this ground of appeal cannot succeed.

Criticism has been directed at the regional magistrate for concluding that the appeal has no prospects of success yet nevertheless granting the appellants leave to appeal. I accept that there may be element of contradiction in this. However, if the regional magistrate has erred in this regard then, in my view, the error to be attributed to him is that he erred in granting leave to the appellants to appeal against their conviction and sentence and not that he was incorrect in refusing to grant the appellants bail.

I have studied the record of the trial proceedings and the silence of the appellants in the face of strong evidence incriminating them in the commission of the offence is damning. I am driven to one conclusion only. In so far as the merits are concerned I consider the appeal to be doomed to failure. In my view the appeal is not reasonably

arguable and I cannot find any basis for holding that it is not free from predictable failure to avoid imprisonment. See *S v Hudson* (*supra*).

It is also evident that the regional magistrate, in determining an appropriate sentence, gave due consideration to all the relevant factors which impact on sentence. Faced with the prescriptive provisions of the Criminal Law Amendment Act 105 of 1997 the trial court considered it compulsory to impose the minimum sentence which the aforesaid Act prescribes unless the court was able to find that there were substantial and compelling circumstances which justified the imposition of a lighter sentence. I am not persuaded that the regional magistrate has misdirected himself in finding that such circumstances do not exist. I do not find any evidence on the record of the proceedings before this Court which indicates that such circumstances exist.

I am of the view, therefore, that there is no reasonable prospect of the appellants succeeding on appeal in having their sentences set aside on the ground that the regional magistrate misdirected himself or that he erred in imposing the minimum sentence which Act 105 of 1997 prescribes. In view of the prescriptive provisions of the aforesaid Act I do not consider there to be any reasonable prospect either of them persuading the Court of appeal that the sentence is disturbingly inappropriate and that it induces a sense of shock.

However, even on the assumption that there may be a reasonable prospect that the Court of appeal may alter the sentence I do not consider that the sentence will be reduced to the extent that either of the appellants would not have to serve some period of imprisonment. The offence of which both appellants have been convicted is of a

serious nature and the only appropriate sentence is a period of direct imprisonment. Accordingly, it is in the interests of justice that the appellants commence serving their sentences without delay and that this not be deferred until their appeals are finalised.

In regard to the question whether the appellants will abscond it is so that they were granted bail of R20 000.00 each on 7 September 1999 after the defence case had been closed for the regional magistrate's judgment on the merits. First appellant honoured her bail conditions by attending court on 21 September 1999. Counsel has conveyed that the second appellant could not raise the amount of the bail and remained in custody. On that date the regional magistrate handed down judgment and convicted the appellants and their co-accused. He thereupon cancelled the bail of the appellants as well that of the other accused and remanded all of them in custody until 29 September 1999, on which date he imposed sentence as aforesaid.

The circumstances which obtained when the appellants were admitted to bail cannot be equated with those prevailing after sentence was imposed. The risk of the appellants absconding is manifestly greater after their conviction than at the stage when they were awaiting the trial court's judgment on their guilt or innocence of the crime of which they were charged. Their conviction and the lengthy term of imprisonment that has been imposed, notwithstanding their own view that they will successfully prosecute their appeals, is a factor that was given due weight by the learned magistrate in arriving at his decision to refuse the appellants bail. Accordingly, this ground of appeal is not upheld.

I find the criticism directed at the regional magistrate that there was no evidence

upon which to conclude that the appellants would abscond and not surrender themselves should their appeal fail, to be unjustified. The appellants bore the *onus* to have furnished the court *a quo* with all the relevant information so that the court could satisfy itself that they be granted bail. See *S v Ho* 1979 (3) SA 734 (W) at 737G. It was incumbent on the appellants to satisfy the court that there was no risk of flight on their part and that they would surrender themselves when required to do so. This they have clearly failed to do, as is apparent from the record of the proceedings.

It is common knowledge to judicial officers that the police experience great difficulty in apprehending accused who have absconded. Here, too, the *onus* was on the appellants to satisfy the court that in their case such danger did not exist. This similarly they have failed to do.

Nothing prevented the appellants from making a full disclosure in respect of their personal and proprietary affairs including their economic circumstances. Their failure to do so, has prevented the court *a quo* from determining what an appropriate amount of bail would be having regard to the personal circumstances of the appellants and the need for bail to act as a deterrent against the appellants absconding. In the absence of such information the conclusion of the regional magistrate that they constituted a flight risk cannot be said to be improper nor unreasonable. This ground of appeal also fails.

Despite the able argument presented by Mr Pillay I am not persuaded that the regional magistrate was wrong in arriving at the decision that he did. The learned magistrate has properly assessed and given due weight to all the relevant factors. I do not find that there are any grounds upon which this Court may interfere with his decision and replace

it with its own. Accordingly, his decision must stand.

In the result the appeal of both the appellants against the decision of the regional magistrate not to grant them bail pending their appeal is dismissed.

Y EBRAHIM
JUDGE OF THE HIGH COURT, BISHO

Date:17 November 1999

I concur

Z S PEKO
JUDGE OF THE HIGH COURT, BISHO

Counsel for the Appellants	:	Mr D Pillay
Counsel for the state	:	Mr GS Twani
Appeal heard on	:	11 November 1999
Judgment delivered on	:	17 November 1999