

**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: A58/2024

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

DATE

In the matter between:

HECTOR SIBUSISO MABULA

Appellant

and

THE STATE

Respondent

JUDGMENT

MKHABELA AJ:

Introduction

[1] This is an appeal in terms of the provisions of Section 65 (4) of the Criminal

Procedure Act 51 of 1977 ("the CPA") against the decision of the Kempton Park Magistrates' Court refusing to release the appellant on bail pending his appeal against his sentence only. The appellant was sentenced for a period of three years imprisonment pursuant to his conviction of culpable homicide.

- [2] Section 65(4) of the CPA deals with bail appeals from the lower Courts to the High Court and provide as follows:

"4. The Court or Judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such Court or Judge is satisfied that the decision was wrong, in which event the Court or Judge shall give the decision which in its opinion the lower Court should have given."

- [3] In *S v Barber*¹, Hefer J considered the test to be applied and remarked as follows:

"It is well-known that the powers of this Court are largely limited where the matter comes before it as an appeal and not as a substantive application for bail. This Court has to be persuaded that the Magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed, that no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.

Without saying that the magistrate's view was actually the correct one, I have not been persuaded to decide that it is the wrong one."

¹ 1979 (4) 218 (A) at 220E-H.

- [4] As already stated the accused 's conviction of culpable homicide is pursuant to a motor vehicle collision in which he was the driver.
- [5] Upon an application for leave to appeal against his conviction and sentence, leave was granted in respect of sentence only. Leave against conviction was refused.
- [6] Motivated by the granting of leave to appeal against his sentence, the accused applied for bail pending the outcome of his appeal against the sentence. The Magistrates' Court refused.
- [7] Aggrieved by the refusal, the accused has now brought on appeal against the refusal to be released on bail pending the outcome of the appeal on sentence.
- [8] During oral submission in respect of the bail application, the State vehemently opposed it.
- [9] The prosecutor submitted that since the accused has now been convicted, the risk of him evading trial was higher compared to the time when the appellant was still undergoing his trial.
- [10] It was submitted on behalf of the accused that the fact that the Trial Court is of the opinion that the High Court might come to a different view on sentence, should have nudged the trial Court to grant bail.
- [11] The Magistrate refused bail on the basis that even though it was on the opinion that the High Court might interfere with sentence, it does not mean that the Court will find that the entire sentence of 3 years imprisonment was incorrect.

[12] The Magistrate then held that it had reservations as to whether the High Court will consider a lower period of imprisonment.

[13] Further, the Magistrate held that the issue of innocence no longer exist and accordingly refused bail.

Arguments before this Court

[14] It was submitted on behalf of the accused that the Magistrate committed a misdirection when it refused bail.

[15] The basis of the alleged misdirection was that the Court failed to take into account that the appellant attended his trial and was not a flight risk.

[16] On the contrary the respondent submitted that the Magistrates' Court did not commit any misdirection in refusing bail.

[17] Further, that it was correct for the Magistrate to have taken into account that the issue of innocence does not exist anymore.

Analysis

[18] In my view applications for bail after conviction stand on a different footing.

[19] In circumstances where a Court has refused leave to appeal against conviction and the pending appeal is only in respect of sentence, it does not amount to a misdirection for purposes of Section 65(4) to justify substituting setting aside the Magistrate 's decision .

[20] The cliché justice must not only be done but must be seen to be done must be given effect to. Society must see that crime does not pay and a convicted

person must go to jail and do the time after doing the crime. It is as simple as that. This must be so since the appeal is in respect of sentence only.

[21] Otherwise Courts risk losing the confidence of our society and would inevitably give fertile ground to vigilantism if convicted persons are treated like persons who are still innocent notwithstanding conviction.

[22] Granting bail after conviction pending sentence on this peculiar facts would negate the very direct imprisonment that the trial imposed. This would undermine the rule of law underpinned by our constitutional order as envisaged in the Constitution of the Republic of South Africa, 108 of 1996.

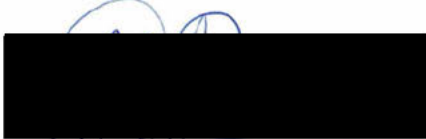
[23] The peculiar facts that I am alluding to as gleaned from the record are , inter alia, that the appellant drove the motor vehicle recklessly which ultimately lead to the appellant losing control of the motor vehicle. The evidence was that the appellant ignored requests to drive slowly before the crash happened. The result of the motor vehicle accident caused the death of one passenger. The alluded evidence above must have occupied the magistrate s' mind when she refused bail. This court as an appeal court is not at liberty to substitute that decision in the absence of a misdirection.

[24] For all these reasons I reiterate that I am not persuaded that the Magistrate committed a misdirection on refusing bail. After all she took into account the gross negligence committed by the appellant in the manner that he drove the motor vehicle that resulted in the loss of life.

Order

[25] I therefore make the following order:

1. The appeal against the Court *a quo*'s refusal to grant bail to the appellant is dismissed.


R B MKHABELA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **23 July 2024**.

FOR THE APPELLANT: MR AJ MASIYE

FOR THE STATE: ADV HHP MKHARI

DATE OF THE HEARING: 23 JULY 2024

DATE OF JUDGMENT: 23 JULY 2024