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

CASE NO. AR 633/11

In the matter between:

JAMEEL PEERBHAI **FIRST APPLICANT**
SIVALINGUM MURUGAN **SECOND APPLICANT**

and

THE STATE **RESPONDENT**

JUDGMENT Delivered on 17 September 2012

SWAIN J

[1] On 28 June 2012 the appeal of the first and second applicants against their convictions of attempted murder and kidnapping, for which they were each sentenced to eight years' imprisonment, of which three years were suspended on conditions, was dismissed.

[2] The applicants now apply for leave to appeal to the Full Bench of this Division, and for leave to adduce further evidence on appeal. In the alternative they ask that the case be remitted to the trial court

for the hearing of further evidence. In the event that leave to appeal and/or leave to adduce further evidence is granted, the applicants seek a further order that they be released on bail, on such terms and conditions as this Court may determine. In the event that leave to appeal and leave to adduce further evidence is refused, an order is sought admitting the applicants to bail, pending the outcome of a petition for leave to appeal to the Supreme Court of Appeal.

[3] At the outset it should be noted that an appeal from the decision of this Court, sitting as an Appeal Court from a decision in the Magistrates' Court, does not lie to the Full Bench of this Division, but to the Supreme Court of Appeal. At the hearing when I put this to Mr. Chetty, who appeared for the applicants, he agreed that this was so.

[4] In addition, the Criminal Procedure Act No. 51 of 1977 only makes provision for evidence to be heard on appeal by this Court, in two distinct situations.

a) In terms of Section 309 (3) read with Section 304 (2) of Act No. 51 of 1977 and Section 22 of the Supreme Court Act No. 59 of 1959, this Court sitting as a Court of Appeal, can hear further evidence, or direct that it be heard, in respect of any matter that is before it on appeal.

b) In terms of Section 316 (5) (a) read with Section 316 (1) of Act No.51 of 1977 an application for leave to appeal by an accused convicted by a High Court, may be accompanied by

an application to adduce further evidence, relating to the prospective appeal.

[5] This Court has already determined the appeal of the applicants and consequently the first situation envisaged by Act No. 51 of 1977 is not applicable. This Court is therefore *functus officio* and ceases to have the power to entertain an application to lead further evidence, at this stage of the proceedings.

S v Marais
2010 (2) SACR 606 (CC) at para 14

In addition, the applicants were never "convicted" by this Court, within the meaning of that term as contained in Section 316 (a) of Act No. 51 of 1977. Accordingly, the second situation envisaged by Act No. 51 of 1977 is equally inapplicable. When I put this proposition to Mr. Chetty, he agreed with it.

[6] The application by the applicants to lead further evidence before this Court, alternatively for the matter to be remitted to the Court *a quo,* for this purpose must accordingly fail.

[7] Turning to the merits of the application. The contradictions in the complainants' evidence, to which Mr. Chetty has referred, pale into insignificance, when weighed against the gross improbabilities in the version of the applicants, which we have referred to in our Judgment. Having carefully considered the arguments advanced on behalf of the applicants by Mr. Chetty, I am satisfied that there is no reasonable

prospect that the Supreme Court of Appeal could come to a different conclusion, either in regard to the applicants' conviction, or with regard to the sentences imposed.

[8] In this regard, Mr. Chetty submitted that this Court would be entitled to have regard to the additional evidence which the applicants sought to lead, in the form of the affidavit of Tina Harrod, in deciding whether the applicants have prospects of success on appeal. I disagree. It would be anomalous having decided that this Court had no power to admit the evidence, to then have regard to such evidence, albeit for a different purpose.

[9] Mr. Chetty informed us that in the event of the application for leave to appeal being refused by this Court, the applicants intended petitioning the Supreme Court of Appeal for leave to appeal. He applied for the applicants to be released on bail pending the finalisation of such proceedings. Mr. Cooke, who appeared for the State, opposed the grant of bail and undertook that in the event of the applicants being granted leave to appeal by the Supreme Court of Appeal, the State would not oppose the grant of bail at that stage. In the case of

S v Mabapa

2003 (2) SACR 579 (T) at 582 (d) – 583 (e)

van Rooyen A J, set out the different approaches to the grant of bail, pending an appeal. The conventional approach was that it should be

granted, only if there are reasonable prospects of success on appeal and no likelihood that the appellant will abscond.

S v Anderson

1991 (1) SACR 525 (C) at 527 e – g

As opposed to the conventional test "a more lenient, fundamental rights and liberty-orientated approach has developed in the last decade".

Mabapa at 582 e

In such instances the test to be applied was "whether it could be said that the appellant had no possibility of success on appeal".

Mabapa at 582 e

S v Naidoo

1996 (2) SACR 250 (W) at 252

As regards an appeal against sentence, the following was stated:

"....even in the absence of reasonable prospects of success bail should be granted where the possibility cannot safely be excluded that the term of imprisonment, which the Court of Appeal may substitute would, at that stage, have expired. In such a case 'it is enough that the appeal against sentence is reasonably arguable and not manifestly doomed to failure'".

Mabapa at 582 G quoting

S v Hudson

1996 (1) SACR 431 (W) at 434 b

[10] In this regard the Supreme Court of Appeal in the case of

S v Scott-Crosley
2007 (2) SACR 470 (SCA) at 473 d

stated the following:

"....the approach to bail pending appeal in respect of certain serious offences has become less lenient and less liberty-orientated in the last decade".

[11] However, even if I apply the more lenient approach to the facts of the present case, I am satisfied that not only do the appellants not have reasonable prospects of success on appeal, but that they do not have any possibility of success on appeal. Their version of events is so grossly improbable that it simply has no prospect of being found to be reasonably possibly true. As regards the sentence imposed, I am satisfied that the appeal against sentence is "manifestly doomed to failure" and is not "reasonably arguable". In addition, the appellants have been sentenced to effective terms of five years' imprisonment and I am satisfied that in the unlikely event that the appeal against sentence is successful, the possibility can safely be excluded that the term of imprisonment which the Supreme Court of Appeal may substitute would, at that stage have expired.

[12] I am accordingly satisfied that the appellants should not be granted bail pending the outcome of any petition to the Supreme Court of Appeal.

I accordingly make the following order:

a) The applicants are refused leave to adduce further evidence on appeal.

b) The applicants are refused leave to adduce further evidence before the trial court.

c) The applicants are refused leave to appeal to the Supreme Court of Appeal against their convictions and sentences.

d) The applicants are refused bail pending the outcome of any petition to the Supreme Court of Appeal for leave to appeal against their convictions and sentences.

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SWAIN J

I agree

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HENRIQUES J

Appearances /…

Appearances

For the Applicants	:	K. Chetty
Instructed by	:	Charmane Pillay & Company Pietermaritzburg
For the Respondent	:	Mr. I. Cooke
Instructed by	:	Director of Public Prosecutions
Date of Hearing	:	12 September 2012
Date of Filing of Judgment	:	17 September 2012