THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 100/07

In the matter between:

MARK SCOTT-CROSSLEY Appellant

and

THE STATE Respondent

Coram: *Farlam JA, Hancke et Musi AJJA*

Date of hearing: **23 March 2007**

Date of delivery: **29 March 2007**

Summary: Bail – pending appeal –accused granted leave to appeal – effect of – mere fact that sentenced person granted leave to appeal not constituting exceptional circumstance – court will take into account that the accused has no prospect of avoiding a custodial sentence – accused's personal circumstances commonplace and not out of the ordinary – accused has not discharged the onus of establishing 'exceptional circumstances' as contemplated in s 60(11)(a) of the Criminal Procedure Act 51 of 1977.

Neutral citation: This judgment may be referred to as *Scott-Crossley v The State* [2007] SCA 46 (RSA).

HANCKE AJA

HANCKE AJA:

[1] The appellant was convicted of the murder of Simon Chisale and sentenced to life imprisonment. He unsuccessfully applied for leave to appeal from the trial court. Leave was, however, subsequently granted by the Supreme Court of Appeal. As a consequence thereof the appellant brought an application for bail pending the outcome of his appeal. This too was dismissed. He now appeals as of right to this court to be released on bail.

[2] The appellant was convicted of a planned or premeditated murder as defined in part 1 of Schedule 2 read with s 51(1)(a) of Act 105 of 1997 which prescribes a minimum sentence of life imprisonment. According to s 60(11)(a) of the Criminal Procedure Act, Act 51 of 1977, an accused is to be detained in custody when charged with an offence referred to in Schedule 6, unless he adduces evidence to the satisfaction of a court that 'exceptional circumstances exist which in the interests of justice permit his or her release.'

[3] In *S v Bruintjies* 2003 (2) SACR 575 (SCA) this court held (at para 5) that a person who has been found guilty of a Schedule 6 offence and been sentenced cannot claim the benefit of a lighter test than that imposed in the case of unconvicted persons by s 60(11).

[4] It is thus clear that the appellant bore the onus to persuade this court that exceptional circumstances exist which in the interest of justice permit his release on bail.

[5] To discharge the onus the appellant gave no *viva voce* evidence but relied on affidavits deposed to by himself, his wife and his attorney. It appears therefrom that the most important factor relied upon is the fact that the Supreme Court of Appeal has granted leave to appeal against his conviction. It is the appellant's case that he therefore has reasonable prospects of success which, in cases not covered by s 60(11), is an important consideration in favour of the granting of bail: see, for example, *R v Mthembu* 1961 (3) SA 468 (D) at 471A-D; *S v Anderson* 1991 (1) SACR 525 (C) at 527e-g; *S v Hudson* 1996 (1) SA 431 (W) at 434b-d; *S v De Villiers en 'n ander* 1999 (1) SACR 297 (O) at 310c; *S v Rawat* 1999 (2) SACR 398 (W) at 401f-g and *S v Mabapa* 2003 (2) SACR 579 (T) at 588 para 17.

[6] It is important to note that the majority of cases mentioned in the preceding paragraph were decided before the advent of the new bail dispensation ushered in by Act

85 of 1997 and Act 34 of 1998[1], the constitutionality of which is now settled. *S v Dlamini*; *S v Dladla and others*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC). As a consequence of this legislation, the approach to bail pending appeal in respect of certain serious offences has become less lenient and less liberty orientated in the last decade. Hiemstra *Suid-Afrikaanse Strafproses* 6 ed (2002) by J Kriegler and A Kruger, p 150.

[7] 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. *S v Bruintjies*, supra. 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 561g-i. Findings made at this stage might also create an untenable situation for the court hearing the appeal on the merits.

[8] As regards the merits, the appellant stated the following in his affidavit:

'As already pointed out, legal argument will be addressed on this issue, I have an arguable case and I am informed by my legal representatives, that I have reasonable prospects of success on appeal in the sense that my conviction on a murder charge will be altered on appeal to being an accessory after the fact. I am informed that there is a reasonable possibility that the charge against my co-accused, and on this aspect argument will be addressed, will be changed to one of guilty to culpable homicide, in which case I will only be an accessory after the fact to the crime of culpable homicide.'

[9] Mr *Engelbrecht*, counsel for the appellant, mentioned the possibility that the appeal could succeed because of alleged irregularities but conceded that in such event a trial *de novo* would probably be ordered, in which case the appellant will again be arraigned on the Schedule 6 offence and will most probably be rearrested. In such a case the provisions of s 60(11)(a) of Act 51 of 1977 will be applicable. Counsel did not pursue this argument nor was it relied on in the appellant's affidavit.

[10] The appellant's version was that on the day in question, he returned to the farm at 22h30 and found the deceased already dead. He, together with the then accused 1 and Robert Mnisi, conveyed the deceased's body to the Mokwalo White Lion Camp in his utility vehicle and he, together with accused 1 and Robert Mnisi, threw the body over the fence into the lion camp. According to the State's evidence, which was accepted by the court *a quo*, the deceased was still alive when this happened. The appellant denies that the

[1] In not one of those decided after those acts were passed was s 60(11) applicable.

deceased was alive at the time he was fed to the lions. On his version the dead body of the deceased was thrown into the lions' den to prevent the authorities from discovering the commission of a crime of culpable homicide by his co-accused. On his own story thus the appellant has committed a callous and heinous crime. His counsel conceded that this amounted to an admission that he was guilty of being an accessory after the fact to culpable homicide and that the average sentence for this crime was approximately five years. According to the Assistant Registrar of this court, the matter will be enrolled for the third term of 2007. If regard is had to the fact that the appellant was sentenced on 13 September 2005 he will have served two years of his sentence when the appeal is dealt with during August/September 2007.

[11] It is therefore clear on the probabilities that the appellant has no prospect of avoiding a custodial sentence for a longer period than the period he will have served when judgment is given in his appeal. Counsel for the appellant submitted that there is a reasonable possibility that the sentence imposed will be in terms of s 276(1)(i) of the Criminal Procedure Act, although he conceded that he cannot submit that this was a probability.

[12] As far as the appellant's personal circumstances are concerned, they are commonplace and not out of the ordinary ─ none of these factors constitutes exceptional circumstances. In my opinion an application of the test laid down in *S v Bruintjies*, supra, leads inevitably to the conclusion that the appellant has not discharged the onus put upon him by s 60(11).

[13] It follows from the aforegoing that the court *a quo* correctly dismissed his application for bail pending the appeal.

[14] The following order is made:

The appeal is dismissed.

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S P B HANCKE
ACTING JUDGE OF APPEAL

CONCUR:

FARLAM JA
MUSI AJA