THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case no: 439/2007

In the matter between:

JEWELL CROSSBERG Appellant

and

THE STATE Respondent

Coram: *Navsa, Heher, Jafta, Ponnan JJA et Malan AJA*

Date of hearing: **22 August 2007**

Date of delivery: **22 August 2007**

Summary: Bail – after conviction and sentence trial judge refusing bail pending an application for leave to appeal to this court on the basis that there were no prospects of success on the merits – this court granting leave to appeal – in the interests of justice that bail be granted pending finalisation of appeal.

Neutral citation: This judgment may be referred to as *Crossberg v S* [2007] SCA 93 (RSA).

THE COURT

THE COURT:

[1] This is an appeal against the refusal of bail accompanied by an application for condonation for its late filing. The background is set out hereafter.

The background

[2] On 5 April 2007 the appellant Mr Jewell Crossberg was convicted in the Transvaal Provincial Division on a charge of murder and on four counts of attempted murder. The State was held to have proved its case, namely that the appellant had shot and killed Mr Jealous Dube and had fired shots at four other persons with the same weapon with the intention of killing them.

[3] The appellant was sentenced to 20 years' imprisonment on the charge of murder and five years' imprisonment on each of the four counts of attempted murder. The trial court ordered that the sentences run concurrently. Thus the appellant was sentenced to an effective sentence of 20 years' imprisonment.

[4] After the appellant had been sentenced he applied for leave to appeal to this court against the convictions. This was refused by the trial court. He applied for bail pending his application for leave to appeal to this court. That application was also refused by the trial court.

[5] In refusing bail the trial court said the following:

'The general attitude of a court is that when an accused person is still awaiting trial and where there is no indication that the interests of justice might be prejudiced that such an accused person should be released on bail on suitable conditions pending his trial. The notion is underpinned by the presumption of innocence against any accused person, which exists in our law. However, once an accused person has been convicted and sentenced, the position changes radically, because the presumption of innocence against the accused is no longer applicable and the court now knows for a fact that an accused person has in fact been convicted. . .

[T]he pivotal and decisive consideration in such an application is the reasonable prospect of success on appeal as it would serve no purpose to release an accused on bail pending an appeal which is doomed to fail.'

[6] The trial court concluded as follows:

'Suffice to say that having given this matter careful consideration I am not satisfied that there is a reasonable prospect that the Supreme Court of Appeal will grant the petition for leave to appeal.'

[7] On 11 June 2007 this court granted the appellant leave to appeal the convictions referred to earlier. Counsel for the State was approached by the appellant's legal representatives to ascertain the State's attitude in the light of this new development. According to the affidavit of the appellant, which the State did not controvert, counsel for the State agreed that since the very basis of the refusal of bail had fallen away the State would not oppose a fresh application for bail. Indeed, according to the appellant the State agreed bail conditions subject to approval by the court.

[8] An approach by appellant's counsel (accompanied by counsel for the State) to the trial judge to arrange the hearing of a fresh application for bail was unsuccessful. Another judge was appointed by the Deputy Judge-President to hear the application. The problem was that the judgments in terms of which the appellant was convicted and sentenced, as well as the judgments refusing the application for leave to appeal and the bail application, had not been revised and signed by the trial judge. Repeated attempts to have the judgments finally revised and signed failed.

[9] In his affidavit the appellant refers to a number of conversations between his legal representatives and the trial judge, as well as with the judge appointed to hear the fresh application. It is not necessary for present purposes to explore this aspect any further, save to record that it is not disputed that months elapsed without the fresh application being finalised.

[10] This frustrating state of affairs led the appellant's legal representatives to advise the appellant to proceed with this appeal against the initial refusal by the trial judge to grant bail pending an application for leave to appeal his convictions to this court. I record that the fresh application for bail has in any event recently been withdrawn.

[11] The State filed heads of argument but no affidavit denying any of the material facts upon which the appellant relied. At the commencement of the hearing before us counsel for the State conceded that he had no basis upon which to oppose the present appeal.

The law

[12] The appellant was convicted of murder and attempted murder, which in the ordinary course attract heavy sentences.

[13] It is so that there is a different emphasis in respect of bail pending finalisation of a trial as against bail pending finalisation of an appeal. The presumption of innocence operates in favour of an accused person until his guilt has been established in court.[1]

[14] Section 60 of the Criminal Procedure Act 51 of 1977 regulates the granting of bail pending finalisation of a trial. In respect of bail pending a petition to this court the High Court has a common law power to release the would-be appellant. See in this regard *S v Hlongwane*.[2]

[15] The prospects of success are very relevant in an assessment of whether to release the appellant pending finalisation of an application for leave to appeal.[3] As pointed out in the *Hlongwane* case, a substantial number of applications for bail pending a further appeal are launched as a dilatory tactic.[4] That of course amounts to an abuse of court process. On the other hand, there may be a number of such applications that are meritorious.

[16] Bail applications should in principle be heard as a matter of urgency. In *Magistrate, Stutterheim v Mashiya*[5], this court said the following:

'It is evident that finalising an application for bail is always a matter of urgency. ... And if bail is refused, the decision can be appealed. The right to a prompt decision is thus a procedural right independent of whether the right to liberty actually entitles the accused to bail.'[6]

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[1] Section 35(1)(f) of the Constitution gives arrested persons a right to be released from prison if the interests of justice permit, subject to reasonable conditions. This of course clearly deals with the position before finalisation of a trial. In *S v Acheson* 1991 (2) SA 805 (Nm) Mahomed J said the following at 822A-C:
'An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.'
See also Du Toit *et al Commentary on the Criminal Procedure Act* in relation to pre-trial release at 9-2A to 9-5.

[2] 1989 (4) SA 79 (T) at 102A-G

[3] *Hlongwane* at 102D-G.

[4] At 102E-G.

[5] 2003 (2) SACR 106 (SCA) at 113c-d.

[6] See also *Du Toit et al* at 9-8.

[17] Over and above the procedural right is the Constitutional right to freedom and security of the person as set out in s 12(1) of the Constitution. Our courts have always treated matters of personal freedom as matters of importance and urgency.

[18] The appellant has the right to appeal the refusal of bail without prior leave of the High Court. See in this regard *S v Van Wyk* 2005 (1) SACR 41 (SCA).

[19] It is important to note that the appellant was released on bail during the entire period of his trial. It is not disputed that the State, recognising that bail had been refused by the trial court on the narrow basis that there were no prospects of success, agreed not to oppose a fresh application for bail and in fact agreed bail conditions subject to the court's approval. As noted earlier the State has not filed an affidavit in opposition and has therefore not indicated that the appellant is a flight risk. Furthermore, there is no factual basis on which one can conclude that it is not in the interests of justice for the appellant to be released pending the finalisation of his appeal.

[20] Leave to appeal was granted by this court. The trial court's emphatic view that there were no prospects of success would therefore appear to have been without foundation.

[21] The amount and conditions of bail agreed by the State are reflected in the order that is to follow. In our view, it is in the interest of justice that the appellant be released on bail in the amount and on the conditions agreed by the State.

Condonation

[22] The appellant has explained that he was advised first to pursue an application for leave to appeal before proceeding with the appeal against the refusal of bail by the trial judge. Of course, in the event that the application for leave to appeal to this court against the convictions failed, the appellant would not have proceeded with the appeal against the refusal of bail.

[23] Furthermore, it is due to no fault of the appellant that he was unable to arrange the hearing and finalisation of a fresh application for bail. Thus, the appellant has provided a satisfactory explanation and is entitled to condonation.

[24] There is one further aspect that requires attention. It is regrettable that the State has waited until the matter was called in open court to make known its attitude in respect of the present appeal. The consequence has been inconvenience and for the appellant it involved the costs of engaging two counsel.

[25] The following order is made:

(a) The application for condonation is granted.

(b) The appeal is upheld.

(c) The order of the court below is set aside and substituted with the following:

'The applicant is granted bail in an amount of R50 000.00 (Fifty Thousand Rand) pending the finalisation of his appeal in the Supreme Court of Appeal on the following conditions:

(a) Applicant is prohibited from obtaining any passport and/or any other travelling document whilst on bail.

(b) The Applicant is prohibited from visiting any International Airport or Harbour where access can be obtained to any means of leaving the Republic of South Africa.

(c) The Applicant is prohibited from leaving the Northern Province without the prior written consent of the Investigating Officer in this matter.'

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M S NAVSA
JUDGE OF APPEAL

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J A HEHER
JUDGE OF APPEAL

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C N JAFTA
JUDGE OF APPEAL

_____
V M PONNAN
JUDGE OF APPEAL

_____
F R MALAN
ACTING JUDGE OF APPEAL