IN THE HIGH COURT OF SWAZILAND

Criminal case No: 36/2007

In the matter between:

SIMANGA MASHAYA	**FIRST APPLICANT**
THEMBINKOSI MASHAYA	**SECOND APPLICANT**
MSINGATSENI SIMELANE	**THIRD APPLICANT**

VS

REX	**RESPONDENT**

Neutral citation: *Simanga Mashaya & 2 Others vs. Rex (*36/2007) [2012] *SZHC128 19 June 2014*

Coram: **M.C.B. MAPHALALA, J**

Summary

Criminal Procedure – bail pending appeal – appellants convicted of Murder in the Court *a quo* on the basis of the doctrine of common purpose – the requirement of reasonable prospects of success on appeal considered – held that in view of the evidence there were no prospects of success on appeal and that there is a likelihood that the applicants might abscond their appeal – application accordingly dismissed.

JUDGMENT
19 JUNE 2014

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[1] This is an application for bail pending appeal. It is common cause that the applicants were convicted of murder on the basis of the doctrine of common purpose and subsequently sentenced to fifteen years imprisonment. The appeal is on both conviction and sentence. As grounds of appeal the appellants contend that they were convicted on the evidence of an accomplice witness, which evidence was not corroborated and that the Court did not exercise caution when accepting the evidence. They further contend that the Crown's evidence did not establish common purpose in respect of each of them. They also contend that they were sentenced before they could mitigate the sentence.

[2] *Fieldsend CJ* in *S. v. Williams* 1981 (1) SA 1170 2AD at 1172 – 1173 had this to say with regard to bail pending appeal:

> **"Different considerations do of course arise in the granting of bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that is putting it too high to say that before bail can be granted to an applicant on appeal against conviction, there must always be reasonable prospects of success on appeal. On the other hand even where there is a reasonable prospect of success on appeal, bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding. Such cases as Milne and Erleigh (4) 1950 (4) SA 601 (W) and R. v. Mthembu 1961 (3) SA 468 (D) stress the discretion that lies with the judge and indicate that the proper**

approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. In my view, to apply this test properly, it is necessary to put in the balance both the likelihood of the applicant absconding and the prospects of success. Clearly, the two factors are inter-connected because the less likely the prospects of success are the more inducement there is on an applicant to abscond. In every case where bail after conviction is sought, the onus is on the applicant to show why justice requires that he should be granted bail."

[3] In order for this Court to determine prospects of success on appeal, I have to consider the grounds of appeal in light of the evidence tendered in the Court *a quo*. The contention by the appellant that they were sentenced before they could mitigate is void of truth and misleading to the extreme. It is apparent from the record that after the applicants were convicted, the Court invited the defence to make submissions on the possible existence of extenuating circumstances. The Court subsequently accepted as the defence had contended that there were extenuating circumstances in the form of youthfulness and the immaturity of the applicants as well as provocation by the deceased. After the Court had made its finding on extenuating circumstances, it further invited the applicants to make submissions on mitigation of sentence or lead evidence in mitigation of sentence. This is apparent in paragraphs 122 and 123 of the judgment. The

Court imposed its sentence after considering the triad as fully reflected in paragraph 124 of the judgment.

[4] The applicants further contends that the Crown did not establish common purpose as a basis of their liability. This issue is dealt with in paragraphs 105-115 of the judgment; it is clear therefrom that the applicants assaulted the deceased with kicks and fists and further pelted him with stones. Thereafter, the first applicant went home and returned armed with a spear and knobstick and told PW3 Duduzile Simelane that he wanted to revenge for the stab wounds inflicted by the deceased. The second and third applicants joined the first applicant and attacked the deceased who fled down to the fields; they pursued and assaulted the deceased. On their return the first applicant declared that they had killed the dog, referring to the deceased.

[5] Similarly, it is not true that the court convicted the applicants on the evidence of an accomplice witness which was not corroborated, and, that the court did not exercise caution when accepting the accomplice evidence. PW1 Bongiwe Dlamini testified under oath that he saw the first applicant, third applicant, Sipho Simelane and Tito Ndlovu assaulting the deceased with fists and kicks and pelting stones at him to the extent that the deceased was severely injured. The deceased entered the front of the motor vehicle

and locked himself. The first applicant went home and came back armed with a spear and knobstick; and, he pulled the deceased from the motor vehicle whilst the third applicant hit the windscren with a log. They assaulted him and he ran down the fields where he was further assaulted. The first applicant was later heard saying that they had killed the dog referring to the deceased. It is the first applicant in the company of the other applicants who subsequently led the police to the scene where the deceased was found severely injured; he was taken to hospital where he died.

[6] PW2 Gcinile Simelane corroborated the evidence of PW1 Bongiwe Dlamini, and, she further told the Court that she saw the applicants forcefully pulling the deceased out of the motor vehicle and assaulting him. The deceased ran to the fields and was pursued by the applicants and other boys in the group. PW3 Duduzile Simelane, the owner of the homestead also corroborated the evidence of PW1 and PW2. She testified that the first applicant had reported to her that the deceased had stabbed him, and, she advised him to go home. She undertook to take him to hospital the next day because the injuries were minor. The first applicant left for his homestead and came back shortly carrying a knobstick; and that the other applicants were carrying logs which were used to block the motor vehicle.

[7] PW7 Sibusiso Ndlovu was introduced in Court as an accomplice witness but he was duly warned by the Court. PW8 Sergeant Sabelo Nkambule testified that the first applicant had led them to the scene after being cautioned of his rights to remain silent and legal representation; they found the deceased who was severely injured on the head. The deceased was later taken to hospital. It is the evidence of PW8 that the first and second applicants, after being cautioned, led the police to their parental homestead where they pointed out a knobstick and a spear which were carried by the first applicant. The third applicant further led the police to the homestead of PW3 Duduzile Simelane where he pointed out a log which he had used in hitting the windscreen before the deceased was unlawfully taken out of the motor vehicle.

[8] PW8, the investigator testified that the first applicant on being detained after his arrest had declared money in his possession to the police; however, on being examined by the police they found other monies hidden in the first applicant's underwear. The said money linked the first applicant to count three of Robbery against the deceased. Similarly, the cellphone belonging to the deceased was handed to the police by PW7, the accomplice witness who testified that he had been given the cellphone by the first applicant for safe-keeping soon after the incident; the cellphone was identified as belonging to the deceased by his sister PW6 Sibhekile Masuku. PW7 had

maintained his evidence under cross-examination both in respect of the cellphone and that the three applicants had assaulted the deceased at the homestead of PW3 Duduzile Simelane and at the fields and only stopped when the group of boys arrived at the scene.

[9] Paragraphs 103 to 107 of the judgment show that when dealing with the evidence of the accomplice witness, the court took the necessary precautions as required by section 234 of the Criminal Procedure and Evidence Act. The accomplice witness was duly introduced by the Crown Counsel, duly sworn, and he answered fully all lawful questions put to him under examination. He gave a detailed evidence of the commission of the offence including the role that he played himself. He gave an honest account of the events and was not evasive; he did not falsely incriminate the applicants.

It is against this background that he was subsequently freed and discharged from all liability to prosecution for the killing of the deceased. Most importantly the evidence of the Crown was corroborative, and, it is not true that the conviction of the applicants was based solely on the evidence of the accomplice witness. The judgement shows that the Court was astute and mindful of the dangers posed by accomplice evidence and took the necessary precautions when dealing with such evidence.

[10] It is well-settled that in general bail lies in the discretion of the Court, and, that in applications for bail pending appeal, the applicant bears the onus of satisfying the court on a balance of probabilities the existence of reasonable prospects of success on appeal. If he succeeds to discharge that onus, the risk of absconding is greatly minimised. What is paramount is the interest of justice which should not be compromised by granting bail where there are no reasonable prospects of success on appeal. In coming to this decision, I have considered that the applicants were convicted of a very serious offence of murder and sentenced to fifteen years imprisonment. The applicants have already served about two years of their sentence of imprisonment and the absence of prospects of success on appeal may tempt them to abscond their appeal.

[11] Accordingly, the application for bail pending appeal is hereby dismissed.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For the Crown Senior Crown Counsel Macebo Nxumalo
For the Defence Attorney Noncedo Ndlangamandla