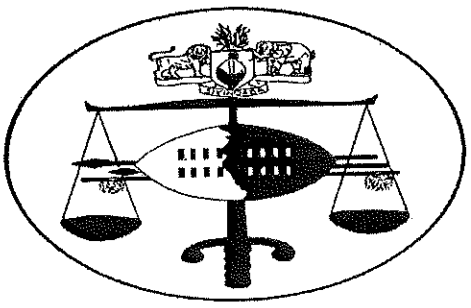

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE No. 383/2011**

In Matter between:

THE KING **APPLICANT**

And

ALLAN BETRAM STEWARD **RESPONDENT**

Neutral citation: *THE KING v ALLAN BETRAM STEWARD (383/11) SZHC 36 [2011] (01.03. 2023)*

CORUM: Z. Magagula J

Dates heard: 16.02.23

Date delivered: 01.03.23

Summary: *Criminal Procedure – Bail pending appeal – applicant convicted of attempted murder and sentenced to three years imprisonment - applicant has noted an appeal against conviction and sentence - applicant has applied for bail pending appeal.*

Held : *That an applicant for post-conviction bail has to show reasonable prospects of success on appeal.*

Held Further: *The applicant failed to satisfy the court on prospects of success. The application is refused.*

JUDGEMENT

"Different consideration... arise in granting bail after conviction from those relevant in granting of bail pending trial. On the authorities that I have been able to find it seems that it is putting it too highly to say that before bail can be granted to an applicant on appeal against conviction there must always be a reasonable prospect of success on appeal. Per Fieldsend C J in S v Williams 1981 (1) SA 1170 at 1172

[1] The applicant was convicted of attempted murder on the 31st January 2023 and sentenced on the 10th February 2023 to three years imprisonment (without the option of a fine)

[2] The applicant has now approached this court with application that he be admitted to bail pending the hearing of his appeal which he duly noted on the 13th February 2023.

[3] The applicant noted an appeal on the following grounds:

AD MERITS

1. *The court a quo erred both in fact and in law in finding and holding that the Crown has proved its case beyond a reasonable doubt whilst on the same breath finding and holding that the Crown and the*

Defence evidence under which the shooting occurred stands at stark contrast to each other-this finding ought to have been weighed in favour of the appellant as it demonstrates that there was doubt pertaining to the events that led to the shooting as observed by the Court thereby resulting in his acquittal or a conviction of assault with intent to cause grievous bodily harm (if not accepted that he acted in self –defence)

2. *The Court a quo erred both in fact and in law in finding and holding that:*
   "...it cannot be ruled out as a possibility that the complainant was armed with a knife during their confrontation with the accused"
   Yet rejects the version of the defence as being false beyond a reasonable doubt pertaining to the version put that complainant was the initial aggressor. This fact was also concealed by the investigating officer that the appellant informed them that he shot at a person who wanted to stab him.

3. *The court a quo misdirected itself in finding that the Crown witnesses (Pw2), (Pw4) and (Pw5) corroborated the evidence of the medical practitioner (Pw1) pertaining to the direction from which the bullet entered from when this witness (Pw1) conceded under cross examination that he could not give 100% analysis of the medical report because he did not author it. Further- evidence to support the finding*

ought to have been presented by the Crown in view of the hereunder inconsistencies emanating from the complainant (Pw2), (Pw4) and (Pw5) evidence.

4. *The court a quo erred in finding and holding that the defence did not dispute the evidence to the effect that the bullet entered the back of the elbow and further held that the appellant without success struggled to explain under cross examination how the bullet fired from the front could enter the back of the arm yet it is trite that the appellant does not bear any onus to prove his guilt or innocence at any given point in time throughout a Criminal trial. Much reliance was placed on the accused version and this has the effect of shifting the onus which never vests on the appellant through the Criminal trial.*

5. *The Court a quo misdirected itself in law by rejecting the evidence of the appellant as being false beyond a reasonable doubt whilst partially acceding to the possibility of certain aspects of it as being probably true.*

6. *The court a quo erred in convincing the appellant of attempted murder in circumstances where the Crown failed to prove by way of evidence that the appellant*

had intention to kill the complainant either in the form of dolus eventualis or any other form of intention.

AD SENTENCE

7. *The Court a quo erred in finding and holding that the appellant pursued the complainant firing several shots, one of which hit his arm thereby establishing intention to kill as a lethal weapon was used – whereas the fact that a lethal weapon was used should not be looked in isolation to the part of the body that was injured, it is submitted that the arm is not a delicate part of the which can result in imminent death and consequently it negates the intention to kill be in the form of dolus eventualis or any other form of intention.*

8. *The court a quo imposed a sentence that induces a sense of shock in circumstances where assault with intent to cause grievous bodily harm would befit the offender given the totality of the evidence.*

[4] In his application, which is opposed by the Crown, the applicant averred that there were prospects of success in his appeal: He said he believed these are determined by considering if there was a chance another court may hold differently from the trial court as opposed to inquiring whether the trial court came to the correct conclusion or not.

[5] The applicant submitted he was a liSwati born and bred in eSwatini. He holds no other citizenship and/or passport other than that of the Kingdom of eSwatini. His family is deeply rooted in the Ezulwini area, of the Hhohho Region for whom he serves as a member of Parliament. The applicant further submitted that prior to his conviction, he had been admitted to bail and had compiled with all the conditions imposed by the court. Applicant further submitted that should his appeal fail, he will be available to serve his sentence and finally, that the administration of justice will not endangered if he is admitted to bail.

[6] The Crown's opposing affidavit was deposed by Khumbulani Mngomezulu who deposed that he was the Crown counsel seized with the prosecution of this matter. Mr Mngomezulu stated that there was reasonable apprehension that if admitted to bail, the applicant may abscond regard being had to the fact that he has already been found guilty by the court. It was his further submission that there were no prospects of success on appeal nor was there possibility that another court may come to a different conclusion.

[7] It has now been accepted as part of our law that an applicant for post-conviction bail has to demonstrate that there are reasonable prospects of success on appeal and that there exist some exceptional circumstances in order to be granted bail. See the Judgement of **His Lordship MCB Maphalala C.J (with M.J., Dlamini J.A and J.P Annandale J.A concurring) in Lindokuhle Maxwell Sibandze v The King Criminal Appeal Case no. 05/2022** where he says:

> *"[22] The Judgement in **Salvado v the State** was followed and applied by this court, in the case of **Leo***

Ndvuna Dlamini v Rose as well as Rex v Mfanukhona Dlamini *and it now form part of our law…"*

[8] **Nganunu C.J sitting in the court of appeal of Botswana in Salvado v the state (2001) (2) BLR 411** at 413 had said;-

"The presumption of innocence on the side of the accused falls by the wayside when he is convicted at his trial. It becomes a fact that the law considers him a criminal until perhaps he succeeds to upset the conviction in any appeal he may make. With the disappearance of innocence, also disappears the tilt of the courts towards the liberty of that person in any bail application. The law expects, the convict to serve any term of imprisonment decreed by the court. To me, this constitutes the fundamental divide between the approach of our courts in pre-trial bail applications and those after conviction and sentence. In my view, the principle followed by our courts in post-conviction bail application is that the applicant must show the existence of some exceptional circumstances in order to be granted bail, otherwise he is expected to serve his sentence instead of being on the streets as a free man"

[9] As far back as **1981, Fieldsend C.J in S v Williams 1981 (1) SA 1170** at **1172 (H)** had already alluded to the shift in the consideration of the court when determining post-conviction bail.

"Different consideration do, of course, arise in granting bail after conviction from those relevant in the granting bail pending trial. On the authorities that I have been

able to find it seems that it is putting it too highly to say that before bail can be granted to an applicant on appeal against conviction there must always be a reasonable prospect 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 dander of an applicant absconding. Such cases as ***R v Milne and Erleigh 1950 (4) SA 601 W and R v Mthembu 1961 (3) SA 468 (D)*** *stress the discretion that lies with the judge."*

[10] A determination of whether or not there are reasonable prospects on appeal necessarily entails an examination of the available evidence. However, in this exercise great care must be taken not to usurp the function of the appeal court by inadvertently deciding the appeal.

[11] The only fact that appears to be common is that the complainant was shot on the arm by the appellant on the morning of the funeral of applicant's brother. Everything else is in issue. The court remarked in its judgement that the accused's version is diametrically opposed to the Crown's version.

[12] The Crown's evidence, which the court accepted, is that the complainant was standing in line to receive refreshments after the burial of the appellant's brother who had been cohabiting with the complainant's sister for some time. While the complainant was in a conversation with one of appellant's relative concerning the way his sister was being ill-treated by the appellant's family, the appellant interrupted the conversation after which he drew his fire-arm.

[13] On seeing the fire-arm, the complainant started running, several shots were fired one of which struck him on arm as he ran. He eventually got weak and collapsed on the ground. The appellant caught up with him, tried to fire more shots at him but none came out. He was assisted by his brothers to get to hospital.

[14] The medical report was handed into court by a medical practitioner. This is not the doctor who treated the complainant and prepared a report. The doctor testified that the bullet entered complainant's elbow from the back and exited at the front. This would mean he was shot while facing away from the appellant. Various other witnesses gave evidence along the version of the complainant. The court was satisfied that a *prima facie* case had been made against the appellant.

[15] The appellant's version was that on the morning of his brother's funeral, at home, he was confronted by one of the complainant's brothers who was apparently accusing him of ill-treating their sister who had been in a relationship with his deceased brother. While so engaged in conversation he heard his relative shout or raise the alarm for him to "look out". When he turned, he saw the complainant charging at him with a knife in his hand. The appellant fired one to four shots in the air, but complainant continued advancing towards him. When the complainant continued advancing despite a verbal warning, the appellant fired a shot at his arm intending to disarm him.

[16] The complainant fell to the ground still holding the knife, got up and fled with the knife. The appellant did not pursue the complainant. After listening to further evidence, Her Ladyship Tshabalala J. who heard the matter concluded that the appellant's version was false

and therefore could not reasonably possibly be true. Appellant's defence of self-defence was rejected on the basis that there should be a balance between the attack and the defence act.

[17] Concerning the Crime itself, the court found that attempted murder had been proved. **His Lordship M.C.B Maphalala J (as he then was) in Rex V Mkhonta Criminal case no. 422/2010** held that:

> *"[31] It is trite law that in order to support a conviction of attempted murder, there need not be a purpose to kill proved as on actual fact. It is sufficient if there is an appreciation that there is some risk to life involved in the action contemplated coupled with recklessness as to whether or not the risk is fulfilled in death. Only mens rea in the farm of dolus eventualis is required for purposes of attempted murder, and mens rea on the form dolus directus is not required."*

[18] Applying the test established in S.V Williams (supra) if I believe that there are no prospects of success on appeal; the test in Salvado v The State (*supra*) that no exceptional circumstances exist that warrant that applicant be admitted to bail, then I cannot exercise my discretion in favour of granting bail.

[19] As to what constitutes exceptional circumstances warranting the grant of bail pending appeal, I draw from the wise words of Hannah C.J sitting in the High Court of Botswana in the case of the **State v Sephuri and Kgoroba 1982 (1) BLR 211** where he said:

> *"The approach of the court of appeal in England when dealing with application for bail pending appeal is now clearly set out in R v Walton. In that case the court held*

that exceptional circumstances are the test and the two questions to be considered in determining whether exceptional circumstances exist are (1) whether it appears prima facie that the appeal is likely to be successful or (2) whether there is a risk that the sentence will have been served by the time the appeal is heard."

[20] I see who no reason why the same test should be not be applied in this jurisdiction. I say that of course, mindful of the Supreme Court *obiter dictum* in **Lindokuhle Maxwell Sibandze v The king** (supra), where in reference to the above excerpt, **His Lordship M.C.B Maphalala C.J.** remarked:

"[23] Notwithstanding the decisions aforesaid, it is now settled in this jurisdiction that in application for bail pending appeal the applicant is only required to prove the existence of reasonable prospects of success on appeal. There is no need to establish exceptional circumstances"

[21] It seems to me that where there is a real likelihood that the applicant may have served his entire sentence before the appeal is heard by the appellate court then the court hearing the application for bail pending appeal ought to inquire into.

[22] I now turn to the sentence imposed on the applicant. The applicant was sentenced to three years imprisonment. Sentencing is the exclusive preserve of the trial court and the Supreme Court has, in a number of previous decisions and judgments made it clear that the appellate court will rarely interfere with that discretion.

[23] His Lordship , M.C.B Maphalala J.A (as he then was) in **Elvis Mandlenkhosi Dlamini v Rex Criminal Appeal case no. 30/2011** explained the position of the law as follows:

> *"It is trite that the imposition of sentence lies at the discretion of the trial court, and that an appellate court will only interfere with such sentence if there has been a material misdirection resulting in a miscarriage of justice. It is the duty of the appellant to satisfy the appellate court that the sentence is so grossly harsh or excessive or that it induces a sense of shock as to warrant interference in the interest of justice. A court of appeal will also interfere with a sentence where there is a striking disparity between the sentence which was in fact passed by the trial court and the sentence which the court of appeal would itself have passed; this means the same thing as a sentence which induces a sense of shock. This principle has been followed and applied consistently by this court over many years and it serves as a yardstick for the determination of appeals brought before this court"*

[24] On the face of it, a sentence of three (3) years for attempted murder does not appear to me to be grossly excessive to warrant the appeal court to interfere with it. Again I emphasize that whether the sentence is appropriate or not is in the exclusive domain of the trial court. Do I believe that another count may come to a different conclusion pertaining to the sentence or that the applicant may have served his sentence by the time the appeal is heard; I think not.

[25] In the totality of the foregoing, I find that the applicant has failed to satisfy this court that there are prospects of success on appeal both on the conviction and sentence.

The application for bail pending appeal accordingly fails.

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Z.Magagula
Judge of the High Court

Appearance:

Mr. L Dlamini for the Applicant

Mr. K. Mngomezulu for the Crown