IN THE SUPREME COURT OF ESWATINI

Case No. 27/2023

In the matter between:

WAKHILE WANDILE FAKUDZE **Appellant**

and

REX **Respondent**

NEUTRAL CITATION: ***Wakhile Wandile Fakudze v Rex (27/2023) [2024] SZSC 96 (30 September 2024)***

CORAM: MD MAMBA, J M VAN DER WALT *et* J M CURRIE JJA

HEARD: 22 August 2024

DELIVERED: 30 September 2024

Summary

Appeal - bail pending appeal – general principles restated - consideration of prospects of success on appeal a prime but not absolute and singular factor – discretion of Court informed by balancing prospects of success against the protection of the interests of justice – considerations of the seriousness of the crime for which the applicant has been convicted, the

length and severity of the sentence form part of the primary test to be applied in regard to the interests of justice - counterbalancing factor is the prejudice to the interests of justice - potential prejudice to the interests of justice looms large where an incentive to abscond for it is possible for the convicted person may be tempted to take a chance on abandoning the appeal

Appeal - bail pending appeal – onus - difference in approaches between bail before and after conviction and the rights of the applicants – post-conviction bail not a right and onus on the applicant, in particular that an appellant is not a flight risk – in casu *Appellant failed to acquit onus*

Appeal - bail pending appeal – prospects of success on appeal – same standard as applicable in applications for leave to appeal or for condonation finds application i.e., "More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal"

Appeal - criminal procedure and evidence – pointing out by accused person – distinction between allegation that pointing out de facto *was made however was not made freely and voluntarily as opposed to allegation that alleged pointing out was staged i.e., denial of pointing out - accused person may not approbate and reprobate or rely on one in the alternative as a fallback position*

Appeal - Criminal procedure and evidence – pointing out by accused person – onus throughout on Crown to prove freely and voluntarily made – where alleged that pointing out de facto *was made however was not made freely and voluntarily, primary question one of admissibility and a trial within a trial is required – on the other hand, where alleged that alleged pointing out was staged i.e., denial of a pointing out, no trial within a trial required because a non –existent pointing out cannot be measured whether freely and voluntarily made in trial within a trial - (a) primary question then one of fact and (b) if held* de facto *to be have been made, secondary question one of admissibility - obiter, same would apply to confessions*

Appeal - Criminal procedure and evidence — based on the facts and the law, unlikely that a Court of Appeal could reasonably arrive at a conclusion different to that of the Court a quo court and application accordingly dismissed

JUDGMENT

Cur adv Vult
(Postea: 30 September 2024)

INTRODUCTION

[1] This is an appeal against refusal to grant bail pending appeal. After a full-blown trial the Appellant, who was represented *a quo* and before us by Mr L Dlamini, was convicted in the Court *a quo* of the crime of murder of the biological mother of his child (hereinafter referred to as the "deceased") and the Appellant was sentenced to fifteen (15) years' imprisonment.

1.1 The Appellant had been out on bail during the course of the trial but after conviction the Appellant was incarcerated, as a procedural matter of course.

1.2 This resulted in the noting of an appeal as against the conviction only (hereinafter referred to as the "Main Appeal") but not as against the

sentence and an ancillary application for bail pending appeal, said application which was refused by the Court *a quo*.

[2] Dissatisfied by the refusal of the Court *a quo* to grant bail pending appeal, the Appellant noted the appeal now serving before this Court (hereinafter referred to as the "Bail Appeal.")

A THE EVIDENCE

[3] A transcript of the proceedings *a quo* was not available yet as at the date of hearing the Bail Appeal. Mr S Phakathi for the Respondent was the Prosecution Counsel and Mr L Dlamini for the Appellant Defence Counsel *a quo,* and both Counsel therefore were in a position to elucidate on what happened at trial and appeared to be *ad idem* on the summaries contained in the Judgment of the Court *a quo.* Having heard both Counsel, we were of the view, regard had to the fact that the matter was not before us to determine the correctness of the conviction but only to assess the refusal of bail pending appeal, that Counsel had placed sufficient information before us to enable the Court to properly consider the Bail Appeal in the absence of a transcription.

[4] The conviction was predicated on the confluence of pieces of circumstantial evidence primarily being a single witness's identification of the Appellant at a formal identification parade; pointings out to the police by the Appellant and evidence uncovered as a result thereof, and the conduct and whereabouts of the Appellant prior to and after the last known sightings of the deceased. All of these occurred during the month of December 2014.

[5] The relevant time line[1] and the evidence tendered, as appears from the Judgment *a quo,* can be summarised as follows:

5.1 5th December: Last known telephone call by the deceased: made to her friend PW 2 Phumlile Precious Simelane from the Appellant's telephone;

5.2 6th December: PW 2 saw deceased with a bruise on her face;

5.3 7th to 10th December: The deceased was staying with her boyfriend PW 10 Mlungisi Trevor Vilane until the morning of the 10th:

[1] Leaving out hearsay evidence

5.3.1 During this period PW 2 daily received calls from the Appellant enquiring after the deceased's whereabouts and stating that he cannot reach her on her phone;

5.3.2 On the 9th the Appellant phoned the deceased while she was with PW 10

5.4 Further on the 10th December:

5.4.1 At about 10:00 PW 5 Xolile Nxumalo, who was in the company of her daughter and a friend, were walking towards a shopping centre in Nhlangano. They encountered the deceased with an unknown man who PW 5 understood to be the father of the deceased's son. The deceased appeared anxious and preoccupied and promised to call PW 5 later. PW 5 called the deceased at approximately 13:00 but the call was not answered.

5.4.2 PW 3 Sibusiso Mandla Matsenjwa, co-worker of the Appellant, stated that the Appellant left work from approximately 11:00 to 13:00 to run a personal errand in Nhlangano.

5.4.3 At approximately noon PW10 unsuccessfully attempted to contact the deceased by phone.

5.5 13th December: The body of the deceased, decomposing and partially covered with branches, was discovered in a wooded area (hereinafter referred to as the "primary crime scene") and according to a subsequent autopsy, cause of death was found to be consistent with strangulation but approximate time of death could not be ascertained. The body was identified by PW 2 on the 14th.

5.6 17th December:

5.6.1 PW 5 at a formal identification parade identified the Appellant as the person who was with the deceased on the 10th; the Appellant denied that he was the person seen by PW 5.

5.6.2 Thereafter the Appellant apparently made a statement contemporaneously with the pointing out of certain clothing bearing the features of an inadmissible confession which, it must be stated from the outset, was duly excised by the Court *a quo* as being inadmissible.

5.6.3 The Appellant, having been warned in terms of the Judges' Rules, [2] thereafter was photographed at the primary crime scene as well as at a

[2] The date of arrest is unclear but appears to have been on the day of the formal identification parade

secondary crime scene, commencing with the secondary scene where the Appellant allegedly pointed out a black plastic bag containing a damaged ZTE cell phone, subsequently identified by PW 2 as belonging to the deceased. At the primary crime scene the Appellant allegedly pointed out the deceased's identity card concealed in a charred tree stump. Persons present at the alleged pointings out included police officers and PW 4 Andile Boy-Boy Dube, a local community police volunteer, the latter engaged to serve as an independent witness.

[6] The Appellant denied any involvement in the death of the deceased or having pointed out anything.

6.1 It was put to witnesses in cross-examination that the police had led the Appellant to the crime scenes, had directed him to the items and locations, and had coerced or instructed him to pick up the items and pose for photographs. [3]

6.2 In his evidence in chief the Appellant testified to the effect that the last time he had been with the deceased was on the 7th , that he had not called her after the 9th and that he had been incorrectly identified by PW 5 as

[3] Judgment Paragraph [22]

having been in the company of the deceased on the 10th . The Appellant repeated his version regarding the alleged pointings out but with a level of detail not put to the Crown witnesses. [4]

B THE BASIS FOR THE CONVICTION AND THE APPEAL AGAINST THE CONVICTION

[7] The conviction was based purely on circumstantial evidence and the trite legal requirements in respect of reasonable inferences and the cumulative effect of all the evidence, as set out by the Court *a quo*, [5] appear to be common cause.

[8] In convicting the Appellant, the Court *a quo* accepted the evidence of the identification by PW 5 and of the alleged pointings out as part of *"the mosaic of circumstantial evidence,"* stating as follows:

> *"[30] The evidence establishes that the deceased was killed by means of constriction of the neck consistent with strangulation. The evidence of the police pathologist confirms that without doubt. The prosecution conceded that its case against the accused is constructed upon circumstantial evidence – there being no direct evidence linking the accused with the deceased's killing. It is trite that for the mosaic of circumstantial evidence to meet the required threshold it must constitute a coherent whole in the kind that eliminates any reasonable doubt and where the defence has led countervailing evidence, the Crown's case must eliminate any exculpatory inference from being a reasonable possibility that the accused persons version is true,"* and

[4] Judgment Paragraph [29], ultimate paragraph

[5] With reference to **R v Blom 1939 AD 235; *John Spokes Lawrence Madeleke v Rex Case No.17/1991;* S v Msweni 1985 (1) 590 (A); Miller v Minister of Pensions [1947] 2 All ER 372; S v Hadebe and Others 1998 (1) SACR 422 (SCA)**

"... *[53] The identification of the accused by PW 5 and his location at Nhlangano town with the accused* [sic] [6] *makes him the last person to have been witnessed with the deceased. This aspect of the evidence taken with that of pointing out by the accused of the deceased's personal effects at the crime scenes together with the rest of the evidence led by the Crown leads to an irresistibly high degree of probability that it was the accused who killed the deceased in the absence of a reasonable inference otherwise."*

[9] In particular, the Court *a quo* with reference to **section 227(2)** of the Criminal Procedure and Evidence Act, 1938[7] ignored an inadmissible confession involving clothing preceding the pointings out and accepted the evidence of pointings out as admissible on the basis *inter alia* that same constitutes separate and distinct evidence of pointing out which was removed in time and circumstances from the inadmissible confession. [8]

[10] The conviction is challenged in the Main Appeal on the following grounds, reproduced *verbatim* as written: [9]

"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.*

2. *The Court a quo erred both in fact and in law by failing to follow the Supreme Court judgment in the case of Phinda Elmon Mavuso v Rex, Criminal Appeal case 42/2014 which enunciated the legal position that evidence of a confession made to a police officer and not reduced into writing is inadmissible as well as anything discovered consequent thereof, and*

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[6] Apparent typographic error intended to refer to the deceased

[7] *"Admissibility of facts discovered by means of inadmissible confessions*

227. (1) Evidence may be admitted of any fact otherwise admissible in evidence notwithstanding that such fact has been discovered and come to the knowledge of the witness giving evidence respecting it, only in consequence of information given by the accused person in a confession or in evidence which by law is not admissible against him, and notwithstanding that such fact has been discovered and come to the knowledge of the witness against the wish or will of such accused.

(2) Evidence that any fact or thing was discovered in consequence of the pointing out of anything by the ***accused*** *person or in consequence of information given by him may be admitted notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him."*

[8] Also referencing ***Alfred Shekwa and Another v Rex*** **Criminal Appeal Case No. CA 21/1994** [reported as ***Shekwa And Another v King (21 of 1994) [1995] SZSC 5 (26 May 1995)]***

[9] *En passant,* concise grounds are required by the Rules and some of these grounds as well as those in respect of the refusal of bail pending appeal are overly verbose

the fact that an enquiry to determine the admissibility of a pointing out where it is disputed has to be conducted, yet it is binding on it. This ground is cemented by the following factors:

2.1 *PW 11 the investigating officer (Detective Sibusiso Vilane) in his evidence under oath stated that the accused person from information he gave to the police led them to the Mahamba area at his work place where he gave the* ***clothing items he admitted to have been wearing*** *during the commission of the offence. (underlining ours)*

2.2 *The evidence and the resultant pointing out consequent thereto is inadmissible as it is a confession made to a policeman, investigating a case and clearly a person in authority over the appellant and it was not reduced into writing as per the provisions of section 226(1) of the Criminal Procedure and Evidence Act, 67 of 1938.:*

3. *The Court a quo misdirected itself in its duty by failing to embark on an enquiry to determine whether the pointing out was done freely and voluntarily as the Crown failed to apply for a trial within a trial in circumstances where the pointing out was being challenged as not having been freely and voluntarily made, consequently, there was an issue of fact which was in dispute hence the Crown was enjoined to prove the same beyond a reasonable doubt.*

4. *The Court a quo misdirected itself on the question of corroboration of a single witness as corroboration can only be put as independent evidence implicating an accused person in the commission of the offence which it is submitted there was none in the present matter.*

5. *The Court a quo misdirected itself on the question of or issue of identification. As stated by PW5, save for "seeing the Appellant," and on the alleged day when she alleges, he was with the deceased mother of his children art the identification parade, and by her own evidence, she had never known the Appellant before. Since the police already had Appellants photograph (a common cause fact), off course the issue of her not being coached is irrelevant which Appellant never alleged, she was shown the pictures prior to the pointing out. Noteworthy, the Crown did not bring any evidence to dispute that she had shown the pictures before doing any identification (at the parade) yet it bore the onus to do so."*

C REFUSAL BY COURT *A QUO* OF BAIL PENDING APPEAL

[11] The basis for the refusal of bail pending appeal *in casu* was articulated as follows by the Court *a quo*:

"[12] In the matter at hand the factors to be weighed against prospects of success on appeal in the equation whether to grant bail include the likelihood or incentive to the applicant to abscond; the likely delays in the prosecution and hearing of the appeal; the right of the applicant to liberty. In framing his case the Applicant has fallen prey to the temptation of isolating and exaggerating one defect in the evidence led by the Crown during the trial in a bid to demonstrate the paucity of the case for the State. That is but one feature in a larger body of circumstantial evidence. In all cases sight must not be lost to the bigger picture involving the

assessment of the Crown evidence in its totality. That is the Blom principle that has been followed by this Court over the years."

.....

"[17] From this approach in my view a proper filter through which the objection by Mr Dlamini for the Applicant must be considered is provided. It does not permit for a selective but contextual consideration of all the evidence and its impact on the conviction and not a selective isolation of the element objected to. The Crown has adduced and relied on other pertinent evidence - albeit all circumstantial - linking the applicant with the commission of the offence. That is the heart of the evidence. For the applicant to succeed he must demonstrate that notwithstanding that evidence the court on appeal could reasonably arrive at a different assessment and determine the conviction to be incorrect. I am not persuaded that is the case. In my opinion the cumulative effect of the Prosecution evidence excluding the objectionable aspect of that evidence, sufficiently founds a determination that the Crown has proven the applicant's guilt to the standards required: that of proof beyond reasonable doubt.

[18]Consequently I am of the opinion that even if the applicant could arguably succeed on the point that the specific evidence of pointing out is inadmissible; that on its own should not for the reasons advanced herein ensure to his conviction being set aside. It is therefore not persuasive as basis for the contention that his prospects on appeal are reasonable. I am not persuaded either that purely on the basis of his case being arguable that grounds his release pending appeal from the perspective of service to the interests of justice. The risks outweigh the benefit. In the result the application for bail pending appeal is dismissed."

D THE APPEAL AGAINST THE REFUSAL OF BAIL PENDING APPEAL

[12] The Grounds of Appeal in relation to the Bail Appeal are formulated as follows:

*"1. That the learned Judge erred in refusing to apply the test as espoused in **Lindokuhle Maxwell Sibandze v Rex, Criminal Appeal Case No. 05/22** (to which decision He was bound) to the application for bail pending appeal that was serving before him. Consequently, the Learned Judge deviated from precedents.*

2. That the Learned Judge erred in finding that appellant's release on bail pending appeal would defeat the course of justice given the likelihood or incentive of the appellant to abscond trial and delay the prosecution of his appeal. There being no basis for such a finding, more especially in the absence of an explicit finding that he is a flight risk.

3. That the Learned Judge erred in finding that:

*"In support of the contention that the appeal holds good or reasonable prospects of success the applicant proceeds on the premise that the Crown case was weak on account of it being founded on circumstantial evidence. To this end the applicant places much capital on the Defences objection to **one** aspect of the pointing out evidence led by the Crown as warranting rejection*

of the Crown case in its entirety by reason of the evidence being tainted. This is in reference to a ***singular element*** *of instances of pointing out evidence as led by the Crown. This is confined to the pointing out of certain clothing apparel by the Accused to which the Accused objected as constituting an inadmissible confession. The evidence and statement in question was led through the evidence of the lead investigating police office PW 11 Detective Sibusiso Vilane testifying in regard to the pointing out and retrieval of the applicants clothing and a statement attributed to the accused that the articles of clothing were the apparel he was wearing when the deceased was murdered. The statement together with the evidence as to the pointing out and retrieval of the clothing together clearly bears a feature of inadmissible confession. That much was conceded by the Crown Counsel, Mr Phakathi.*

That however constitutes a separate and distinct evidence of pointing out which is removed in time and circumstances from the rest of further evidence of pointing out that the Crown led."

a) *Such finding, with respect, not being the test to be applied when considering whether to grant bail pending appeal is not supported by the record in particular the judgement on conviction as the Crown never conceded to the aspect of the confession being made to the police officer and the statement attributed to the accused was that PW 11 informed the Court that information they received led them to appellants work place where he gave them the clothing he admitted to have been* ***wearing during the commission of the offence*** *not as stated by the Learned Judge that it was the apparel he was* ***wearing when the deceased was murdered****. (underlining ours)*

b) *The Appellant did not raise the above as a single ground of appeal as observed by the Learned Judge but he further relies on the fact that these items referred to by PW11 resulted in the pointing out which is inadmissible and there was no trial within a trial to determine if the entire process of pointing out was made freely and voluntarily. Nowhere in his judgement does the Learned Judge address the issue of His misdirection to embark on a trial within a trial which is another ground for appellant's appeal. Likewise with the issue of identification it is not addressed.*

4. *The Learned Judge also erred both in fact and in law by failing to deal with the reason why the Supreme Court judgement in the case of* ***Phinda Elmon Mavuso v Rex, Criminal Appeal Case No.42/2014*** *which enunciated the legal position that evidence of a confession made to a police officer and not reduced into writing is inadmissible – the Learned Judge does not give reasons why appellants ground of appeal in this regard does not give weight to the assertions of prospect of success on appeal.*

5. *That the Learned Judge erred and misdirected himself in relying on the judgement of* ***Barend Stephanus Smith v The State*** *in the determination of prospects of success, since that judgement did not deal with an application for bail pending appeal at all, but rather with an Appeal against refusal to grant leave to appeal.*

6. *That the Learned Judge erred and misdirected himself in applying the judgement of* ***Alfred Shekwa and Another v Rex, Appeal Case No. CA 21/1994*** *and refused bail in that the said judgement notoriously cement the fact that a pointing out is admissible only in circumstances where it is shown that it was made freely and voluntarily."*

[13] The issue of identification, forming the subject matter of Main Appeal Grounds 4 and 5, is not expressly challenged in the Bail Appeal grounds, nor was it addressed in the Appellant's Heads of Argument in the Bail Appeal.

D.1 SUBMISSIONS BY COUNSEL

[14] Counsel's oral argument primarily revolved around the issue of the admissibility of the alleged pointings out, which forms the subject matter of Main Appeal Grounds 1, 2, 2.1, 2.2 and 4 and Bail Appeal Grounds 3, 3(a), 3(b), 4 and 6, Mr Dlamini for the Appellant arguing that they were inadmissible for want of being freely and voluntarily made and Mr Phakathi for the Respondent submitting to the contrary.

[15] The Court invited Counsel to make submissions with reference to the difference between an accused person on the one hand admitting that he or she made a pointing out but denying that it had been made freely and voluntarily, and on the other hand an accused person denying that he or she had made any pointing out at all but that alleging that the process had been stage managed, i.e., that the purported pointings out were mere pretence for the benefit of the onlookers and/or the camera.

15.1 Mr Dlamini seemed to cast the net wide by maintaining that the actual version of the Appellant was that the Appellant had no knowledge of the scenes or of the incriminating items, but then referred to a statement by the Appellant in his Replying Affidavit *a quo* to the effect that he had not acted freely and voluntarily, reading:

> *"26. I deny that the scene of crime officer was never challenged and submit that my attorney put to the witness that the pointing out was not made freely and voluntarily as it was the police who led me to the scene of crimes."*

15.2 Mr Phakathi contended that the evidence showed that the Appellant indeed had made the pointings out.

[16] On the secondary issues as to the reliability of or the weight to be attached to the other evidence that had been presented, Mr Dlamini contended that same were insufficient for a proper finding based on circumstantial evidence alone. Mr Phakathi for the Respondent contended to the contrary.

D.2 ANALYSIS

[17] It needs to be emphasised that the Court at this stage of the proceedings is concerned only with the merits or demerits of the application for bail

pending appeal including prospects of success on appeal and is not seized with, or attempting decisively determine the merits of the pending appeal.

[18] Bail Appeal Grounds 3, 3(a), 3(b), 4 and 6 deal with issue of the conviction *apropos* the alleged pointings out. The other Bail Appeal grounds pertain to the appropriate test to be applied in applications for bail pending appeal, including the issues of reasonable prospects of success on appeal and the issue of likelihood of absconding:

D.2.1 BAIL PENDING APPEAL GROUNDS

D.2.1.1 GROUNDS PERTAINING TO APPLICABLE LEGAL PRINCIPLES IN APPLICATIONS FOR BAIL PENDING APPEAL

[19] **Ad First Ground of Appeal: Factors to be taken into account - *"refusal"* to apply the test in the *Sibandze* case**

19.1 It appears the Appellant is contending that prospects of success on appeal are the sole criterion in applications for bail pending appeal.

19.2 As to what is to be considered in such applications, the Court *a quo* pronounced as follows:

"[9] It cannot be that all an applicant for bail pending appeal has to do is demonstrate any prospects of success to automatically qualify for the grant of bail. This much was suggested by Mr Dlamini on behalf of the applicant relying on the dictum of the Supreme Court in the case:

Lindokuhle Maxwell Sibandze v Rex Cr. Appeal Case No. 05/2022[10] *where at para 23 the Court said:*

"Notwithstanding the decisions aforesaid, it is now well settled in this jurisdiction that in applications 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."

I think the words are abstracted from the true context in that I believe the court in the remark sought to debunk the suggestion that 'exceptional circumstances' is an additional requirement for bail pending appeal. The meaning conveyed is not that it is enough to just show the existence of reasonable prospects in applications for bail pending appeal. That is the context in which the passage must be read for there is more to the procedure.

[10] The fact that there is a likelihood that an appellate court could reach a different opinion regarding the conviction suggesting the existence of prospects of success on appeal is but part of the enquiry this court must consider in the exercise of its discretion in the bail application at hand. It certainly does not end there. Considerations of the seriousness of the crime for which the applicant has been convicted, the length and severity of the sentence form part of the primary test to be applied in regard to the interests of justice. The counterbalancing factor is the prejudice to the interests of justice. Potential prejudice to the interests of justice looms large where an incentive to abscond for it is possible for the convicted person may be tempted to take a chance on abandoning the appeal."

19.3 No argument as to why prospects of success on appeal should be the sole criterion, or as to why the Court *a quo* misdirected itself in the above respects, was advanced in the Appellant's Heads of Argument or before this Court.

19.4 That prospects of the success are not the sole criterion in our jurisdiction and that *inter alia* the interests of justice have to be considered as well, have been held for instance in ***Phindile Gwebu v The King:*** [11]

[9]The test on whether or not to grant an application for bail was recorded as follows in the same Judgement of SV Williams 1981(1) SA 1170 (ZA) at page paragraph.

"[A] Judge has a discretion and the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of Justice: 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 on appeal and these two factors are clearly inter – connected

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[10] ***(05/2022) [2022] SZHC 36 (2022) Paragraph [23]***
[11] ***(42/2017) [2017] SZHC 65 (20th April 2017)***

because the less likely the prospects of success are the more inducement there is on the applicant to abscond.""

19.5 No incidences of misdirection by the Court *a quo* or by the Court in the ***Gwebu*** matter have been demonstrated and in the circumstances, the aforesaid judicial pronouncements in our view stand unchallenged, from which it follows that this ground of appeal too does not bear reasonable prospects of success.

[20] **Ad Second Ground of Appeal: Onus - no basis for finding of likelihood or incentive to abscond trial more so in the absence of an explicit finding that the Appellant is a flight risk**

20.1 No argument in this regard was advanced in the Appellant's Heads of Argument or before us but it would behove to address the issue of onus.

20.2 In Paragraph [18] of the ***Sibandze*** case supra reference is made to:

"*...There is a presumption that the fact of conviction and sentence renders the appellant a flight risk unless he can establish reasonable prospects of success on appeal.* ***See Leo Ndvuna Dlamini.***[12]"

20.3 The Appellant also did not take issue with the following exposition by the Court *a quo* to the effect that a convicted accused person bears the onus for purposes of bail pending appeal:

"*[11] In a nutshell the key difference in the exercise of the Courts bail discretion between pre and post-conviction bail proceedings lies in that due to the conviction and sentence to imprisonment, the grant of bail is not an a priori right. In petitioning the court to grant bail the burden rests on the applicant to persuade the court of good grounds to do so in the interests of justice. The obverse situation in pre-conviction bail applications obtains. There the Crown bears the onus*

[12] ***Criminal Appeal Case No. 12/2013***

to prove, and consequentially the court has to find whether there are objectively established reasons for refusing bail."

20.4 In the circumstances the Appellant failed to demonstrate why an explicit finding of a flight risk should be required and/or that a convicted person does not bear the onus in this respect. Nor, as regards the merits, was this Court persuaded that the Appellant acquitted himself of the onus and in the premises this ground too in our view does not pass muster.

[21] Appeal Ground 5: As regards the criterion of prospects of success, reliance in an application for bail pending appeal on a judgment dealing with prospects of success in an application for leave to appeal

21.1 The Court *a quo* expressed itself as follows:

"Prospects of Success

[5] In vague terms one meaning that has been assigned to the term is whether there are reasonable prospects that another court may come to a different conclusion. That suggests that a mere possibility of different conclusion and the appellate court's finding that the judgment of the trial court was incorrect is sufficient. ***In S v Smith v S,***[13] *a South African court in considering the term formulated a different approach as to what constitutes 'reasonable prospects of success' when it held:*

> *[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince the court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal"*
> *[Emphasis added]"*

[13] Full citation: **Smith v S (475/2010) [2011] ZASCA 15 (15 March 2011)**

21.2 On the face of it, there is no reason why the same standard should not apply to any application involving prospects of success, including applications for condonation.

21.3 The Appellant's Counsel, neither in the Appellant's Heads of Argument nor in oral argument before us referred the Court to any alternative formulation of the appropriate concept and in the circumstances it is our view that this ground too cannot be upheld.

D.2.1.2 GROUNDS PERTAINING TO CONFESSIONS AND POINTINGS OUT

[22] **Appeal Grounds 3, 3(a), 3(b), 4 and 6: The pointings out pursuant to an inadmissible confession**

***These are the only grounds dealing with the merits of the conviction and thus with prospects of success on appeal in the main appeal.

22.1 **The inadmissible confession**

22.1.1 The Court *a quo* was at pains to separate the inadmissible confession in relating to the clothing from the pointings out at the crime scenes *vis-à-*

vis said **section 227(2)**, with the evident aim of assessing the admissibility of the latter and the Court *a quo* did not place any reliance on the preceding confession in arriving at the verdict of guilty.

22.1.2 In fact, the confession was not referred to in the Judgment on the merits at all but only in the Judgment on the bail application, wherein the following was stated:

> *"[14] That however constitutes a separate and distinct evidence of pointing-out which is removed in time and circumstances from the rest of further evidence of pointing out that the Crown led in relation two instances involving two separate incidents at the sites identified as 'the primary' and 'secondary' crime scenes... "*[14]

22.1.3 The issue of the confession therefore would not require further scrutiny and Bail Appeal Ground 4 would appear to be bound to fail.

22.2 **The subsequent pointings out**

22.2.1 As held for instance in ***Mhlongo and Others v Rex*** [15] a pointing out is a statement by conduct which, if unaccompanied by an exculpatory explanation, amounts to a statement of knowledge of relevant facts which in turn, *prima facie* operates to the person's disadvantage and it can thus

[14] Possibly as a result of Main Appeal Ground 4
[15] ***(185/1992) 1993 SC 1 (1 January 1993)***

in an appropriate case constitute an extra-judicial admission. The Appellant, on either his version or on the Crown's version, did not make any exculpatory statements when making the pointings out.

22.2.2 Logic dictates that an accused person may not approbate and reprobate, or rely on one in the alternative as a fallback position by maintaining that he or she as a matter of fact did not make admissions through conduct but was directed by the police to perform certain pretend actions, but plead in the alternative, if it were to be found that he or she did in fact make such admissions through conduct by way of pointings out, that same had not been made freely and voluntarily and that evidence thereof subsequently is inadmissible.

22.2.3 This would be analogous with an accused person charged with murder pleading that he did not commit the murder but in the event that the Court finds that he did, that he acted in self-defence.

22.2.4 Either an admission had been made or it had not been made. It cannot be both. *In casu* the Appellant's version was that he had been forced into a stage managed pretence, and the Appellant would be bound by his election which primarily calls for the determination of a question of fact, as opposed to primarily a question of admissibility, which further means

that a trial within a trial was not required; [16] whether it had been made freely or voluntary is the secondary question.

22.2.5 The Court *a quo* did not appear to be alert to the distinction between the two differential scenarios[17] and in our view should have approached the issue primarily as a question of fact, i.e., whether the photographed actions of the Appellant were pretend pointings out, or *de facto* pointings out.

22.2.6 *In casu* the Appellant had been warned in terms of the Judges' Rules, a pointless exercise were the aim of the police to create stage managed conduct on the part of the Appellant. Although the scene where the body had been deposited would have been known to the police because that is where the body was discovered, no basis was advanced for even a suggestion that the police would have known about the identity card concealed in a tree stump thereat, or the deceased's telephone phone in a black plastic bag resting at a different location, or that the police would have planted these items on these scenes.

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[16] See also for instance **Nkosi v S (A798/15) [2017] ZAGPPHC 697 (12 October 2017)** at Paragraph [25]

[17] *Obiter,* the same distinction would apply to confessions.

22.2.7 The above would lend corroboration for and support to the evidence of multiple witnesses for the Crown, including PW 4, a member of the community police, to the effect that the Appellant *de facto* made these pointings out.

22.2.8 Upon consideration of the above, it would appear that the answer to the question of fact should be in the affirmative i.e., that the Appellant's actions were not stage managed but that he in fact did make the incriminating pointings out, which would be indicative of knowledge of the offence.

22.2.9 It would then follow that the Appellant, in view of his election to plead a stage managed version of pretence, cannot subsequently plead that if found not to have been stage managed, that the pointings out it had not been made freely and voluntarily, from which it further follows that there was no need for a trial within trial to determine admissibility.

22.2.10 However, the onus as to ultimate admissibility i.e., freely and voluntarily made, remains resting on the Crown. In our considered view, the Crown appears to have acquitted itself thereof in light of the following:

22.2.10.1 The Appellant had been warned in terms of the Judge's Rules prior to departure, an unnecessary procedure if a sham production was designed to follow;

22.2.10.2 An independent witness PW 4 was present at all relevant times and confirmed the evidence of the police officers that the Appellant had acted freely and voluntarily.

22.2.11 In all the circumstances, the finding that said pointings out constituted admissible extra- judicial admissions, could be justified.

22.3 For the aforegoing reasons, the relevant Bail Appeal Grounds should fail in that it is unlikely that this Court, on appeal, could reasonably arrive at a different conclusion.

D.2.2 MAIN APPEAL GROUNDS

[23] Reverting to these grounds and the requirement of prospects of success on appeal in applications for bail pending appeal, it is our considered view that that the Appellant failed to demonstrate reasonable prospects of success of appeal:

23.1 **Ground 1**: That 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:

23.1.1 This is the generic basis of any appeal against conviction and not a specified ground of appeal.

23.1.2 In any event, the Court is not persuaded that the Court *a quo* had misdirected itself in accepting the evidence that it did.

23.1.3 Regarding the cumulative effect of circumstantial evidence, it has been said that a feather by itself is light in weight but a string of feathers can become an albatross around a person's neck. The pointings out *in casu,* read in particular with the identification of the Appellant by PW 5 and the conduct and whereabouts of the Appellant during the relevant time period, may lead to a conclusion than that the Appellant had been responsible for the death of the deceased, the disposal of her body and the concealment of her property.

23.2 **Grounds 2, 2.1, 2.2 and 3**: These grounds pertain to the confession and pointings out, dealt with fully *supra* and for the reasons aforestated, would not hold reasonable prospects of success.

23.3 **Grounds 4 and 5**: The Court *a quo* accepted the identification by PW 5[18] and this finding was not challenged before us. This finding, of course, by itself does not suffice to connect the Appellant to the murder but, read with the other pieces of circumstantial evidence, would serve to complete the picture.

E CONCLUSIONS AND ORDER

[24] In the result, the Court is not persuaded that the grounds advanced by the Appellant in the Main Appeal hold reasonable prospects of success on appeal. As regards the Bail Appeal, the Court is not persuaded that any of the grounds advanced by the Appellant hold merit. The Appellant failed to acquit himself of the applicable onus *a quo* and before this Court, failed to demonstrate any error or misdirection by the Court *a quo* which would vitiate the judgment *a quo*.

[18] As alluded to in the Judgment, in terms of section 236 of the Criminal Procedure and Evidence Act, 1938 a Court may rely on the evidence of a single witness as a competent and credible witness to prove a fact; also ***Khumalo and Others v Rex 1079- 1981 SLR***

[25] Accordingly, it is ordered that:

The appeal against the refusal of bail pending appeal is refused and the judgment by the Court *a quo* is confirmed.

J M VAN DER WALT
JUSTICE OF APPEAL

I agree

M D MAMBA
JUSTICE OF APPEAL

I agree

J H CURRIE
JUSTICE OF APPEAL

For the Appellant: Mr L Dlamini of Linda Dlamini & Associates
For the Respondent: Mr S Phakathi of the Chambers of the Director of Public Prosecutions