

SOUTH AFRICA / JUDGMENT

Carneiro v S (A125/2010) [2018] ZAGPJHC 66 (28 March 2018)

[2018] ZAGPJHC 66

COURT

South Gauteng High Court, Johannesburg

BEFORE

Moshidi, Nicholls

CASE / FILE NUMBER

A125/2010

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A125/2010

Not reportable

Not of interest to other judges

7/3/2018

In the matter between

CARNEIRO JOSE PEDRO MARAIS APPLICANT

AND

THE STATE RESPONDENT

JUDGMENT- APPLICATION FOR LEAVE TO APPEAL

MOSHIDI J:

INTRODUCTION

- [1] We have before us an application for leave to appeal against conviction. The application has a long and unfortunate history.
- [2] On the 10/12/2010, this court dismissed the initial application for leave to appeal against the conviction imposed by the Johannesburg

Regional Court. The applicant subsequently appealed to this court against the order dismissing the appeal. On the 29/04/2016 this court struck the application off the roll on the ground that we had no jurisdiction to entertain the application.

[3] The applicant, feeling aggrieved by our order in striking off the matter from the roll, applied to the Supreme Court of Appeal (SCA) for special leave to appeal. On the 24/11/2017, the SCA, in finding that this court was incorrect in adjudicating the application for leave to appeal on the basis of the provisions of the Superior Courts Act 10 of 2013 (the new Act), instead of the provisions of the Supreme Court Act 59 of 1959 (the old Act), granted the special leave – to us. It was urged upon us to hear the present

application expeditiously – which we hereby do.

[4] We are now enjoined to adjudicate the application for leave to appeal our decision in accordance with the provisions of Section 20, in particular, Section 20(4)(b) of the old Act. The latter section provides that: “in any other case, (an appeal) with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division”. (Insertion added). I must add that, in the application, the applicant also requested the extension of his bail pending the appeal in terms of the provisions of Section 309C of the Criminal Procedure Act 51 of 1977.

[5] The grounds of appeal against our decision to dismiss the application, are contained in the applicant’s notice of application for leave to appeal dated the 7/12/2010. In essence, the grounds of appeal came to this: the contradictions in the evidence of the state witnesses were material; It was not established persuasively and on a balance of probabilities that the gunshot which

killed the deceased was fired by the applicant; and that therefore, the State had not succeeded to prove the guilt of the applicant

beyond reasonable doubt.

[6] The trite test in applications of this nature is, and has always been, that: “Whether there are reasonable prospects of success on appeal. In other words, whether there is a reasonable prospect that a court of appeal will have a different view.” *R v Ngubane and Others* 1945 (A) 185, at 187; *Capital Building Society v De Jager and Others*; *De Jager and Another v Capital Building Society* 1964(1) SA 247(A); *Afrikaanse Pers Bpk v Olivier* 1949(2)SA 890(O) at 892-893 and *S v Sikosana* 1980(4) SA 559(A) at 562. See additionally, *Van Heerden v Cronwright and Others* 1985(2) SA 342(T) at 343 C-D. It is also so that if there is a reasonable prospect of success on appeal for the applicant, leave to appeal ought to be granted without hesitation or reluctance (See *S v Ackerman* 1973(1) SA 765(A).

[7] More instructive in applications of this nature, is what was said in *S v Mabena and another* 2017 (1) SACR 482 (SCA) at paragraph [22] that: “It is the right of every litigant against whom an appealable order has been made to seek leave to appeal against the order. Such an application should not be approached as if it is an impertinent challenge to the Judge

concerned to justify his or her decision. A court from which leave to appeal is sought is called upon merely to reflect dispassionately upon its decision, after hearing argument and decide whether there is a reasonable prospect that a higher court may disagree”.

- [8] During the course of argument, counsel for the applicant made an important concession, namely that the applicant shot and killed the deceased. The only question therefore that remains is whether on the objective evidence, his conduct could be construed to amount to culpable homicide. On the other hand, the state, while not conceding, reluctantly agreed that there was a possibility of another court coming to a different conclusion on the issue of culpable homicide.
- [9] In the light of the above it is just and equitable that the applicant's bail be extended as per the terms of the draft

order agreed upon between the parties, pending the outcome of the appeal.

ORDER

[10] In the result of the following order is made:

1. Leave is granted to the Supreme Court of Appeal
2. The applicant's bail is extended pending the outcome of the appeal.

DSS Moshidi

Judge of the High Court

of South Africa, Gauteng

Local Division Johannesburg

I Concur,

Nicholls J

Judge of the High Court of

South Africa, Gauteng Local Division

Johannesburg

Counsel for the appellants – E. Kilian SC

Instructed by – Gascoine Rawdon & Associates

Counsel for the respondent – R.N Mogagabe

Instructed by – DPP, Johannesburg

Date of hearing – 28 March 2018

Date of Judgement – 28 March 2018

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