

SOUTH AFRICA / JUDGMENT

De Bruin v S (Leave to Appeal) (KS21/2020) [2025] ZANCHC 43 (23 May 2025) [2025] ZANCHC 43

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

KS21/2020

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Latest**amended version: 27 May 2025****IN****THE HIGH COURT OF SOUTH AFRICA****NORTHERN CAPE****DIVISION, UPINGTON****Case No: KS 21/2020****Reportable: YES / NO****Circulate to Judges: YES****/ NO****Circulate to Magistrates:****YES / NO****Circulate to Regional****Magistrates: YES / NO****In the matter between:****EDWARD****DE****BRUIN****Applicant****and****THE****STATE****Respondent****Heard:****Determined on the papers****Delivered on:****23 May 2025**

Summary: Application for leave to appeal against his conviction and sentence.
ORDER
The application for leave
to appeal is dismissed.

JUDGMENT

Mamosebo ADJP

[1] On 06 May 2024 the applicant was convicted of the following: Count 1: Murder read with the provisions of s 51(1) of the Criminal Law Amendment Act, 105 of 1997 (CLLA) ; Count 2: kidnapping read with s 51(2) of the CLLA; Count 3: Assault with intent to do grievous bodily harm; Count 4: Contravention of s 3(1) read with sections 1, 120(1),

and 121 of the Firearms Control Act, 60 of 2000 (FCA) and Count 5: contravention of s 90 read with sections 1, 120(1) and 121 of the FCA. He was sentenced in respect of all counts (1 – 5), respectively, as follows: 25 years, 10 years, 3 years, 5 years and 12 months imprisonment. The sentences were ordered to run concurrently with the sentence in Count 1.

[2] The applicant now seeks leave to appeal against his conviction and sentence in Count 1 (murder) to the Supreme Court of Appeal, alternatively, to the Full Court of this Division. The application is opposed. The parties have agreed that this application be adjudicated on the papers and have also filed heads of argument. The hearing of oral argument as contemplated in s 17(2)(d) of the Superior Courts Act is therefore dispensed with. The Notice for Application for Leave to Appeal was filed on 27 November 2024 and the administrative glitches caused a delay in the adjudication of this matter, which is regrettable.

[3] The following are the grounds upon which the applicant relies to substantiate his application for leave:

Ad conviction

3.1 That another court may find that the state failed to prove beyond reasonable doubt that the applicant had the intention to murder the deceased;

3.2 That on all the evidence considered holistically, the applicant acted negligently in killing the deceased and that another court may find that the applicant should have been convicted of culpable homicide.

Ad sentence

3.3 That another court may find that the sentence of 25 years imprisonment imposed on the applicant is shocking and inappropriate taking into account the applicant's personal circumstances.

[4] Cachalia JA, writing for a unanimous court in *Caratco*[1], on the threshold to be met, made these instructive remarks:

‘In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act[2] an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive.’

[5] The first ground claims that the state has failed to prove intention beyond a reasonable doubt and, if granted leave, another court would find that the applicant acted negligently, and would convict him of

culpable homicide.

[6] The uncontroverted evidence before the court was that the applicant was armed with a loaded and unlicensed firearm which he used to fire several shots aimed at the deceased resultantly causing his death. The test to determine intention is subjective and the test to determine negligence is objective.

[7] Snyman defines *dolus eventualis* [3] as follows:

‘A person acts with intention in the form of *dolus eventualis* if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but:

- (a) He subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused, and
- (b) He reconciles himself to this possibility.’

[8] The eyewitness Chico Patrick Mtuyedwa’s evidence appears at paras 11 to 15 of the main judgment. It was highlighted in the judgment that Mtuyedwa’s evidence does not stand alone but was corroborated to a great extent by Aobakwe, Dr Fouché, and Sgt Pico. I found Mtuyedwa to be a credible witness. Having assessed the evidence in totality in conformity with the correct approach enunciated in *Chabalala*[4] I rejected the version of the applicant as palpably false where it differed with the state’s version. I particularly rejected the allegation that the deceased was armed with a knife. Para 66 of the main judgment deals with the contradictions taking cue from *Mkohle*[5] and *Mafaladiso*[6] and find it unnecessary to repeat them here.

[9] The contention that the applicant be found guilty of culpable homicide was also dealt with as the state had urged the court to find the form of intent to be *dolus directus* in the main judgment paras 71 – 76. The court’s reasoning why the applicant, and his co-accused were convicted of murder (*dolus eventualis*) with a common purpose is that the applicant foresaw the possibility of the result and reconciled himself with the possibility that firing several

shots at the deceased could result in his death but persisted in not only chasing him but also firing shots at him. If I erred at all it would be that I should have found that the applicant had direct intent to murder.

[10] Counsel argues that a term of imprisonment of 25 years is shockingly inappropriate. Murder is unquestionably a heinous offence and there must be a balancing act when imposing sentence. But this court had considered the applicant's personal and mitigating circumstances, the issue of remorse, age and rehabilitation prospects of the applicant. Para 22 of the judgment on sentence carefully explains why the court deviated from imposing the prescribed minimum sentence of life imprisonment.

[11] Having dispassionately considered the grounds raised by the applicant in an effort to determine whether there are reasonable prospects that another court would come to a different finding than this court whose judgment is sought to be appealed against, I have not found any. In the result, the application for leave to appeal stands to fail.

[12] The following order is made:

The application for leave to appeal is dismissed.

M.C.MAMOSEBO

ACTING DEPUTY JUDGE PRESIDENT

NORTHERN CAPE DIVISION

For the Applicant: Adv RJ Pieterse (Judi care)

Instructed by:

Justice Centre (Kimberley)

For the Respondent: Adv. JJD Rosenberg

Instructed by:

Office of the Director Public Prosecutions

[1] Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd 2020 (5) SA 35 (SCA) para 2

[2] Section 17 of the Superior Courts Act, 10 of 2013: Leave to appeal (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that – (a)(i) the appeal would have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments n the matter under consideration.

[2] Section 17 of the Superior Courts Act, 10 of 2013: Leave to appeal

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments in the matter under consideration.

[3] CR Snyman, updated by SV Hoorntje, *Criminal Law*, 7th Edition, 2020, at 161

[4] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15

[5] *S v Mkohle* 1990 (1) SACR 95 (A) at 98f – g

[6] *S v Mafaladiso* 2003 (1) SACR 583 (SCA) at 593j – 594e

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