

SOUTH AFRICA / JUDGMENT

De Klerk v S (718/2022) [2023] ZASCA 172 (5 December 2023)

[2023] ZASCA 172

COURT

Supreme Court of Appeal

BEFORE

Carelse, Mothle, Hughes

CASE / FILE NUMBER

718/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 718/2022

In the matter between:

PIETER CORNELIUS DE KLERK

APPELLANT

and

THE STATE

RESPONDENT

Neutral Citation: De Klerk v The State (718/2022) [2023] ZASCA 172 (05 December 2023)

Coram: CARELSE, MOTHLE and HUGHES JJA

Heard: No oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 05 December 2023 at 11h00.

Summary: Criminal law and procedure – appeal – appeal to the Supreme Court of Appeal against the refusal of a petition in the high court seeking leave to appeal against conviction and sentence imposed by a regional court – whether the State’s version of the events was to be preferred over the appellant’s version – if so, whether there was intent or negligence on the part of the accused – whether a sentence of 15 years imprisonment is appropriate – reasonable prospects of success on appeal.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Monama J and Mhango AJ, on petition for leave to appeal from the Regional Court, Boksburg in Gauteng):

1 The appeal succeeds.

2 The order of the high court to the extent that it refused leave to appeal is set aside and substituted by the following:

‘The application for leave to appeal the conviction and sentence imposed on the applicant succeeds and the applicant is granted leave to appeal against conviction and sentence to the Gauteng Division of the High Court, Johannesburg.’

Mothle JA (Carelse and Hughes JJA concurring):

- [1] On 14 October 2019, the appellant, Mr Pieter Cornelius de Klerk (Mr de Klerk), was arraigned on one count of murder, and in terms of s 51(2) read with Part II to Schedule 2 of the Criminal Law Amendment Act 105 of 1997, in the Regional Court, Boksburg (the regional court). On 16 March 2020, the regional court convicted Mr de Klerk on one count of murder with direct intent, and on 2 June 2020, sentenced him to 15 years’ imprisonment. The regional court refused to grant him leave to appeal. Mr de Klerk lodged a petition to the Gauteng Local Division of the High Court, Johannesburg (the high court), for leave to appeal both the conviction and sentence. The high court also declined to grant him leave to appeal. He turned to this Court with a petition for special leave to appeal, which was granted against both conviction and sentence on 22 June 2022.
- [2] Mr de Klerk and the Director of Public Prosecution, Gauteng Local Division, Johannesburg agreed, to mitigate the costs of litigation, that the appeal in this Court should be adjudicated in terms of s 19(a) of the Superior Courts Act 10 of 2013. The parties dispensed with the court appearance for oral argument.
- [3] This Court has developed the approach to be taken in the adjudication of an appeal as in this case. In *S v Matshona*[1] it was held that ‘...where, as is the case here, an accused obtains leave to appeal to this court against the refusal in a high court of a petition seeking leave to appeal against a conviction or sentence in a regional court, the issue before this court is whether leave to appeal should have been granted by the high court, and not the appeal itself...’[2] ‘Not only does this court lack the authority to determine the merits of the appellant’s appeal [against his sentence] at this stage, but there are sound policy reasons why

the court should refuse to do so, even if it could'[3]...‘The test in that regard is simply whether there is a reasonable prospect of success in the envisaged appeal...rather than whether the appeal...ought to succeed or not’.[4]

- [4] Therefore, in considering this matter, the Court cannot determine the merits of the appeal, but should confine itself to the question whether there are reasonable prospects of success in the envisaged appeal against both conviction and sentence. The background facts are largely common cause. On the afternoon of 27 December 2018 at about 18h00, at Reiger Park, Boksburg, Gauteng, along Forel and Johnny Arends Streets, a fight broke out between Mr Wendell Pietersen (the deceased) and his friends, Mr Darryl Dwan van Greunen (Darryl), Mr Theodore Hoffman (Theo) and Mr Ethan Johnson (Ethan), over money. The deceased threw stones at Darryl and Theo. This incident occurred on Forel Street, with houses on both sides and some motor vehicles parked on the side of the street, in front of the houses. There were also members of the public present on the street.
- [5] Mr de Klerk testified that he had just arrived from work and was seated on one of the benches, next to Mrs Russon, his neighbour from across the street, Mr Russon and Uncle Cyril were seated on another bench opposite Mr de Klerk. The deceased threw a stone which went over their heads. The stone was seemingly aimed at Darryl and Theo, who at that time were using the fence next to Mr Russon's gate as cover. The deceased threw a second stone which hit Mr Russon's gate in what the witnesses described as a hard and loud impact, which startled the people on the benches. Darryl and Theo chased the deceased in the direction of his home but returned midway. The deceased also returned, armed with a half-brick.

Mr Russon approached the two men who were returning in order to reprimand them from throwing stones in a public area. Mr de Klerk crossed the street towards his house and saw the deceased returning. He stood and faced the deceased to stop him.

- [6] Mr de Klerk further testified that as the deceased approached him, he (the deceased) said to him 'get out my way'. Mr de Klerk stood in his path and refused to move aside. He intended to stop the deceased from throwing further stones. The deceased, who had a half-brick in his right hand, took a swing with the right hand and Mr de Klerk ducked by bending down. The swing missed him and as he stood up, he produced his firearm from the holster on his hip, with a view to scaring the deceased. The deceased, who was already near him, dropped the half-brick and grabbed the firearm by the barrel, and they scuffled for control of the firearm. It was during that scuffle that Mr de Klerk's forefinger accidentally slipped into the trigger guard and pulled the trigger. A shot went off, the projectile hit the deceased in the chest. The deceased clutched at his chest, turned, and started running towards his home, calling for help. He ran for a short distance when he fell to the ground. Mr de Klerk drove to the police station to report that he had just shot the deceased. When he came back with the police, the deceased's body was surrounded by onlookers.

[7] In regard to sentence, the regional court heard evidence of Mr de Klerk's personal circumstances, when he testified in support of his application for bail pending sentencing. In addition, the regional court had the correctional supervision report and the pre-sentencing report authored by Ms Anna Elizabeth Cellier, who also testified in mitigation of sentence as an expert. The evidence from the witnesses and reports confirmed that Mr de Klerk was 43 years of age, a first offender, and single. He had a daughter aged 22, a son aged 16 and a one-year-old grandchild. At the time of sentencing, Mr de Klerk had been in custody and consequently

lost his employment. His dependants were therefore deprived of the benefit of his employment. His children depended on him. Of concern is that he had to leave his residence on Forel Street and stay somewhere else as a condition of his bail, imposed by the magistrate. As a result, hereof, he had to rent his house out and move to another area. In addition to these mitigating factors, the circumstance of the crime involved an active participation by the deceased. These factors were either ignored or not accorded sufficient weight by the regional court.

[8] The regional court concluded, on this evidence, that Mr de Klerk was guilty of murder, committed with direct intent, without specifically indicating the evidence on which it relies. This was a misdirection. As regards sentence, the regional court found that there were no substantial and compelling circumstances, justifying a departure from the prescribed minimum sentence of 15 years, which it imposed. The defence in this appeal contends that there is no evidence, alternatively sufficient evidence, to support a finding that Mr de Klerk's conduct manifested a direct intention to kill the deceased. It submits that at best for the State, the offence is culpable homicide.

[9] It is evident that the very circumstances of the case point to the deceased as an active participant as opposed to an innocent bystander, a fact which, together with the evidence tendered in mitigation, renders the sentence of 15 years' imprisonment harsh and disproportionate to the crime. Having regard to the circumstances under which the shooting incident occurred, I am of the view that the high court erred in not granting leave to appeal, as there exist reasonable prospects that a court of appeal would interfere with the conviction and sentence imposed on Mr de Klerk. The appeal must therefore succeed, and the decision of the high court should be set aside and substituted with one granting Mr de Klerk leave to appeal to the high court.

[10] It will be remiss of me if I were to conclude without commenting on how the trial was conducted. It is evident from reading the trial record that the magistrate comes across as being overbearing on the witnesses, having repeatedly admonished and rebuked them for answering the questions without his permission to do so. This prompted one of the state witnesses to say that he was scared. In addition, the magistrate kept Mr de Klerk standing for long hours as he read his judgment. He insisted that Mr de Klerk should remain standing. As a result, Mr de Klerk's long-standing injured ankle became swollen. Further, the magistrate did not refrain from entering the fray when he subjected Mr de Klerk, and his witness in mitigation of sentence, to a line of questioning which was lengthy and went

beyond just clarifying issues. The transcript is also replete with instances where the witnesses had to repeat their answers, often regarding questions or answers that were misinterpreted. It is not surprising that during the lengthy cross-examination of Mr de Klerk, the magistrate warned him of misleading the court with one of his answers. This prompted Mr de Klerk's attorney to object and apply for the magistrate's 'withdrawal'[5]. Proceedings in a courtroom should not be conducted in an atmosphere where participants are terrified of the presiding officer and are not at ease to testify on what they witnessed.

[11] In the result, I make the following order:

2 The order of the high court to the extent that it refused leave to appeal is set aside and substituted by the following:

'The application for leave to appeal the conviction and sentence imposed on the applicant succeeds and the applicant is granted leave to appeal against conviction and sentence to the Gauteng Division of the High Court, Johannesburg'.

SP MOTHLE

JUDGE OF APPEAL

Appearances

For the appellant:

F Roets

Instructed by: Lawley Shein Attorneys, Johannesburg

Symington De Kok Attorneys, Bloemfontein

For the respondent: M M Rampyapedi

Instructed by:

Director of Public Prosecutions, Johannesburg

[1] S v Matshona

[2008] ZASCA 58; [2008] 4 All SA 68 (SCA); 2013 (2) SACR 126 (SCA) paras 5 to 7. See also Smith v S

[2011] ZASCA 15; 2012 (1) SACR 567 (SCA); Radebe and Another v S

[2013] ZASCA 31; 2013 (2) SACR 165 (SCA) and Vumani Oscar Ntuli v S

[2023] ZASCA 150 (10 November 2023).

[2] Ibid para 5.

[3] Ibid para 6.

[4] Ibid para 8.

[5] It is clear from the transcript that in fact, he meant 'recusal.'

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Prepared on 9 October 2026 · Esheria