

SOUTH AFRICA / JUDGMENT

Gafoor v S (SS35/05) [2009]

ZAWCHC 192 (23 September 2009)

[2009] ZAWCHC 192

COURT

Western Cape High Court, Cape Town

BEFORE

Zondi

CASE / FILE NUMBER

SS35/05

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IN

THE HIGH COURT OF SOUTH AFRICA(WESTERN CAPE HIGH COURT. CAPE
TOWN)CASE NO: SS35/05

DATE: 23

SEPTEMBER 2009

In

the matter between:

MOGAMAT
ABDUL GAFOOR Applicant
and
THE
STATE Respondent

JUDGMENT

(Application for Leave to Appeal)

ZONDI, J

This is an application for leave to appeal against the conviction and sentence imposed on the applicant. On 13 November 2008 the applicant was convicted of robbery with aggravating circumstances, kidnapping, indecent assault, rape, murder and unlawful possession of firearm and ammunition. On 11 December 2008 he was sentenced as follows; 15 years for robbery with aggravating circumstances; five years for kidnapping; five years for indecent assault; life imprisonment for rape and life imprisonment for murder and three years imprisonment in respect of unlawful possession of a firearm and ammunition which charges were taken together for the purpose of sentence.

In deciding on this application I have to determine whether there is a reasonable prospect of success on appeal. Put differently the question is whether there is a reasonable prospect that another Court might come to a different conclusion. See in this regard *S v Skhosana* 1980(4) SA559 AD.

Mr Charters who appeared for the applicant submitted that the Court should have given the applicant a benefit of doubt and acquitted him. He argued that Square, on whose evidence the applicant was convicted, was not a credible witness. He pointed out that the fact that Square came forward with information some eight days after the incident gave him an opportunity to tailor his evidence in order to get a lighter sentence. Mr Charters accordingly argued that that created a reason for Square to tailor his evidence. It was submitted by Mr Charters that Square's evidence should for this reason be approached with caution. He further submitted that the applicant was not treated

fairly. He pointed out that the Court was very harsh in its treatment of his evidence regarding his alibi defence, but the same level of criticism was not applied to the consideration of Square's evidence.

Finally Mr Charters argued that the place at which the exhibits were found on the scene did not coincide with the evidence of Square. He argued that Square was unable to explain the discrepancies and his inability to do so affected his credibility as a witness. Mr Charters accordingly submitted that there is a reasonable prospect that another Court might approach the evidence of Square differently and find that he was not an honest witness.

As far as the sentences imposed on the applicant are concerned Mr Charters argued that there was no reason to treat Square and the applicant differently. They had committed the same offences and should have been given the same sentences. In support of his contention he referred to the recent S A decision in *S v Vilakazi* which is now reported in 2009(1) SACR 552.

Mr Stevens, who appeared for the State, opposed the application, arguing that it should be refused as there is no reasonable prospect that another Court might come to a different conclusion on appeal. He rejected the suggestion that the Court was unfair in its treatment of the applicant's evidence of his alibi defence. He argued that it was clear that the applicant's alibi defence was concocted, and flawed. He also rejected the suggestion that the police might have tampered with the scene evidence, because they were not found at the points where according to Square they should have been.

I have fully considered the submission made by both counsel. In its evaluation of Square's evidence the Court was aware of the nature of Square's evidence, and why it had to be approached with caution. Serious attention was given to the concerns now raised by Mr

Charters. Square's evidence was properly analysed to determine its reliability. Upon the analysis of all of the evidence the Court was satisfied with the reliability of his evidence, and that he was an honest witness.

With regard to the attack on the sentence it was argued by Mr Charters that the sentences imposed on the applicant were harsh and that the Court erred in imposing sentences which differed to the one imposed on Square. The circumstances of Square and the applicant differ and the circumstances in which their convictions occurred are different. The applicant did not plead guilty to the charges, whereas Square was convicted and sentenced in terms of the plea bargaining agreement he had concluded with the State in terms of Section 105A of the Criminal Procedure Act.

In my view there is no reasonable prospect that on the merits and sentence another Court might come to a different conclusion. In the result the APPLICATION FOR LEAVE TO APPEAL AGAINST THE CONVICTIONS AND SENTENCES IS HEREBY DISMISSED.

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