

SOUTH AFRICA / JUDGMENT

S v Bopalamo (A818/05 , 818/05) [2006] ZAGPHC 49 (17 May 2006)

[2006] ZAGPHC 49**COURT**

High Courts - Gauteng

BEFORE

E L Goldstein, V Khampepe, R S Mathopo

CASE / FILE NUMBER

A818/05

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Source record

IN THE HIGH COURT OF SOUTH AFRICA (WITWATERSRAND LOCAL DIVISION) CASE NO: A818/05
In the matter between: BOPALAMO, BRIAN Appellant and THE
STATE Respondent

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THE STATE
Respondent

JUDGMENT

GOLDSTEIN J:

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This matter has an unusual history, the unfortunate result of which has been to delay inordinately the finalisation of the appellant's appeal.

[2] The appellant was convicted in this Court on 23 February 1996 by Schabert J, as he then was, and two assessors of murder and robbery with aggravating circumstances, and sentenced to 20 years' imprisonment on the first count, and 15 years' imprisonment on the second, with 10 years of the latter sentence to run concurrently with the former, resulting in an effective sentence of 25 years' imprisonment. By letter dated 19 July 1996 the appellant sought to "lodge an appeal" See p 187 of the record before us. All references in the footnotes hereafter are to the pages in such record or apply "for appeal" 186 against his convictions and sentences. [3] On 17 September 1996 Schabert J in Chambers made the following note in respect of the appellant's request: "Certificate refused. No reasonable prospect of success on appeal." In acting as he did the learned Judge clearly intended following the procedure previously applied in respect of prisoners seeking to appeal. [4] That procedure was laid down by section 305 of the Criminal Procedure Act 51 of 1977 (as amended) which read as follows:

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In acting as he did the learned Judge clearly intended following the procedure previously applied in respect of prisoners seeking to appeal.[4] That procedure was laid down by section 305 of the Criminal Procedure Act 51 of 1977 (as amended) which read as follows:

"Notwithstanding anything to the contrary in any law contained, no person who has been convicted by a lower court of an offence, shall be entitled to prosecute in person any proceedings for the review of the proceedings relating to such conviction unless a Judge of the Provincial or Local Division having jurisdiction has certified that there are reasonable grounds for review."

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This section, found to be unconstitutional in *S v Ntuli* 1996(1) SACR 94(CC), and repealed by section 1 of Act 76 of 1997, became invalid on 30 April 1997. The section was operative when Schabort J dealt with the matter but, with respect, the learned Judge erred in effect applying the section because it applied only to convictions in the lower Courts and not to such in the High Court. It follows that the learned Judge had no jurisdiction to adjudicate on the grant or refusal of a certificate as he purported to do, and that his ruling or order in regard thereto was a nullity. *S v Absolom* 1989(3) SA 154(A) at 164 E-F. Cf. *S v Ngema* 1999(1) SACR 218 (W).[5] The appellant thereafter directed a petition dated 3 June 1997 to the Supreme Court of Appeal asking for "Special leave to Appeal"²¹³. This elicited a letter from the Registrar of the Supreme Court of Appeal, dated 17 June 1997, seeking copies of the application for leave to appeal, and of the judgment refusing leave²¹⁵. Thereafter, and on 12 September 1997, the Registrar of this Court sent the appellant's application for leave to appeal and a copy of Schabort J's letter refusing the certificate to the Registrar of the Supreme Court of Appeal. The latter Registrar cannot trace his file but has, according to an affidavit of the appellant to which I shall again refer below, an independent recollection of what occurred: the petition was not considered by the Supreme Court of Appeal since the Registrar was of the view that "as the Application for Leave to Appeal was not heard in

opencourt, and was dealt with as a refusal of a Judge's certificate to appeal, that no Application for Leave to Appeal was heard or refused, and that the Petition was therefore premature."²³⁰ The appellant says that he "received a letter from the Registrar of the Supreme Court of Appeal wherein it was stated that (he) had submitted the Petition incorrectly and that (he) should obtain legal advice how to do so."²²⁹ He says that he has lost the letter.^[6] Thereafter attorneys apparently acting on behalf of the appellant filed with the Registrar of this Court on 4 May 2000 a document headed "Applicant's Notice of Application for Leave to Appeal." This document seeks leave to appeal from Schabort J,^{217–220} and was accompanied, it seems, by a notice of motion and supporting affidavit.^{221–239} None of these documents appear to have been placed before Schabort J.^[7] On 21 May 2001 the appellant wrote once again to the Registrar of the Supreme Court of Appeal advising what he had done and that he had received no response. That letter also elicited nothing.^[8] On 7 July 2003 the appellant contacted the office of the Director of Public Prosecution telephonically. This resulted in a letter to him by the Office Manager of that office dated 10 July 2003 the body of which reads as follows:

This section, found to be unconstitutional in

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purported to do, and that his ruling or order in regard thereto was a nullity.

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“Your leave to appeal, your telephone enquiries on Monday 7 July 2003 refers. As you are already aware your application for leave to appeal has been refused by the trial Judge on the 17 July 1996, see attached a copy of an order from the office of the Registrar. You then petitioned to the Supreme Court of Appeal to grant you a further appeal. The result of the petition is not known to this office. I suggested that you enquire from the Supreme Court of Appeal as to the result of your petition, see attached copy of acknowledgement of your petition application. You can address your enquiries to: The Registrar of Supreme Court of Appeal P O Box 258 BLOEMFONTEIN 9300”

Your leave to appeal

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As you are already aware your application for leave to appeal has been refused by the trial Judge on the 17 July 1996, see attached a copy of an order from the office of the Registrar.

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The Registrar of Supreme Court of Appeal

P O Box

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BLOEMFONTEIN

9300”

[9] Thereafter, by notice of motion dated 3 August 2003, and citing the Director of Public Prosecutions as first respondent, and the Minister of Justice as second²⁴⁰⁻¹, the applicant submitted that another court may differ from Schabort J. The relief sought in the notice of motion relates only to costs and dispensing with the Rules of Court.^[10] The application so launched came before Willis J on 28 November 2003, apparently with no notice of set-down having been served on either of the respondents cited. The appellant appeared in person and the transcript of at least part of what occurred²⁶⁴ is included in our record. Willis J first expressed the intention of postponing the matter for service on the Director of Public Prosecutions. Thereafter, however, he went on to grant the appellant condonation of his late application for leave to appeal and then said that “the applicant is granted leave to appeal.” And so the matter has been placed before this Full Court of three Judges.^[11] Section 316(2)(a) of the Criminal Procedure Act provides that an application for leave to appeal “must be made to the judge whose conviction, sentence or order is the subject of the prospective appeal: Provided that if –(i) the trial judge is not available; or (ii) in the case of a conviction before a circuit court the said court is not in sitting, The application may be made to any other judge of the High Court concerned.” The trial Judge, Schabort J, was available to hear the leave to appeal, and the matter did not involve a circuit court. It follows that Willis J had

no jurisdiction to hear the application for leave to appeal and that his order in regard thereto is a nullity.

[9]

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[12] This is a most unfortunate case in which our system of the administration of justice has sadly failed the appellant. His counsel requests that we condone any lateness in his application for leave to appeal. The State does not oppose this request, and wisely, since where the system has functioned so poorly we ought to be astute to assist as far as we are able to do so.

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[13] In the result I make the following order:

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] In the result I make the following order:

1. The refusal of certificate of Schabort J of 17 September 1996 is declared null and void.
2. The order of Willis J of 28 November 2003 is declared null and void.
3. The appellant's application for leave to appeal against his convictions and sentences of 23 February 1996 is referred in terms of section 316(2) (a) Act 51 of 1977 for adjudication in open Court to Schabort J, or if he is not available to hear such application, to another Judge of this Division.
3. The appellant's application for leave to appeal against his convictions and sentences of 23 February 1996 is referred in terms of section 316(2) (a)

section 316

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J, or if he is not available to hear such application, to another

Judge of this Division.

4. The lateness of the application for leave to appeal is condoned.

_____E L GOLDSTEIN

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JUDGE OF THE HIGH COURT

I agree

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KHAMPEPE

I agree_____RSMATHOPO

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MATHOPO

For appellant:

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For

first

respondent:

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Loots

Date of hearing:

17 May 2006

Date of Judgment:

17 May 2006

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