

SOUTH AFRICA / JUDGMENT

Van Dalen and Others v S (SS57/2008)

[2008] ZAWCHC 86 (21 November 2008)

[2008] ZAWCHC 86**COURT**

Western Cape High Court, Cape Town

BEFORE

Ngewu

CASE / FILE NUMBER

SS57/2008

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Source record**1 JUDGMENT****N****THE HIGH COURT OF SOUTH AFRICA****(CAPE****OF GOOD HOPE PROVINCIAL DIVISION)CASE NO: SS57/2008****DATE: 21****NOVEMBER 2008****In****the matter between:****EMILY
VAN DALEN
ANGELIQUE
VAN DALEN
CHRISTO
VAN DALEN
versus
THE
STATE****JUDGMENT****(Application for Leave to Appeal)****NGEWU, A J:**

On 31 October 2008 I heard an argument from counsel on applications for leave to appeal and a special entry brought by the defence

simultaneously and made orally immediately after imposition of sentence.

The grounds of appeal were cited as follows by Mr Smith on behalf of accused No 1:-

1. He made an application for special entry, it being his contention that at 174, that is when the Court refused to discharge the accused at the closure of the state case, it did not grant its reasons for its judgment, and it never gave its judgment at any stage of the proceedings.
2. As borne out by the record of proceedings the honourable judge presiding in the matter allowed the learned assessor to intervene

and question counsel for accused No1 upon counsel's submissions in an application for discharge in terms of section 174. I must say this is briefly a summary of what Mr Smith argued for. The third ground was that the Honourable Court inhibited cross-examination of the counsel for accused No 1 with regards the

testimony of Captain Van der Heever. In his argument the advocate, Mr Smith, explained that when Captain Van der Heever was questioned on paragraph 7 of the statement, the Court indicated that the question is not allowed, and according to him, then he said then he would not ask questions and obviously sat down. That is how the inhibition occurred. According to him, that was irregular. A further ground for an application in terms of section 316 was that the Court misdirected itself again in not giving reasons for judgment pertaining to the application in terms of section 174, that is failure to discharge the accused at close of the State case. Furthermore, he concluded that the statement by accused No 3 was inadmissible, and according to him was found as corroborating the evidence against No 2. According to him that was in contradiction with section 219 of the Criminal 10 Procedure Act. Another point was raised that the Court failed to apply the cautionary rules in the evidence of Mr Roy Swan. The Court a quo disregarded the demeanour, the untruthfulness, the 15 contradictions, the evasiveness and the manipulation of the judicial system by Mr Swan. According to Mr Smith, the confession was used in corroborating the version of the accused, that is the statement of accused No 1. It was further argued by Mr Smith that the Honourable Court failed to make credibility findings and to provide reasons for any testimony and evidence presented by witnesses. He further argued that the Court misdirected itself in finding that an exculpatory statement by accused No 1 was adequate to satisfy the deficiencies in the State case.

The grounds of appeal were cited as follows by Mr Smith on behalf of accused No 1:-

1. He made an application for special entry, it being his contention that at 174, that is when the Court refused to discharge the accused at the closure of the state case, it did not grant its reasons for its judgment, and it never gave its judgment at any stage of the proceedings.
2. As borne out by the record of proceedings the honourable judge presiding in the matter allowed the learned assessor to intervene

and question counsel for accused No1 upon counsel's submissions in an application for discharge in terms of section 174. I must say this is briefly a summary of what Mr Smith argued for.

The third ground was that the Honourable Court inhibited cross-examination of the counsel for accused No 1 with regards the

testimony of Captain Van der Heever. In his argument the advocate, Mr Smith, explained that when Captain Van der Heever was questioned on paragraph 7 of the statement, the Court indicated that the question is not allowed, and according to him, then he said then he would not ask questions and obviously sat down. That is how the inhibition occurred. According to him, that was irregular.

A further ground for an application in terms of section 316 was that the Court misdirected itself again in not giving reasons for judgment pertaining to the application in terms of section 174, that is failure to discharge the accused at close of the State case.

Furthermore, he concluded that the statement by accused No 3 was inadmissible, and according to him was found as corroborating the evidence against No 2. According to him that was in contradiction with section 219 of the Criminal 10 Procedure Act.

Another point was raised that the Court failed to apply the cautionary rules in the evidence of Mr Roy Swan. The Court a quo disregarded the demeanour, the untruthfulness, the 15 contradictions, the evasiveness and the manipulation of the judicial system by Mr Swan. According to Mr Smith, the confession was used in corroborating the version of the accused, that is the statement of accused No 1.

It was further argued by Mr Smith that the Honourable Court failed to make credibility findings and to provide reasons for any testimony and evidence presented by witnesses.

He further argued that the Court misdirected itself in finding that an exculpatory statement by accused No 1 was adequate to satisfy the deficiencies in the State case.

A further point raised was that the Court erred concerning the fact that it drew an inference from the fact that the alarm was not activated and he further added that he had, or they had no evidence as to whether the alarm was in fact in a working order. Mr Cox, for the accused No 2, raised further grounds in 10 addition to those raised by Mr Smith, that the Court erred in finding that the State proved the accused guilt beyond reasonable doubt and that undue weight was afforded

(indistinct) to the statement of Mr Roy Swan, although the Court found that it was to be approached with caution. He 15 further

submitted that there was lack of coherence in the judgment; weight was still afforded to his testimony and no credibility finding was made in regard to his evidence. He further sought to deny that there was a common thread, as concluded by the Court, running through the uncontradicted evidence of Mr Swan and the statements that were tendered by the State into evidence implicating the accused in other words. It was his further submission that there were prospects of success on appeal. And if heard in front of another Court, another decision could have been granted and more irregularities could be found. Mr Jennings, in addition to the above

submissions by Mr Smith and Mr Cox, added that the Court erred and misdirected itself in accepting or admitting the confession of accused No 3. He based this on an allegation that accused No 3 indicated that his attorney was not present and that he did not wish to say anything. He further hoped that another Court interpreting or considering the document in question might come to a different conclusion to that of the Court, or might well exclude the document. It was his further submission that an appeal is a vehicle and not manifestly doomed to failure.

A further point raised was that the Court erred concerning the fact that it drew an inference from the fact that the alarm was not activated and he further added that he had, or they had no evidence as to whether the alarm was in fact in a working order. Mr Cox, for the accused No 2, raised further grounds in 10 addition to those raised by Mr Smith, that the Court erred in finding that the State proved the accused guilt beyond reasonable doubt and that undue weight was afforded

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He further hoped that another Court interpreting or considering the document in question might come to a different conclusion to that of the Court, or might well exclude the document.

It was his further submission that an appeal is a vehicle and not manifestly doomed to failure.

The application was opposed by counsel for the State, who conceded, (her submission was not that there is anything wrong with the finding that the Court made). The State's submission was that the assessor at 174 asked questions. I must state, if I failed to at the beginning, that one of the factors raised by Mr Smith was the fact that an assessor asked a question at 174 stage, hence he wanted a special entry. According to Ms. Gravenjas, the fact that the assessor asked a question does not mean that he participated into the finding that the court reached. It was his further submission that the problem that the defence 5 experienced was further that the only evidence that was before Court was that of the State and the accused elected not to testify, and therefore

there was nothing to gainsay the evidence of Mr Swan, and it was evident that the application for leave to appeal should not succeed. It is trite that in an application of this nature, I will start first with the application for leave to appeal, the question is whether the Court is satisfied that there are prospects of success on appeal. Stated differently, the test is whether there are reasonable prospects that another Court might reverse or materially alter the judgment of the Court that heard the matter appealed against. See *S v (Indistinct)*, 1993(1) SA 523 (?). The Court is further mindful of the fact that special entry is necessary in those cases where the irregularity or illegality complained of is discovered after the conclusion of trial, and the procedure may not be followed where the irregularity or illegality appears from the record of the case. In such an event, the irregularity or illegality may form the basis of an In this regard see the case of *Sefatsa and Others v the Attorney General of Transvaal and Another*, 1989(1) SA 821(A) 834 H - J. Furthermore, a non-constitutional irregularity committed during the trial does not per se constitute sufficient justification to set aside a conviction on appeal. What the Appeal Court considers is the effect of the irregularity on the verdict. That the Court gave no reasons for not discharging the accused at 10 174 stage cannot be said to have had an impact on the verdict. Mr Smith, in his oral grounds of appeal, included also the grounds mentioned in his application for special entry. What became manifest in his reply was that he was uncertain as to whether the assessor asked a factual question or a question of law. A further uncertainty related to whether he made that application in order to get the Appeal Court to make a legal pronouncement on the relevant submission. Unfortunately, a reasonable prospect of success on appeal is not a factor which may be taken into account when one considers the question whether special entry should be noted or not. On the oral grounds for appeal, I must say there were many, On the oral grounds for appeal, I must say there were many, many grounds that Mr Smith raised. On the following points the Court wishes to comment as follows. Mr Smith denied that there was evidence led regarding the working condition of the alarm. However, Inspector van der Heever testified that there was a panic button in the bedroom where accused no 1 and 2 hid. The alarm system was on and the panic button was not activated. He referred to section 316 of the Criminal Procedure Act, and raised the question whether the Court should have accepted the statements

as a confession or not. I wish to say that section 316 of the Criminal Procedure Act does not deal with the statements or

confessions, but with the applications for condonation, leave to appeal and further evidence. On the aspect that the Court inhibited his cross-examination, the Court specifically wanted him to elucidate what he meant by that, and according to him, as I have already indicated, the Court denied him an opportunity to ask a question and, according to him, he then said, "Then I may not ask questions", and he obviously sat down. I am not certain as I am sitting here whether that amounts to inhibiting further cross-examination. However, I have had the opportunity to peruse the record concerned. Apparently there is nothing to support the contentions by Mr Smith. What is reflected there on the record is that he was given an opportunity to ask questions and the State objected to the question that he wanted to ask, and he said that he was happy that he had asked whatever question he so wanted to, and I do not think that that amounts to inhibiting his cross-examination. I am not sure of any system that the Court should have adopted in keeping him

standing if it so wanted to keep him standing. The statement he referred to that was admitted as a confession was a statement by accused No 3, or Mr Pretorius, who had made a confession. In that statement he had made the admissions that would render him unequivocally guilty of 15 the crime of conspiracy to commit murder. He admitted all the essential elements of the offence. Hence the Court branded his statement a confession relating to the offence which he was convicted of.

The application was opposed by counsel for the State, who conceded, (her submission was not that there is anything wrong with the finding that the Court made). The State's submission was that the assessor at 174 asked questions. I must state, if I failed to at the beginning, that one of the factors raised by Mr Smith was the fact that an assessor asked a question at 174 stage, hence he wanted a special entry. According to Ms. Gravenjas, the fact that the assessor asked a question does not mean that he participated into the finding that the court reached.

It was his further submission that the problem that the defence 5 experienced was further that the only evidence that was before Court was that of the State and the accused elected not to testify, and therefore there was nothing to gainsay the evidence of Mr Swan, and it was evident that the application for leave to appeal should not succeed.

It is trite that in an application of this nature, I will start first with the application for leave to appeal, the question is whether the Court is satisfied that there are prospects of success on appeal. Stated differently, the test is whether 15 there are reasonable prospects that another Court might reverse or materially alter the judgment of the Court that heard the matter appealed against. See *S v (Indistinct)*, 1993(1) SA 523 (?).

The Court is further mindful of the fact that special entry is necessary in those cases where the irregularity or illegality complained of is discovered after the conclusion of trial, and the procedure may not be followed where the irregularity or illegality appears from the record of the case. In such an event, the irregularity or illegality may form the basis of an

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to the offence which he was convicted of.

The Court noted with concern that in most of the grounds that were raised for the appeal there was no honesty and the grounds were mostly untrue. From the fact that Mr Smith included the grounds he so wanted considered for special entry also in the grounds of appeal, the Court drew an inference that there may not have been certainty as to what procedure to follow, and what is

more, those grounds were also part of the record and were not issues that arose after closure of proceedings. The Court is further mindful of the fact that the test that the Court should consider regarding special entry is not whether there are irregularities but whether it [the application] was made frivolously or was absurd. Judging by the nature of the grounds for application for special entry, it is clear that the granting thereof will be an abuse of the process of the Court. In all the alleged irregularities, there are no prospects of success. As I said, most of the grounds of appeal are not in agreement with the record. What is manifest from the record is that all three accused exercised their right to remain silent on the face of the evidence tendered by the State that there was conspiracy to murder and harm the deceased amongst all the three accused. That evidence remained uncontroverted. The contradictions in Mr Swan's evidence relating to their part in the murder of the deceased were irrelevant when one has regard to the verdict that the court returned. The Court concedes that it made no credibility findings relating to Mr Swan's evidence because his evidence relating to conspiracy went unchallenged. Accused No 3 also made a confession admitting conspiracy. There is no basis, therefore, for the allegation that the guilt of the accused was not proved beyond reasonable doubt. I must say that the record was not complete. Before we adjourned on the last occasion, I asked for a transcript of the record, which was not provided up to today, and some of the other points raised, I could not verify them from the record. With what I said so far, both applications are DENIED NGEWU, J

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Accused No 3 also made a confession admitting conspiracy. There is no basis, therefore, for the allegation that the guilt of the accused was not proved beyond reasonable doubt.

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With what I said so far, both applications are DENIED

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