

SOUTH AFRICA / JUDGMENT

## Van Staden v S (K/S21/2016) [2017] ZANCHC 36 (21 April 2017) [2017] ZANCHC 36

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

K/S 21/2016

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: K/S 21/2016

Heard on: 20/04/2017

Delivered on: 21/04/2017

In the matter between:

NEVILLE VAN STADEN

APPLICANT

V

THE STATE

RESPONDENT

### JUDGMENT:

APPLICATION FOR LEAVE TO APPEAL

MAMOSEBO J:

[1] On 07 December 2016 the applicant pleaded not guilty to but was convicted of murder with *dolus directus* as the form of intent, assault with intent to cause grievous bodily harm (Assault GBH) and two counts of assault common. On 20 March 2017 he was sentenced to a term of life imprisonment on the murder count, 12 month s' imprisonment on each count of assault common and two years' imprisonment for assault GBH. The sentences in respect

of each one of the assault charges were ordered to run concurrently with the murder charge. The applicant now seeks leave to appeal against his conviction and sentence to the Supreme Court of Appeal alternatively, the Full Bench of the Northern Cape Division in respect of the murder count only. The State opposed the application.

[2] The grounds for this application boil down to the contention that I erred in my finding that the act of asphyxiation coupled with the excessive force exerted on the deceased's body which caused the multiple injuries sustained was without doubt an indication of a clear direct intent to kill which was also premeditated and there are therefore reasonable prospects of success on appeal.

[3] Adv Schreuder, arguing for the applicant, submitted that the State should have presented some evidence to show that the murder was premeditated. This contention was addressed by the Supreme Court of Appeal in the unreported judgment *Kekana v The State* (629/2013)

[2014] ZASCA 158 (1 October 2014) where Mathopo AJA pronounced (Lewis JA and Gorven AJA) concurring:

"[12] Another argument advanced on behalf of the appellant was based on *S v Raath* [2009 (2) SACR 46 (CPD)] where it was held that to prove premeditation, the State must lead evidence to establish the period of time between the accused forming the intent to murder and the carrying out of his intention. In the present matter there is no evidence as to how much time passed between the appellant's admitted decision to kill the deceased and when he doused the bed with petrol and set it alight. But a consideration of the appellant's evidence suggests that it was a matter of a few minutes, at the least.

[13] In my view it is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action. "

[4] Adv Schreuder relied on the case of *S v Ferreira and Others* 2004 (4) All SA 373 (A). In my view the case in casu is distinguishable from the Ferreira case. It is my view that premeditated murder is not only found in contract crimes but the circumstances in each case can determine whether the murder was premeditated or not. It must be borne in mind that the two assault common charges preceded the murder of the accused. In the early hours the assault with intent to cause grievous bodily harm then followed. The applicant in all these counts inflicted the injuries unprovoked. The evidence against him was found to be overwhelming and credible. When a deceased is strangled to death and the supply of oxygen to the brain is curbed, the deceased thrashes about until life is squeezed out of her. How can the death not be premeditated?

[5] In terms of the provisions of s 17(1) of the Superior Courts Act 10 of 2013, leave to appeal may only be granted if the Judge or Judges concerned are of the opinion that:

5.1 The appeal would have reasonable prospects of success or if there is some compelling reason why leave should be granted;

5.2 The decision sought on appeal does not fall within the ambit of s 16(2)(a) of the Act; and

5.3 Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

[6] Section 17(6)(a) of the Act stipulates that if leave is granted to appeal against a decision of a Division as a court of first instance consisting of a single Judge the Judge or Judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider that the circumstances set out in s 17(6)(a)(i) and (ii) are applicable.

[7] In *S v Smith* 2012 (1) SACR 567 (SCA) para 7 Plasket AJA stressed:

"[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal. "

As reiterated by Leach JA in *S v Kruger* 2014 (1) SACR 647 (SCA) at 649d (para 3) the Courts should follow the aforementioned test scrupulously in the interests of justice.

[8] Having regard to the above and having dispassionately considered the application I am satisfied that the applicants have no reasonable prospects of success on appeal and the application stands to fail. I am not swayed that a court of appeal could reasonably arrive at a conclusion different to that of the trial court.

[9] It becomes unnecessary to deal with the appeal against sentence as correctly conceded by Mr Schreuder that if the murder was

premeditated the applicant would not have a leg to stand on.

[10] In the result, the following order is made:

The application for leave to appeal is dismissed.

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MAMOSEBO J

NORTHERN CAPE HIGH COURT

For the applicant: Adv JJ Schreuder

In structured by: Legal Aid South Africa (Judicare)

For the Respondent: Adv KM Kgatwe

Director of Public Prosecution

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