

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: CC 27/2014

Date heard: 24 April 2019

Date delivered: 14 May 2019

RODWELL STANTON PETERS

First Applicant

OSCAR ALEXANDER

Second Applicant

And

THE STATE

Respondent

JUDGMENT

Goosen J:

[1] The applicants, who were accused 2 and 3 respectively in the trial, were convicted of robbery and murder on 31 March 2016. They were sentenced on 16 April 2016. They now seek leave to appeal against their conviction on the count of murder.

[2] It appears from the case file that the applicants timeously filed their notices of application for leave to appeal. For reasons not disclosed the applications were not pursued. I was informed by Mr *Daubermann*, who now appears for the applicants, that the applications were not pursued because the applicants did not have funds to instruct their erstwhile attorney. Now, having secured such funds, they persist in their applications.

[3] When asked why the delay in prosecuting the applications is not explained by way of affidavit, Mr *Daubermann* submitted that the applicants are under no duty to explain the delay. Having timeously initiated the applications they can prosecute them at any time thereafter. That submission is doubtful.

[4] The procedure by which an appeal against a conviction and/or sentence imposed by a High Court is prosecuted is provided for in s 316 of the ***Criminal Procedure Act***¹. That section must be read in conjunction with sections 16 and 17 of the ***Superior Courts Act***². Those provisions provide that an appeal against a decision of the High Court lies only in the event that the High Court (or failing it the Supreme Court of Appeal on petition) grants leave to appeal. Leave to appeal may be granted on application. The application must be brought within a stipulated time period, subject to condonation in respect of non-compliance with such period.

[5] An application is initiated when the applicant files with the Registrar (and serves upon the state) a notice of application for leave to appeal. The notice must set out the grounds upon which leave to appeal is sought. Once leave to appeal has

¹ Act No, 51 of 1977

² Act No 10 of 2013

been granted the provisions of s 316(7), read with Rule 52 of the Uniform Rules and the Rules of the Supreme Court of Appeal apply.

[6] Section 316(7)(a) places on the Registrar an obligation to file copies of the record of proceedings within the stipulated period. Rule 8(3) of the Supreme Court of Appeal Rules, which provides for the lapsing of an appeal in the event that the record of proceedings is not filed timeously, does not apply to a criminal appeal. (See **S v Carter**³). Nevertheless, while it is the Registrar's duty to lodge the record, both the accused and the state are under a duty to pursue the appeal with reasonable expedition. Heher JA noted⁴:

"[10] But that is not the end of the matter, unfortunately. Appellants in criminal cases, whether the State or an accused, are under a duty to pursue their appeals with reasonable expedition. The proper administration of justice demands that they do so. Undue delay may in appropriate circumstances even amount to the abandonment of an appeal. What happened in this case falls not far short of that situation. It follows that the attorneys representing appellants act to the potential detriment of both their clients and the public interest if they choose to ignore the expeditious prosecution of the appeal because they do not regard their clients as responsible for the delay."

[7] If the undue delay in the prosecution of a criminal appeal may be taken to constitute abandonment of the appeal, then there is no reason in principle why an inordinate and undue delay in pursuing an application for leave to appeal may not be

³ 2007 (2) SACR 415 (SCA) at par [9]

⁴ (supra) at par [10]

taken to constitute abandonment of the application. Whether the delay indeed evidences abandonment is to be decided on the facts. For this reason it is to be expected of an applicant to explain the reason for the delay.

[8] This is all the more necessary in light of the provisions of the Joint Rules of Practice of the Eastern Cape which seek to regulate the hearing of applications for leave to appeal. Rule 10 requires the parties to approach the presiding judge within 10 court days of the filing of the application to arrange a date for the hearing thereof. In the event that this is not done the presiding judge may determine a date for hearing of the matter and the matter is then set down by the Registrar on notice to the parties. The primary responsibility rests upon the legal representatives to ensure that the application for leave to appeal is prosecuted. The judge can, however, only act if she/he is aware that such application has been commenced and upon the failure of the parties to comply with the Rule.

[9] I do not, in this matter, intend to dispose of the application on the basis that there has been no explanation given for the inordinate delay in proceeding with the application for leave. This is however not to be taken as licence on the part of would-be appellants that such delays need not be properly and fully explained in the future.

[10] The inordinate delay in bringing this application for leave has a direct bearing upon the merits of the application. As noted above, the applicants were accused 2 and 3 at trial. Their co-accused, Cedric Johnson, also brought an application for leave to appeal. That application was argued before this court on 8 May 2017 and leave to appeal was refused⁵. Johnson thereafter filed a petition seeking leave to

⁵ The judgment refusing leave to appeal was delivered on 9 June 2017

appeal⁶. The Supreme Court of Appeal granted Johnson leave to appeal against his conviction on count 4 i.e. the murder conviction. It was directed that the appeal be heard by the Full Bench of this Division. Johnson prosecuted his appeal before the Full Bench. The appeal was heard on 29 October 2018 and on 5 February 2019 judgment was delivered⁷.

[11] The Full Bench dismissed the appeal⁸. I was informed from the Bar that the applicants had sought the advice of Mr *Daubermann* at a stage before the appeal judgment was handed down. They were however only able to provide him with so-called “*financial instructions*” after judgment was delivered, hence the timing of this application.

[12] In this application the applicants seek leave to appeal only against their conviction on the count of murder⁹. The grounds of appeal set out in the applications are essentially threefold. The first is that this court erred and/or misdirected itself in respect of the test to determine *dolus eventualis*. Secondly, it is contended that the court misdirected itself in finding as a fact that the applicants had foreseen the possibility of a shooting occurring. Thirdly, it is submitted that the court erred in imputing intention on the basis of what a reasonable person in the position of the applicants might consider would occur when conducting a house robbery, thereby confusing the test for *dolus* with that of *culpa*.

⁶ The petition was filed on 8 September 2017

⁷ *Cedric Johnson v The State* (CC27/2014) [2019] ZAECHGHC 6 (5 February 2019)

⁸ *Dawood J with Beshe J and Msiwa AJ concurring.*

⁹ The grounds of appeal raised in their original application are abandoned.

[13] The grounds of appeal, compositely viewed, are premised upon this court's alleged error, both in fact and law, in finding that the accused at trial had the requisite *mens rea* and accordingly convicting them of murder.

[14] A perusal of the notice of application for leave to appeal; the petition filed on behalf of Cedric Johnson; and the notice of appeal prosecuting his appeal indicates that the same essential grounds of appeal were advanced. A reading of the judgment of the Full Bench indicates that these issues were canvassed in the appeal and are comprehensively dealt with in the judgment of the Full Bench.

[15] Mr *Daubermann* argued that in the light of the Supreme Court of Appeal's decision to grant leave to appeal this court ought to find that there is indeed a reasonable prospect of success on appeal. The argument was premised upon the fact that this court's previous finding to the effect that there was no reasonable prospect had been overruled.

[16] When asked what the effect of the Full Bench finding on appeal has upon the present application, Mr *Daubermann* submitted that it ought to be disregarded. He founded the argument upon the basis that to hold the Full Bench decision as decisive would effectively deny the applicants a right to appeal. He also submitted that it cannot be taken into account since that judgment may itself be overturned on appeal. He went so far as to suggest that it was (as was this court's original judgment) "*patently wrong*". He developed the argument to suggest that this court is not bound by the Full Bench decision. That court applied a different test in deciding the appeal to that to be applied in deciding this application. This application is to be decided on the basis that there is a "*reasonable prospect*" rather than that there is a ground for appellate interference.

[17] I am unable to discern the logic in this latter argument. The threshold for granting leave to appeal requires only that a reasonable prospect of success be established in relation to one or more of the grounds of appeal. This threshold does not require a decision that the appellant will succeed. When an appellate court sits and considers the grounds of appeal it decides whether on that basis it can interfere with the decision. The appellate court considers whether the trial court erred or misdirected itself either in respect of fact or law. Thus, when the appellate court deals with an appeal on an issue which the trial court considered that another court may decide differently, its finding in that regard necessarily disposes of the question one way or the other.

[18] The argument that the applicants will be denied their right to appeal if the Full Bench decision is taken into consideration also holds no water. The right to appeal against the decision of a High Court is limited by the requirement that leave must be obtained from that court. Whether or not leave is to be granted is to be decided dispassionately by the trial court with reference to extant decisions of courts (whether of equal or higher status) on relevant legal principles and their application to the facts.

[19] This is a fundamental principle of adjudication and the concept of *stare decisis*. The judgment of the Full Bench constitutes one such decision (as it turns out a highly relevant decision) of a superior court. It simply cannot be disregarded. Mr *Daubermann* suggested that the Full Bench decision cannot be determinative since the applicants were not parties to that decision. The argument is without substance. It frequently happens that the judgment of another court on an issue is decisive before another court. In this instance what is to be decided is whether there is a

prospect that another court will decide an issue differently to how this court determined the issue. If there is a judgment of another court precisely on point it can hardly be ignored.

[20] The argument that the Full Bench decision may itself be overturned on appeal also does not assist. As matters presently stand there is no appeal lodged in respect of the Full Bench judgment.

[21] What must be decided in this application is whether, on the grounds set out in the notice of application, the applicants enjoy reasonable prospects of success on appeal. Mr *Daubermann* conceded that the applicants, on the facts found to be proved by the state at trial, are in precisely the same position as their co-accused, Cedric Johnson. Mr *Daubermann* also conceded that the contentions raised in the application to found a reasonable prospect are the same contentions advanced before and considered by the Full Bench. No doubt it was for this reason that Mr *Daubermann* argued that in the event that leave is granted it should, in terms of s 17 of the ***Superior Courts Act***¹⁰, be to the Supreme Court of Appeal. No purpose, he said, would be served by an appeal to the Full Bench since it has already pronounced upon the issues on appeal.

[22] This latter submission in my view effectively disposes of the question as to the prospects of success. I shall, however, nevertheless consider the broader arguments advanced.

¹⁰ Act No, 10 of 2013

[23] A careful reading of the judgment of the Full Bench demonstrates that it was called upon to consider precisely the same grounds which are now advanced by the applicants. The full court stated that¹¹:

“5. The crisp issue in this matter is whether or not the state had established that the appellant had the requisite mens rea in respect of the count of murder of his co-perpetrator as found by the court a quo.”

[24] At paragraph 5(f) the full court sets out the facts as found and the arguments in relation thereto. It is not for this court to comment on the full court findings. It is however bound to accept its determination that upon consideration of the facts and the relevant legal principles it decided that the trial court’s finding was not assailable. The effect of such finding, therefore, must be that on the same grounds of appeal as now advanced, there is no reasonable prospect of success on appeal.

[25] Mr *Stander*, for the respondent, went further in argument to suggest that in any event this court was correct in its prior refusal of leave to appeal and that it should again refuse leave having regard to the merits of the application. With reference to authorities referred to in argument at trial¹² he argued that this court’s approach to foreseeability cannot be faulted. He submitted that properly considered there is no prospect that another court would come to a different conclusion.

¹¹ Cedric Johnson v The State (*supra*) at par 5

¹² S v Reddy and Others (416/94) [1996] ZASCA 55 (28 May 1996); Rex v De Villiers 1944 AD 493 at 508 to 509; R v Mlambo 1957 (4) SA 727 (A) page 738A-B; S v Nkosi 2016 (1) SACR 301 SCA; S v Nhlapo and Another 1981 (3) SA 744 (A); S v Lungile and Another 1999 (2) SACR 597 (SCA); S v Molimi and Another 2006 (2) SACR 8 (SCA) par 29-36

[26] Mr *Daubermann*, however, argued that the finding by the Supreme Court of Appeal that there is a reasonable prospect of success cannot be ignored. I agree. That finding exists as fact and must of necessity be taken into account. But in doing so it must be considered in the light of the subsequent appeal. The decision of the Supreme Court of Appeal on petition served no more than to overrule my previous decision not to grant leave to appeal. It cannot now determine how this application is to be decided.

[27] Different considerations would, of course, apply if the appeal had not yet been prosecuted to finality. In that event, this court would have to consider that the Supreme Court of Appeal had determined the existence of reasonable prospects of success on appeal. It would then, notwithstanding its reservations previously expressed, be duty bound to grant leave to any co-accused who raised the same or similar grounds of appeal. This court would do so not merely in deference to the Supreme Court of Appeal decision (as is required) but also in the interests of justice.

[28] Wholly different considerations apply where the appeal has been prosecuted to finality as in this case. Provided that this court is satisfied that the grounds of appeal fall within the ambit of the issues decided on appeal, as is the case here, the appeal judgment determines that there are, indeed, no reasonable prospects of success on appeal.

[29] One final aspect to consider is whether or not overarching considerations of justice favour granting the applicants leave to appeal. In my view there are none. To grant leave in the interests of justice would necessarily require considerations of the sustainability of the full bench judgment. For this court to venture upon this terrain would give rise to myriad jurisprudential problems.

[30] In the result the following order is made:

The applicants' applications for leave to appeal are dismissed.

G.G GOOSEN

JUDGE OF THE HIGH COURT

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