

IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: CC124/2008

Heard on: 14/01/21

Delivered on: 26/01/21

In the matter between:

BONGANI KUTU

Applicant

and

THE STATE

Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

NHLANGULELA DJP

[1] This applicant was accused No. 1 at the trial that ended on 27 May 2015 with his convictions for murder, unlawful possession of a semi-automatic pistol, and unlawful possession of ammunition. The applicant was sentenced on 19 September 2016 to undergo life imprisonment for murder, with sentences for the other offences to run concurrently with the sentence of life imprisonment. He now applies for leave to appeal against both the convictions and sentence. The application for leave is opposed by the State.

[2] To succeed in the application the applicant is saddled with a duty to prove that a reasonable prospect(s) of success on an appeal exists. This test is expressed in *S v Smith* 2021 (1) SACR 567 (SCA) as follows at para [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 in proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. Mote 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.”

[3] The grounds upon which the application relies upon for the grant of the application can be summarised as follows:

- (a) The finding that the applicant confessed guilt was not proved by the evidence adduced in the trial within-a-trial.
- (b) Even if the confession made by applicant does meet the requirements of s 217 of the Criminal Procedure Act 51 of 1977, it should have been excluded as is envisaged in s 35 (5) of the Constitution, RSA.
- (c) The trial court *erred* in finding that the firearm that was recovered from Xakuva Nobhekaphaya, which was linked balistically to the murder of the deceased, was the same faulty firearm that was handed over by the applicant to accused No. 2.
- (d) The trial court *erred* in finding that the evidence proved that the applicant and accused No. 2 had entered into a prior agreement or made common purpose to kill the deceased.
- (e) The trial court *erred* in finding that the applicant has an intention or common purpose with accused No.2 to possess the firearm and ammunition that were used to kill the deceased.

[4] At arguments stage, relevant to the issue of admissibility of the applicant’s confession, it was submitted that the evidence proves that the applicant had visible injuries because Mvu confirmed this in contra-distinction to Hanise’s evidence that the applicant had no injuries. Therefore, it was wrong for the trial court not to find that the version of the applicant that he was assaulted in order to confess was

reasonably possibly true. It was submitted that the applicant, as a fact, did tell Hanise and Mvu that he wanted a legal representative to assist him during the investigations and, in particular, to be present when Hanise was interrogating him.

[5] It was submitted on behalf of the State that at the trial Hanise and Mvu did not contradict themselves in any way. Further, the evidence does not show that the applicant made a request for the legal representative to participate in the investigations. The applicant also sees faults in the evidence led in the main case that the respondent could not support. It was submitted that the trial court should have come to the conclusion that the evidence of Mr Mphuthumi Dyantyi was not sufficient for the purposes of the ultimate convictions in that his discussions with the applicant “were nothing more than an attempt by accused No. 1 to stop accused No. 2 and Mr Xolobile in their plan to kill the deceased.”

[6] It was submitted further on behalf of the applicant that the mere fact that the confession was administered by the police was intimidatory and influential to the applicant. Counsel for the applicant also drew the attention of the Court to the case of *S v Majosi and Others* 1964 (1) SA 68 (N) where it was stated that the mere presence of a peace officer is seen by the accused as an intimidating factor the confession may nevertheless be excluded on the ground of undue influence.

[7] It was argued that the trial court should have found that the admission of the confession rendered the trial unfair and detrimental to the administration of justice within the meaning of s 35 (5) of the Constitution, which reads:

“Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.”

[8] Counsel for the appellant attacks the convictions on unlawful possession of a firearm and ammunition on the basis that the applicant was not found at the scene of crime in actual possession of these exhibits. In other words, the argument

is that the applicant was found incorrectly to be the possessor with intention to do so. The argument goes further to say that the evidence does not prove that the detentor (unidentified hitman) of the firearm and ammunition had the intention to possess these exhibits jointly. The Court was referred to the cases, dealing with robbery as being the authorities on which Counsel's contentions are based, namely: *S v Gcam-Gcam* 2015 (2) SACR 501 (SCA) at [30]; *S v Mbuli* 2003 (1) SACR 97 (SCA) at [71].

[9] However, it bears mentioning that the submission that visible injuries on the body of the applicant were proved by the evidence during trial within-a-trial is not correct. That Mvu contradicted Hanise on the issue of the existence of bodily injuries is also not correct. Further, that the applicant asked Mvu to cause his legal representative to be present in the investigations and during the time of recoral of the confession is not correct. The proved facts are that the applicant expressed a wish to be assisted by a legal representative in court. I remain unpersuaded, just as I was in the trial, that the applicant's constitutional rights to legal representative was breached.

[10] The circumstances under which the policemen obtained the confession of the applicant were canvassed fully during the trial. On objective facts I could not find anything untoward with regard to investigations carried out by Mvu and his colleagues. The same can be said about the involvement of Hanise. The submission that the facts state that Hanise had played a role of the investigator is not correct.

[11] I refer to the portions of the judgment on trial within-a-trial at paragraphs 23, 24, 25, 26, 27, 28, 29 and 30 as if specifically incorporated herein which demonstrate that this application for leave is, at its best, a show that this case is capable of being argued on appeal rather than a demonstration of existence of a reasonable prospect(s) of success on appeal.

[12] The high water mark of this application for leave is the criticism of the admissibility findings, it being contended that the version of the applicant ought to have been regarded as reasonably possibly true, *albeit* without reference being made to the strength of and the credibility of the state evidence. I am not persuaded by this contention. I re-iterate paragraphs 31 and 33 of my judgment in the trial within-a-trial, which read:

“[31] State witnesses based the claim of non-violence on a number of events, which are that, *inter alia*, the accused admitted killing the deceased as early as during their first interaction with both accused; hence the arrangement made to involve Hanise, Verster, Mdepha, Mjindi and Kilili. There is no need to recount full evidence on those events. Suffice it to say that the evidence of State witnesses is acceptable. Accused 1’s contradictory versions in this regard may be summarised as follows:

- (a) Hanise assaulted the accused when he was together with other police officials. At the same time the accused testified that he met Hanise for the first time being alone in the office when the discussions about a confession took place.
- (b) Hanise undressed the accused for the purpose of assaulting him. At the same time the accused testified that he undressed himself.
- (c) It was put to State witnesses that the accused will testify that he was ridden as a horse as he lay down on the floor to force him to confess guilt. On the contrary, he told the Court that he was merely trampled with feet on his body.
- (d) He did not confirm the version put to State witnesses that he had been forced to admit killing the deceased by means of being suffocated with a plastic bag.
- (e) Whereas in this case the accused admitted committing murder due to assault during the present trial, in the Magistrates’ Court during bail application he denied killing the deceased despite the fact that he had been assaulted to say so.”

...

[33] I have no hesitation in accepting the submission made on behalf of the State that the versions of assault advanced by both accused is fraught with material inconsistencies and contradictions. Their versions cannot be reasonably possibly true in the circumstances. Even if they were true they would not, on the consideration of all the evidence led, be the proximate cause of making self-incriminatory statements.”

[13] I understood the submission that the trial court *erred* in finding that the applicant was intimidated by the presence of the police to be based on the fact that Hanise should not have been the person to administer the taking of the applicant’s confession by reason merely that he is a policeman. However, it was not the applicant’s submission that the facts that are peculiar to this case, which are different from the facts in the case of *Gcam-Gcam*, proved biasness on the part of Hanise. My findings on the issue trenched on the proved facts as is shown in the judgment as follows:

“[34] What remains is the legal submission made on behalf of the accused that the confessions and admissions must be rejected by reason that Mvu, Hanise and Verster were justices of the peace who were compromised by the fact that they served in one and the same Provincial Task Team concerned in combating organised crime. There is uncontroverted evidence that these officials served under 3 different commands, namely Zwelitsha, East London and Mthatha. Mvu was a member of the Task Team stationed in Zwelitsha but deployed to Engcobo to investigate a murder case emanating from there. The three seats of the Task Team were completely detached from the investigating unit that was rooted in Engcobo. The submission cannot be sustained. The Appellate Court in the case of *S v Mbata En Andere* 1987 (2) SA 272 (A) stated that in the absence of a genuine suspicion of biasness towards the suspect, there is nothing irregular with the practice of an investigating officer in capacity of a peace officer taking a confession from a suspect.”

[14] Without regard to the proved facts the submission that the admission of the applicant’s confession should have been excluded by the trial court in terms of s 35 (5) of the Constitution should not have arisen. It had not been demonstrated in this case that the facts governing the manner in which Hanise went about to obtain

the confession were irregular. Consequently, it is hard to see how undue influence can arise. In the absence of objectively determinable facts pointing to a violation of constitutional right(s) of the applicant the trial court could not willy-nilly exercise discretion to exclude the confession.

[15] The grounds that the applicant did not enter into a prior agreement to kill coupled with the other ground that the murder weapon he supplied in order to achieve the purpose to murder the deceased do not raise reasonable prospects of success on appeal. They are merely arguable; moreso in that the facts of this case are distinguishable from the facts in the cases of *Gcam-Gcam*, and *Mbuli*. Quite correctly, proof of common purpose is not the ingredient of joint possession for the purpose of conviction under s 3 of the Firearms Control Act. In this case, however, the supplying of the murder weapon for use by a hired-assassin that was later ballistically linked to the murder made the applicant a joint possessor of the weapon. In this case actual possession of the exhibits by the applicant at the murder scene is not a relevant factor or the reason for conviction on unlawful possession of the firearm and ammunition.

[16] Therefore, the application for leave against the convictions must fail.

AD SENTENCE

[17] The over-arching ground of appeal against sentence is not founded on misdirection that was committed, but it is that the sentence imposed is shockingly inappropriate in that it is out of proportion with the totality of the accepted facts in mitigation; such as that the applicant was a first offender, susceptible to rehabilitation and that he had been in custody for more than 8 years awaiting finalization of his case. In a sense, this Court is urged to grant leave by reason that it *erred* in not finding that the factors referred to constituted substantial and compelling circumstances which justify imposition of a sentence lesser than life

imprisonment. These contentions must be given a short shrift. There is no reasonable prospect of success on appeal on those grounds. The approach adopted by the trial court that the offences involved in this matter are serious is not challenged. In terms of s 15 (1) of Act 105 of 1997 the offence of premeditated murder here carries a mandatory sentence of life imprisonment, or in terms of s 51 (3) a lesser sentence if substantial and compelling circumstances are proved by the evidence. The list of factors mentioned on behalf of the applicant are not such circumstances. The sentences under sections 3, 15 (2) and 90 of the Firearms Control Act 60 of 2000 are mandatory, meaning that the crimes created in terms of that Act are also serious. Such circumstances as would mitigate the sentences under the Firearms Control Act were duly taken into account. This Court is not being told that the trial court had a room to do more than what it did. Therefore, it is unlikely that the appeal court will impose a different sentence other than life imprisonment. On those considerations the application for leave to appeal against sentence must also fail

[18] In the result the following order shall issue:

“The application for leave to appeal against both the convictions and sentence imposed is dismissed.”

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

For the Applicant	:	Adv. Halam
	:	c/o LD Tsengiwe Attorneys
		MTHATHA.

For the Respondent : Adv. M. Siyo
: The Director of Public Prosecutions
MTHATHA.