



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: **01/2016**

In the matter between:

SIMPHIWE TSHABALALA

Applicant

and

THE STATE

Respondent

CORAM: DAFFUE, J

HEARD ON: 07 JUNE 2019

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 07 JUNE 2019

- [1] The applicant was convicted on several counts with two co-accused in March 2016 and sentenced to effective imprisonment of 18 eighteen years.

[2] Applicant specifically instructed his attorney, Mr Reyneke, at the time not to apply for leave to appeal. This is apparent from the record. I refer to pages 83 and 84 of the transcribed record in respect of the proceedings on 17 March 2016 and I quote:

“Mr Reyneke and Mr Tshabalala I understand that you have applications for leave to appeal, do you want to have an adjournment and we can carry on tomorrow morning?

MR REYNEKE M’lord may I ask that I can just approach accused 1 and 2 here in court and hear of those are still my instructions, otherwise we might postpone and then I do not have an application, I might not have. May I ask that we take a short adjournment so that I can just consult them?”

After an adjournment of 10 minutes we went back to court and I quote the following conversation:

“MR REYNEKE I have consulted accused 1 and 2. I have explained to them the legal principles applicable to an application for leave to appeal and my instructions are not to proceed with an application for leave to appeal on either the conviction or the sentence.

COURT On either?

MR REYNEKE On neither one of the conviction or the sentence.

COURT Thank you.

MR REYNEKE There will be no application, thank you.

COURT Mr Tshabalala?

MR TSHABALALA I have consulted Mr Shezi, we are bringing no application M’lord.

COURT You mean you are going to come later with one?

MR TSHABALALA Not at all.”

[3] Contrary to the specific instructions, the applicant now avers in paragraph 2 of his affidavit in support of an application for condonation as follows:

“2. On 16 March 2016, I was convicted and sentenced by the Honourable Justice Daffue, seated at the Harrismith Circuit of the Free State High Court. At the time, I did not instruct my Attorney to Apply for Leave to Appeal, as I wanted think about the matter and to appoint private Counsel to pursue a possible Application for Leave to Appeal.”

[4] Applicant’s present version is in direct contradiction with his instructions three years ago.

[5] I accept that courts lean over backwards and often close their eyes when convicted prisoners apply for condonation, even when relying on flimsy reasons. In *casu*, applicant failed to show what has been done in the period of three years. The default has not been explained properly as is expected by our courts; however the application for condonation is not opposed by the State.

[6] Applicant’s version in paragraph 4 of his affidavit that he always had the intention to apply for leave to appeal is contradicted by the transcribed record. However, I shall consider the merits of the application.

[7] I also find it quite unfortunate that I have to consider an application at this late stage, based on a transcribed judgment and sentence that were never presented to me earlier for

perusal and approval. I never had the opportunity to verify the record.

[8] In the short time available to me since I received the application for leave to appeal on 28 May 2019 I did my best to ascertain the correctness of the typed judgment and sentence. Fortunately I kept my handwritten notes. I detected several mistakes when perusing the document on 6 June 2019 and there was not time to arrange for the editing of, for example wrong quotations and referrals to authority have not been corrected. I just mention one mistake: Heher AJA is typed as Hare AJA.

[9] The applicant relies on several grounds of appeal. In my questioning of Mr Reyneke, he specifically indicated that he had communication with the applicant in respect of the application for leave to appeal and that the applicant instructed him that those were the only grounds of appeal to rely on. I quote from the application:

“1. **AD CONVICTION**: That the *court a quo* erred in –

- 1.1 Accepting the evidence by the State witnesses despite them being unreliable, contradicting their own – and other witnesses’ versions;
- 1.2 Rejecting Applicant’s version of an alibi despite the absence of DNA or fingerprints at the scene and the Complainant being unable to point Applicant out at an Identification Parade, yet he did so only in Court. According to the Complainant he was not at the scene of arrest, yet the Court rejected Applicant’s version that the Complainant had assaulted Applicant at the said scene;

- 1.3 Accepting the numbers depicted on Applicant's warning statement to be that of Applicant;
- 1.4 Accepting the evidence of the erstwhile Accused 4, being called in terms of Section 204 of Act 51 of 1977, without applying caution to his evidence.

2. **AD SENTENCE:**

- 2.1 The sentence is shocking and severe. The Court erred in not properly analysing Applicant's personal circumstances;
- 2.2 Applicant's personal circumstances, including his young children and ill mother's care were not taken as mitigating factors so to ultimately sentence Applicant to a lessor sentence."

[10] I do not intend to deal in any detail with the grounds of appeal, save to say the following:

- 10.1 I summarised the evidence fully in the judgment and made a proper and detailed evaluation of the evidence, the legal position and the submissions of the parties.
- 10.2 The State witnesses collaborated each other on crucial aspects indicated and although I detected minor discrepancies, these were insufficient for rejecting the versions based on unreliability as alleged.
- 10.3 Applicant was indeed identified at the ID parade by Mr Maritz and the allegation in the grounds of appeal is totally wrong. I made a particular finding as to why Mr Maritz identified him at the ID parade, while his wife, Mrs Maritz, failed to identify applicant at the ID parade.

- 10.4 Mr Dladla, the Section 204 witness and a former co-accused, testified against applicant and his two co-accused. I accepted his evidence as credible and reliable, after having cautioned myself as the law dictates.
- 10.5 It was not necessary to rely on any DNA or fingerprint evidence in order to convict applicant – the case against him and his co-accused was overwhelming.
- 10.6 In the light of the totality of the evidence I rejected applicant's evidence and his alibi as false and thus not reasonably possibly true. The versions of the three accused were fanciful and so improbable that it was rejected as false. The person, Tshepo, who allegedly took applicant's car to visit his ill grandmother, he being a friend of the applicant, returned with applicant's car, laden with firearms and other stolen items. On applicant's version, he and accused two were innocently waiting for the food they had ordered at the café. Accused three was an innocent passer-by at the stage when applicant's car collided with a vehicle of one of the farmers that pursued it. Tshepo was nowhere to be seen afterwards. The accepted evidence contradicted the applicant and his co-accused's version. All three accused and Mr Dladla were occupants in the applicant's vehicle, laden with stolen firearms and other items, when the collision occurred.

- 10.7 There was no reason to reject the cell phone numbers on applicant's warning statement as those belonging to applicant and his mother as testified to by him the investigating officer.
- 10.8 The evidence of Mr Dladla – the section 204 witness - was most definitely considered with caution. I made a point to stipulate the authorities in that regard and critically examined his evidence, also finding that he did not explain satisfactorily why Jabulani, Mr Maritz's employee, would contact him in particular to arrange the robbery. Mr Dladla's version was corroborated on several expects by several State witnesses and also objectively pertaining to the cell phone communication between him and the accused.
- 10.9 Applicant may count himself fortunate that he received an effective sentence of 18 years imprisonment only. Even Mr Reyneke, who also appeared for him at the trial, submitted that a sentence between 15 – 18 years imprisonment would be reasonable. I really considered a harsher sentence as the record reflects, but ultimately decided against that.
- 10.10 The applicant's personal circumstances paled in comparison with the seriousness of the crimes and the interests of the community. In any event, none of those circumstances can be seen to be substantial and

compelling circumstances to deviate from the prescribed minimum sentences.

[11] I am of the opinion that the appeal would not have a reasonable prospect of success. There is also no other compelling reason why the appeal should be heard.

[12] Should the applicant want to petition the Supreme Court of Appeal, he should ensure that the typed judgment and sentence be represented to me for verification and editing (to exclude all typing errors) and eventual approval thereof.

[13] The application for leave to appeal the convictions and sentences is dismissed.

J P DAFFUE, J

On behalf of Applicant : Mr JD Reyneke
Instructed by : Legal-Aid South Africa
BLOEMFONTEIN

On behalf of Respondent : Adv DW Bontes
Instructed by : Office of the DPP
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