CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 54/10
[2010] ZACC 16

In the matter between:

RUBY CHARMAINE MARAIS Applicant

and

THE STATE Respondent

Decided on : 21 September 2010

JUDGMENT

THE COURT:

Introduction

[1] The applicant, Ms Ruby Charmaine Marais, is currently serving a sentence of life imprisonment, having been convicted of the 'contract murder' of her husband. Her case is agonising because it raises the horrific spectre of domestic violence and, in particular, the dilemma of an abused woman who may resort to murdering her partner by engaging others to kill him. On this the Supreme Court of Appeal had much to say in the leading

judgment of *S v Ferreira and Others*.[1] It found contract killing arranged by a battered woman, and depending on her subjective state of mind and motive, may constitute self-defence provided that the killing is objectively justifiable and is thus a complete defence to a charge of pre-meditated murder.

[2] The applicant was convicted of pre-meditated murder by Dlodlo J sitting on circuit in the Western Cape High Court (High Court) with two assessors. Thereafter, the High Court refused her application for leave to appeal against the murder conviction but granted her leave to appeal to the Full Court of the High Court against sentence only. Unhappy with the refusal, Ms Marais petitioned the Supreme Court of Appeal for leave to appeal against her conviction. On 19 May 2010, it refused leave to appeal without furnishing reasons for the decision.

[3] The applicant, through her daughter, a practising attorney, has now approached this Court for leave to appeal against her conviction and sentence by the High Court. It is not inappropriate to observe that the applicant's appeal against sentence is still pending before the Full Bench of the High Court. To this matter we revert when we later consider whether it is in the interests of justice to hear an appeal on sentence whilst it is still pending before the High Court. However, first, we narrate a few salient facts.

[1] 2004 (2) SACR 454 (SCA).

[4] Ms Marais was charged as accused 6, together with five other people, for the murder of her husband, Mr Jacobus Petrus Marais. The essence of the charge was that she had arranged the murder by engaging the other accused to commit a so-called "contract murder" of her husband. However, before the trial commenced, Mr Ivan Sefoor (accused 1) and Mrs Caroline May (accused 5) became state witnesses.[2] The other accused were Mr Ricardo Piedt (accused 2), Mrs Hester Ronika Afrika (accused 3) and Mrs Elizabeth Lawerdien (accused 4). Mr Piedt was found to be the person who delivered the multiple stab wounds that killed the deceased and he, Mrs Africa and Mrs Lawerdien, together with the applicant, were convicted as co-perpetrators of the murder.

[5] During her trial, the applicant raised the defence that she was a battered woman who had been suffering at the hands of her deceased husband for many years. She had come to a point where she could no longer stand the abuse, assaults and what she saw as repeated rape by her husband. She explained that she had arranged with Mrs May and Mrs Afrika for the deceased to be given a "hiding" but that when she arranged her husband's "hiding" she was not herself because she had abused tranquilizers. She testified that she had arranged for the "hiding" to take place some 30 metres from the front door of their residence, in the hope that the deceased would phone her from his mobile phone for help; that she would then help him and that thereafter he would treat her better and with more respect.

[2] In terms of the provisions of section 204 of the Criminal Procedure Act 51 of 1977. In essence the section provides that, should a witness agree to provide incriminating evidence in a frank and honest manner, the court will discharge that witness from being prosecuted for the offence or offences to which the incriminating evidence relates.

[6] The High Court rejected the applicant's defence as improbable and untrue. It found that she was not a battered woman and that she had committed a calculated murder because of financial greed and gain.

[7] In this Court, the applicant challenges the conviction and related sentence imposed upon her by the High Court. Her pivotal complaint is that the trial court breached her right to a fair trial guaranteed under section 35 of the Constitution when it dismissed her defence of being a battered woman and consequently found her guilty of murder.

[8] The State opposes her application for leave to appeal. It contends that her defence was correctly rejected on the facts, and that she was properly convicted of pre-meditated murder which was motivated by monetary considerations. The murder was well-planned over a number of weeks. It was accordingly not surprising that the Supreme Court of Appeal rejected her petition for leave to appeal.

Should leave to appeal be granted?

[9] It is by now trite that an application for leave to appeal should be granted only if two important considerations are satisfied. The first is whether the application raises a constitutional issue. The second is whether, if it does, it is in the interests of justice to hear the appeal. Where the interests of justice lie will depend on a myriad of relevant considerations, chief of which, but not solely decisive, are prospects of success.

Constitutional issue?

[10] We have explained that the applicant contends that she has been denied a fair trial guaranteed by section 35 of the Constitution. At best, her case is that, in rejecting her defence to the charge of murder, the trial court wrongly found that she was not a battered woman. Had it found so, she would have been entitled to an acquittal. The instant question to resolve is whether her complaint presents a constitutional issue.

[11] In *S v Boesak* we observed that a litigant's dissatisfaction with the factual mistakes of the Supreme Court of Appeal regarding the evidence which had been presented by the state against the accused at trial does not, in itself, constitute a constitutional matter.[3] Later, in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*,[4] we again made plain that—

> ". . . where the only issue in a criminal appeal is dissatisfaction with the factual findings made by the SCA, and no other constitutional issue is raised, no constitutional right is engaged. . . . ."[5]

[12] The applicant readily acknowledges that her dissatisfaction with the factual findings made by the trial court that she is not a battered woman does not engage a constitutional right. Her case is different, she says. She contends that in contrast to

[3] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 15.

[4] [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC).

[5] Id at para 52. This holding has been affirmed by this Court in several subsequent cases. See *Minister of Safety and Security v Luiters* [2006] ZACC 21; 2007 (3) BCLR 287 (CC) at para 27; *S v Van Vuuren* [2005] ZACC 11; 2005 (2) SACR 1 (CC); 2005 (7) BCLR 639 (CC) at para 4.

Boesak,[6] her appeal raises a constitutional issue. This is so because it relates to the application of legal rules that are meant to ensure a fair trial. She claims that the High Court has misapplied the legal rules "applicable to criminal trials and the leading of evidence, particularly insofar as they relate to the context of the battered woman syndrome". This, she says, has compromised the fairness of her trial.

[13] She advances five interrelated grounds of appeal that support the core complaint that, in reaching the conclusion that she was not a battered woman; the trial court misapplied certain legal rules. First, she draws attention to her and other evidence led before the High Court which, she says, supports her version that she was a battered woman and asserts that the trial court ignored that evidence when it considered the question whether she was an abused woman. Second, she argues that because the High Court misunderstood the battered woman syndrome, it erroneously found that she was not a battered woman. Third, she states that the High Court disregarded the rule against inadmissible evidence and improperly took evidence into account which it should have disregarded. Fourth, she claims that the High Court has committed several material misdirections by making erroneous inferences on the facts; or by ignoring the evidence that is contrary to its other conclusions; or by disregarding the evidence that is supportive of her defence; or by holding that she is a liar. She invites us to hold that these grounds, taken together, lead to the conclusion that she has not had a fair trial guaranteed under the Constitution.

[6] Above n 3.

[14] The final ground the applicant advances is that the trial court misdirected itself by failing to apply the legal rule set out in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*.[7] That rule states that "[i]f a point in dispute is left unchallenged in cross- examination, the party calling the witness is entitled to assume that the unchallenged witness's evidence is accepted as correct."[8] She argues that because her evidence on being a battered woman was never seriously contested in cross-examination, her legal advisers were entitled to accept and did accept that it was not necessary to lead further evidence in this regard. She claims that she realised for the first time when the merits judgment of the High Court was delivered that her defence of being a battered woman had been rejected. She further contends that if she had realised during the course of the trial that her evidence that she was a battered woman was in dispute, she would have led additional evidence to support that defence.

[15] We have rehearsed the "legal rules" that the applicant says have been breached by the trial court. They seem to relate to the caution a trial court should observe when it makes factual findings. However, aside from the trappings of "legal rules", the pith of her complaint is no more than that the factual determinations of the High Court on the battered woman defence are incorrect. The high watermark of her case is no more than that the High Court was wrong on the facts. Her complaint is simply that the trial court misdirected itself in the manner in which it evaluated and made factual determinations.

[7] [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

[8] Id at paras 61-3.

On this reasoning it was mistaken in rejecting her evidence that she had arranged for her husband to be killed because she was a battered woman. Her dissatisfaction is over a factual finding that stabs at the heart of her defence. But even so, in itself, the dissatisfaction with the finding does not constitute a constitutional issue.

[16] Ordinarily, this would be the end of the matter. Absent a constitutional issue, an application for leave to appeal would fail. One question, however, remains.

Further evidence on the battered woman syndrome

[17] That question is whether it is open to this Court to receive further evidence that could upset the conviction of the High Court or to remit this matter to the trial court or to the Supreme Court of Appeal in order to receive further evidence. This enquiry is prompted by two matters. The first is the applicant's assertion that had she known before the judgment of the trial court was delivered that her defence of a battered woman was disputed; she would have sought leave from that court to lead further evidence. The record before us shows that she did not seek to tender fresh evidence when she sought leave to appeal before the High Court or when she petitioned the Supreme Court of Appeal. In this Court too her notice of motion does not carry a prayer to lead new evidence. As we show later, even if she had sought to tender new factual matter she faces considerable obstacles.

[18] The second matter that prompts an enquiry into whether further evidence should be entertained is that this Court has received, somewhat belatedly, an application from Tshwaranang Legal Advocacy Centre (Tshwaranang) to be admitted as *amicus curiae* and to be granted leave to present written and oral argument. The main thrust of their submissions is that the trial court misunderstood the defence of a battered woman syndrome and Tshwaranang seeks to make legal submissions on the appropriate ways in which courts ought to deal with the victims of domestic abuse and their response to the abuse. Importantly, Tshwaranang also seeks to rely on a report containing expert evidence on domestic violence. Put simply, it seeks to introduce new matter that was never tendered before the trial court and that is directed at contesting the correctness of the factual findings of that court on the battered woman syndrome.

[19] An application for leave to lead further evidence by an accused person who is convicted of any offence before the High Court is regulated by section 316(5)[9] of the

[9] Section 316(5) provides:

> "(a) An application for leave to appeal under subsection (1) may be accompanied by an application to adduce further evidence (hereafter in this section referred to as an application for further evidence) relating to the prospective appeal.
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> (b) An application for further evidence must be supported by an affidavit stating that—
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> (i) further evidence which would presumably be accepted as true, is available;
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> (ii) if accepted the evidence could reasonably lead to a different verdict or sentence; and
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> (iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.
>
> (c) The court granting an application for further evidence must—
>
> (i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and

Criminal Procedure Act.[10] An application to re-open a case for further evidence after a conviction must be made by the accused at the time when the application for leave to appeal is made before the High Court or before the Supreme Court of Appeal disposes of the appeal. The power of the Supreme Court of Appeal to receive further evidence derives from section 22(a)[11] of the Supreme Court Act.[12] However, once an application for leave to appeal has been disposed of by granting or refusing it, the High Court that has finally determined the matter is rendered *functus officio* and thus ceases to have the power to entertain an application to lead further evidence unless the conviction is set aside and remitted to the High Court by the Supreme Court of Appeal.[13]

[20] By parity of reasoning, it seems plain that once the Supreme Court of Appeal has considered an application for leave to appeal and has refused it, in other words, once the appeal procedure has been exhausted, it is not open to the High Court that entered the conviction or to the Supreme Court of Appeal that has refused leave to appeal, to re-open

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(ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness."

[10] Act 51 of 1977.

[11] Section 22 provides:

"Powers of court on hearing of appeals. The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power—

(a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary. . . ."

[12] Act 59 of 1959.

[13] *S v Vontsteen* 1972 (4) SA 1 (TPD) at 4G; *S v Swanepoel* 1983 (1) SA 434 (A) at 450H-451F.

a concluded case or, put otherwise, to consider an application to receive further evidence thereafter.[14] This position was confirmed by the Supreme Court of Appeal more recently in the matter of *Britz v The State*.[15]

[21] For the sake of completeness we draw attention to three well settled substantive requirements for re-opening a case after a criminal conviction in the High Court.[16] There must be an adequate explanation for the delay. The evidence must be probably true and reliable. And, lastly, if admitted the evidence must lead to a substantive reversal of the outcome of the case.

[22] This Court does not have before it an application from Ms Marais to re-open her criminal trial for further evidence. For that reason, we neither have an explanation for the delay nor an inkling of the probative value of the new matter she might want to adduce and whether it may lead to the setting aside of her conviction. In any event, we have already held that the application before us does not raise a constitutional issue. It follows that, even if she had applied to tender new evidence, we would hold no power to re-open her case for further evidence. For the same reason, this Court would have no power to remit this matter to the High Court or the Supreme Court of Appeal if those courts have already disposed of her application for leave to appeal on the merits of the conviction.

[14] *Sefatsa and Others v Attorney-General, Transvaal and Another* 1989 (1) SA 821 (A) at 835H-836B.

[15] Supreme Court of Appeal, Case No 613/09, 27 May 2010.

[16] These elements are set out in the case of *S v De Jager* 1965 (2) SA 612 (A) at para 613D. Also see Du Toit *et al Commentary on the Criminal Procedure Act-Supplementary* (Juta & Co Ltd, Cape Town 1987) at 31-16A.

Should she decide to mount an application to set aside her conviction and seek leave to adduce further evidence it will have to be done within the constraints of section 316(5) of the Criminal Procedure Act. And to that end, she would have to take legal advice on which court, if any, is still available to her to initiate the application to re-open her case in order to lead fresh evidence.

[23] In conclusion on this aspect, we note that the Supreme Court of Appeal, in considering an application for leave to appeal that has been refused in the High Court, has power to grant leave to appeal either to it or to a Full Court of the High Court.[17] However, neither the Supreme Court Act nor the Criminal Procedure Act give this Court express power, when refusing leave to appeal in a criminal case, to undo a prior refusal of leave to appeal to another court, and to remit the matter to another court. The reason is, no doubt, that the relevant provisions of those statutes were drafted before this Court was created. The Constitutional Court Complementary Act[18] does not give this power either.

[24] In the case before us, the High Court granted leave to appeal to the Full Court on sentence, but refused leave to appeal on the merits of the conviction. The Supreme Court of Appeal, in considering the resultant application for leave to appeal to it, had power under the Supreme Court Act to grant leave to appeal on the merits of the appeal either to

[17] Above n 12 section 20.

[18] Act 13 of 1995.

it, or to the full court.[19] There is no explicit statutory or constitutional provision granting this Court an equivalent power when refusing leave to remit a matter to another court. Having found that there is no constitutional issue, this Court is, therefore, not empowered to set aside the refusal of leave to appeal by the Supreme Court of Appeal, and grant leave to appeal on the merits of the applicant's appeal to either the full court (which is already seized of her appeal on sentence), or to the Supreme Court of Appeal.

Conclusion

[25] The application for leave to appeal does not raise a constitutional issue and, thus, falls to be dismissed. What then is the fate of the party that seeks to be admitted as *amicus*? An application to be admitted as *amicus* is always ancillary and subservient to the main application in regard to which the *amicus* seeks admission. When the main application falters so must a request to become *amicus.*

Order

[26] The following order is made:

(a) The application for leave to appeal is dismissed.

(b) The application of Tshwaranang Legal Advocacy Centre to be admitted as *amicus curiae* is not granted.

[19] Above n 12 Section 20.

Ngcobo CJ, Moseneke DCJ, Brand AJ, Cameron J, Froneman J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Yacoob J.