CCT 01/95

IN THE SUPREME COURT OF SOUTH-AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: SS144/93

DATE: 14 JUNE 1994

In the matter between:

PEET RENS — Applicant

versus

THE STATE — Respondent

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JUDGMENT

ROSE-INNES, J: This is an application for leave to appeal against the applicant's conviction by this Court sitting with two assessors on a count of abduction and a second count of attempted murder and against the sentence imposed on the second charge of attempted murder.

The accused was convicted and sentenced on the 25th of May 1994. For the sake of completeness it is necessary for me to deal with the application as if the provisions of the Criminal Procedure Act relating to applications for leave to appeal against convictions in a criminal matter in the Supreme Court to the Appellate Division, are valid provisions. 20

The proposed grounds for appeal against the convictions have been set out fully in the Notice of Application file on applicant's behalf. The first ground is that the trial court erred in accepting the evidence of complainant, since the evidence was subject to the criticisms set out in the Notice of Application. The first is that his evidence was inherently contradictory. 30

This ground was not elucidated in argument. I refer

to the judgment at the trial with regard to the assessment of the complainant as an honest and satisfactory witness, subject to certain qualifications in regard to his reliability of recollection in certain respects. None of the grounds of criticism of this witness at the time was that he was self-contradictory, except in one unremarkable and insignificant respect and that was that he contradicted himself as to whether, when he was assaulted by the appellant, he was kicked on his left or his right leg. He 10 could not be faulted for self-contradiction in any significant respect.

The second criticism is that his evidence was contradicted by the evidence of the two independent state witnesses, Van der Merwe and Brand. In regard to the evidence of Van der Merwe it is not necessary for me to go into matters of detail. I do not need to recapitulate the discussion in the judgment of the Court. The evidence of Van der Merwe was totally destructive of the versions of the applicant and of the second accused as to the nature and the 20 place of the first assault which was committed by applicant upon the complainant. It was also totally destructive of the evidence of the second accused as to his conduct at the time of this assault.

The evidence of Van der Merwe showed up the testimony of the applicant at his trial to be a preconceived deliberate fabrication of fact, in order to establish the two spurious defences, on the charge of abduction that he was effecting a bona fide arrest on genuine suspicion that the complainant was a thief, and on the charge of attempted 30 murder that he was acting in self-defence.

There was much other evidence in the case, besides the evidence of Van der Merwe as to what happened in his presence in his own garden, which showed without any doubt at all that applicant's evidence was as I say in all material respects a prefabricated tissue of lies. This is dealt with in the judgment. I for example, point to the facts that there was no weapon found after the shooting, whether a knife or a screwdriver, anywhere in the vicinity where the complainant was left lying unable to move after 10 the shooting, to the fact that the applicant attempted to suborn his co-accused into falsely testifying that there was a screwdriver in the second accused's motor car which had been used and left there when the second accused worked on the loudspeakers to the radio in his motor car. It was not contested at the trial that applicant did attempt to induce second accused to give this false evidence, that it was false evidence, that the loudspeakers were never worked upon and there were no such tools or weapons in the motor car at the time of the shooting of the complainant. I refer to the 20 facts which show that there was no intent in the mind of either of these accused to affect an arrest or to hand over the complainant to the police. These and other factors showed that the evidence of both accused, could not be relied upon and I am satisfied that there is no prospect of another Court coming to a different conclusion.

By contrast, the evidence of Van der Merwe showed up no such falsehood in the evidence of the complainant in relation to his initial assault. It did, however, show that his evidence that he took his bag to the premises of 30 the witness Brand, after he had been assaulted on the premises of Van der Merwe, was incorrect. The bag had been

left on the lawn of Van der Merwe's premises. I am satisfied that on this mistake in his evidence no Court would reject him as an unreliable or untruthful witness.

In regard to the evidence of Brand, it corroborated the evidence of the complainant that he sought help at the front door and on the front stoep of Brand's house where he was fetched by the applicant. The evidence of Brand completely negated applicant's evidence that applicant found the complainant hiding behind a bush in the garden and apprehended him there and returned to the motor car. That evidence was part of the fabrication by the applicant to create an illusion of suspicious behaviour on the part of the complainant.

Brand's evidence, which is the evidence of an independent witness, shows that that part of the fabrication, the apprehension of the complainant in the shrubbery in his garden, did not take place.

The evidence of Brand demonstrated the lack of credibility of the evidence of applicant. The evidence of Brand also showed that the complainant's evidence was unreliable in regard as to whether he was fetched from Brand's front stoep and front door by the applicant only or by the applicant and second accused. Brand says it was only one man who came to fetch the complainant and take him to the motor car whereas complainant had testified that he was fetched by both the accused and that the second accused had made certain threats to him at the time he was fetched.

The Court dealt in its judgment with the assessment of this discrepancy in the evidence of the complainant. It was the gravest discrepancy in his evidence. The Court is satisfied that another Court would not take a different view

in regard to this discrepancy. It was not a ground for rejecting as either false or unreliable the evidence of the complainant of the nature of the assaults upon him that morning.

After careful reassessment of the case it appears quite unlikely that a Court of Appeal would infer from these peripheral criticisms of the evidence of the complainant, that is to say criticisms in relation to peripheral facts and not the main facts in issue on the two charges, that the applicant cannot be found to be a credible witness on the principal facts and issues. Anothr Court would not find that his evidence is to be rejected and that the palpable lies told by the applicant should be preferred.

It is then said that the evidence shows that the complainant was unsatisfactory in that he had a motive to implicate both the accused throughout the trial in that he did this for material gain in an action for damages that might be instituted, or because he desired the conviction of both the accused at the trial.

The complainant without a doubt desired the conviction of the two accused who were involved in his abduction and in his assault. The judgment of the trial court shows that both accused were implicated, to the extent found. It is not an appropriate criticism of a complainant in a case of grievous crime such as this, that his evidence implicated the accused who were guilty of the offences of which they were convicted. It is also not an appropriate criticism of the evidence of a man who was assaulted and terrorised, shot and maimed in the manner in which he was by the applicant. It is not a criticism of his evidence that he seeks to implicate justly the wrongdoers who committed the offences.

I am satisfied that another Court will not find improper motive on the part of the complainant in the giving of his evidence.

Then it is said that his evidence is clearly the evidence of a lying and untruthful witness. I refer to the judgment of this Court which deals fully with an assessment of his worth and his deficiencies as a witness and I am satisfied that another Court would not interfere with the credibility findings of this Court at the trial. 10

It is said on applicant's behalf that the evidence of the single complainant witness was insufficient to establish mens rea on the abduction, nor intent to kill on the attempted murder. These questions of a guilty state of mind are also discussed in the judgment of the trial court. Once it was shown, and I am satisfied that another Court would not find to the contrary, that on the attempted murder charge the defence of self-defence was spurious, and it was transparently spurious, then it seems to me that no other Court would find that the seven shots fired with the firearm 20 at the complainant by applicant and the four shots at least which struck him, and three of which grievously wounded him, that that shooting was or could possibly be otherwise than with an intent to kill as found by the Court.

It is then said that because of the disparate location of the wounds sustained by the complainant, his version of the shooting is not to be preferred to the version of the applicant. There is no merit whatsoever in this argument.

Certain of the shots missed the complainant, one grazed 30 his temple, another smashed the left-hand side of his jaw, another hit him on his left thigh and another entered his

chest, passed upwards through the chest cavity and the left lung and smashed the vertebrae and tore a main artery in his neck. The wounding is perfectly consistent with the evidence of the complainant that he was shot at a distance of some 2½ to 3 paces while he was standing facing the applicant with his left side slightly turned towards him and was further shot while he lay on the ground. The wounds are also consistent with the version of the applicant relating how he pursued the complainant down that road, how he grabbed him by the shoulder and how the complainant turned around upon him, stabbed him in the hand, and how applicant crouched down and shot the complainant in self-defence. 10

The evidence shows that that version of applicant is untenable for anyone reading the record. There was no such knife or screwdriver. There was no such pursuit. The evidence of the applicant relating to the whole of the shooting incident was palpably false. That false version may very well be consistent with what is described as the disparate wounding of the complainant. The location of the various wounds is not evidence upon which any inference one way or the other as to the nature of the shooting can be drawn. 20

It is then further said that the Court had reservations as to the reliability and the veracity of the complainant due to its not accepting his evidence that the accused robbed him of his bag and its contents, that both accused accompanied him to the vehicle at Mr Brand's house, that while driving to Sandringham Road, second accused told him that he was to die, and that immediately before the shooting in Sandringham Road there were some words exchanged 30

between the two accused in relation to the handing over of the gun to applicant.

In considering the case against the second accused, the Court decided that it would give the second accused the benefit of the doubt as to whether the complainant's evidence of the threats made by second accused should be relied upon. The Court's view was that those threats that he would be shot, that he would be killed, and the discussion relating to the handing over of the firearm to 10 applicant at the scene of the shooting in all probability did take place precisely as the complainant testified. His evidence was probably true. But because he had been shown to be inaccurate in his recollection of the events which took place at the house of Mr Brand, the Court gave the benefit of the doubt to the second accused and declined to convict him of being a particeps to attempted murder.

As appears from the judgment of the Court, the Court's position was not that the complainant was lying in regard to threats and discussions about a firearm at or immediately 20 before, the shooting. That evidence of threats and the evidence of the conversation relating to the handing over of the firearm, was evidence which if true, would be decisive of second accused's guilt as an accomplice to attempted murder. The Court, therefore, decided that that evidence of words spoken and the handing over of the firearm had to be proved beyond reasonable doubt. The Court had much doubt. Non Constat that the Court found that the complainant was lying in his evidence in relation to the threat of death or in relation to a conversation about the handing over of the 30 gun.

In the further proposed grounds of appeal, at page 5

paragraph (b) of the application it is said that the Court relied on the testimony of second accused to corroborate the evidence of the complainant, in order to convict applicant of abduction and murder.

This whole ground is misconceived. I need say no more than that the Court found the second accused to be an unreliable and untruthful witness. The Court accordingly in no way accepted his evidence as corroboration of complainant's evidence. That would be a rudimentary mistake 10 which this Court certainly did not commit. A perusal of the judgment shows that the evidence of the second accused was castigated by the Court as being false and untruthful and was certainly not relied upon as corroboration.

The error in this submission on behalf of the applicant arises because it so happens that second accused's evidence of the manner of the shooting is the same in most respects as that of the complainant. The Court remarked upon the similarity. The fact that an untruthful witness gives 20 evidence of the manner in which the shooting occurred, which coincides with the evidence of the complainant, is not corroboration of the evidence of the complainant, and it was not so held to be.

At page 6 paragraph (c) of the Notice of Application, reference is made to the evidence of Dr Siroky. No Court will regard this evidence of the doctor as of any significance in the decision of this case. The evidence of the doctor was for the reasons stated in the judgment, unreliable. It stated no findings by the doctor, but 30 merely a note on his report of what he had been told was the case namely that the applicant had been stabbed by a knife

or a screwdriver. The doctor, of course, misread his own report and was not man enough to admit the serious error he made in evidence. He read the word "screwdriver" to be the word "secondary" and added the word "infection" to his reading which word was not in the report which he was reading.

The doctor's evidence in this case reflects his complete incompetence in regard to forming any opinion, or recording any opinion, or indeed recording any medical 10 observation at all at the time of his examination.

For these reasons I am not disposed to grant leave to appeal against the convictions. It seems to me that there is no likelihood that another Court would come to the conclusion either that the spurious untruthful defences raised by applicant can possibly be true, or that the evidence of the complainant supported by the real evidence relating to the wounding, does not prove beyond reasonable doubt the commission of the two offences.

In regard to sentence I do not propose to go into such 20 detail. These offenses were brutal, inhumane, violent, vicious with a complete disregard for whether the complainant lived or died as a result of the shooting. It is an atrocious case, in the true sense of the word atrocity. It is the gratuitous assaulting of a complainant while on his peaceful way towards work, his abduction and transportation out of Kraaifontein village for a distance of some six kilometres to a suitably remote place at a country road where he was told to get out of the motor car and where he was shot in order to kill him and where by the grace of 30 God he survived a truly atrocious wounding. It is suggested that because the applicant has not committed any similar

offences before, that these offences do not merit imprisonment. It is suggested that because the applicant has lost his job, his employment and has not been able to maintain the bond payments on his smallholding and has accordingly suffered financial loss because of his commission of these offences, one should have a feeling of sympathy and leniency towards him, in a case which would not inculcate sympathy for him in any reasonable court.

It seems to me that the sentence of ten years imprisonment on the second charge and the fine and the suspended sentence on the first charge are not in these circumstances overly severe punishments. It seems to me that the sentence of imprisonment was the only justifiable sentence having regard to the nature of the offence. I am unconvinced that there is any likelihood that the sentence of imprisonment of ten years would be reduced by another Court.

I would accordingly DISMISS the application for leave to appeal against the sentence.

That brings me to the final consideration in this case. The submission was that in terms of Section 25(3) of the Constitution Act of 1993, the applicant has an appeal as of right. Section 25(3) forms part of chapter 3 of the Constitution and sets out certain of the fundamental rights contained in chapter 3. Section 25(3)(h) provides:

> "Every accused person shall have the right to a fair trial which shall include the right (h) to have recourse by way of appeal or review to a higher Court than the Court of first instance."

It was submitted that this affords as one of the fundamental rights under the Constitution, a right of

appeal. That submission, if correct, would have as a consequence that the provisions of the Criminal Procedure Act 1977 Section 316(1)(b) are not binding upon this Court since they inhibit the right of appeal. In terms of Section 316 the appeal is subject to the leave of the Supreme Court on an application for leave to appeal. The appeal is not as of right. See S.315(4) of Act 51 of 1977.

The submission is that these provisions of Section 316 the Criminal Procedure Act, 1977 are unconstitutional because they are repugnant to Section 25(3)(h) of the Constitution. Section 33 of the Constitution which deals with limitations of fundamental rights under the Constitution, provides as follows:

> "33(1) The rights entrenched in this chapter may be limited by law of general application provided that such limitation -
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> (a) shall be permissible only to the extent that it is -
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> (i) reasonable; and
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> (ii) justifiable in an open and democratic society based on freedom and equality; and
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> (b) shall not negate the essential content of the right in question, and provided further that any limitation to -
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> (aa) a right entrenched in Section 10,11,12, 14(i), 21, 25 or 3(1)(d) or (e) or 2; or
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> (bb) a right entrenched in Section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair

political activity, shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary."

As I understand these provisions the right entrenched in Section 25(3)(h) to an appeal or review, is one that can only be limited by a law of general application, as the Criminal Procedure Act, 51 of 1977 undoubtedly is, if such limitation in addition to being reasonable is also necessary. 10

It may be arguable that there may be considerations which render the restriction of a right of appeal reasonable and necessary. This Court has no jurisdiction to decide the question. In regard to the jurisdiction of this Court, in matters of a constitutional nature, Section 101(3)(c) of the Constitution invests this Court with jurisdiction in respect of any enquiry into the constitutionality of any law applicable within its area of jurisdiction, other than an Act of Parliament. It is quite apparent, reading this provision with the provisions of Section 98 governing the 20 jurisdiction of the Constitutional Court, that this Court has no jurisdiction to rule upon the constitutionality of an Act of Parliament and that that jurisdiction is the sole jurisdiction of the Constitutional Court in terms of Section 98(2)(c).

The procedural provisions in Section 102 of the Constitution make it clear in my opinion how the Supreme Court when confronted with a constitutional matter in any proceeding has to act.

Section 102(1) provides: 30

"If, in any matter before a provincial or local division of the Supreme Court, there is an issue

which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of Section 98(2) and (3), the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision: Provided that, if it is necessary for evidence to be heard for the purposes of deciding such issue, the provincial or local division concerned shall hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court.

(2) If, in any matter before a local or provincial division, there is any issue other than an issue referred to the Constitutional Court in terms of sub-section (1), the provincial or local division shall, if it refers the relevant issue to the Constitutional Court suspend the proceedings before it, pending the decision of the Constitutional Court."

It seems clear that the question of the constitutionality of Section 316(1)(b) of the Criminal Procedure Act 1977, in regard to applications for leave to appeal, is a matter which is solely for the decision of the Constitutional Court. It has been raised in these proceedings in the manner which I have described. It is in the interests of justice that that question should be decided, because in the present case the right of the applicant to appeal against his convictions and his sentence may turn upon whether he has an appeal as of right or only with leave in terms of the provisions of the Criminal

Procedure Act. Accordingly, it seems to me that I am obliged to refer the matter to the Constitutional Court for its decision.

In terms of Section 102(2), I am in that event obliged to suspend the proceedings presently before me in the application for leave to appeal, pending the decision of the Constitutional Court.

I might add that if the Supreme Court, when confronted with a question of the constitutionality of an Act of Parliament, as is the case here, can decide the matter before it by reference to other considerations than the question of constitutionality of the Act of Parliament, it will then proceed to decide the matter on such other grounds. Where, however, there are no other grounds open to the Court to decide the issue, other than deciding upon the invalidity of an Act of Parliament by reason of its repugnance to the Constitution, then the issue must be referred for decision to the Constitutional Court.

The order which I accordingly make is as follows:

> The present proceedings before this Court in the application for leave to appeal against the convictions and the sentence at the main trial are suspended pending the decision of the Constitutional Court upon the following matter, namely whether in terms of Section 25(3)(h) of the Constitution, applicant has an appeal as of right against his convictions and sentence, notwithstanding the provisions of Section 316 of the Criminal Procedure Act, 1977; and, incidentally thereto, whether the aforesaid provisions of Section 316 of the Criminal

Procedure Act, 1977, are unconstitutional and of no effect by reason of repugnance to the provisions of Section 25(3)(h) of the Constitution.

L.A. Rose Innes.

ROSE-INNES, J

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OORSKRYFSTER SE SERTIFIKAAT

Ek, die ondergetekende, sertifiseer hiermee dat die voorafgaande, tot die beste van my vermoë en sover dit hoorbaar is, 'n ware en juiste afskrif is van die oorspronklike getuienis wat deur middel van 'n meganiese opvangtoestel opgeneem is in die saak van:

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DIE STAAT TEEN	:	PEET RENS EN JAMES DOWNEY	
OORSKRYFSTER	:	L KALIS [signature]	
SAAKNOMMER	:	SS144/93	
DATUM VOLTOOI	:	20.9.94	
LIASSEERNOMMER	:	H22.9	
NAGESIEN DEUR	:		DATUM:
GEKORRIGEER DEUR	:	[signature]	DATUM: 17.10.94

SNELLER OPNAMES (KAAP) (EDMS) BPK, KAAPSTAD

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