IN THE NORTH WEST HIGH COURT, MAHIKENG

CASE NO: CC 56/2018

Reportable: YES/**NO**

Circulate to Judges: YES/**NO**

Circulate to Magistrates: YES/**NO**

Circulate to Regional Magistrates: YES/**NO**

In the matter between:

XANDER BYLSMA Applicant

and

THE STATE Respondent

DATE OF HEARING : 11 DECEMBER 2020

DATE OF JUDGMENT : 18 FEBRUARY 2021

COUNSEL FOR APPLICANT : ADV. P.F PISTORIUS SC
with ADV. I J NEL

COUNSEL FOR THE RESPONDENTS : ADV. JJ SMIT SC

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 18 February 2021.

ORDER

Consequently, the following order is made:

Leave to appeal against conviction and sentence to the Supreme Court of Appeal <u>alternatively</u> to the Full Court of this Division is refused.

JUDGMENT

<u>HENDRICKS DJP</u>

<u>Introduction</u>

[1] This is an application for leave to appeal. Mr. Xander Bylsma, the applicant, was convicted on two counts of murder and sentenced to life imprisonment on each count. He applies for leave to appeal to the Supreme Court of Appeal (SCA), alternatively to the Full Court of this division against conviction as well as the sentence imposed.

[2] The application for leave to appeal is promised on the following grounds of appeal:

> *"AD CONVICTIONS:*
>
> *1. The honourable court erred:*
>
> *1.1 in finding that the State has proven its case against the applicant beyond a reasonable doubt,*
>
> *1.2 in rejecting the defence of the applicant as not reasonably possibly true and rejecting it as false;*
>
> *1.3 by provisionally admitting the statements made by the applicant to Colonel Koeghlin and Colonel Lange as evidence against him, more particularly, in not making a final ruling on the admissibility of the statements made by the applicant to Colonel Koeghlin and Colonel Lange before the closure of the case for the respondent;*

1.4 in finally admitting the statement(s) made by the applicant to Colonel Koeghlin as well as the statement and pointing out by the applicant to Colonel Lange as evidence against him, and only stating reasons for its admission at the end of the case upon giving judgment on the guilt of the applicant;

1.5 more particularly in admitting the evidence of a statement made by the applicant to Colonel Koeghlin as well as the statement and the pointing out by the applicant to Colonel Lange as evidence against him, rendered the trial of the applicant unfair;

1.6 in holding that the relevance of the evidence of Saunders was limited only to rebut the applicant's version that Saunders prescribed to him what to tell the police, more particularly:

1.6.1 in not finding nor considering that the witness, Chris Saunders, materially violated the fundamental rights of the applicant in terms of the Constitution by not warning him of his rights in terms of section 35 of the Constitution, more particularly his right(s) to remain silent, to consult with a legal practitioner of choice and the right not to incriminate himself;

1.6.2 in disregarding the fact that the witness, Chris Saunders, unduly influenced the applicant to incriminate himself with the commission of the offences, and more particularly, influenced, deceived and induced the applicant to waive his right to legal representation, despite the fact that he knew that a legal representative has been appointed for him;

1.6.3 in not considering, alternatively disregarding the fact that the applicant did not make an informed decision to make a confession and/or pointing out without seeking legal advice and/or assistance of a legal representative and/or understood the legal consequences of making same;

1.6.4 in not holding, nor considering the evidence of Saunders, that the applicant was not in his sound and sober senses, was aware that the applicant was under the influence of medication and was threatened with assault, was assaulted by Mr Stefanus Engelbrecht and was also fearful for his own life and that of his parents due to threats;

1.7 in not holding that the admission of the evidence so obtained, violated the applicant's rights in terms of the Bill of Rights and should have been excluded as its admission had rendered the trial unfair or otherwise be detrimental to the administration of justice;

1.8 in holding that the State proved beyond a reasonable doubt the admissibility requirements in terms of section 217(1) of Act 51 of 1977 that the statement and pointing out by the applicant was made freely, voluntarily, without undue influence and whilst the applicant was in his sound and sober senses;

1.9 im mero motu evoking the provisions of section 186 of the Criminal Procedure Act 51 of 1977, by calling the witness Impumelelo Ndzonda (driver of the truck) whilst the evidence of this witness was essential to the just decision of the case, particularly with regard to the defence raised

by the applicant and was pertinent to the determination of the guilt and/or innocence of the applicant;

1.10 in not attaching enough, alternatively sufficient weight to the undisputed evidence that unknown (foreign) DNA was found under the nails of Chanelle Hough (deceased in count 1) as well as on the strap that was used to throttle Mama Engelbrecht (deceased in count 2);

1.11 in not attaching any, alternatively sufficient weight to the lack of objective and proper investigation by the investigating officer in the case;

1.12 in not taking into account and/or sufficiently into account the material contradictions and the improbabilities in the evidence of Brandon Victor;

1.13 in not taking into account, alternatively sufficiently into account the contradictions and improbabilities in the evidence of Anastasia Visser;

1.14 in finding on the mere evidence of Captain Botes, that the applicant was in Stella after 3:26 and in Vryburg at 5:01;

1.15 in rejecting the evidence of the applicant in totality as not reasonably possibly true;

1.16 in finding the applicant guilty on both counts of murder.

AD SENTENCES:

2. The honourable court erred:

2.1 by imposing sentences that induces a sense of shock which was disproportionate to all the circumstances of the case and disturbingly inappropriate;

2.2 more particularly in not finding that the applicant presented the court with factors which cumulatively constituted "substantial and compelling circumstances" in terms of the Criminal Law Amendment Act, Act 105 of 1997, justifying the court to deviate from the prescribed minimum sentence of life imprisonment on count 1;

2.3 in imposing a greater sentence than the prescribed minimum sentence on count two;

2.4 by under-emphasizing the personal circumstances of the applicant, more particularly his youthfulness, the fact that he was emotionally immature, the fact that he could still be rehabilitated and a first offender;

2.5 by over-emphasizing the seriousness of the offences as well as the interests of the community."

[3] Section 17 of the Superior Courts Act 10 of 2013 deals with applications for leave to appeal. It reads thus:

"Leave to appeal

17. *(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—*

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[4] The grounds of appeal can be divided into different groups. The first relate to the alleged procedural irregularities committed by this Court. It is contended that this Court erred when it provisionally admitted the statements made by the applicant to Colonel Coglin and Colonel Lange after conclusion of the trial-within-a-trial and did not provide reasons for so doing at that point in time. Reasons were only provided in the main judgment at the end of the trial. The submission is that the mere fact that this Court only gave a ruling without giving any reasons for it and only gave reasons in the final judgment, was a fatal irregularity in that it infringed the applicants' right to a fair trial. The applicant, so it was further contended, were placed in a position of uncertainty and in the dark with regard to the totality of the case against him, after the close of the case for the State. Reliance for this proposition was placed on the case of **Van der Walt v S** [2020] ZACC 19, by Mr. Pistorius SC on behalf of the applicant.

[5] With due respect, the facts of the Van der Walt case is quite distinguishable from that the present case. In the Van der Walt case the Regional Magistrate only dealt with the evidence against the appellant (accused) in the judgment. Unlike in this case where a ruling was given admitting the statements as evidence. The contention that the appellant was caught unaware is unmeritorious as the appellant knew that the statements were provisionally admitted as evidence against him, before the closing of the case for the State.

The basic principles of a fair trial and that the applicant (accused) was not caught unaware about the case he had to meet, was observed.

[6] It has been an age old common practice that reasons for a decision either to allow or reject a statement after a trial-within-a-trial was conducted, are only given at the end of the main trial for obvious reasons. One being that the reasons will surely include credibility findings with regard to the witness(es) who testified during the trial-within-a-trial, including the accused. Such witness(es) may again testify in the main trial and the court would then have already made credibility findings, perhaps adverse, and would not be objective and impartial.

[7] Mr. Smith SC on behalf of the respondent (State) submitted that it was clear, before the State close its case, that these statements were admitted as evidence against the applicant as accused. At the close of the case for the State nothing happened that affected this ruling by this Court, that could have excluded these statements. The applicant could not have been in any position of uncertainty and in the dark with regard to the totality of evidence against him nor was he prejudiced with regard to the "late judgment of the final admissibility." Reliance on the Van der Walt judgment is with due respect misplaced.

[8] The second group or category of grounds of appeal relate to the admissibility requirements in terms of section 217 (1) of the Criminal Procedure Act 51 of 1977. It was contended that this Court erred in finding that the statements which the applicant made to Colonel Coglin and Colonel Lange were made freely and voluntarily, without undue influence and whilst the applicant was in his sound and sober senses. This, in the main, centers around the role which Mr. Saunders played to get the applicant in a "confession state of mind" and that the applicant waived his right to legal representation.

[9] This Court in its judgment found that the evidence of Mr. Saunders was not presented by the State to prove the contents thereof. The statement was presented to disprove that the applicant was told by Mr. Saunders what to say when making these statements. Mr. Pistorius SC conceded that this was indeed correct. However, he submitted that it did not end there. He submitted that Mr.

Saunders stole a march on the applicant with only one goal in mind and that is to hand him to the police after he persuaded him to make a statement incriminating himself in the commission of the offences. It was argued that Mr. Saunders, through his conduct, indeed influenced and misled the applicant, which caused the applicant to make these statements.

[10] It was contended that Mr. Saunders' role was underplayed and this Court and this Court should have found that Mr. Saunders played an integral role in inducing the applicant to make the statements to Colonel Coglin and Colonel Lange respectively. This Court provided comprehensive reasons for admitting these statements as evidence against the applicant. Same need not be regurgitated herein. This Court also made very strong credibility findings against the applicant. Once again, some need not be repeated herein.

[11] It was contended that this Court erred by placing too much reliance on the fact that the applicant fabricated his evidence with regard to what he was told by Mr. Saunders and ignored the fact that these statements were not freely and voluntarily made. This is incorrect. Reasons of this Court's findings are contained in the main judgment. With regard to the right to legal representation, the evidence tendered clearly proves that the applicant made an informed decision and waived his rights with regard to be legally represented. This much was established by both Colonel Coglin and Colonel Lange. It is correct that the evidence of Adv. Van Heerden is not mentioned in the main judgment. This does not mean that it was not considered. No judgment can ever be all inclusive. The applicant, being appraised of his right to legal representation, made an informed decision not to be legally represented.

[12] Thirdly, it was contended that this Court should have *mero motu* called the witness Epumelelo Ndzomba, the truck driver, as he was an essential witness in terms of the provisions of section 186 of the Criminal Procedure Act 51 of 1977 (CPA), as amended. The applicant was legally represented by an attorney as well as counsel during his trial. Counsel for the applicant, Mr. Nel, informed this Court during the trial that a subpoena was sent to the witness. That in his view may probably not be effective service. However, he indicated that because the

matter has long been delayed and in light of the instructions from the applicant, he does not want the delay the matter any further. It was decided that the applicant's case be closed without calling this witness. Once again, this was an informed decision taken by the applicant who instructed his legal team (attorney and advocate/counsel) to close his case.

[13] It is undoubtedly clear that the applicant and his legal team took this decision collectively which boils down to the fact that this witness was no longer considered by them to be an essential witness. No application was made to this Court either to have the matter postponed in order to get hold of the witness or to ask the State to assist in getting hold of this witness or even to apply to Court that this witness be subpoenaed. The contention that this Court ought to have *mero motu* ensured the attendance of this witness, despite the applicant's instructions and most probably the advise of his legal team (attorney and advocate/counsel) is with due respect unmeritorious. So too, is the contention that the failure to invoke the provisions of section 186 materially and fundamentally affected the fairness of the trial, wrong. I am holding a different view.

[14] Mr. Smit SC submitted, quite correctly in my view, that Mr. Nel told the Court that he did not want to waste time by trying to get a postponement to try and get hold of the witness. He never told the Court that he had a statement from this witness that indicated to him that the witness was an essential witness for the applicant's case. Quite the contrary. It seemed apparent that Mr. Nel did not have a statement from this witness, but merely a vague hope that the witness may benefit the applicant's case. On the further submission by Mr. Smit SC, this hope evaporated almost completely when it was shown that the applicant in all likelihood saw the Volvo truck on his way through Vryburg from Stella. I agree with this submission.

[15] In terms of section 186, a court is obliged to call a witness if that witness is essential to the just decision of the case. This was never the contention of Mr. Nel. He never stressed the fact that this is a vital important witness for the applicant's (accused's) case, nor did he request the Court to call the witness.

Section 186 comes into operation when a court, upon an assessment of the evidence before it, considers that unless it hears the evidence of a particular witness, it is bound to conclude that justice will not be done. That does not mean that a conviction or acquittal will not follow but rather that it will be arrived at without reliance on available evidence that will probably, not possibly, affect the result. If there is no explanation before the Court which justifies the calling of the witness and if the statement of the proposed witness is not amicable or is non-specific in relation to the relevant issues, it is difficult to justify the witness as essential rather than of potential value. None of the abovementioned information was submitted to the Court and there was no indication that the evidence of this witness will probably affect the result, as correctly submitted by Mr. Smit SC, on behalf of the respondent (State). On this basis too, I am of the view that this Court did not erred in failing to apply the provisions of section 186 of the CPA.
See: **Gabaatholwe and Another v S** [2003] All SA 1 (SCA).

[16] Having considered all the grounds of appeal and having listened to both counsel's submissions and after studying the respective heads of argument filed, as well as carefully perused the record and main judgment, I am of the considered view that no other court, as court of appeal, **would** come to a different decision than what this Court had arrived at with regard to the conviction. Leave to appeal against conviction should resultantly be refused.

[17] As far as sentence is concerned, it was submitted on behalf of the applicant that the sentence of life imprisonment on both counts is extremely harsh and it induces a sense of shock. Especially the sentence on count 2 which was not planned or premeditated. I am holding a different view. In the judgment on sentence, this Court dealt with all the principles applicable for the impositioning of a fit and proper, as well as a just sentence. None of the factors relevant for the impositioning of a just and appropriate sentence was either over-or under-emphasized but was carefully balanced in order to arrive at the sentence imposed. I am of the view that there are no reasonable prospects of success with regard to sentence too and that leave to appeal in respect of sentence too, should be refused.
See: **S v Malgas** 2001 (1) SACR 469 (SCA).

S v Matyityi 2011 (1) SACR 40 (SCA).

Order:

[18] Consequently, the following order is made:

Leave to appeal against conviction and sentence to the Supreme Court of Appeal alternatively to the Full Court of this Division is refused.

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R D HENDRICKS
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG.