IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED: **YES**

Date: ***23rd AUGUST 2017*** Signature: _____

CASE NO: SS120/2015

DATE: 2017-08-23

In the matter between:

ASHONDOLF, SEAN Applicant

and

THE STATE Respondent

JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

ADAMS J:

[1]. This is an application by the applicant for leave to appeal against his conviction by this Court (Louw AJ) on the 24th of March 2016. He also applies for leave to appeal the sentence imposed by the Court also seemingly on the 24th of March 2016. The applicant was convicted of assault with intent to do grievous bodily harm and sentenced to five years direct imprisonment. He was also declared unfit to possess a firearm.

[2]. The application for leave to appeal was only filed on the 24th May 2017. In terms of s 316(1)(a) and (b) of the Criminal Procedure Act 51 of 1977 *('the Act')* the application for leave to appeal against conviction and the resultant sentence ought to have been made by the applicant within fourteen days from the passing of the sentence or within such extended period as the court may on application and for good cause shown, allow. The fourteen day period expired on or about the 15th April 2016, which means that the applicant is required to be granted condonation in terms of s 316(1)(b)(ii). Such an application has indeed been filed by the applicant and I shall proceed to deal with same presently.

[3]. In terms of s 316(2)(a) the application for leave to appeal must be made to the judge whose conviction, sentence or order is the subject of the prospective appeal, provided that if the trial judge is not available, the application may be made to any other judge of the High Court concerned.

[4]. Louw AJ is no longer available. Therefore, this application comes before me in terms of the provisions of s 316(2)(a)(i) of the Act, read with s 17(2)(a) of the Superior Courts Act 10 of 2013, which provides that leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.

[5]. The applicant's application in terms of s 316(1)(b)(ii) for an extension of the period within which to make his application for leave to appeal is premised on the fact that he did not have the requisite funds to timeously brief his legal representatives to file the application for leave to appeal. This, coupled with the fact that since his conviction he has been incarcerated, have made it difficult for the applicant to comply with the period prescribed by s 316(1)(b)(i). He did however do his level best to ensure that in the circumstances of this matter he makes the application for leave to appeal as expeditiously as possible. His cause was also hampered by his legal representation, who had been arranged for him by others, and who left him in the lurch. His matter was not attended to as diligently and as expeditiously as it should have been. I am therefore satisfied that good cause has been demonstrated by the applicant for an extension of the period within which to file his application for leave to appeal. The application for condonation is in any event not opposed by the state.

[6]. The applicant also applies for leave 'to lead further and new evidence'. The new evidence which the applicant intends introducing at this late stage is that of two eye witnesses, one being his son and the other being a friend of the son, both of whom are alleged to have been present when the shooting occurred. No indication is however given of the details and particulars of their testimony and what it is that they will be saying that has not already been said.

[7]. In terms of s 316(5)(a) of the Act an application for leave to appeal may be accompanied by an application to adduce further evidence relating to the prospective appeal. In terms of ss (b) An application for further evidence must be supported by an affidavit stating that-

(i) further evidence which would presumably be accepted as true, is available;

(ii) if accepted the evidence could reasonably lead to a different verdict or sentence; and

(iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.

[8]. In terms of s 316(5)(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

(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.

[9]. The aforesaid provisions should also be read in conjunction with s 19(b) of the Superior Court Act, which provides that the Court exercising appeal jurisdiction may, on hearing the appeal, in addition to any power as may specifically be provided for in any other law 'receive further evidence'. S 19(c) provides that the appeal court also has the power to remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary. The aforesaid provisions are in my view not applicable as I am only seized with the application for leave to appeal and not the appeal itself.

[10]. I am however required to consider the application to receive new evidence at this stage of the proceedings, which is at the application for leave to appeal juncture.

[11]. In his founding affidavit the applicant stated that the reason why these two witnesses were not called at the trial of the matter, although they were available, was due to the fact that he 'was the victim of inadequate legal representation at the instance of my legal representative'. The applicant also expressed the view that the testimony of these two witnesses would advance the interest of justice and the court would have a full picture of what actually transpired. How this objective would be accomplished is not explained by the applicant especially since no indication is given by him of the detail of the evidence which these witnesses would give. There are no affidavits by these witnesses in support of the application. So, for all we know, the evidence of the witnesses may very well be in favour of the state. More apposite is the fact that it is assumed by the applicant and his application that the trial court did not have a full picture of what happened on the day of the shooting.

[12]. The State opposes this application. I am not persuaded that the applicant's affidavit complies with s 316(5).

[13]. In any event, I do not see the relevance of the new evidence. Put another way, in my judgment the applicant has failed to demonstrate, as he is required to do by the provisions of s 316(5)(b)(ii), that, if accepted the evidence could reasonably lead to a different verdict or sentence.

[14]. The judgment of Louw AJ was premised in the main on his factual findings, which, in turn, he had reached on the basis of probabilities coupled with the credibility findings relative to the witnesses called on behalf of the State

and the defence. The court had rejected the version of the applicant and found that, having regard to all of the evidence in the matter, his version cannot reasonably possibly be true.

[15]. The common cause facts of the matter are the following: A few days before the shooting the deceased and his friends had an altercation with the applicant's son, which resulted in the applicant's son being stabbed in the hand. This would understandably have angered the applicant, who on the day in question went looking for the deceased, whom he found sitting on the stairs of a bridge crossing over a railway line. The applicant, who is a police officer, testified that his intention was to arrest the deceased for armed robbery of his son on the 27th March 2015. My view is that he probably intended confronting the deceased about the assault on his son. Either way, at some point the applicant fired a shot, which hit the deceased in the lower leg. The deceased then fled the scene after having been shot, and, due to excessive blood loss, succumbed to his injuries. I interpose here to note that the deceased suffered two gunshot wounds, one to the left lower leg and the other to the right upper leg. The trajectory of the bullet, according to the expert medical evidence, indicated that the applicant, when he shot the deceased was at a lower level than the deceased. The exit wound to the left lower leg was 6cm higher than the entry wound.

[16]. The crisp issue in this matter is whether the deceased was shot whilst fleeing from the applicant or whether he was shot while attacking the applicant. The applicant's very elaborate version is that the deceased, when first confronted by the applicant, tried to flee by jumping over the side railing of the bridge. Thereafter, having landed on the ground, and faced with the applicant who by then had also descended down the stairs of the bridge to ground level, attacked the applicant with a knife. At that point the applicant shot the deceased once in the leg. The deceased thereupon dropped the knife and ran away. The court rejected the version of the applicant as being highly improbable.

Importantly, what weighed heavily on the court's mind was the objective medical evidence which clearly showed that when the deceased was shot he was at a higher level than the applicant. This means that the only reasonable inference and the irresistible conclusion to be drawn is that the deceased was shot at the time he tried to flee by jumping over the side railing of the railway bridge.

[17]. Central to the defence of the applicant was his claim that he acted in self – defence. That version has been rejected by the court on the basis of the probabilities which renders the said version unsustainable. No new evidence is likely to upset that finding. In other words, no matter what the evidence of any further witnesses may be, the point is that the version of applicant is unsustainable.

[18]. As to the power of the Court to hear further evidence, Corbett JA said in *S v N,* 1988 (3) SA 450 (A) at 458E - 459A:

'It is a power which the Court exercises only in exceptional cases for:

> "It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be reopened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty."

(Per Holmes JA in *S v De Jager*, 1965 (2) SA 612 (A) at 613B.) The possibility of the fabrication of testimony after conviction is an ever present danger in such matters (see *R v Van Heerden and Another,* 1956 (1) SA 366 (A) at 372H - 373A; *S v Nkala*, 1964 (1) SA 493 (A) at 497H; *S v Zondi,* 1968 (2) SA 653 (A) at 655F). For these reasons this Court has in a long series of decisions laid down certain basic requirements which must be satisfied before an application for the re-opening of a case and its remittal for the hearing of further evidence can

succeed. These were summarised by Holmes JA *in De Jager's* case supra (at 613C - D) as follows:

"(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial. H

(b) There should be a prima facie likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial."

....

A study of the reported decisions of this Court on the subject over the past 40 years shows that in the vast majority of cases relief has been refused: and that where relief has been granted the evidence in question has related to a single critical issue in the case (as to which see eg *R v Carr*, 1949 (2) SA 693 (A); *R v Jantjies*, 1958 (2) SA 273 (A); *S v Nkala* (supra) and S v Njaba (supra)).' J

[19]. One is here dealing with relevance. 'Relevancy is based upon a blend of logic and experience lying outside the law' (per Schreiner JA in R v Matthews and Others 1960 (1) SA 752 (A) at 758A - B). Relevance can never be reduced to hard and fast rules and some allowance must be made for unforeseen and extraordinary cases.

[20]. The contemplated evidence of these two witnesses is entirely neutral to the issue of whether the applicant acted in self-defence. In light of the rejection by the court of the applicant's version, for good reason in my view, the evidence of these witnesses is irrelevant to the issue. In my view the application failed to demonstrate the material relevance of the evidence of either witness which the applicant intends calling.

[21]. Therefore, in my judgment, the application for leave to lead further evidence therefore should be dismissed.

[22]. The application for leave to appeal by the applicant is couched in broad terms and is against the factual finding the Court made, some of which were based on circumstantial evidence. I am not convinced that the applicant has complied fully with the provisions of s 316(4)(a) of the Criminal Procedure Act, which provides that:

> 'Every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires to appeal'.

[23]. The sum total of the grounds upon which the applicant desires to appeal the conviction is that the State had failed to prove beyond a reasonable doubt the element of intention as a requirement of the crime of assault with intent to do grievous bodily harm. I have dealt with this aspect *supra*. The court rejected as false the version of the applicant, and then decided the matter on the basis of the evidence of the State witnesses, whose evidence was supported by the objective medical evidence. The only reasonable inference to be drawn from the evidence presented and accepted by the court was that the applicant had the intention to and did in fact cause grievous bodily harm to the deceased by shooting him in the leg. In all of the circumstances of the matter, the court could not find any justification for the action of the applicant, the least of which was the defence of self – defence. The deceased was attempting to flee when he shot by the applicant.

[24]. I can find no fault with the reasoning of Louw AJ.

[25]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may

come to a different conclusion to that reached by the trial court in its judgment. Section 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that *'the appeal would have a reasonable prospect of success'.*

[26]. For the reasons mentioned above, I do not believe that the appeal against conviction has a reasonable prospect of success.

[27]. As far as the sentence of five years direct imprisonment is concerned, the applicant appeals against the imposition of the sentence and avers that the sentencing court erred in its failure to consider correctional supervision as an option. The court erred in preferring custodial sentence when it was not warranted in the circumstances. It is also submitted on behalf of the applicant that the court erred in that it did not attach sufficient weight to the fact that the applicant was a first time offender.

[28]. The only question is whether, by imposing a sentence of five years imprisonment, having not found the existence of substantial and compelling reasons in order not to impose the applicable minimum sentence of five years imprisonment for assault GBH, the learned Judge *a quo's* decision is open to attack. In the context of this application for leave to appeal, the question is whether there is reasonable prospects of success on appeal against sentence.

[29]. The enquiry regarding the imposition of sentence on appeal is not whether the sentence was right or wrong but whether the court acted reasonably or properly in the exercise of its discretion. Whether the trial court exercised its discretion reasonably depends on whether considering all the

circumstances of the case the trial court could have reasonably imposed the sentence, which it did.

[30]. In addition, a court of appeal will interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly inappropriate or when the court, when imposing the sentence, committed a misdirection. Since *S v Rabie*, 1975 (4) SA 855 (A) it has consistently been held that the discretion to impose a sentence is pre-eminently that of the court imposing the sentence and that an appeal court should be careful not to erode such a discretion. The test then, is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

[31]. In *S v Salzwedel & Ano*, 1999 (2) SACR 585 (SCA), the Supreme Court of Appeal held that an appeal court can only interfere with a sentence of a trial court in a case where the sentence is disturbingly inappropriate or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably.

[32]. The applicant advanced one ground on which he bases his application for leave to appeal his sentence. It was submitted on behalf of the applicant that the sentencing Judge failed to attach due and sufficient weight to the fact the applicant was a first time offender. However, I am of the view that the sentencing court evenly balanced all the relevant factors. I am furthermore of the view that the applicant failed to show that the trial court misdirected himself or that any irregularity occurred or that the sentence is disturbingly inappropriate.

[33]. When all is said and done, the incident in question let to the death of a young man. A firearm was used in the commission of the offence. This is indicative of the severity of the crime, which in turn explains the Legislature decision to legislate a minimum sentence. Therefore, the aggravating circumstances far outweigh the personal circumstances of the applicant.

[34]. In the circumstances and applying the above principles to this case, I am of the view that the applicant has failed to show that the sentencing Judge Louw AJ exercised his discretion in a manner which would warrant interference by a court of appeal.

[35]. The judgments of the court *a quo* in respect of both the conviction and sentence are well reasoned and are based on the applicable legal principles.

[36]. I do not believe that the appeal has a reasonable prospect of success. Another court is, in my view, unlikely to come to a conclusion different than the one reached by Louw AJ. The application for leave to appeal therefore stands to be dismissed.

ORDER

[37]. In the circumstances the following order is made:

1. The applicant's application in terms of s 316(1)(b)(ii) of the Criminal Procedure Act 51 of 1977 for an extension of the period within which to make his application for leave to appeal is granted.

2. The applicant's application in terms of s 316(5)(a) of the Act to adduce further evidence relating to the prospective appeal is refused.

3. The application for leave to appeal the conviction is dismissed.

4. The application for leave to appeal the sentence is dismissed.

L ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	23rd August 2017
JUDGMENT DATE:	23rd August 2017
FOR THE APPLICANTS:	Adv Mkhabela
INSTRUCTED BY:	CHSM Incorporated
FOR THE RESPONDENT:	Adv Molwantwa
INSTRUCTED BY:	The National Director of Public Prosecutions, Gauteng