

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: SS95/2009

In the matter between:

THE STATE

and

SIBIYA, JACOB MIKE

Accused

SUMMARY

S PILG J:

LEAVE TO APPEAL- WHERE JUDGE DID NOT PRESIDE

- A court which must consider an application for leave to appeal the decision of a judge who is no longer available is at the disadvantage of not being able to bring into the equation the demeanour and credibility of witnesses unless the trial court made specific findings in that regard.
- Court preferring to err on the side of the caution and guard against applying any test higher than asking whether "*the appeal would have a reasonable prospect of success*".

S 209 OF CRIMINAL PROCEDURE ACT 51 of 1977

- The last part of s 209 indicates that an accused need not be linked to the crime scene; it is sufficient if the crime to which the confession relates was actually committed.

- The difficulty arose whether the evidence of the witness to whom the confession was made was sufficiently satisfactory to constitute proof beyond reasonable doubt, bearing in mind that on the facts s208 might also apply.
- Sufficiency of evidence in the circumstances of a case may, when s209 is applied, relate as much to the evidence led as to evidence not led by the State. Furthermore a proper application of s209, where the only other testimony relates to the commission of an offence, may require some other evidence, even if it is only as to motive which ordinarily would be irrelevant.
- The facts of the case may also expose possible risks inherent in a simple statement allegedly made by an accused which amounts to a confession being capable of receipt as evidence under the last part of s 209, where there are few practical safeguards against manufactured testimony and where consideration may be given to some additional cautionary measures as mooted.
- The issue comes down to the sufficiency of evidence and the pragmatic need to allow a court to make findings, as it does, on the evidence of an extra-curial confession made to a member of the public.