

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

29/9/2022
DATE

SIGNATURE

Case number: SS52/2020

In the matter between:

THE STATE

and

SUSANA CATHARINA HESTER MAGDALENA NOETH

APPELLANT

BERNARD NOETH

ACCUSED 2

RULING: APPLICATION FOR LEAVE TO APPEAL

AFRICA AJ:

- [1] Appellant, who was arraigned in this court on a charge of being an accessory after the fact to murder, was convicted and sentenced to 5 (five) years direct imprisonment, in terms of section 276 (1) (i) of the Criminal Procedure Act 51 of 1977 ("CPA"). It is against this conviction that appellant seeks leave to appeal.
- [2] The said application is brought in terms of section 316 of the CPA, which provides that: (1) (a) Subject to section 84 of the Child Justice Act, 2008, any accused convicted of any offence by a High Court may apply to that court for leave to appeal against such conviction or against any resultant sentence or order.
- [3] What has to be considered in deciding whether leave to appeal should be granted is whether there is a reasonable prospect of success. And in that regard more is required than the mere 'possibility' that another court might arrive at a different conclusion. As was stressed by this court in *S v Smith* 2012 (1) SACR 567 (SCA) para 7:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[4] In the case of *Kruger v The State*¹ it was stated that it is in the interest of the administration of justice that the test set out above should be scrupulously followed.

[5] The Appellant's grounds of appeal against the conviction are, in essence, that the court erred in:

1. Finding that there was a *prima facie* case made out by the state, at the close of the state's case;
2. That the state failed to prove the element of unlawfulness;
3. That the actions of the appellant do not constitute an accessory after the fact;
4. That the state failed to prove its case against the appellant beyond a reasonable doubt, because an election not to testify does not relieve the state of such burden;
5. That there is no evidence to show that there was a link between the appellant and the murders committed. Unlike theft being a continuing offence, an accessory after the fact to murder, is not an ongoing offence.

[6] The state in opposing the application argued that the actions taken by the appellant, constituted a positive act, by blocking the police. Further, the act of blocking the police, in conjunction with her actions when she informed the police that she did it for her husband, which stands before this court, uncontested, makes her guilty as an accessory after the fact to murder.

[7] At the outset, this court wishes to deal with the last ground of appeal raised, namely that because the police were not able to make contact with the appellant, ± 4 months after the Murders were perpetrated, this court, as the argument goes, will be extending the definition of an accessory after the fact.

To put it differently, the defence is saying that due to the lapse of time from the commission of the murders, to the time of the alleged actions of the appellant, the actions of the appellant do not constitute an accessory after the fact.

¹ (612/13) [2013] ZASCA 198 (2 December 2013).

- [8] When asked for any authority or case law to support this argument, that there is a certain time frame attached to being an accessory after the fact, the defence rightfully conceded that there was none. The reason being, in my considered view, is because such an argument is simply untenable. If the legislature intended for a time frame to be attached to being an accessory after the fact, it would have expressly provided for it. Further, putting a timeframe within which a person can be held liable as an accessory, will result in a travesty of justice.
- [9] The argument that the state failed to make out a *prima facie* case will be dealt with in conjunction with the ground whether the state proved its case beyond a reasonable doubt, notwithstanding the appellant's election not to testify.
- [10] This court during the trial, find that with reference to the case of *Nooroodien en Andere*² firstly, that it could not be said that the evidence of the state was of such a poor quality for it to be said that no reasonable court acting carefully, may convict and secondly the court does not look at the failure of accused 1 to report her husband's whereabouts in isolation. It is the failure to report the offence, coupled with other circumstances of the accused's conduct, which constitutes an association with the crime whereby material assistance is rendered to the principal offender.
- [11] Further, the court found that in the absence of any testimony by accused 1 under oath, it was seized only with the version as presented by the state and that the actions of accused 1 cumulatively, in my view satisfied the elements of an accessory after the fact to the commission of the crime, as accused 1 engaged in conduct intended to enable accused 2 to evade liability for his crime or facilitated him in the evasion of liability. This court still holds the same view, in this regard.
- [12] A further ground is that the state failed to prove the element of unlawfulness because the appellant's conduct in deciding not to entertain the police, can in no way be viewed as unlawful.

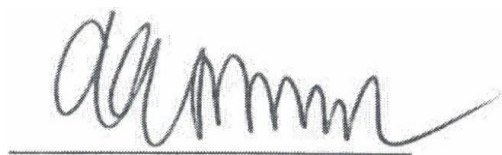
² 1998 (2) SACR 510 (NC).

[13] It is indeed important to examine the nature of assistance rendered to the perpetrator. In this case the court found that the actions of the appellant were directed at preventing the apprehension of her husband, thereby enabling him to evade liability. The unlawful element in my view is satisfied firstly by the appellant's knowledge of the fact that a crime was committed by her husband, as a prime suspect and secondly her association with the commission of such crime, through her conduct. The unchallenged evidence before this court is that the appellant was aware that her husband, as a suspect was being pursued by the police. Being armed with this knowledge, she severs all communication with the police, be it by blocking their numbers, not responding to their messages or changing her phone number, so as not to be traced or found. Appellant was well aware that if she maintained contact with the police as she did in the preceding months, that it may inevitably have led to her husband being apprehended. It is common cause that appellant was residing with her husband at time of his arrest. The fact remains that by breaking all contact with the police, appellant was well aware that in doing so, that she was unlawfully and intentionally protecting her husband and thereby assisting him to evade apprehension and thereby, justice. Appellant's actions were clearly directed at assisting her husband to evade liability. This knowledge of the unlawfulness of her actions is echoed in the appellant's words uttered to the police, namely that she did this because she loves him. Within the meaning of these words lies the appellant's understanding and appreciation of the unlawfulness of her actions, why else utter these words.

[14] It is the considered view of this court that *in casu*, there is no reasonable prospects of success.³

[15] The application for leave to appeal is accordingly dismissed.

³ and that no court of appeal could reasonably arrive at a conclusion different to that of this court.



A AFRICA
ACTING JUDGE OF THE HIGH COURT

Date Heard
Judgment handed down

28 September 2022
29 September 2022

Appearances:

On behalf of the State
On behalf of Accused 1
On behalf of Accused 2

Adv Badenhorst
Adv Mvatha
Adv Botha