CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 52/01

RETHEA BIERMAN Applicant

versus

THE STATE Respondent

Decided on : 11 June 2002

JUDGMENT

O'REGAN J:

[1] This is an application for special leave to appeal against a decision of the Supreme Court of Appeal in terms of rule 20 of the Rules of this Court. The applicant was convicted of murder and of two other offences relating to the unlawful possession of a firearm and ammunition by the High Court in Pretoria. She was sentenced to life imprisonment. Her subsequent applications for leave to appeal against the conviction were refused both by the High Court and the Supreme Court of Appeal.

[2] The applicant now seeks special leave to appeal to this Court on the ground that her constitutional rights were infringed by the High Court. In particular, she states that the High

Court's admission of the evidence of the Rev G Bothma, a minister of the Dutch Reformed Church, was in breach of her right to privacy (section 14 of the Constitution) and her rights to a fair trial (section 35 of the Constitution). She further asserts that if the Rev Bothma's evidence had not been admitted by the High Court, she could not have been convicted.

[3] The Rev Bothma testified that the applicant had confessed to him that she was guilty of the charge of murder during one of his visits to her in prison. He had been advised by his lawyers that these communications were not privileged and that he was therefore a competent and compellable witness. Counsel for the applicant in the High Court argued that the Rev Bothma's evidence should not be admitted, but after consideration Bosielo J decided to admit the evidence. It should be noted that the conviction of the accused rested on the testimony of several witnesses in addition to the Rev Bothma. A friend of the applicant, Mrs H Botha, testified that the applicant had also confessed her involvement in the crime to her on two separate occasions. There was also direct evidence of her involvement in the crime given by an accomplice, Mr C Nxumalo and there was circumstantial evidence given by an employee of the applicant, Mrs W Moeagi and by senior Superintendent J Fourie.

[4] The State opposes the application for special leave to appeal to this Court on two bases: first, on the basis that as the applicant did not raise the question of the infringement of her constitutional rights in her application for leave to appeal to the Supreme Court of Appeal, she is not entitled to seek leave to appeal to this Court on this ground. Secondly, on the basis that the applicant has no prospects of success upon appeal in that the conviction of the accused was not dependent on the admission of the evidence of the Rev Bothma.

[5] It appears from the High Court judgment that counsel for the applicant argued in the High Court that the evidence of the Rev Bothma should not have been admitted. In *Smit v Van Niekerk NO en 'n ander* 1976 (4) SA 293 (A) at 303 F-G, the Appellate Division rejected an argument that public policy required that statements made to a clergyman be privileged. It was argued before the High Court that the principle enunciated in this judgment was no longer valid in the light of the provisions of the Constitution, but this argument was rejected by Bosielo J who held that it would not be in the interests of justice to exclude the evidence.

[6] However, it appears from the papers before this Court that the applicant did not raise crisply the question of the common law principles governing the admissibility of the Rev Bothma's evidence in her application for leave to appeal to the Supreme Court of Appeal. In particular, she did not argue that the admission of that evidence resulted in an infringement of her constitutional rights, nor was any reference made to the common law position established in *Smit v Van Niekerk NO en 'n ander* despite the fact that these issues were canvassed before the High Court and dealt with in the judgment of Bosielo J.

[7] It is clear that special leave to appeal against a decision of the Supreme Court of Appeal will only be granted when it is in the interests of justice to do so.[1] This Court has held that in determining whether it is in the interests of justice to grant leave, prospects of success upon appeal are an important consideration.[2] It has also held that where the development of a rule of

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1 See *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) para 12.

2 Ibid. See also *S v Pennington and Another* 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) para 52.

the common law is in issue, this Court will be reluctant to grant an applicant leave to appeal directly to this Court and ordinarily requires the application to be heard first by the Supreme Court of Appeal.[3] The corollary of that rule is that where an applicant asserts that the common law rules require reconsideration in the light of the Constitution, such arguments must be placed before the Supreme Court of Appeal before being raised in this Court.[4]

[8] The applicant's failure to raise the constitutional issues concerning the admissibility of the Rev Bothma's evidence in her application to the Supreme Court of Appeal inhibits her ability to raise them now in this Court. As a result of that failure, this Court has not had the benefit of that Court's consideration of these issues which relate directly to established principles of the common law and to the application of such principles. The applicant's failure to raise the constitutional issues upon which her application to this Court is based in the Supreme Court of Appeal may well have been sufficient of itself to mean that her application to this Court should have been refused.

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3 See, for example, *Amod v Multilateral Motor Vehicle Accidents* Fund 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) para 33; *De Freitas and Another v Society of Advocates of Natal* 1998 (11) BCLR 1345 (CC) para 23

4 See *Lane and Another v Dabelstein and Others* 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) para 5.

[9] In addition, however, the applicant has also failed to establish that she has reasonable prospects of success in this Court. It is not in the interests of justice to grant leave to appeal against a criminal conviction on a point of law where a decision favourable to the applicant will not result in the conviction being set aside. The applicant's conviction in the High Court rested not only on the evidence of the Rev Bothma as described above but on the evidence of several other witnesses. We have before us the judgment of the High Court, as well as her application for leave to appeal to the Supreme Court of Appeal. We also have almost the full record of the proceedings in the High Court, a small portion of which was mislaid and could not be traced. We are satisfied on the material that is before us, that we are able to form a clear view that even if the Rev Bothma's evidence were to be held constitutionally inadmissible, there is no reasonable prospect that this would lead to the conviction being set aside.

[10] In the circumstances, therefore, this application for special leave to appeal must be refused. It should be made plain however that in refusing this application, this Court has not considered the question whether the common law principle enunciated in *Smit v Van Niekerk NO* (referred to above) is inconsistent with the spirit, purport or objects of the Bill of Rights. That is a matter that remains to be considered in the future in an appropriate matter.

Chaskalson CJ, Langa DCJ, Ackermann J, Du Plessis AJ, Goldstone J, Kriegler J, Madala J, Ngcobo J, Sachs J and Skweyiya AJ concur in the judgment of O'Regan J.

For the applicant: Du Toit, Swanepoel, Steyn & Spruÿt.

For the respondent: Director of Public Prosecutions, Pretoria.