



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

CASE NO: SS 27/2021

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
(3)	REVISED: No
08 April 2024 DATE	 _____ SIGNATURE

In the matter between:

THE STATE

Applicant

and

SEKGAPANE, RAYMOND

First Respondent

BEMBE, NOMTHANDAZO MERIAM

Second Respondent

JUDGMENT ON LEAVE TO APPEAL

YACOOB J:

INTRODUCTION

1. Mr Sekgapane and Ms Bembe were charged with the murder of Ms Bembe's 12 year old daughter, Nthatisi. On 27 March 2023 I convicted Mr Sekgapane of culpable homicide and Ms Bembe of murder, and on 19 October 2023 sentenced both to non-custodial sentences.
2. The state now seeks leave to appeal the sentences on the grounds that:

- 2.1. the court over-emphasised the personal circumstances of the respondents and under-emphasized the seriousness of the offences and the interests of the community;
 - 2.2. the court erred in finding that there were substantial and compelling circumstances that justified the departure from the prescribed minimum sentences, and that the court found that remorse on its own was a substantial and compelling circumstance;
 - 2.3. the court erred in imposing correctional supervision in the context that there is a scourge of gender-based violence and that potential offenders will therefore be encouraged to commit this kind of offence, and
 - 2.4. the sentence is shockingly inappropriate in the facts and circumstances of this case, and another court will come to a different conclusion.
3. The state's application was brought only on 18 December 2023, almost three months to the day after the sentence was handed down, where it is obliged in terms of section 316 read with 316B(2) of the Criminal Procedure Act, 51 of 1977, to do so within 14 days. An application for condonation was submitted with the application for leave. The delay was mostly occasioned by the request for transcripts and the need for a person other than the prosecutor who dealt with the matter in court to take the decision. The application was not opposed and I am satisfied that there was no undue delay. The application for condonation is therefore granted
 4. It was submitted for the state that leave should be granted simply because another court may come to a different conclusion, and that the test for leave to appeal on sentence, and in particular when the state seeks leave to appeal on sentence, is the same as the ordinary test for leave to appeal, now codified in section 17(1)(a)(i) of the Superior Courts Act, which provides that the court considering the application may grant leave only if the court is of the opinion that the appeal would have a reasonable prospect of success. It is by now established that this means that there is a realistic chance of the appeal succeeding, not just that there is an arguable case, or that there is a mere possibility.¹ Even if this court is not of the opinion that there is a reasonable prospect of success, section 17(1)(a)(ii) permits the grant of

¹ See for example *S v Smith* 2012 (1) SACR 567 (SCA) at [7] and *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA) at [23] and [24].

leave if there is some other compelling reason. However the state did not rely on the existence of any other compelling reason.

5. It is by now trite that another court will only interfere with the trial court's discretion with regard to sentence in very limited circumstances.² In order to find that the appeal would have a reasonable prospect of success, I must find that those circumstances exist.
6. However, even before I get to that consideration, I must consider the circumstances in which the state is entitled to seek leave to appeal a sentence. These too are very limited and constrained by statute. The reason for this is obviously that a convicted person is entitled to certainty once they are sentenced. Section 316B(1) of the Criminal Procedure Act provides that the state may appeal to the Supreme Court of Appeal only "where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute." The state was unable at the hearing of this matter to make any submissions regarding the interplay between section 316B(1) of the Criminal Procedure Act and section 17(1) of the Superior Courts Act. I therefore requested the parties to make further submissions dealing specifically with this issue, after the hearing of the leave to appeal application. Unfortunately neither set of submissions engaged with the question whether, where it is specifically the state seeking leave to appeal sentence, the question whether there is a reasonable prospect of success includes a consideration whether there is a contention that a grave failure of justice would otherwise result or whether the administration of justice may be brought into disrepute.
7. In my view this is necessary for the state to establish in order to demonstrate that it is entitled to appeal sentence, and therefore a *conditio sine qua non* to a finding that there is a reasonable prospect of success. The bar is necessarily much higher for the state than it is for a convicted and sentenced person. In my view the state has not established a basis for a finding by the appeal court that either of those factors exist.
8. Even if it were not, I am not satisfied that another court will find that this court misdirected itself in exercising its discretion. Each relevant factor was carefully considered, including the state's contentions of this being an instance of gender-

² *S v Kgosimore* 1999 (2) SACR 238 (SCA) at [10]

based violence, and the contention that this sentence may be considered by other potential offenders to be some kind of encouragement. It is clear from my judgment in imposing sentence that I consider these particular circumstances to be highly exceptional, and that this kind of sentence for this kind of offence should always be the exception rather than the rule.

9. All of the grounds raised as grounds for appeal have been dealt with in my sentencing judgment and having reconsidered them, I do not see that there is a reasonable prospect of an appeal court finding that the exercise of discretion should be interfered with. I am not convinced that, in the specific facts of this case, the sentence induces a sense of shock.
10. The application for leave to appeal is therefore dismissed.



S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the Applicant: Adv E Moseki

Counsel for the Respondent: Adv R Greying

Date of hearing: 20 February 2024

Additional submissions: 27 February and 6 March 2024

Date of judgment: 08 April 2024