



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: 66 /2017

In the matter between:

NTSANE ISIAH TOGOWE

APPLICANT

AND

THE STATE

RESPONDENT

JUDGMENT BY: P MOLITSOANE, J

DELIVERED ON: 21 OCTOBER 2022.

- [1] The applicant was charged with one count of murder and one count of robbery with aggravating circumstances. He was convicted as charged and sentenced to life imprisonment on the murder charge and to 15 years' imprisonment on the robbery charge. He seeks leave to appeal to the Full court of this Division, alternatively, to the Supreme Court of Appeal. This Court caused certain directives to be issued with regard to the filing of the Heads of Arguments with a view to deal with the application in chambers and as a result dispensed with oral submissions.

- [2] The application for leave to appeal is out of time and the applicant further seeks condonation for the late bringing of the application for leave to appeal. The State does not oppose the condonation application and having regard to the reasons given by the applicant I am of the considered view that condonation for the late bringing of the application for leave to appeal should be granted.
- [3] The applicant further filed a notice to lead further evidence in the appeal.
- [4] Section 17 of the Superior Court Act 10 of 2013 states:

“Leave to appeal

17. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

- [5] Section 17(1) requires that an applicant seeking leave to appeal is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success in the appeal. In *Democratic Alliance v President of the Republic of South Africa and Others*¹ the Full Court held as follows:

“The test as now set out in s17 constitutes a more formidable threshold over which an applicant must engage than was the case. Previously the test was whether there was a reasonable prospect that another court might come to a different conclusion. See, for example, *Van Heerden v Cronwright and Others* 1985(2) SA 342 (T) at 343 H. The fact that the Superior Courts Act now employs the word ‘would’ as opposed to ‘might’ serves to emphasise this point. As the Supreme Court of Appeal said in *Smith v S* 2012(1) SACR 567 (SCA) at para 7;

‘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.’”

- [6] The judgment is assailed on the following grounds:

AD CONVICTION

- (i) That the Court erred in finding that the State proved its case beyond a reasonable doubt against the applicant having regard to the contradictions in the state case which the Court found to be immaterial;
- (ii) That the court erred in not properly analyzing and evaluating the evidence of state witnesses and further not considering inherent improbabilities in the state's version;
- (iii) The appellant did not enjoy proper and adequate legal representation;

¹ (21424/2020) [2020] ZAGPPHC 326(29 July 2020) paras [4] – [5].

AD SENTENCE

- (i) That an effective term of imprisonment is strikingly inappropriate and induced a sense of shock.

[7] The gravamen of the attack on the conviction lies with the submission that this court erred in finding that the identification of the appellant by the two state witnesses was reliable and credible. This court, having cautioned itself of the dangers of identification dealt fully with the reasons for accepting the version of the state and rejecting that of the appellant. The applicant seems to labour under the impression that the acceptance of the version of the state in respect of the identification was solely based on the clothing the two witnesses described in order for this court to accept the evidence of identification. This cannot be correct.

[8] This court took into account, inter alia, the time this incident took place, the mobility of the scene, the time the witnesses had the applicant in sight in order to make a reliable identification. The facial and physical characteristics of the applicant as described by the witnesses, the reliability of the identification parade evidence tendered relating to the identification parade as well as the version of the appellant. It is not expected of two or more people who make an observation to give a carbon copy of the evidence or observation they make, what the court has look at, is where there are differences in their observation, whether such differences are so material as to taint the reliability and credibility of their evidence. In this case the court did not deal with the evidence piece meal. The acceptance of the evidence of the two witnesses was not based on the evidence of the clothing alone. On the ground raised I cannot find that another court will come to a different finding.

- [9] The appellant seeks to cast aspersions on his erstwhile legal representative by alleging that he did not enjoy proper and /or adequate legal representation. This submission is rejected outright. Mr Tshabalala, an experienced Counsel appeared for the applicant. On the first day of the hearing, he successfully applied for the proceedings to be postponed at the instance of the applicant in order that he and the applicant could have access to the bail proceedings in the lower court.
- [10] The reason for seeking the bail proceedings was to show that the applicant was assaulted by the police at the time of arrest. Throughout the hearing the court had from time to time allowed him to consult with the applicant, most of the time at the request of the applicant. Throughout the proceedings the applicant gave Mr Tshabalala instructions from time to time regarding the evidence which was led. The appellant cannot point a single instance which could likely point to the ineptness of Mr Tshabalala. This submission that the applicant had no proper representation is rejected and no other court will find in favour of the applicant in this regard.
- [11] With regard to the sentence the applicant submits that the sentence imposed is shockingly inappropriate. The accused simply asserts that the court erred in finding that no substantial and compelling circumstances exist to warrant deviation from imposing the prescribed minimum sentence. The applicant was convicted on two counts which attract the imposition of prescribed minimum sentences. The attack of the sentence in this application is only geared at the murder charge. The appellant does not seem to challenge the finding that no substantial and compelling

circumstances exist in the robbery charge. These offences happened at the same time and were intertwined. The applicant still has not demonstrated which factors this court must take into account in finding that there exist any substantial and compelling circumstances warranting deviation from imposing prescribed minimum sentences. The sentence imposed is not shockingly inappropriate and having regard to the fact that the deceased was shot and killed in his house while still unclad after taking a shower, I am of the view that there are no prospects that another court will decide this matter differently.

- [12] The applicant also implores this court to grant him leave to lead further evidence in the appeal. The basis for this application is encapsulated in the following parts of the appellant's founding affidavit:

4.

"The basis for the application to lead further evidence will be laid by way of the medical records of myself pertaining to the 31st of March 2016. This medical record indicates that I sustained facial injuries after the 30th of March 2016 and thus had no marks on face as testified by Ms Maliehe.

5.

I humbly request the honourable court to find that this is indeed new evidence on the following reasons:

- a. The medical records are available and true reflection of the treatment that I received at National Hospital on the 31st of March 2016;*
- b. I will further submit that the acceptance of the medical records could lead to a different conclusion as to my guilt on the said convicted charges;*

c. *The medical records were not tendered during the trial as my legal representative did not have sufficient time to obtain the said records as he did not fully consult with myself in order to give proper instructions.'*

[13] *S v De Jager*.² laid down the requirements the court must observe in an application where leave to lead further evidence on appeal is sought. In *St Clair Moor and another v Tongaat-Hulett Pension Fund and others*³ the court said the following:

“[36] The test for the admissibility of further evidence on appeal is well established (*S v de Jager* 1965 (2) SA 612 (A) at 613C – D). An applicant must meet the following requirements:

- (a) there must be a reasonably sufficient explanation, based on allegations which may be true, why the new evidence was not led in the court a quo;
 - (b) there should be a prima facie likelihood of the truth of the new evidence; and
 - (c) the evidence should be materially relevant to the outcome of the case.
- Further evidence is allowed only in exceptional cases (*De Aguiar v Real People Housing (Pty) Ltd* [2010] ZASCA 67 2011 (1) SA 16 (SCA) para 11).”

[14] Leave will only be granted for new evidence to be adduced in exceptional cases only. During the trial the appellant sought the copies of the record of the proceedings of the lower court to prove that he was assaulted. Much time was spent by the defence during cross examination to prove the assault. At no stage during the said cross examination did the appellant confront any of the state witnesses that he had no mark on the face. The sole purpose of cross examination was to prove assault. This

² 1965 (2) SA 612 (A) at 613 C - D

³ 2009 (3) SA 465 (SCA) at para 36

court dealt fully with the issues raised in paragraphs [30] to [34] of its judgment. At the time when the trial started the medical records sought to be led in evidence were already available. There is no explanation why such evidence was not led. On this point alone this application is ill fated and has to fail. I accordingly make the following order:

ORDER

1. Condonation for the late noting and prosecution of the application for leave to appeal is granted;
2. Leave to appeal against the conviction and sentence is refused;
3. Leave to lead further evidence is denied.



P.E. MOLITSOANE, J

On behalf of Applicant:

Ms. V ABRAHAMS

Instructed by:

Legal Aid South Africa
BLOEMFONTEIN

On behalf of Respondents:

Adv. DW Bontes

Instructed by: _____

Director of Public Prosecutions
BLOEMFONTEIN