

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : P87/11

In the matter between:-

MORNé BARNARD

Applicant/Appellant

and

THE STATE

Respondent

CORAM:

HANCKE *et* KRUGER, JJ

HEARD ON:

2 DECEMBER 2011

JUDGMENT BY:

HANCKE, J

DELIVERED:

8 DECEMBER 2011

[1] This is an application for leave to appeal against the dismissal of applicant's petition under section 309C of the Criminal Procedure Act, 51 of 1977, by Kruger, J and Moloi, J. Because Moloi, J is at present at Circuit Court Kruger, J requested me to sit with him in this application in order to finalise it before the end of the year.

[2] The applicant was convicted and sentenced in the Regional

Court. Leave to appeal was refused by the Regional Magistrate, and therefore his petition was turned down by this court. In order to obtain leave to approach the Supreme Court of Appeal, the applicant must ask this court for leave to appeal against the dismissal of his petition (**KHOASASA v S** [2002] 4 ALL SA 635 (SCA) **S v KHOASASA** 2003 (1) SACR 123 (HHA) at paras [19] – [22]).

[3] The applicant was convicted of rape and sentenced to fifteen years imprisonment. As far as the conviction is concerned, it is submitted on behalf of the applicant that in considering the applicant's petition, the court erred in not finding that there is a possibility that another court might find that

3.1 the trial court misdirected itself in not properly evaluating the evidence in a holistic manner, with due regard to the negative and positive aspects in both the State and the defence cases;

3.2 the trial magistrate did not approach the evidence of the complainant with the necessary caution justified by the specific circumstances of the matter;

3.3 the trial court erred in not finding that the version of the complainant is properly supported by the evidence of the

other state witnesses;

- 3.4 the trial court misdirected itself in finding that the applicant answered questions in an evasive manner;
- 3.5 the trial magistrate erred in finding that the version of the applicant cannot reasonably possibly be true;
- 3.6 the trial court misdirected itself by apparently rejecting the evidence of the applicant on the basis that the evidence of the state witnesses is accepted as satisfactory and correct.

[4] As far as sentence is concerned, it is submitted that this court erred in not finding that there is a reasonable possibility that another court might find that there exist substantial and compelling circumstances which justify the imposition of a lesser sentence than the prescribed minimum and that the imposed sentence of fifteen years imprisonment is unduly excessive and shockingly inappropriate in the circumstances. It is also submitted that the trial magistrate misdirected itself in several respects. Another court might therefore find that there were misdirections or that the effective sentence is shockingly inappropriate.

- [5] There are reasonable prospects that another court can come to a different conclusion regarding the dismissal of the petition.
- [6] An appeal from an order of two judges of this court cannot be heard by the full court, and must be heard by the Supreme Court of Appeal. (See **S v MCMILLAN** 2001 (1) SACR 148 (W) at 151 J par. [11] per Cloete, J.)
- [7] As to the correct order to be issued, see **DE SOUSA v THE STATE** (Case No. 334/11 delivered by the SCA on 29 November 2011).

ORDER

- [8] Leave is granted to the applicant to appeal to the Supreme Court of Appeal against the dismissal of his petition.

S.P.B. HANCKE, J

I agree.

A. KRUGER, J

On behalf of applicant:

Adv. J. Nel
Instructed by:
Pie-ér Huggett Inc
BLOEMFONTEIN

On behalf of respondent:

Adv. A. Bester
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN

/sp