



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

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

Case number: **51/2021**

In the matter between:

RAMPHANE PETRUS TSOLO

APPLICANT

versus

THE STATE

RESPONDENT

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

CORAM: NAIDOO, J

HEARD ON: 9 MAY 2024

DELIVERED ON: 9 MAY 2024

- [1] The accused was charged with one count of Murder, read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 (Minimum Sentences Act) (Count1) and one count of contravening a Protection Order (the Protection Order) granted in terms of the Domestic Violence Act 116 Of 1998 (Count 2), brought against him in this court, sitting at Bethlehem. He pleaded guilty to the charge on 7 September 2021 and was convicted accordingly. He was sentenced on the same day to Thirty (30) Years' Imprisonment in respect of count 1 and Twelve (12) Months' imprisonment in respect of count 2. The sentence in respect of count 2 was ordered to run concurrently with that in count 1. Mr PL Van der Merwe appears for the applicant and Mr WJ Harrington for the state.
- [2] It is perhaps prudent to give context to why there was a delay in hearing this matter. Initially there was confusion as to who the presiding judge was in this matter, as is apparent from the Notice of Application for Leave to Appeal, which refers to the sentence of Judge Reinders that is being appealed. The applicant filed an Application for Leave to Appeal on 5 December 2022, during the December court recess, hence the clerks dealing with this matter were unable to locate the judge who handed down the sentence. That was eventually resolved. As is required, a transcript of the judgment was to accompany the Application, which was not done in this case. In or about January/February 2023, the applicant's representative, from Legal Aid South Africa, was requested to comply therewith before the matter

could be placed before this court. It appears that the Judge President was advised that Legal Aid South Africa was unable to pay for transcripts in this matter (and other matters) and discussed this with the Judge President of this Division. After many months, I was advised that I should hear the application without such transcripts. The state was in the difficult position that it required a copy of the judgment as the prosecutor who dealt with the matter initially was no longer able to continue doing so. To expedite the matter, I made available to the parties copies of my personal written judgment to enable the state to determine if it would oppose the application, which it did. The matter was ultimately enrolled for hearing on 9 May 2024, after the parties filed Heads of Argument.

[3] The applicant sought the following relief:

- 3.1 Condonation for the late filing of the application;
- 3.2 Leave to Appeal be granted to Full Bench of this court against the sentence handed down on 7 September 2021 in Bethlehem.

[4] With regard to the application for condonation, the applicant alleged that it took time for him to “digest” that he would be spending thirty years in prison, hence he did not immediately give instructions to his legal representative to lodge this appeal. This coupled with the fact that he is a lay person and that the sentencing fell during the period when Covid-19 regulations were still in place, preventing any consultation

with his legal representative, also contributed to the delay in prosecuting this appeal. The state did not take issue with the application for condonation and submitted that in the interests of finalising the matter condonation should be granted. Condonation for the late filing of the application was accordingly granted.

- [5] The sentence in this matter was assailed a number of grounds, which in essence, are that the court erred or misdirected itself in that it:
- 5.1 did not take into account the applicant's personal circumstances, and gave too much weight to the aggravating circumstances in finding that there were substantial and compelling circumstances to justify deviation from imposing the prescribed minimum sentence;
 - 5.2 imposed a sentence that is harsh and induces a sense of shock
 - 5.3 over-emphasised the seriousness of the offences over the mitigating and personal circumstances in respect of sentencing;
 - 5.4 over-emphasised that this was a femicide case
 - 5.5 imposed a sentence of thirty years' imprisonment, after finding that there were substantial and compelling circumstances present to deviate from imposing the prescribed minimum sentence.
- [6] The test applicable to an application for leave to appeal was correctly set out in the Heads of Argument on behalf of the applicant, with which the state agreed. For the sake of completeness, I repeat the

legal position as it currently stands. Section 17 of the Superior Courts Act 10 of 2013 regulates the test to be applied in an application for leave to appeal. The relevant provisions of section 17(1) provide as follows:

“(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;”

(my emphasis and underlining)

- [7] It has been held in a number of cases that an applicant was, previously, merely required to show that there is a reasonable possibility that another court, differently constituted, would find differently to the court against whose judgment leave to appeal is sought. It is clear from section 17(1), set out above, that the situation is now somewhat different, and an applicant for leave to appeal is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success.

[See in this regard *The Mont Chevaux Trust v Tina Goosen + 18 2014 JDR LCC*, which was cited with approval in a number of cases, such as *Matoto v Free State Gambling and Liquor Authority*

(4629/2015) [2017] ZAFSHC 80 (8 June 2017), a decision emanating from this Division, and also a Full Court decision in *Acting National Director of Public Prosecutions and Others v Democratic Alliance* (19577/2009) [2016] ZAGPPHC 489 (24 June 2016)]

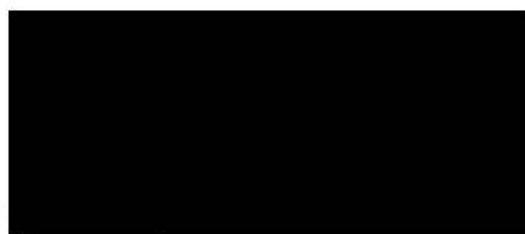
- [8] The judgment in this matter took account of the personal circumstances of the accused and weighed those against the seriousness of the offence and the interests of society. The court also took account of the fact that the accused pleaded guilty, cooperated with the police in pointing out the murder weapon and handed himself over to the police.
- [9] The appellant has not alleged or shown that the court misdirected itself or improperly exercised its discretion in imposing the sentences it did. An appeal court will not lightly interfere with a sentence imposed by the court of first instance, even if it would have imposed a different sentence, unless the sentencing court had misdirected itself or improperly exercised its sentencing discretion.
- [10] During oral argument, Mr Van der Merwe submitted that while he could not argue that the court misdirected itself or improperly exercised its sentencing jurisdiction, he was of the view that thirty years' imprisonment was harsh and another court may sentence differently. Mr Harrington submitted that, in addition to his submissions in his Heads of Argument, he is of the view that the court showed mercy to the applicant in a large measure and that the court treated the applicant

leniently. He was of the view that the sentence was not manifestly unjust, and was fair. He further submitted that the court should not grant the application, as to do so would be a waste of court resources. If the application were to be granted, the state may well consider a cross-appeal for the imposition of life imprisonment, which would not be in the interests of the applicant.

[11] The grounds upon which the applicant proposes to base his appeal, cannot be sustained, as the judgment in this matter deals with each of those aspects raised by him. In view of the position relating to an appeal court's ability to interfere with the sentence, I am of the view that the applicant has not satisfied the threshold of the requirement that there is a reasonable prospect of success on appeal and that another court could or would come to a different conclusion in respect of the sentence in this matter.

[12] In the circumstances, I order as follows:

The application for leave to appeal is dismissed

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S NAIDOO J

On behalf of the Applicant:

Mr PL Van Der Merwe

Instructed by:

Legal Aid South Africa

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(Ref: X89299912101)

On Behalf of the Respondent:

Mr WJ Harrington

Instructed by:

Office of the Director of Public
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