



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: **4/2022**

In the matter between:

SIMON YANDISA GALADA
PAUL KATISO NKOESA

First Applicant
Second Applicant

and

THE STATE

Respondent

JUDGMENT - LEAVE TO APPEAL

CORAM: **NAIDOO, J**

HEARD ON: **8 MAY 2024**

DELIVERED ON: **9 MAY 2024**

- [1] This is an application by the first and second applicants, who were accused 1 and 3 respectively in the main trial for leave to appeal against my judgments on conviction and sentence, handed down on 31 May 2023 and 2 June 2023 respectively. The respondent (the state) opposed the application. The state was represented by Adv (Ms) A Bester, while the first applicant (Galada) was represented by Mr JH Jordaan and the second applicant (Nkoesa) by Ms H Fourie.
- [2] The judgment was assailed on a number of grounds by each applicant. The grounds relied upon by Galada in respect of the conviction and sentence are, in essence, that the court erred or misdirected itself by finding that:
- 2.1 the proven facts supported only one reasonable inference, namely that Galada raped the complainant and did so on numerous occasions;
 - 2.2 the complainant, being a single witness, was honest, credible and reliable, and that her evidence was satisfactory in all material respects;
 - 2.3 the injury to the genital area would have been self-inflicted, if Galada's version were to be accepted, even though no history of consensual sexual intercourse in the previous seven days was recorded on the J88 medical report;
 - 2.4 the version of the complainant was too complex for her to have fabricated it on the spur of the moment to implicate Galada;

- 2.5 the applicant was required to furnish a reason for the complainant to falsely implicate him;
- 2.6 the whole of Galada's evidence was not properly evaluated, and the court refused leave to recall the complainant when Galada instructed a new legal representative;
- 2.7 there were no substantial and compelling circumstances to justify a deviation from the prescribed minimum sentence, in that all Galada's personal circumstances, the manner of commission of the offence, and the role he can play in the community in future were not taken into account.

[3] The grounds on which Nkoesa assailed the convictions and sentences in respect of counts 3 and 4 are, in essence, that the court erred or misdirected itself by finding/holding that:

- 3.1 the evidence of entrapment in terms of section 252A of the Criminal Procedure Act is admissible;
- 3.2 over- emphasising the seriousness and prevalence of the crime as justification for admitting the evidence;
- 3.3 the state proved beyond reasonable doubt that Nkoesa influenced the witness and defeated the ends of justice, for a variety of reasons set out in the Application for Leave to Appeal;
- 3.4 not taking account of all Nkoesa's personal circumstances as listed.
- 3.5 The sentences create a sense of shock and are unreasonably harsh;

3.6 There are reasonable prospects of success on appeal before a Full Court of this Division.

[4] The test applicable to an application for leave to appeal was correctly set out in the Heads of Argument on behalf of the accused, 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)

[5] 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)]

- [6] In the case of *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021), a decision of the Supreme Court of Appeal (SCA) the following extract from para 10 of the judgment is instructive:

I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.

- [7] The judgment in this matter sets out comprehensively the reasons for the orders made, and it is unnecessary for me to repeat it here.

Similarly, the judgment in respect of the trial-within-a-trial (TWT), deals in detail with the tape recordings and evidence in respect of the witnesses in respect thereof, which answer the grounds raised by Nkoesa. For convenience, a copy of the judgment in the TWT is also available in the file.

- [8] The grounds set out by Galada skirt around the court's assessment of the evidence in arriving at the conclusions it did, both in respect of the merits and sentence. He completely denied that he had sexual intercourse with the complainant and relied on a spurious explanation that she smeared her underwear with semen from a used condom, to explain how he is linked to the offence by DNA evidence. This has been dealt with in the judgment. Similarly with Nkoesa, the court's evaluation of the evidence seems to be the cause of his complaint as well as the sentence the court imposed. He has failed to allege or show that the application of the court's discretion, with regard to sentence, was irregular or improper.
- [9] During oral argument, Mr Jordaan on behalf of Galada, did not raise any points further to his heads of argument and Ms Fourie, for Nkoesa, mentioned the case of *S v Smith 2012(1) SACR 567 (SCA)* in respect of the test for determining whether leave to appeal should be granted. She submitted that the second applicant, Nkoesa, has reasonable prospects of success on appeal. Ms Bester, on behalf of the state, argued that in respect of the first applicant, the only thing of relevance in this matter is that Galada is linked by DNA evidence and his

explanation regarding the manner in which the semen ended up on the complainant's underwear is untenable as two witnesses confirmed that there were no used condoms in the house. The complainant had also reported to three witnesses that she had been raped.

- [9] With regard to prospects of success on the grounds set out in the Notice of Appeal, I am not satisfied that the appellants have made out a compelling enough case that they enjoy reasonable prospects of success on appeal, and I would refuse leave to appeal on that basis. However, I have noted what the SCA in the Ramakatsa case said further in para 10 of its judgement, that a court should take into consideration the provisions of section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013, and even *"if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive'"*
- [10] The state and the defence attorneys were asked to address the court on whether the facts and circumstances of this matter raise any questions of law or any matter of public importance, which demand the attention of either a Full Court of this Division or the SCA. Mr Jordaan, for Galada submitted that when he came on record as the legal representative for Galada, it was because the mandate of the previous attorney was terminated on account of the latter not carrying out Galada's instructions. Mr Jordaan's application to recall the

complainant was refused and this is compelling matter to be dealt with on appeal.

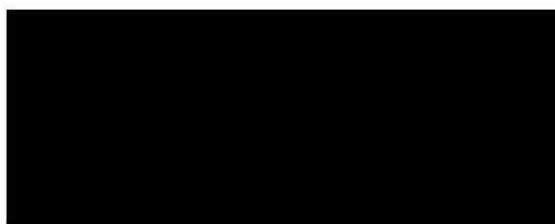
[11] Ms Fourie on behalf of Nkoesa submitted that the accused was convicted on two counts arising out of the same incident and the same facts. This is a duplication of charges and the court should give due weight to this. Ms Bester, for the state, argued that in respect of Galada, they wished to recall the complainant to question her about the two “please call me” messages that she ostensibly sent to Galada’s cellular telephone. This had nothing to do with the rape, and would not have taken that matter any further. With regard to Nkoesa, she pointed out that the counts that he was convicted of are two different offences, with different elements that needed to be proved. There was no duplication of charges. The court mitigated the effect of the sentences by ordering them to run concurrently. Therefore, there is no compelling reason to consider an appeal in this matter.

[12] As I indicated earlier, all the points raised by the defence have been dealt with in the judgment. I am in agreement that the matters raised are based on the facts and evidence of this case and do not implicate issues of law of public importance. It is clear that such issues must, of necessity, be decided on a case- by-case basis.

For the reasons set out in this judgment, I am of the view that the applicants have not satisfied the threshold of the requirement that there is a reasonable prospect of success on appeal and that another court could would come to a different conclusion.

[13] In the circumstances, I make the following order:

The applications for leave to appeal by the first and second respondents are dismissed.

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S NAIDOO J

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On behalf of the Respondent:

Adv A Bester

Instructed by:

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