



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: CC146/2016

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED YES/NO
	
SIGNATURE	28/08/2024 DATE

In the matter between:

VUSI REGINALD MATHIBELA

APPLICANT

V

THE STATE

RESPONDENT

JUDGMENT

MOSOPA J

1. This is an application for leave to appeal to the Full Court of this Division or the Supreme Court of Appeal, in terms of section 316(1) of Act 51 of 1977 ("Act"), alternatively section 17(1) of the Superior Courts Act 10 of 2013 ("SC Act"). On

the 23 June 2023 I convicted the applicant, who was accused number 3 during trial, on the following counts;

- 1.1. Murder read with the provisions of section 51(1) of Act 105 of 1997,
 - 1.2. Attempted murder,
 - 1.3. Unlawful possession of firearm, and
 - 1.4. Unlawful possession of ammunition
2. As a sequel of the convictions, the applicant was sentenced to undergo an effective period of 30 years imprisonment. This leave of appeal is only against conviction. The grounds for the application for leave to appeal are contained in the Notice and need not be repeated, but will be fully dealt with in this judgment.
3. Section 17(1)(a)- (c) of the SC Act makes the following provision,
 "[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 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,
 - (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."
4. The application is premised on the following grounds that;
 - 4.1. The applicant has reasonable prospects of success on appeal;
and

- 4.2. Another court could reasonably come to a different conclusion, and find that the trial court erred on the grounds listed in the notice of leave to appeal.
5. The concept a reasonable prospect of success has obtained a statutory force but it is not statutorily defined. In **S v Smith 2012 (1) SACR 567 at par 7**, the concept was defined as follows;
- “[7] What the test of reasonable prospects of success postulates is 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 order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. 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. In the **Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others (LCC 14R/2014)** (Land Claims Court judgment, unreported) Bertelsmann J, when dealing with the concept stated that;
- “It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed...”

7. Criticism was levelled by the applicant that the court erred in not discharging the applicant at the end of the State's case. That there was no reasonable evidence established to secure a conviction against the applicant. It must be noted at that stage, that the applicant had already made an admission that he was within the vicinity of the deceased and the complainant in count 2, at the Nelson Mandela Square, the same time when they were there. Also, cellphone evidence pinning the applicant's cellular device near the vicinity of the deceased and complainant in count 2. Most importantly that the applicant's co-accused extra-curial statements were ruled admissible.
8. In refusing a discharge of the applicant at the end of the prosecutor's case, I relied on the matter of *Mafokone* which provides that if there is a possibility that one or more of the applicants co-accused will during the cause of the case implicate their co-accused, The applicant's at the end of their respective cases including the appellant, closed their cases without testifying.
9. The *obiter* remark I made when refusing a discharge is inappropriately construed by the applicant. The fact of the matter is that he was not arraigned alone and most importantly there was evidence by his co-accused, implicating him in the commission of the offences. The applicant exercised his right to remain silent after a refusal of his discharge, and I cannot understand why it is alleged that failure to discharge him, violated his presumption of innocence. I dealt at length in my judgment on conviction, that extra-curial of the accused is not admissible against his co-accused in terms of the provisions of section 217(1) of the Act.
10. In my judgment on conviction, I dealt to a great length with the cellphone evidence and how the applicant is connected to the movement of the devices of the deceased and the complainant in count 2 and I stand by that reasoning. As already alluded, the accused admitted to being in Sandton and Menlyn areas which eventually corroborates his cellphone activity. He admits to being in the Menlyn area, closely to the time when the deceased and the complainant in

count 2 were shot. This makes this matter distinguishable from the *Molimi* matter which I was referred to by Advocate Potgieter on behalf of the applicant.

11. The applicant did not testify himself about the movements but called several witnesses to testify about his movements, none of the witnesses he called confirmed that on the day of the commission of the offence he was at Sandton City and the reason for him to be there. One witness who is a tailor, who used to tailor the applicant trousers, testified that he used to see the applicant at the place where he used to tailor his trousers. The witness who testified about the applicant being present at Menlyn, testified that he was used to give the applicant money that he collected from various drivers of the applicant on Friday afternoon, but could not confirm meeting the applicant on the day of the commission of the offence.
12. Criticism was also levelled on the fact that I criticised the applicant for refusing to testify. This contention is not correct and lacks merit. What the court did was to layout the principle involving the applicant's failure to testify and also to elaborate on the applicant's right to remain silent. No negative inferences was drawn relating to the applicant's failure to testify.
13. It was further contended that the court infringed on the Applicant's Constitutional right as I did not afford the applicant's witnesses the same weight as I did with the State's witness. The applicant led the evidence of a witness who is a bank manager at Standard Bank where the applicant had several bank accounts. I fail to understand why I should give such kind of evidence the same weight as the witness said she was shot and got injured, but did not say who shot and injured her. I fail to understand this criticism, and in my considered view it lacks merit.
14. I have dealt in detail as to why I found that the applicant acted in common purpose with his co-accused for reasons given in my judgment on conviction

and I stand by those reasons. It is therefore my considered view that the applicant failed to meet the standard as set out in *Smith*. This application ought to fail.

ORDER

15. As a result, the following order is made;

15.1. Application for leave to appeal against conviction is hereby refused.


M J MOSOPA

**JUDGE OF THE HIGH COURT,
PRETORIA**

Date of hearing: 23 July 2024

Date of Judgment: 28 August 2024

APPEARANCES:

For the Applicant: Advocate Potgieter

Instructed by: Emile Viviers Attorneys

For the Respondent: Advocate Cronje

Instructed by: The Director of Public Prosecutions, Pretoria