

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: CC30/2020

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

07-10-2024
DATE

PD. PHAHLANE
SIGNATURE

In the matter between:

JABULANI TSOTETSI

APPLICANT

And

THE STATE

RESPONDENT

LEAVE TO APPEAL JUDGMENT

PHAHLANE, J

- [1] This is an opposed application for leave to appeal against the sentence imposed on the applicant by this court on the 4th of September 2024. Leave to appeal is sought in terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 which provides that: "*Leave*

*to appeal **may** only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success”.*

[2] The main grounds of appeal can be summarized as follows:

- 2.1 The sentence of life imprisonment and 45 years imprisonment imposed on the applicant is disproportionate to the mitigating factors and to the offences that were committed.
- 2.2 The court under emphasized the personal circumstances of the applicant and over emphasized the nature and seriousness of the offenses, and the interest of the community.
- 2.3 The court erred in not finding that there were substantial and compelling circumstances justifying a deviation from the prescribed minimum sentences.
- 2.4 The court erred in not giving effect to the cumulative effect of the sentences.
- 2.5 The court did not attach any weight to the time period ~~of four (4) years~~ that the applicant has spent in custody awaiting trial.
- 2.6 The court erred in sentencing the applicant to fifteen (15) years imprisonment for the unlawful possession of a semi-automatic firearm.

[3] It is incumbent upon an applicant in an application such as this, to prove the existence of reasonable prospects of success on appeal. In this regard, the test/principle in respect of what constitutes ‘reasonable prospects of success’ in terms of section 17(1)(a)(i) was succinctly described by the Supreme Court of Appeal in **Smith v S**¹ as follows:

"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

¹ 2012 (1) SACR 567 (SCA) at para 7 (15 March 2011). See also: MEC Health, Eastern Cape v Mkhitha [2016] ZASCA 176 at para 16 and at para 17 where the court held: “...A mere possibility of success, an arguable case or one that is not hopeless, is not enough”.

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”.

[4] It is therefore imperative that in considering the application for leave to appeal, the court remain cognizant of the higher threshold raised by section 17(1) that needs to be met before leave to appeal may be granted as stated by Bertelsmann J, in ***The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others***² 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 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 against.”*

[5] With regards to the first ground, Mr Kgagara appearing for the applicant submitted that if the sentence is disproportionate to the offences, that on its own constitute substantial and compelling circumstances justifying a lesser sentence.

[6] With regards to the applicable legislative prescript in section 17(1)(a)(i) to which this application is based, Mr Maritz appearing for the respondent submitted that the applicant failed to demonstrate and persuade the court that there are reasonable prospects of success on appeal, and that the court did not misdirect itself on any aspect when sentence was considered. He accordingly submitted that there are no reasonable prospects that another court will come to a different conclusion.

6.1 It was further submitted that the aspects mentioned by the applicant in his grounds of appeal had all been considered and weighed by the court. The basis of this submission as it relates to the count of murder where life imprisonment has

² 2014 JDR 2325 (LCC)

been imposed is that the deceased was a police officer who was shot and robbed of his service pistol which was ultimately used in criminal activities.

[7] I agree with Mr. Maritz that the points raised in this ground have already been considered. This is so, because these were dealt with in detail in the judgment³, and will not be repeated herein, save to state that, not only was the deceased a police officer, but his murder was also committed in the process of committing three robberies in counts 2, 3 and 4. I further concur with Mr. Maritz that the murder of the deceased and the robberies were planned because the applicant specifically stated that he was with nine (9) friends, and “they all discussed and agreed to rob the Orange Farm Train Station; arm themselves; and split themselves into groups”, just to make sure that they carry this well thought out plan.

[8] It is important to note that the sentences life imprisonment on the count of murder and 15 years imprisonment in respect of robbery for a first offender are prescribed by the legislature under the circumstances described above. In both circumstances, the provisions of sections 51(1) and 51(2) of the CLAA is couched as a peremptory instruction. These sentences could only be avoided if substantial and compelling circumstances existed, justifying a deviation from their imposition.

[9] Section 51(1) provides that:

“Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment to life”

The offences referred to in Part I of Schedule 2 are *Murder when:*

(a) It was planned or premeditated

(b) The victim was (i) a law enforcement officer performing his or her functions as such, whether on duty or not

(c) The death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit (ii) robbery with

³ See paragraph 18-20 of Judgment.

aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977.

(d) The offence was committed by a person or group of persons acting in the execution or furtherance of a common purpose.

[10] With regards to the first, second and third grounds, there is nothing disproportionate about the sentences which have been prescribed by the legislature for specific crimes. I fail to understand how counsel could make a submission that the sentences are disproportionate to the offences, while the deceased was brutally murdered while he was on duty wearing full uniform - by a group of criminals who were heavily armed and ready to kill after having discussed and agreed that they will eliminate whoever is on their way.

[11] Paragraphs (a) to (d) of Part I of Schedule 2 specifically covers the offences committed by the applicant and provides for a specific sentence. For the sake of completeness, paragraph (a) of the Schedule is covered by the applicant where he noted in his plea that the offence was discussed and agreed to by the group that it had to be carried out.

- Paragraph (b)(i) is covered in that the deceased was a uniformed police officer on duty. It is on record that he was at the scene where he lost his life because he wanted to check if the security guards on duty were ok. He could not find the guards because they had already been bound and tied up by the applicant and his friends. When the deceased and his colleague went back to their patrol vehicle, they were attacked, and the deceased was shot and killed.
- There was clearly no reason for brutally killing the deceased in the manner that he was. Unfortunately, he was shot several times while sitting in the police vehicle.
- Paragraphs (c) and (d) of the Schedule are covered because the aggravated robbery was committed by a group of people acting in the furtherance of a common purpose. The principle of common purpose was specifically explained to the applicant by the court, but the applicant himself admitted knowledge of the principle in his plea where he stated that he “knew that by associating himself with the group, he is responsible for the death of the deceased even if he did not pull the trigger because

he knew that the firearms they possessed as a group may be used to shoot someone in the case of resistance”.

[12] I had in my judgment referred to the horrific injuries noted in the post-mortem report. Specifically noted were multiple fractures and three skull wounds caused by passing projectiles. Not only was the deceased shot three times on the head and sustained three bullet wounds, but he was also shot on the neck, hand and wrist.

[13] In my view, when the legislature prescribed specific sentences for serious offences like murder, and in this case, the horrendous and gruesome killing of NORMAN MUHLARI, such sentences cannot be described as being disproportionate, when regard is had to the manner in which the murder was carried out.

[14] Having said that, Mr Kgagara’s submission seems to ignore the fact that, nothing extraordinary has been placed before the court as circumstances justifying a deviation from the imposition of the prescribed minimum sentences, save to state that he has two adult children aged 27 and 21 years respectively, and had a good upbringing having been raised by his grandfather who played a fatherly role and guided him, and an uncle who is a pastor and had a hand in his upbringing.

14.1 He submitted that the court failed to strike a balance in respect of the factors presented before the court and chose to accentuate the interest of the victims more than that of the applicant.

[15] In my view, this submission is misplaced because the court carefully considered and evaluation all the circumstances of this case and applied the holistic approach which takes into account the purposes of punishment; the “triad” factors as pronounced in **S v Zinn**, and the basic principles to be followed when the sentence is prescribed⁴.

[16] The court in **S v Dodo**⁵ and **S v Vilakazi**⁶ emphasized that the aggravating or mitigating factors should not be taken individually and in isolation as substantial or compelling

⁴ See para 28 and 31 of the Judgment.

⁵ [2001] ZACC 16; 2001 (3) SA 382; 2001 (1) SACR 594 (CC).

⁶ 2012 (6) SA 353; 2009 (1) SACR 552 (SCA).

circumstances. Nugent JA in **S v Vilakazi** stated the following at para 15: *'It is clear from the terms in which the test was framed in **Malgas**⁷ and endorsed in **Dodo** that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.'*

- [17] On the other hand, the SCA in **S v Ro and Another**⁸ warned that: "to elevate the personal circumstances of the accused above that of society in general and the victims in particular, would not serve the well-established aims of sentencing, including deterrence and retribution". A further warning given by the SCA as it relates to the issue of substantial and compelling circumstances was in the case of **S v Vilakazi supra** where the court stated that once it becomes clear that the crime is deserving of a substantial period of imprisonment, the personal circumstances of the accused are in themselves largely immaterial to what that period should be, because those are the flimsy grounds that **Malgas** said should be avoided.
- [18] It is on record that the probation officer who compiled a pre-sentence report on behalf of the applicant noted in his report that the applicant reported to him that over the years, he has been committing crimes with his friends as a means of generating an income. Furthermore, he recommended that the court should consider imposing imprisonment in terms of the provisions of section 276(1)(b) of the CPA, which provides for imprisonment, including imprisonment for life, or imprisonment for an indefinite period as referred to in section 286B (1)⁹.
- [19] I have carefully considered the submissions made to determine whether the applicant passes the test laid down in section 17(1)(a)(i) to which this application is based. Be that as it may, the basic principle on appeal remains that a court of appeal will only interfere with the sentence of the trial court if the sentence is vitiated by an irregularity; a material misdirection; or where the sentencing discretion was not judicially exercised.

⁷ S v Malgas 2001 (1) SACR 469 (SCA).

⁸ 2010 (2) SACR 248 (SCA)

⁹ See para 40 of Judgment.

[20] Having regard to the first to the third grounds for leave to appeal, there is no basis for me to find that there are reasonable prospects that another court would come to a different conclusion than the one arrived at by this court. Accordingly, I cannot find that on these grounds the appeal if allowed, would have a reasonable prospect of success.

[21] With regards to the fourth ground, section 280(2) of the CPA provides that where several sentences have been imposed, such sentences shall commence one after the expiration of the other, unless the court directs that they run concurrently. The section confers upon a sentencing court, the **discretion** to direct otherwise - because it specifically uses the word “*may*”.

21.1 In deciding whether or not to exercise such a discretion, the court will consider the overall objects of the sentence it imposes and will seek to achieve a balance between the competing interests at the stage of sentencing.

21.2 In *Mopp v State*¹⁰ the court stated that: failure by a trial court to order the sentences imposed to be served concurrently in terms of section 280 of Criminal Procedure Act, does not constitute a misdirection where the court exercised its sentencing discretion reasonably, and that in such a case, there was no basis for the appeal court to interfere with the sentence, and accordingly, the appeal was dismissed.

21.3 Nonetheless, the court already made an order that counts 5 and 6 run concurrently with the sentence imposed on count 1.

[22] Having regard to the above principle, I can find no compelling reasons to persuade this court to grant leave or that another court will find that this court erred. Consequently, I am of the view that there are no reasonable prospects of success on appeal.

[23] With regards to the fifth ground, the issue has been thoroughly dealt with in my judgment¹¹ and will not be repeated herein. The respondent correctly submitted that ‘the applicant was responsible for most of the period he spent in custody and should

¹⁰ [2015] ZAECGHC 136 (25 November 2015).

¹¹ See paras 8, 32 and 33 of judgment.

therefore not expect to receive a benefit of a lighter sentence' from such a delay. Accordingly, I cannot find that on this ground the appeal if allowed, would have a reasonable prospect of success.

[24] With regards to the last ground, Mr Kgagara referred to the unreported decision of ***Mtshali v S***¹² and submitted on behalf of the applicant that it was not proved that the applicant knew at the time that the firearm he possessed was a semi-automatic.

[25] It should be noted that when the charges were put to the applicant, he knew that count 5 related to the unlawful possession of a semi-automatic firearm. This charge was read with Schedule 4 of the Firearms Control Act 60 of 2000, and further read with other provisions of the CPA. Most importantly, when the applicant decided to change his plea from not guilty to guilty, that guilty plea was specifically tendered and admitted by the applicant and his counsel in terms of section 220 the CPA.

[26] Schedule 4 specifically provides for a sentence of 15 years imprisonment that was ultimately imposed by the court. In my view, the applicant knew exactly what he was pleading guilty to, considering that he was asked by the court to confirm if a plea of guilty and its admission that was strengthened by section 220 was made freely and voluntarily.

26.1 Section 220 of the CPA provides as follows:

"An accused or his or her legal adviser or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact". (underlining added for emphasis)

[27] The effect of any fact admitted in terms of section 220 absolves the State from proving such a fact because the Act specifically states that *"any admission thereof is sufficient proof of that fact"*.

¹² (A268/2023) [2024] ZAGPPHC 701 (18 July 2024).

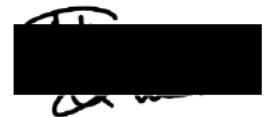
[28] In my view, the defence submission has no merit. It was therefore very opportunistic for the applicant to raise ignorance of knowledge for the first time during this application for leave to appeal when this aspect was not even an issue of concern from the onset. I say this being mindful of the fact that the applicant specifically absolved the State from proving that the firearm he was in unlawful possession of, was a semi-automatic, because he did not just tender a guilty plea, but he tendered that plea as a section 220 admission. Consequently, the submission cannot stand.

28.1 In the circumstance, I cannot find that on this ground the appeal, if allowed, would have reasonable prospects of success. It is also my considered view that no other court acting reasonably on the facts of this case, would come to a different finding than the one reached by this court.

[29] Having regard to the above, I am of the view that no other court would come to a different conclusion to find that the sentence imposed by this court is harsh and shockingly inappropriate. Therefore, I cannot find any basis that there are reasonable prospects of success and that another court would come to a different conclusion regarding sentence. Consequently, I cannot find that leave to appeal if allowed, would have a reasonable prospect of success.

[30] In the circumstances, the following order is made:

1. The applicant's application for leave to appeal is refused.



PD. PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the State	: Adv. GJC Maritz
Instructed by	: Director of Public Prosecutions, Pretoria
For Accused 1	: Adv. Kgagara

Instructed by : Legal Aid South Africa

Heard : 7 October 2024

Judgment Delivered : 7 October 2024