

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.
(Palm Ridge)**

Case Number: SS20/2023

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
21 October 2024.	
DATE	SIGNATURE

In the matter between:

MSWELI, SIYABONGA VELA

Applicant

And

THE STATE

Respondent

JUDGMENT – LEAVE TO APPEAL

NOKO J

Introduction

[1] The applicant launched an application for leave to appeal the conviction and the sentence imposed by this Court. The applicant was found guilty of the charges preferred against him and was sentenced as follows:

1. 5 years for the assault of Lauralee Phillips with intent to cause grievous bodily harm.
2. 3 years for common assault of Rowen Phillips.
3. 3 years for common assault of Rowenique Phillips.
4. Life imprisonment for murder of Rohan Phillips read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997.
5. 5 years for defeating the administration of justice.

Sentences 1, 2, 3, and 5 were ordered to run concurrently with sentence imposed in 4.

[2] The comprehensive reasons for the decisions are detailed in both judgments and regurgitation thereof is not necessary. The parties submitted comprehensive heads of arguments which are uploaded on Caselines.

[3] The grounds for the appeal are in general based on the submissions which the applicant counsel already advanced during arguments in support for acquittal and also in mitigation before sentence. The applicant contended that there were contradictions in evidence proffered by the witnesses who testified on behalf of the complainant. That the Court went beyond reasonable bounds in inviting further witnesses to provide testimony all who were called under the pretext of the purpose which is set out in section 186 of the CPA though aimed at strengthening the state's case.

[4] The State in retort contended that the leave to appeal is devoid of merits. The contention regarding contradiction has been dealt with and there are authorities which decreed that not every contradiction should be visited with rejection of evidence presented. Where such alleged contradiction is immaterial it pales into insignificance. In addition, the provisions of section 186 of the CPA is warranted where the object is to ensure attainment of a just outcome and this has without any reservation been met.

Legal principles and analysis.

[5] Section 17 of the Superior Courts Act provides that leave to appeal would be granted where the court is, *inter alia*, of the opinion that the appeal would have a reasonable prospect of success and/or further that there is a compelling reason for the appeal to be heard.

[6] It is now trite¹ that the provisions of section 17 introduced a higher threshold to be met in the application for leave to appeal and the usage of the word “would” require the applicant to demonstrate that another court would come to a different conclusion.

[7] The mere possibility of success, an arguable case, or one that is not hopeless is not enough.² There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.³

[8] The applicant’s contention with regard to contradictions were dealt with by the Supreme Court of Appeal which held in *Nkohle* that contradictions do not per se enjoin the court to throw out evidence tendered by the witnesses. The submissions tendered in this regard by the applicant’s counsel failed to unsettle the reasoning presented in my judgment which justified the conclusion that the said contradictions were not material.

[9] The accusation that I invited further witnesses to strengthen the State’s case appears to be underpinned by reasons which indicative of a thin reflection and I found same to be unfortunate. The witnesses called by the court were referred to in the testimony of both the State and applicant’s witnesses but were never called by either of the parties to testify. I called them to, *inter alia*, avoid having to decide on incomplete and hearsay evidence and also to ensure that justice is ultimately attained after consideration of all relevant evidence. The applicant made reference to *Lehloka*⁴, where the court stated that, ‘In my view, this section does not imply that the court must take over the prosecution of the matter to close gaps in the evidence of the state or poke holes in the defence’s

¹ *Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325; *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 (“*Mkhitha*”); *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* [2016] ZAGPPHC 489 (*Mkhitha*).

² *Id* at para 17.

³ *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) at para 7.

⁴ *S v Lehloka* 2022 ZAWCHC 34. The court stated further in that judgment at para 23 that “... the section places a duty on the court to call a witness if it is essential to the just decision of the case”.

evidence’ but the applicant failed to comprehensively demonstrate which gaps were closed. It is always prudent to lay a proper legal foundation for any argument advanced.⁵

[10] The applicant further contended that the court did not have regard to the factors presented to sway the court not to impose prescribed sentence. The courts have been consistent that in instances where there is likelihood of imposing a harsher sentence personal circumstances of the applicant recede into the background. The Supreme Court of Appeal held in *S v Vilakazi* that:

“In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment, the question whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what period be, and those seem to me to be the kind of flimsy grounds that *Malgas* has said should be avoided”.⁶

[11] The personal circumstances of the applicant did not pass the muster and in any event they lack the requisite impetus to tilt the finding in favour of the appellant that minimum sentence should be ignored where a person is facing a serious charge/s.

[12] In the premises, I remain impervious that the applicant has successfully demonstrated that there are good prospects of success and further that another court would come to a different conclusion. There is also no other reason why the appeal should be heard or there are conflicting judgments on the matter under consideration. In the premises, the application for leave to appeal is bound to fail.

[13] I therefore order as follow:

⁵ It was stated by the SCA in *Zuma v Democratic Alliance and Another* 2021 (5) SA 189 (SCA) at para 49 where allegations of bias were made against judicial officers that “The contention, absent any factual foundation, that all three judges who heard the matter had left their judicial station, scandalises the court. If true, that all three either independently or each other, or worse still acting in concert would have renounced their judicial impartiality is the most serious allegation. Imputing bias to judicial officers should not lightly be made. Nor, should the imputation of a political motive. This is not to suggest that courts are immune from criticism, even robust criticism for that matter.” Further that any such criticism must not fall outside acceptable bounds. Reference to this judgment was made on the basis of parity of reasoning.

⁶ *S v Vilakazi* 2012 (6) SA 353 (SCA).

The application for leave to appeal is dismissed.



M V NOKO

JUDGE OF THE HIGH COURT,
GAUTENG HIGH COURT, JOHANNESBURG.

This judgement was handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **21 October 2024**.

Date of hearing: 16 October 2024.

Date of judgment: 21 October 2024.

Appearance

For the State: Adv NP Tyeku
Director of Public Prosecutions, Jhb

For the Accused: Adv TP Ndlovu
Legal Aid, Johannesburg.