



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: K/S26/2022

In the matter between:

THYS MONDZINGER

APPLICANT

and

THE STATE

RESPONDENT

Heard on: Decided on the papers

Delivered on: 16/08/2024

Summary: This is the application for leave to appeal against sentence. The applicant was convicted and sentenced to life imprisonment having been found guilty of murder read with s 51(1) of Act 105 of 1997.

ORDER

(a) The application for leave to appeal is dismissed.

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

MAMOSEBO J

[1] The applicant is seeking leave to appeal against sentence only. This application is determined on the papers. He was sentenced to life imprisonment on 31 October 2023 having been convicted of murder read with s 51(1) of the Criminal Law Amendment Act 105 of 1997. The State is opposing the application.

[2] Application for leave to appeal is governed by s 17 of the Superior Courts Act 10 of 2013. It is unclear in this application whether leave is sought in terms of s 17(1)(a)(i) which requires that prospects of success exist on appeal or s 17(1)(a)(ii) that there is some compelling reason why the appeal should be heard.

[3] This is what appears in the Notice under the head: Application for leave to appeal in terms of s 309B of the Criminal Procedure Act 51 of 1977 as amended:

‘Be pleased to take notice hereof, that applicant intends to bring an application on, a date to be determined by the registrar, for leave to appeal against sentence because there are good and reasonable prospects of success and another court would come to a different conclusion upon considering the grounds of appeal. The decision sought to be appealed against involves an important question of law and that the administration of justice requires the appeal to be heard. There is a compelling reason for the proposed appeal [to] be heard.’

[4] These are the grounds appearing in the Notice of Appeal:

- (a) There was emotional stress preceding the act of killing;
- (b) There was emotional struggle of dealing with the history of infidelity and lack of honesty by the fiancé which constituted substantial and compelling circumstances;

- (c) Accused was under serious provocation and experienced extreme hurt and anger caused by the deceased's infidelity;
- (d) The time spent in custody as an awaiting trial prisoner justify a deviation from the period of life imprisonment for the murder of the deceased; and
- (e) Section 51(1) does not require [a] court to impose a sentence of life imprisonment where it would be inconsistent with the offender's right guaranteed by s 12(1)(e) of the Constitution.

[5] Evidently, the applicant is raising new facts and arguing evidence that was not heard during the trial. Points a, b, c, and e are, in my view, evidence that cannot be relied on at this stage for purpose of seeking leave to appeal his sentence. All the witnesses who testified at the trial were cross-examined at length and the version of the applicant was also put to them in rebuttal. It is too late to try to introduce new evidence at this stage. Consequently, I will only deal with the period of incarceration while awaiting trial.

[6] The test to determine whether leave to appeal should be granted or not is trite. The Supreme Court of Appeal in *Ramakatsa and Others v African National Congress and Another*¹ made these insightful remarks:

‘[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in *Caratco*, concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that 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

¹ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021) at para 10

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’. 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.’

See also *Caratco (Pty) LTD v Independent Advisory (Pty) LTD* 2020 (5) SA 35 (SCA) para 2.

[7] The applicant’s reliance on the period of incarceration as a substantial and compelling circumstance under these circumstances is unmeritorious. The applicant stabbed a 34-week pregnant woman indiscriminately, having earlier that morning taken her to the Magistrates Court in an effort to coerce her to withdraw the protection order against him. That did not happen. I said in the main judgment that this was no ordinary murder but a femicide. The death of the unborn child was considered in sentencing because it is an aggravating factor. The applicant was acutely aware of the pregnancy. I stated that, until Parliament prioritises the killing of unborn foetuses as a criminal offence, the trajectory on gender-based violence on women and children, in this instance a foetus, will continue to be downplayed by the perpetrators. The applicant was incarcerated

for a period of 10 months awaiting trial. He now seeks to amplify the 10-months period as weighty enough to justify a reduced sentence.

[8] I am not persuaded that life imprisonment is inappropriate. Regard being had to the submissions made pertaining to this application for leave to appeal in order to determine whether there are reasonable prospects that another court would come to a different finding than this court had reached, I have not found any. I am not persuaded of any cognisable prospects of success or compelling reasons that warrant the attention of the SCA or the Full Court of this Division. I am therefore satisfied that there are no reasonable prospects of a successful appeal. In the result application for leave to appeal to the Supreme Court of Appeal alternatively, to the Full Bench of this Division, must fail.

[9] In the result the following order is made:

The application for leave to appeal is dismissed.



MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

For the Applicant:
Instructed by:

Adv. JP Moeti
Justice Centre, Kimberley (Judicare)

For the State
Instructed by:

Adv. MA Engelbrecht
The Director Public Prosecutions