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**IN THE HIGH COURT OF SOUTH AFRICA
HELD AT MAKHANDA**

CASE NO: CC58/2024

In the matter between:

THE STATE

And

X[...] M[...]

ACCUSED

JUDGEMENT: APPLICATION FOR LEAVE TO APPEAL

NKELE AJ:

INTRODUCTION:

1. Mr M[...] applied for leave to appeal against both his conviction and sentence imposed by me on the 11th of July 2024. The application for leave to appeal is being opposed by the State.

2. HC M[...] was convicted on count one, the charge of rape, and acquitted on count two, the charge of showing pornographic material to a minor. In respect of count one he was sentenced to life imprisonment.

LEAVE TO APPEAL: THE PREVAILING LEGAL POSITION

3. Section 17(1)(a) of the Superior Courts Act Action¹ regulates applications for leave to appeal and it provides that:

“Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(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.”

4. Recent jurisprudence, on the test for application for leave to appeal, reveals that the change of wording from “**might**” to “**would**” has resulted into a higher test than previously applied. The Supreme Court of Appeal in the Judgment of **MEC for Health, Eastern Cape v Mkhitha** eloquently explained the effect of the amendment of section 17(1)(a) as follows:

[16] “Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there is truly a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

[17] an applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of on

¹No. 10 of 2013.

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

[18] in this case the requirements of Section 17(1)(a) of the Superior Courts Act were simply not met...”.²

5. A mere possibility that another Court might come to different conclusion is not enough to convince the trial Court to grant leave to appeal. In this regard the Supreme Court of Appeal stated the following:

“What is 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”.³

6. It is for this Court to, with an open and honest reflection on the facts and the law, reconsider the evidence and the appellant’s argument in deciding whether to grant leave to appeal. In doing so, the appellant urged this Court to adopt a holistic approach in evaluating the evidence.

ANALYSIS AND DISCUSSION

7. The appellant, in general, argued that the court erred in finding that State proved its case beyond reasonable doubt and in accepting the evidence of

² [2016] ZASCA 176 paras 16-18

³ S v Smith 2012 (1) SACR 567 (SCA) para 7.

the witnesses as reliable and truthful. He further argued that the evidence of the witnesses was replete with errors and contradictions such that the court should have given the accused the benefit of doubt. Because the witnesses contradicted each other, their evidence could not reasonably and possibly be true. For that reason, the appellant argues, the State has failed to prove its case against the accused beyond reasonable doubt. On that basis, the appellant submits that an appeal court will come to different conclusion and find him not guilty.

8. The appellant further argued that the sentence imposed is too severe and that a sentence of 25 years imprisonment should have imposed. For that reason, the appellant argued, another Court can come to a different conclusion regarding both the conviction and sentence. This is so, the appellant submits, because there are substantial and compelling circumstances for the Court to deviate from the minimum sentence prescribed by legislation.
9. On the other hand, the State vehemently opposes the application for leave to appeal sought by the appellant. The State argued that the evidence of the witnesses has been consisted throughout in all material respects and that all relevant evidence that point to the accused as the perpetrator has been presented and considered by the Court. As far as the sentence is concerned, the State argued that the Court was correct in imposing minimum sentence of life imprisonment in line with the governing legislation.
10. It is trite that although a cautious approach needs to be adopted by the court when considering the evidence of a minor, it does not mean that the accused cannot be convicted on the basis thereof when such evidence is clear, reliable and even corroborated by other evidence. In this case the minor gave reliable evidence and was consistent throughout that her father, the appellant, raped her. Her evidence was corroborated by other witnesses who testified that the appellant kissed, touched her inappropriately, got an erection, thereafter dragged her and the minor cried

complaining that she does not like that which her father want to do to her. Furthermore, her evidence was collaborated by medical evidence to the effect that she had been vaginally penetrated and therefore no longer a virgin. Thereafter the evidence presented during trial point to the appellant as the perpetrator and he has failed to present any evidence to exonerate himself from blame.

11. As far as the sentence is concerned, there are substantial and compelling circumstances that were demonstrated to convince the Court to deviate from the minimum sentence prescribed by the governing legislation. Even in the application for leave to appeal none whatsoever have been demonstrated.
12. Instead, the aggravating circumstances far outweigh the mitigating circumstances, especially the fact that the perpetrator of the rape is the father of the victim and that she was six years old at the time the offence was committed. All the authorities point to one direction, which is that the appropriate sentence is life imprisonment.
13. The aggravating circumstances, in particular, are that: the appellant is the biological father of the complainant; he was supposed to protect her; he was in a position of trust vis-à-vis the complainant; the complainant was only six years old when she was sexually violated. For the above stated aggravating circumstances I am of the view no substantial and compelling reasons have been demonstrated to convince the Court to deviate from imposing the prescribed sentence of life imprisonment.
14. In any event the rape of a woman, and a child in particular, is a very serious offence which deserves a serious punishment as prescribed in the minimum sentence legislation. In this regard I echo the sentiments expressed by the Supreme Court of Appeal in the matter of **DPP, North Gauteng v Thabethe** that *“Rape of women and children have become cancerous in our society. It is the crime that threatens the very foundation of our nascent democracy, which is founded on protection and promotion*

of the values of human dignity, equality and advancement of human rights and freedom. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right –thinking and self-respecting members of society. Our Courts have an obligation to impose a sentence for such a crime particularly where it involves defenceless and vulnerable gender. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system”.⁴

15. Furthermore, in **S v SMM** the Supreme Court of Appeal emphasised those sentiments as follows: -

“Our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage. Government has introduced various programmes to stem the tide, but sexual abuse of particularly women and children continues unabated”.⁵

16. I whole heartedly agree with sentiments expressed by the Supreme Court of Appeal and I align myself with them. Accordingly, I come to the conclusion that it would be a grave injustice to exonerate the accused, in the factual circumstance of the case. Leave to appeal should thereafter be refused

CONCLUSION

17. The minimum sentence regime binds this Court to impose the specific minimum sentence of life imprisonment and it can only deviate therefrom if substantial and compelling circumstances have been shown to exist. I have not found any substantial and compelling circumstances evidence to deviate from the prescribed minimum sentence. The sentence of life long imprisonment is a consequence of the conviction for a rape of a minor. No

⁴2011 (2) SACR 567 (SCA) at 577 G-I.

⁵ 2013 (2) SACR 292 (SCA).

reasonable prospects of success have been demonstrated in the application for leave to appeal. I therefore come to the conclusion that no Court, sitting as Court of appeal, would come to a different decision on the same set of facts.

ORDER.

1. I therefore make the following order:
2. Leave to appeal for both conviction and sentence is dismissed.

TA NKELE
ACTING JUDGE OF THE HIGH COURT

Date reserved: 11 December 2024

Date delivered: 11 February 2025

Counsel for the Appellant: Mr Geldenhuys

Instructed by legal Aid South Africa

Counsel for the State: Ms Turner

Director of Public Prosecutions, Makhanda