



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION: MTHATHA)**

CASE NO: CC 28 / 2024

In the matter between

NTUTHUZELO NOKHOKHOB

1st Applicant

SANDILE NTSHETSHE

2nd Applicant

and

THE STATE

Respondent

Heard on: 30 May 2025

Judgment delivered on: 3 JUNE 2025

JUDGMENT – LEAVE TO APPEAL

NGOQO AJ

[1] This is an application for leave to appeal against the judgment of this court which was delivered on the 26th day of February 2025 at the Bizana Circuit Court.

[2] The applicants were found guilty of having committed the following offences;

- a) Housebreaking with intent to commit rape and robbery with aggravating circumstances
- b) Robbery with aggravating circumstances
- c) Rape
- d) Murder

[3] The application by the applicants is brought on the following grounds;

- a) That this court misdirected itself in finding that the state had proved its case beyond reasonable doubt,
- b) The state case relied heavily on the evidence of a section 204 witness and that this court did not exercise caution when dealing with the evidence of this witness,
- c) The section 204 witness informed the court that he was forced to participate in the commission of the crimes yet when an opportunity for him to escape presented itself, he did not escape,
- d) The section 204 witness told this court that it was dark at the crime scene and it was never established from him how he managed to see the applicants stabbing and raping the deceased,
- e) The section 204 witness initially concealed the fact that he was assaulted by community members after he had been apprehended, something which could have influenced him to lie about the applicants,
- f) That independent forensic evidence was necessary, especially DNA and fingerprints,
- g) The court erred and misdirected itself in finding that the 1st applicant had implicated himself to his uncle despite the fact that his uncle only testified about the debt which he said applicant told him they had gone to collect from the deceased and that he was now suspected of murdering her and was afraid of the community members.
- h) That the court misdirected itself in finding that the K-Way hat allegedly found at the crime scene belonged to the 2nd applicant notwithstanding the fact that:
 - I. The hat was never exhibited in court and
 - II. The person who had implicated the 2nd applicant as being the owner of the hat did not testify and

III. No DNA results linked 2nd applicant to the hat.

- i) The testimonies of the 1st applicant's aunt and uncle regarding the conversation between him and his uncle differed materially,
- j) The court erred and misdirected itself in finding that the photos corroborated the section 204 witness' testimony ignoring the possibility that it could have been this witness alone who had committed the offences,
- k) The court erred and misdirected itself in rejecting both applicants' versions.
- l) Another court may reach a different verdict and find both applicants not guilty on all counts and
- m) There are real prospects of success on this appeal.

[4] The application is being strongly opposed by the respondent. The respondent argued that the section 204 witness was with both accused at the time of the commission of the offences. Both appellants were well known to the witness. The respondent argued further that identity cannot be an issue in this matter. Mr. Bidla for the respondent, argued that the application does not meet the threshold that is envisaged in section 17 of the Superior Courts Act.

[5] Applications for leave to appeal are governed by the provisions of section 17 of the Superior Courts Act.¹ In section 17 (1), this Act provides as follows:

“(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 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 appeal does not fall within the ambit of section 16 (2) (a); and

(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 all the real issues between the parties.”

¹ Act 10 of 2013

[6] The traditional test that our courts have been applying in considering leave to appeal, prior to the introduction of section 17 of the Superior Courts Act,² has been whether there is a reasonable prospect that another court may come to a different conclusion to the one reached by the court *a quo*.³ With the enactment of section 17, the test has obtained statutory force and the threshold for granting leave to appeal has been raised.

[7] In the matter of MEC for Health, Eastern Cape v Mkhitha and Another⁴ it was held:

“Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is 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 on appeal.”

[8] The Supreme Court of Appeal dealing with the meaning of reasonable prospects of success, in the case of S v Smith⁵ held 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 mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

² Supra

³ See Commissioner of Inland Revenue v Tuck 1989 (4) SA 888 (T) at 890B

⁴ [2016] ZASCA 176 @ para 16 (25 November 2016)

⁵ 2012 (1) SACR 567 at para 7

[9] This court in its judgment dealt in detail with each specific ground that the appellants are raising in their application for leave. Without saying much, they submit in their application that another court may come to a different finding than that of this court. That is not what is expected of them. Their application falls short of meeting the requirement that is envisaged in section 17 (1) of the Superior Court Act.

[10] On the issue of the absence of DNA evidence, the applicants' argument is misplaced. The state has no duty to adduce all the evidence that possibly can be adduced in a matter. It is even worse in this matter, where there is direct evidence linking the applicants to the commission of the crime.

[11] With that said, this court makes the following order:

The application for leave to appeal is refused.

D NGOQO
ACTING JUDGE OF THE HIGH COURT

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