



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: CC48/2021

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES
	
SIGNATURE	19/08/2025 DATE

In the matter between:

ANDREW MOCHIFEFE

Applicant

and

THE STATE

Respondent

JUDGMENT

MOSOPA, J

[1] This is an application for leave to appeal against both conviction and sentence. The applicant was convicted on 4 March 2024 on a charge of murder read with the

provisions of section 51(1) of Act 105 of 1997, unlawful possession of a firearm and ammunition.

[2] As a sequel to such conviction, the applicant was sentenced as follows on 26 April 2024;

- 2.1. Murder: 20 years imprisonment;
- 2.2. Unlawful possession of a firearm: 6 years imprisonment, and
- 2.3. Unlawful possession of ammunition: 2 years imprisonment

It was ordered that sentences in counts 2 and 3 are to run concurrently with the sentence in count 1. Effective sentence to be served by accused is 20 years imprisonment.

[3] The applicant filed application for leave to appeal against both conviction and sentence on 13 May 2024 (first notice of application for leave to appeal). Subsequent to that the applicant filed the second amended application for leave to appeal.

[4] The first application for leave to appeal was set down for hearing on 10 July 2024. The applicant raised the issue of interpretation relating to the evidence of the first state witness Mr Adolf Serete Phetla. The applicant alleged that there are parts of his evidence that were not properly interpreted. In the interest of justice and in fairness to the parties I made the following order—

“This court’s official recorders and transcribers are hereby authorised to permit the Applicant’s legal representatives, who are hereby authorised, to uplift the audio recordings of the evidence of the state witnesses, Mr Adolf Serete Phetla, who testified on 10 August 2022, and Mr Khulufela Samuel Masombuke who testified on 12 August 2022, for the purpose of examining the evidence of the witnesses and to compare their evidence in their own words with their evidence as interpreted and transcribed for the purpose of the Applicant’s application for leave to appeal.”

[5] The application for leave to appeal was hereby postponed *sine die* to allow the applicant to finalise that process.

[6] The process proved to be tedious and took long to finalise. However, the applicant kept on updating us on the process undertaken.

[7] The matter was then set down for hearing on 20 May 2025, and after listening to the parties, judgment was reserved. After the judgment was reserved, there was a stage in which the file in this matter was taken away from me for the purposes of auditing, and I could not take any step towards finalising the judgment. Recess period also interrupted wherein I have to deal with many partly heard matters that I was seized with. Criminal files are not yet migrated to court-online, and we are still using physical files. I did not deliberately delay in promptly delivering this judgment.

[8] When the matter was heard, I made the following order, following the review of the reviewed evidence of Mr Adolf Serete Phetla which was by agreement between the parties that the official record of the evidence given by Adolf Serete Phetla on 10 August at 10:56:33, presently recorded as;

“It is not a mountain or hill it is just that it is a slope-like demonstrating a upward slope.”

Be deleted and replaced with the following;

“I am not on top of the mountain I am near like here until to the door but a bit elevated.”

Legal principle

[9] For us to properly understand the topic at hand, it is proper for us to appraise ourselves with the legal principle applicable in the adjudication of applications of this nature.

[10] The applicant brings the application in terms of section 316(1)(a) of Act 51 of 1977, which makes the following provision—

“Subject to section 84 of the Child Justice Act, 2008, any accused convicted of any offence by a High Court may apply to that court for leave to appeal against such conviction or against any resultant sentence or order.”

[11] Section 17(1) of the Superior Courts Act 10 of 2013 also governs applications of this nature and makes the following provision—

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

(a)

- (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;

(b) the decision sought on 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 the real issues between the parties.”

[12] The applicant submits that there are reasonable prospects that another court will come to a different conclusion from the one reached by this court. The concept “reasonable prospects of success” was defined in *S v Smith*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

¹ 2012 (1) SACR 567 (SCA) at para 7.

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.”

[13] In *Mont Chevaux Trust (IT 212/28) v Tina Goosen*², Bertelsmann J, when dealing with the concept of reasonable prospects of success, stated—

“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 former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright and Other* 1985 (2) SA 342 (T) at 343 H. 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...”

Conviction

[14] Despite giving a number of grounds for leave to appeal, the main contention of the applicant related mainly to what was reviewed after the evidence of Mr Adolf Serete Phetla went on a review, because of the complaint raised by the applicant.

[15] The admitted evidence being that after hearing the gunshot, Mr Adolf Serete Phetla ran to the mountain, which he estimates to be a distance of 20 metres from where the deceased was shot, which he described it as not being far. When he looked back he saw the applicant going back to his yard, the deceased running away and scaling over a fence, which was in the third house from that of the applicant. He further saw people gathered there.

² (unreported) Land Claims Court Case no: LCC 14R/2014 at para 6.

[16] It is this evidence of the presence of other people who gathered there, that Ms Kolbe is raising the argument that there might have been the presence of a shooter from that group of people, taking into account that Mr Adolf Serete Phetla testified that he did not run for a long distance. However, what is equally important is the evidence of Mr Adolf Serete Phetla that when he started to run away, he did not "notice" the presence of other people.

[17] This might mean different things, that there were other people but did not take notice because he ran away or that there might have not been people, it is just that he did not take notice of that. It is further contended that, where will the people be coming from if they were not there when the deceased was shot, in such a short space of time.

[18] The evidence is that next to where the deceased was shot, there is a path which was referred to in evidence as a "double-up" which was used mainly by TUT Students to access the campus and other people as a "short-cut". The place is notorious for robberies. There are several houses within the vicinity of the crime scene which are used as rental for TUT students. The undisputed evidence of Mr Adolf Serete Phetla is that the deceased's vehicle was the only vehicle on that street at the time of the shooting.

[19] There is no evidence which places the absence or presence of other people before the shooting incident and as such, no evidence places those people or person gathered there as a shooter(s). The applicant is seen walking towards his yard, not running. If there was a presence of another shooter, the applicant could not have just walked to his place but could have been seen running considering the distance he was with the deceased before he was shot. The reviewed interpretation of Mr Adolf Serete Phetla's evidence, does not impact on the findings that I made at conviction stage.

[20] All other grounds of leave to appeal raised, relates to the determinations that I have already made at conviction stage, and I stand by such findings. I therefore find no sound, rational basis for the conclusion that there are prospects of success.

Sentence

[21] The applicant was convicted of murder which resorts under the provisions of section 51(1) of Act 105 of 1997, which prescribes a minimum period of imprisonment of life. I deviated from the imposition of the prescribed minimum sentence as in my view, there was an existence of substantial and compelling circumstances on the part of the applicant.

[22] I am as part of the grounds for leave to appeal, criticised that I incorrectly applied the provision of the minimum sentence legislation as provided in Act 105 of 1997, in that—

“I concluded that section 51(1) of the Act 105 of 1997 is applicable but that the absence of a finding that the murder was premeditated or planned warranted a deviation from the prescribed minimum sentence.”

[23] In the Judgment on sentence, I dealt at length with this aspect I do not intend on repeating it here, but I stand by what was decided at that stage. In *S v Kekana*³, the court when dealing with a sentence in murder cases, stated that—

“The provisions of the CLAA do not create different or new offences, but are relevant to sentence. Thus, murder remains murder, as a substantive charge, irrespective s 51(1) or s 51(2) applies... It follows that there can never be a plea to such a non-existent charge.”

[24] Section 51(2) of Act 105 of 1997 prescribes a minimum sentence of 15 years for a first offender convicted of murder under such provision but also gives a sentencing court a discretion to add a 5-year period of imprisonment to the prescribed minimum sentence. I did not convict the applicant in terms of section 51(2) but section

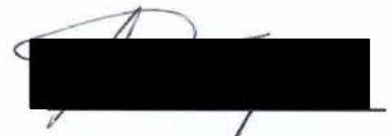
³ 2019 (1) SACR 1 (SCA) at para 22.

51(1) and in addition to that deviation from imposing the sentence prescribed under such provisions. I see no sound, rational basis that the applicant has reasonable prospects on appeal. No other court can come to a different conclusion from the one reached by this court.

Order

[25] In the result, the following order is made;

1. Application for leave to appeal against conviction and sentence is hereby refused.



M.J. MOSOPA

JUDGE OF THE HIGHCOURT
GAUTENG DIVISION, PRETORIA

Appearances

For the Applicant : Advocate Kolbe SC

Instructed by : Malanga Attorneys Incorporated

For the Respondent: Advocate Coetzee

Instructed by : Director of Public Prosecutions

Date of Hearing: 20 May 2025

Date of Judgment: 19 August 2025