

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
29 April 2024

DATE

SIGNATURE

CASE NUMBER:

SS308/2007

In the matter between:

FRANS SEROBA

Appellant

and

THE STATE

Respondent

Coram: DOSIO J

Heard: 26 April 2024

Delivered: 29 April 2024

ORDER

1. Leave to appeal in respect to the convictions of the appellant is dismissed.
2. Leave to appeal in respect to the sentences imposed is dismissed.

JUDGMENT

DOSIO J:

Introduction

- [1] The appellant was convicted of two counts of murder read with s51 (1) of the Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997') and sentenced to 27 years direct imprisonment.
- [2] The application is for leave to appeal against the convictions and respective sentences.
- [3] The application for condonation was not opposed by the respondent, accordingly, condonation was granted to the appellant for the late filing of his application.
- [4] An appellant is entitled to apply for leave to appeal in terms of the provisions of s316 of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977') as amended.
- [5] In terms of section 17(1)(a) of the Superior Courts Act:
'(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 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.'
- [6] An appellant who applies for leave to appeal must satisfy the court that there is a reasonable prospect of success on appeal.¹
- [7] In the matter of *Matshona v S*,² the Supreme Court of Appeal stated that the test to determine whether leave to appeal should be granted is:

¹ *S v Ackerman en n' ander* 1973 (1) SA (A) 765 G-H

² *Matshona v S* 2008 (4) SA 69 SCA at paragraph 4

'simply whether there is a reasonable prospect of success in the envisaged appeal'.

[8] In the case of *S v Mabena and another*,³ the Supreme Court of Appeal held that:

'...the test for reasonable prospects of success is a dispassionate decision based upon the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court.'

[9] In the case of *S v Smith*⁴ the Supreme Court of Appeal held that:

'What the test of Reasonableness prospect 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...There must in other words be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

AD conviction

[10] The grounds for appeal in respect to the appellant can be briefly summarised as follows:

- (a) That the defence was able to prove criminal incapacity. In this regard, I respectfully refer to my judgment as to why I accepted the evidence of Doctor De Wet and rejected the evidence of Doctor Kalaba and Doctor Bramdev.
- (b) The issue raised that the appellant was jealous of his wife, as supported by the witness Mosehle Makwati, is of no moment as this witness is the nephew of the accused and not a psychiatrist. The issue of jealousy and the lack of such finding by the psychiatrists is dealt with at paragraph [89] of my judgment.
- (c) As regards the contention made at paragraph [25] of the appellant's heads of argument that 'It is submitted that it is reasonably probable that even if the applicant could be found to have been capable of appreciating the wrongfulness of his actions, he was still incapable of acting in accordance with such appreciation' was fully dealt with in my judgment.

[11] In light of the reasons given in my judgment, it is my respectful submission that another court will not reach a different decision regarding the conviction and that there are no reasonable prospects of success on appeal.

³ *S v Mabena and another* 2007 (1) SACR 482 (SCA) at paragraph 22

⁴ *S v Smith* 2011 ZASCA 2012 (1) SACR 567 (SCA) at paragraph 7

[12] I accordingly find that the appellant has not satisfied me that he has a reasonable prospect of his appeal succeeding in respect to the convictions.

[13] In the result, leave to appeal in respect to the convictions of the appellant is dismissed.

AD sentence

[14] In respect to the personal circumstances of the appellant, these were considered. I dealt fully in my judgment why a term of eighteen year's imprisonment was imposed on each count.

[15] An Appeal Court's ability to interfere with the sentence imposed by the trial court is very limited and unless an appellant can point to a misdirection on the part of the Honourable Court, or that the sentence imposed is not in accordance with justice, the application for leave to appeal must be dismissed.

[16] The imposition of sentence is in the discretion of the trial court and the court of appeal must not interfere with this discretion for frivolous reasons. The Court of Appeal must not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently.

[17] A decisive question facing a Court of Appeal on sentence is whether it is convinced that the court which had imposed the sentence being adjudicated upon, had exercised its discretion to do so unreasonably. If the discretion was exercised unreasonably then a Court of Appeal may interfere and, if not, it cannot interfere.

[18] In *S v Malgas*⁵ the principles applicable to an appeal against sentence were set out by the Supreme Court of Appeal as follows:

'A court exercising appellate jurisdiction...may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'....'

⁵ *S v Malgas* 2001 (1) SACR 469 (SCA) at 478d

[19] The appellant has not satisfied this Court that he has a reasonable prospect of success on sentence.

[20] In the result, leave to appeal in respect to the sentences imposed is dismissed.

D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 29 April 2024.

Date Heard:

26 April 2024

Judgment handed down:

29 April 2024

Appearances:

On behalf of the Appellant:

Adv. P Milubi

Instructed by:

Legal Aid SA

On behalf of the Respondent:

Adv. V Maphiri

Instructed by:

Office of the DPP, Johannesburg