REPUBLIC OF SOUTH AFRICA

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

Case Number: SS107/2018

(1)	REPORTABLE: Not
(2)	OF INTEREST TO OTHER JUDGES: Not
(3)	REVISED.
14 December 2023	
Date	signature

In the matter between:

DITSHELE THABISO DENNIS **Applicant**

And

THE STATE **Respondent**

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be **14 December 2023**

JUDGMENT

MOLAHLEHI J

[1] This is an application for leave to appeal against both the judgements on conviction and sentence made by this court on 2 July 2019 and 14 October 2019, respectively. The reasons for the convictions are set out in the judgment, and thus, it is not necessary to repeat the same herein. The applicant was charged with the following:

"3.1. Count 1, kidnapping of …

3.2. Counts 1,2,3,4 and 5, rape of …

3.3. Count 6, rape of …

3.4. Count 7, housebreaking with intent to kidnap …

3.5. Count 9, assault GBH on …

3.6. Count 10, rape of ……

[2] Similarly, the reasons for the sentences are set out in the sentencing judgement, and the same does not require to be repeated. In considering the sentence, the court found that the offences committed by the applicant were of a serious nature and that he was not a candidate for rehabilitation. It accordingly imposed an effective life imprisonment. The life sentence was found to be appropriate more particularly because in the case of Ms Setlhamo, she was raped more than once. Furthermore, the applicant had failed to provide substantial and compelling circumstances why life imprisonment should not be imposed.

[3] The court held that the other reason for the life sentence was that at the time of considering the sentence, the accused had already been convicted by this court of two other offences of rape on Ms Sibande and Ms Ramfete.[1] The court further held that life imprisonment was also appropriate in the case of both Ms Sibande and Ms Ramfete in that, at that time of considering the sentence, the accused had already been convicted in each case respectively of the two offences of rape.[2] The sentences imposed on the applicant are as follows:

"5.1. Counts 1,2,3,4 and 5, life imprisonment

5.2. Count 6, life imprisonment

5.3. Count 7, two years direct imprisonment.

5.4. Count 9, one-year direct imprisonment

[1] See paragraph [41] of the judgment.

[2] See paragraph [42] of the judgment.

5.5. Count 10, life imprisonment."

[4] The applicant having failed to institute this application within fourteen days from the date of the judgement on the sentence applied for condonation in terms of section 316 (1) (b) of the Criminal Procedure Act (CPA), which provides as follows:

> "An application referred to in paragraph (a) must be made-
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> (i) within 14 days after the passing of the sentence or order following on the conviction; or
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> (ii) within such extended period as the court may on application and for *good cause* shown, allow."

[5] In determining whether to grant or refuse condonation, the court exercises discretion, which has to be exercised judicially. The proper exercise of discretion entails the court having to determine whether the application satisfies the requirements of good cause for the delay.

[6] In determining the existence of good cause, the court is generally guided by factors such as the degree of the delay, the explanation therefor, the prospects of success, prejudice and the importance of the case. These factors are to be considered collectively and not in isolation of each other. The approach to dealing with these factors was explained in Grootboom v National Prosecuting Authority and Another,[3] follows:

> "51. The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation, there may be no need to consider the prospects of success. If the delay period is short and there is an unsatisfactory explanation but reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition, the various factors are not individually decisive. Still, they should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

[3] (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC).

[7] In Brummer v Gorfil Brothers Investments (Pty) Ltd and,[4] the Constitutional Court held that the broad test for granting condonation in application proceedings was whether it is in the interests of justice to do so.

[8] The reasons for the delay in filing this application, according to the applicant are the following:

a) His family promised but failed to secure private legal assistance due to financial constraints.
b) Attempts at contacting Legal Aid South Africa for assistance telephonically failed.
c) The lockdown during the COVID-19 period.
d) His mother approached the court's registrar for a copy of the judgement only to find that the judgement was delivered extempore and thus had to have it transcribed.
e) An inmate assisted him in drafting the notice of leave to appeal.

[9] Whilst noting that the application involves the liberty of the applicant, the delay of close to three years is excessive. It was thus incumbent on him to provide a strong and convincing explanation for the delay.

[10] There are gaps in the explanation for the delay. In this regard, the applicant provides no supporting affidavit from a family member to confirm the offer to provide him with private legal assistance, and at what point did they indicate that they would not be able to afford the fees of the legal representative? There is also no supporting affidavit from his mother regarding the time at which she approached the registrar for a copy of the judgment. There is also no supporting affidavit from the inmate who is alleged to have assisted him with drafting the application.

[11] The prospects of success do not compensate for the poor explanation of the excessive delay. The applicant deals with the prospect of success in paragraph 8.8 of his affidavit and says nothing more than that; "I was further advised that I have prospects of success." The heads of argument prepared by Legal Aid SA on behalf

[4] Others [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC).

of the applicant are silent on the issue of condonation. It is only stated in the last paragraph of the heads of argument that,

> ". . . there are reasonable prospects of success on appeal in respect of both conviction and sentence."

[12] In the circumstances, the application for condonation stands to fail and accordingly the application for leave to appeal also stands to be dismissed for this reason alone.

[13] As indicated earlier this matter involves the liberty of the applicant. I accordingly found it apposite to enquire into the merits of the application. The application stands to fail even when regard is had to the merits. As indicated earlier, the applicant challenges both his conviction and the sentence.

[14] The test for determining whether to grant leave to appeal for either conviction or sentence is whether the applicant has satisfied the court that there is a reasonable prospect of success in the appeal as required by section 17 (1) (a) of the Superior Courts Act.[5] The basic requirement in an application for leave to appeal in criminal matters is provided for in the CPA. Section 316 (3) (a) of CPA provides:

> "Every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires leave to appeal."

[15] As stated in Tyhala v S,[6] the applicant in a notice of leave to appeal has to set out in clear and unambiguous terms the grounds of appeal with a defined scope.

[16] In the present matter the applicant's notice of leave to appeal provides as follows:

- "That the respondent upholds the right of the applicant to apply for leave to appeal against conviction and sentence,
- That the respondent upholds the right of the applicant to access the court in terms of section 34 of the RSA Constitution.
- That condonation of late filing of applicant's application be upheld.
- Granting applicant further or alternative relief."

[5] Act number 10 of 2015.

[6] (CC22/2019) [2021] ZAECGHC 119 (23 November 2021)

[17] It is apparent from the above that the notice of leave to appeal has no regard for the requirements of section 316 of the CPA; accordingly, the application stands to be dismissed for this reason alone.

[18] The application still stands to fail even when consideration is had to both the founding affidavit and the heads of argument regarding the merits. The grounds of appeal are set out in the founding affidavit as follows:

> "8.1 It is the Applicant's submission that the honourable Judge erred and misdirected himself by failing to apply his mind judicially or in a proper and reasonable manner when he convicted and sentenced the applicant, that another court may come to a different conclusion than that reached by the honourable Judge in question because it may find that:-
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> a) "The single evidence of Ms Dikeledi Sibanda was not approached with caution by the court because the state failed to advance any evidence proving beyond a reasonable doubt that the applicant raped Ms Dikeledi Sibanda, notwithstanding the fact that she did not point/identify the applicant as a perpetrator at an identification parade held during the pre-trial investigative stage. There is no basis to convict the applicant as will be indicated infra.
>
> b) The state failed to prove beyond a reasonable doubt that the sexual intercourse between Applicant and Ms Mapula Ramfate was rape and not consensual. There is no basis to convict the applicant as will be indicated infra.
>
> c) The state failed to prove beyond reasonable doubt that the sexual intercourse between Applicant and Ms. Rebecca Seitlamo was rape and not consensual. There is no basis to convict applicant.
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> d) The sentence imposed by the trial court is severe and induces a sense of shock and is disturbingly inappropriate.
>
> e) There are substantial and compelling circumstances in this matter that should have compelled the hon. Judge to deviate from imposing the prescribed minimum sentence.
>
> f) The seriousness of the offence overemphasized against the personal circumstances of applicant."

[19] The above are but a repetition of the issues raised by the applicant during the trial. It appears this application is nothing but a request for a rehearing of the matter. There is no reasonable chance that the appeal court is likely to find differently regarding both the findings made by this court on the conviction and sentencing. In arriving at the conclusions as it did, the court explained how it applied the facts to the legal principles.

[20] In addition to the above, the applicant raised a legal point relating to the other reason for imposing life imprisonment on the applicant, set out in paragraphs [41] and [42] of the judgment. It is contended in this regard that the court erred in its interpretation of Part 1 of Schedule 2 contemplated in section 51(1) (a) (ii) of the Criminal Law Amendment Act,[7] read with the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.[8]

[21] Section 51 (1) (a) of CLAA provides that a sentence of life imprisonment is mandatory when rape is committed in one or more of the following instances:

(1) (a) (i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution or furtherance of common a purpose or conspiracy;

(iii) by a person who has been convicted of two or more offences of rape but has not yet been sentenced in respect of such convictions."

[22] It is contended in the additional heads of argument on behalf of the applicant that subsection (a) (iii) postulates instances where an accused has already been convicted of two or more offences of rape before the commencement of the trial and whilst still awaiting the sentence for the convictions.

[23] The applicant's Counsel submitted that the legislature could not have intended that where an accused is convicted of multiple rapes and when the appropriate sentence is considered, account should be taken of the rape convictions made during the same trial. In other words, the legislature intended that the court, in

[7] Act number 105 of 1997.
[8] Act number 32 of 2007.

applying the provisions of the sub-clause to Schedule 2, would take into account only those convictions of rape made before that trial commenced.

[24] It is common cause that the applicant had not been convicted of any of the rapes at the commencement of the trial. It was contended on behalf of the applicant that the interpretation and approach adopted by this court was, accordingly, an absurdity.

[25] The applicant's Counsel contended that the approach adopted by this court in the additional reason for imposing life sentence was in line with the decision in Magabara v S.[9] That approach was, however, overturned by the full court in Masenya v S,[10] where the full court of the Gauteng Division held that that approach was not justified by a proper interpretative exercise, of subsection (a) (iii) of *Schedule 2* and that it was clearly wrong and thus should not be followed.

[26] The facts and the circumstances of this case are different to those in Magabara and Masenya. The main reason for the life imprisonment in the present matter is based on the conviction of the applicant on account of the rape of Ms Rebecca Setlhamo. In terms of Part 1 of Schedule 2 contemplated in section 51(1) (a) (ii) of the Criminal Law Amendment Act, she was raped more than once by the applicant. She was raped in the open field and thereafter dragged to the shack, where she was again raped a number of times.

[27] In my view, the additional reason for imposing life imprisonment in terms of sub-clause (1) (a) (iii) of Schedule 2 is of no significance when the judgment is read in its full context. The additional reason for imposing the life sentence, does not detract from the court's obligation to impose such a sentence in the circumstances envisaged in sub-clause (a) (i) of Schedule 2 and when there exist no substantial and compelling reasons not to impose the prescribed minimum sentence.

[28] It should be noted that the provisions of Part 1 of Schedule 2 of the Criminal Law Amendment Act have since been amended thus providing clarity as to the

[9] (A800/2015) [2017] ZAGPPHC 117 (21 March 2017).
[10] (A871/2012) [2017] ZAGPPHC 229; 2018 (1) SACR 407 (GP) (24 May 2017).

interpretative issue arising therefrom. The amendment, which came into effect on 5 August 2022, provides that life imprisonment is triggered when the accused has been convicted by the trial court of two or more offences of rape or offences of rape and compelled rape.

[29] The amendment to Part 1 of Schedule 2 now provides that a sentence of life imprisonment is mandatory when rape is committed in one or more of the following instances:

> "(iii) by the accused who—
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> (aa) has previously been convicted of the offence of rape or compelled rape; or
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> (bb) has been convicted by the trial court of two or more offences of rape or the offences of rape and compelled rape, irrespective of—
>
> (aaa) whether the rape of which the accused has so been convicted constitutes a common law or statutory offence;
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> (bbb) the date of the commission of any such offence of which the accused has so been convicted;
>
> (ccc) whether the accused has been sentenced in respect of any such offence of which the accused has so been convicted;
>
> (ddd) whether any such offence of which the accused has so been convicted was committed in respect of the same victim or any other victim; or
>
> (eee) whether any such offence of which the accused has so been convicted was committed as part of the same chain of events, on a single occasion or on different occasions."

[30] In light of the above I am of the view that the applicant has failed to make out a case for leave to appeal and accordingly his application stands to be dismissed.

Order

1. The applicant’s application for leave to appeal is dismissed.

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E MOLAHLEHI J

Judge of the High Court.

APPEARANCES:

For the applicant:	Adv. S. Hlazo Counsel for the Applicant Legal Aid South Africa
For the respondent:	NP Serepo Counsel for the Respondent
Hearing Date:	23 October 2023
Delivered:	14 December 2023.