

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

2 August 2023

DATE

SIGNATURE

CASE NUMBER: SS100/2022

In the matter between:

THE STATE

and

VUSI MICHAEL DUBE

ACCUSED

JUDGMENT LEAVE TO APPEAL

DOSIO J:

Introduction

[1] This is an application for leave to appeal against the conviction and sentence of the accused.

[2] An appellant is entitled to apply for leave to appeal in terms of the provisions of section 316 of the Criminal Procedure Act 51 of 1977 even referred to as Act 51 of 1977 as amended.

[3] An appellant who applies for leave to appeal must satisfy the Court that there is a reasonable prospect of success on appeal and the Court refers you to the case *S v Ackermann and Another* 1973 (1) SA, an appellate division decision, page 765 at paragraphs G-H.

[4] In the case of *S v Mabena and Another* 2007 (1) South African Criminal Reports at page 492 at paragraph 22 the Supreme Court of Appeal held that and the Court quotes: "The test for reasonable prospects of success is a dispassionate decision based upon the facts and the law that a Court of Appeal can reasonably arrive at a conclusion different to that of the trial Court."

[5] In the case of *S v Smith* 2012 (1) South African Criminal Reports at page 567 at paragraph 7 the Supreme Court of Appeal held that and the Court quotes: "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 a trial Court. In order to succeed therefore, the defendant 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, rationale basis for the conclusion that there are prospects of success on appeal."

Ad conviction

[6] As regards conviction, the following aspects are raised as grounds of appeal –

1. That the Court's finding is based on circumstantial evidence and there is a prospect of another Court reaching a different decision.
2. That the Court erred in finding the accused's guilt beyond reasonable doubt.
3. That the Court discounted evidence of blood of the deceased being found on the bottle.
4. That there was an error on the part of the Court in accepting that the version given by the accused that someone else had assaulted and killed the deceased was a fabrication.
5. That the nurse named Nosipho Ngcobo never properly inspected the body and never saw this wound.

[7] I respectfully stand by my judgment in respect of the above-mentioned matters raised. These issues were dealt with fully in my judgment and reasons were given for the findings made regarding circumstantial evidence. The Court gave full reasons why the Court believes the state has proved the guilt of the accused beyond reasonable doubt. It appears as if the two additional versions namely that the deceased may have inflicted the injury to her neck herself as well as the version of someone else killing the deceased are aspects that were not put to the state witnesses and the Court approached all the evidence that was presented by the state and defence in this regard. As regards Nosipho Ngcobo not inspecting the body of the deceased, the Court dealt with this fully in its judgment and stated that she did find red marks applied to the neck and no injury to the neck depicting a stab wound.

[8] 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 there is no reasonable prospects of success on appeal.

[9] I accordingly find that the appellant has not satisfied me that he has a reasonable prospect of his appeal succeeding in respect of the conviction. In the result leave to appeal in respect of conviction is dismissed.

Ad sentence

[10] As regards sentence, this Court dealt fully with the personal circumstances of the appellant and I dealt fully in my judgment why a term of life imprisonment should be imposed.

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

[12] The imposition of sentence is a discretion of the trial Court and a Court of appeal is not to 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. A decisive question facing the Court on appeal of 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 reasonably, then only then may a Court of appeal interfere and if not, it cannot interfere.

[13] In the matter of *S v Malgas* 2001 (1) South African Criminal Reports at page 478d the Supreme Court of Appeal held that the principles applicable to an appeal against sentence are as follows and the Court quotes:

“The Court exercising appellant jurisdiction may do so when the disparity between the sentence of a trial Court and the sentence which the appellate Court would have imposed had it been the trial Court, is so marked that it can probably be described as ‘shocking’, ‘startling’ or ‘disturbingly inappropriate’.”

[14] This Court is not satisfied that the appellant has satisfied this Court that the sentence is disturbingly inappropriate or that he has reasonable prospects of success on sentence. in the result, leave to appeal in respect of the sentence imposed is dismissed.

D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date Heard:
Judgment handed down:

28 July 2023
2 August 2023

Appearances:

On behalf of the State:
On behalf of the Accused:

Adv A. Deoraj
Adv L. Qoqo