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

CASE NO: 2021/19942

In the matter between:

MOSIA, HAPPY THABO Applicant

and

THE STATE Respondent

J U D G M E N T
(APPLICATION FOR LEAVE TO APPEAL)

MAIER-FRAWLEY J

1. The applicant seeks leave to appeal against both conviction and sentence. On 4 February 2021 the applicant was convicted of the crimes of Kidnapping, Rape, Murder, Defeating or Obstructing the Administration of Justice by committing an act to conceal the corpse of the deceased and Common Assault. On 7 April 2022, the applicant was sentenced to life imprisonment in respect of the murder conviction. The sentences imposed in respect of the other crimes were ordered to run concurrently with the sentence of life imprisonment imposed in respect of the conviction for murder.

2. At the hearing of the matter, the applicant was represented by Ms Brits from Legal Aid SA whilst Ms Marasela represented the State. It bears mention that the

applicant was legally represented by private attorneys for the entire duration of the trial until sentencing proceedings were concluded.

3. The applicant seeks condonation for the late filing of the application for leave to appeal. In terms of section 316(1)(b) of the Criminal Procedure Act, 51 of 1977, an application referred to in s 316(1)(a) must be made within 14 days after passing of sentence. In terms of s 316(1)(b)(ii), the application may be made within such extended period as the court may on application and for good cause allow.

4. The papers in the electronic file in respect of the application for leave to appeal and condonation were prepared by the applicant himself, ostensibly without legal assistance. The applicant avers that *two* applications for leave to appeal were filed by him, one preceding 12 July 2021 and one dated 12 July 2021. The application for leave to appeal, which is on file, is dated 12 July 2021. It bears the Registrar's stamp, dated 16 July 2021. The applicant explained on affidavit that the application dated 12 July 2021 was the second application as filed by him. It remains unclear to this court or the respective legal representatives of the parties how the matter was handled both prior to 16 July 2021 or thereafter, at least until June 2022 when I was alerted thereto, an anomaly that nobody appears able to explain, least of all the applicant. The application was postponed at the instance of the applicant on more than one occasion in order to procure legal assistance. The application was eventually heard in September 2022. The respondent does not oppose the grant of condonation. In the peculiar circumstances of the matter, I am of the view that it is in the interests of justice to grant condonation.

5. In terms of section 17 of the Superior Courts Act, 10 of 2013:

> "(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
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> (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) …"

6. The use of the word 'would' in section 17 (1)(a)(i) of the Superior Courts has been held to denote *'a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'*[1] Such approach was endorsed in this division in *Acting National Director of Public Prosecutions and Others v Democratic Alliance*[2] To this may be added, further cautionary notes sounded by the Supreme Court of Appeal in dealing with appeals: In *S v Smith*,[3] it was stated that in deciding whether there is a reasonable prospect of success on appeal, there must be '*a sound, rational basis for the conclusion that there are prospects of success on appeal.*' In *Dexgroup,*[4] the SCA cautioned that the '*need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit.*' More recently, in *Kruger v S,*[5] the Supreme Court of Appeal reiterated the need for a lower court to act as a filter in ensuing that the appeal court's time is spent only on hearing appeals that are truly deserving of its attention and that the test for the grant of leave to appeal should thus be scrupulously followed. In order to meet the test for the grant of leave to appeal, '*more is required than the mere 'possibility' that another court might arrive at a different conclusion.'* Quoting *S v Smith,* the court went on to state that it is not enough that the case is arguable on appeal or not hopeless, instead the appeal must have '*a realistic chance of succeeding.'*

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[1] *The Mont Chevaux Trust and Tina Goosen & 18 Others* (Case No. LCC 14R/2004, dated 3 November 2014), at para [6], followed by the Land Claims Court in *Daantjie Community and Others v Crocodile Valley Citrus Company (Pty) Ltd and Another* (75/2008) [2015] ZALLC 7 (28 July 2015) at par 3.

[2] *Acting National Director of Public Prosecutions and Others v Democratic Alliance, In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016) ZAGPPHC 489 (24 June 2016) para [25], a decision of the Full Court which is binding upon me.

[3] *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

[4] *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2012 (6) SA 520 (SCA) at par 24.

[5] *Kruger v S* 2014 (1) SACR 647 (SCA) at paras 2 and 3

7. The issues raised in the application for leave to appeal are not new or novel. They are factors I considered when I gave a detailed judgment on conviction and the judgment on sentence. Although a myriad of reasons were proffered for why I am said to have erred in my respective judgments on conviction and sentence, essentially only two grounds were ultimately pursued at the hearing of the matter. I deal with these in turn.

8. In respect of conviction, counsel for the applicant submitted at the hearing of the matter that the court should not have accepted the evidence of the state witness, Mr K [....] M [....] M [....] 1 (K [....]) ' *as he was involved in criminal activities',* or that of Mr J [....] N [....] (N [....]) '*because he had reason to fabricate his evidence and changed his version because he was scared of going to prison for this matter*.' The argument concluded with the submission that the court ' *should have accepted [the applicant's evidence] that he had dropped the deceased off [whilst she was unharmed and alive] and that he was therefore not responsible for her murder.'*

9. K [....]'s evidence is set out in paragraphs 17 to 39 of the judgment on conviction. His pivotal evidence, it will be recalled, was that he witnessed the lifeless body of the deceased in the applicant's vehicle in the early hours of the morning on 9 October 2016, contrary to the applicant's version that he had dropped the deceased off in Finetown during the evening of 8 October 2016, when she was uninjured and alive, never to see her again. K [....] witnessed injuries on the body of the deceased at the time (many hours after the applicant had allegedly dropped the deceased off in Finetown) which were consistent with the injuries described in the post-mortem report, which report was not in dispute. He witnessed the applicant trying to resuscitate the deceased on that occasion, however, without success. N [....] 's evidence is set out in paragraphs 40 to 70 of the judgment. The court's evaluation of the evidence of these witnesses is contained in paragraphs 248 to to 254 of the judgment. Both K [....] and N [....] were found to be credible witnesses, whilst the accused was not. The accused's version was riddled with contradictions. These are dealt with in paragraphs 259 to 271 and 274. The ultimate

conclusion, namely that the accused's version was not reasonable possibly true, was reached on a consideration of the totality of the evidence, including DNA evidence that confirmed that the applicant's semen was found in the deceased's body.[6]

10. In respect of sentence, counsel for the applicant submitted that the court should have taken into account that the applicant had spent four years in prison whilst awaiting trial. The judgment on sentence records that this issue was duly considered.[7] No substantial or compelling reasons were found that would warrant a departure from the prescribed minimum sentence for murder, being life imprisonment. It was further submitted that the court should have attached more weight to the fact that the applicant has eight children whom he is responsible for supporting and that long term imprisonment will have a negative effect on his responsibilities as a father. This factor was duly considered by me, as is apparent from the contents of paragraph 12 of the judgment on sentence, as further evaluated in paragraph 13 of the judgment on sentence.

11. Having re-read both my judgments and having dispassionately applied my mind to the circumstances elucidated and reasoning employed therein, I remain unpersuaded that there exists a reasonable prospect that another court will come to a different conclusion in respect of the applicant's conviction. Likewise, in respect of the sentence imposed, I remain of the view that the sentence imposed was neither inappropriate nor harsh, taking into consideration the aggravating circumstances discussed in paragraphs 16 to 19 of the judgment on sentence.

12. I am not persuaded that a different court <u>would</u> find in accordance with the applicant's submissions.

13. I accordingly make the following order:

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[6] See, in particular, paras 285 to 289 read with par 291 of the judgment.
[7] See par 9 read with paras 12, 17 & 19 of the judgment on sentence.

13.1. The application for leave to appeal by the applicant is dismissed.

A. MAIER-FRAWLEY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 13 September 2022

Judgment delivered 14 December 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 14 December 2022.

APPEARANCES:

Counsel for the Applicant: Adv Brits (Legal aid SA)

Counsel for the Respondent Adv P Marasela (NPA)