

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

4/3/2022
DATE


SIGNATURE

CASE NUMBER : SS69/2021

In the matter between:

MSHUBI, LUCKY
MAMBILA, THABO

1st APPELLANT
2nd APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT LEAVE TO APPEAL

DOSIO J:
INTRODUCTION

- [1] The first appellant has been found guilty of six counts. Count one is the crime of murder read with the provisions of s51(1) and Part 1 of schedule 2 of Act 105 of 1997 ('Act 105 of 1997'). Count two is a charge of housebreaking with the intention to commit the crime of robbery and kidnapping. Count 3 is a charge of robbery read with the provisions of s51(2) and part II of schedule 2 of Act 105 of 1997. Count 4 is a charge of kidnapping. Count 5 is a charge of attempted extortion and count 6 is a charge of defeating or obstructing the administration of justice. The second appellant has been found guilty of five of the same counts as accused 1, with the exception of the charge of attempted extortion which is count 5.
- [2] The application for leave to appeal in respect to both appellants, is solely in respect to the conviction and sentence imposed on count 1.

AD RIGHT TO APPEAL

- [3] 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 ('Act 51 of 1977') as amended.
- [4] An appellant who applies for leave to appeal must satisfy the court that there is a reasonable prospect of success on appeal. (see *S V Ackerman en n' ander* ¹)
- [5] In the case of *Matshona v S* ², the Supreme Court of Appeal stated that the test to determine whether leave to appeal should be granted is:
- 'simply whether there is a reasonable prospect of success in the envisaged appeal'.
- [6] 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.'
- [7] In the case of *S v Smith* ⁴ the Supreme Court of Appeal held that:

¹ 1973 (1) SA (A) 765 G-H.

² 2008 (4) SA 69 SCA at paragraph 4

³ 2007 (1) SACR 482 (SCA) at paragraph 22

⁴ 2011 ZASCA 2012 (1) SACR 567 (SCA) at paragraph 7

'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

[8] The grounds for appeal in respect to the first appellant are:

'1. The Honourable court erred in finding that the first applicant was guilty of the murder of the deceased on the basis of *dolus eventualis*.

2. There is no evidence that the first applicant had necessary intention to kill the deceased. It is submitted that the fact that the applicant was not happy with the deceased did not necessarily mean that he intended to kill her:

2.1 There is clear evidence that the dish cloth was inserted in the mouth of the deceased to prevent her from screaming;

2.2 It is submitted that the honourable court ought to have found that the applicant had taken the applicant to his place of residence in order to avoid members of the community from seeing her and what was happening;

2.3 It is submitted that the applicant could not have removed the cloth from the deceased's mouth because he did not want to attract the attention of the members of the public;

2.4 The applicant covered her with a blanket because it was cold. It is submitted that the conduct of the applicant was not that of a person who intended to kill the deceased.

3. It respectfully submitted that the honourable court erred when it found that by placing the dish cloth in the mouth of the deceased, the applicant should have foreseen that death would be the resultant consequence:

3.1 There is no evidence that the dish cloth was placed deep in her throat and, further there was no evidence that was led with regard to the size of the dish cloth that was used.

3.2 There is uncontroverted evidence that on his return to his place of residence, the applicant had a piece of paper and a pen and wanted to obtain the pins codes of the bank cards of the deceased from her;

3.3 It was not in dispute that the applicant was shocked when he realised that the deceased had passed on;

3.4 There was evidence that the second applicant had asked the first applicant to put on his mask before he went inside the room where the deceased was held captive. It is submitted that the honourable court ought to have found that the applicant did not want the deceased to see him, therefore had planned to release her later.

4. It is submitted that the honourable court ought to have found that by placing the dish cloth in the mouth of the deceased, the applicant could not have foreseen death as a resultant consequence.

5. It is respectfully submitted that the honourable court had failed to guard against 'the subconscious influx of *ex post facto* knowledge which manifests itself in drawing the inference that the accused must have foreseen the possibility of the resultant death of the victim from the very fact of that death'

S v Min 1963 3 ALL SA 81 (A)

6. It is respectfully submitted that the honourable court erred in its finding that the applicant had the requisite *mens rea* in the form *dolus eventualis*.

7. It is submitted that there are reasonable prospects of success on appeal and the applicant should be granted leave to appeal against his conviction of the charge of murder.

8. It is submitted that it cannot be said that the applicant's version was so improbable that it was false beyond reasonable doubt.

9. It is therefore submitted that another court will arrive at a different finding after having considered the merits and after a thorough evaluation of all the evidence tendered in this matter and that Leave to Appeal should therefore be allowed.'

[9] The grounds for appeal in respect to the second appellant are:

'1. The Presiding Judge in the court *a quo* erred that the second applicant had the necessary *mens rea* in the form of *dolus eventualis* in convicting him on the count of murder.

2. The Presiding Judge ignored the evidence that the deceased was approached by both applicants to ascertain the pin numbers of the bank accounts and realised later that the deceased had died.

3. There is no evidence which suggest that the second applicant had the intention kill the deceased.

4. There are reasonable prospects of success on the merits of appeal in that:

4.1 there is no evidence to suggest that the second applicant reconciled himself with the possibility that the deceased may die as result of the cloth that was put on her mouth;

4.2 the conduct of the second applicant amounted to the negligent killing of the deceased and should have been convicted on culpable homicide.'

[10] I respectively stand by my judgment in respect to count 1. The issues referred to by both the appellant's counsel were dealt fully in my judgment and reasons were given for the finding made. I carefully approached all the evidence that was presented by the State and the defence. I refer to the evaluation of the evidence of Mohammed Genner, Sergeant Mofokeng, Dr Shakeera Holland, Colonel Dhlamini, Captain Maremane, first appellant and second appellant.

- [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.
- [12] I accordingly find that the appellants have not satisfied me that they have a reasonable prospect of their appeal succeeding in respect to the conviction on count 1.
- [13] In the result, leave to appeal in respect to the conviction of both appellants on count 1 is dismissed.

AD SENTENCE

- [14] The first appellant's counsel has raised the following grounds in respect to sentence on count 1. They are:
- '10. It is submitted that the sentence of life imprisonment imposed on the applicant was shockingly inappropriate in the circumstance of the present matter.
11. In passing the sentence the Honourable court erred in failing to adequately take into account the personal circumstances of the applicant and the merits of the case.
12. It submitted that the honourable ought to have considered and found the following to constitute substantial and compelling circumstances:
- 12.1 The applicant was found guilty on the count of murder on the basis of *dolus eventualis*. The honourable court ought to have found that that fact only was substantial and compelling circumstance;
- 12.2 the applicant should have been treated as first offender for the purposes of sentence. The previous conviction of robbery in 2009, which is more than 10 years old ought to have been left out of account when determining the appropriate sentence;
- 12.3 he lived a normal life before he was arrested and was earning a living;
- 12.4 The applicant told the police what happened, showed the police where the deceased was buried. It is clear that the police would not have been able to find the body of the deceased without his assistance and/or cooperation.
- 12.5 The applicant pleaded guilty on counts 2,3, 4 and 6 and took the court in his confidence.
- 12.6 It is not in dispute that the applicant was shocked when he discovered that the deceased had passed away and even apologised to her. It is respectfully submitted that it is a factor that ought to have weighed in his favour; and
- 12.7 The applicant has apologised to the family of the deceased in court and it is submitted that it is a sign of remorse. At the age of 37 years old, he is a good candidate for rehabilitation.

13. The Honourable Court over-emphasized the seriousness of the offences and the interest of society.

14. It is respectfully submitted that the sentence of life imprisonment imposed is shockingly inappropriate in the circumstances of the present matter.

15. It is respectfully submitted that there are reasonable prospects that the Appeal court would interfere with the sentence of life imprisonment imposed by this honourable court.

16. It is therefore submitted that on the basis of the above-mentioned, another court could reasonably come to a different finding after having considered the personal circumstances of the applicant and the facts of the case.'

[15] The second appellant's counsel has raised the following grounds in respect to the sentence on count 1. They are:

'5.The Presiding Judge in the Court *a quo* erred in law and in fact to find that:

5.1 There are no substantial and compelling circumstances which justify the imposition of a lesser sentence.

5.2 The sentence imposed by the Court *a quo* is shockingly inappropriate.

5.3 The Leaned Judge *a quo* erred by over-emphasizing the seriousness of the offence over the personal circumstances of the Applicant.'

[16] In respect to the personal circumstances of the appellants, these were considered. I dealt fully in my judgment why a term of life imprisonment was imposed in respect to count 1.

[17] 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.

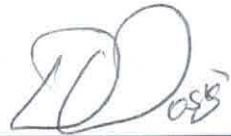
[18] The imposition of sentence is in the discretion of the trial court and the Court of Appeal must not interfere with this discretion for frivolous reasons. The Court of Appeal must not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised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

[19] 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'....'

[20] The appellants have not satisfied this Court that they have a reasonable prospect of success on the sentence imposed on count 1.

[21] In the result leave to appeal in respect to the sentence imposed on count 1 in respect to both appellants is dismissed.



D DOSIO

ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the First Appellant	Advocate Milubi
On behalf of Second Appellant	Advocate Morane
On behalf of the Respondent	Adv Le Roux

Date Heard:	4 March 2022
Handed down Judgment	4 March 2022

⁵ 2001 (1) SACR 469 (SCA) at 478d