

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**Case number: CC73/2020**

REPORTABLE: NO  
OF INTEREST TO OTHER JUDGES: NO  
REVISED: YES  
26/04/2022

In the matter between:

**R[....] J[....] M[....]**

**Applicant**

v

**THE STATE**

**Respondent**

**JUDGMENT**

**MOSOPA, J**

1. This is an application for leave to appeal against both conviction and sentence, to either the full court of this division or to the Supreme Court of Appeal.
2. The applicant was convicted on 22 October 2021 of murder, read with the provisions of section 51(1) of Act 105 of 1997, attempted murder, unlawful possession of a firearm and ammunition, and was sentenced to an effective sentence of 25 years imprisonment, with the concurrent running of sentences ordered. It was further found that substantial and compelling circumstances exist and the court deviated from the imposition of the prescribed minimum sentence.

3. The application is brought in terms of section 316(1)(a) of Act 51 of 1977, which provides;

*“[316] – (1)(a) Subject to section 84 of the Child Justice Act, 2008, any accused convicted of any offense by a High Court may apply to that court for leave to appeal against such conviction or against any resultant sentence or order.”*

4. Section 17 of the Superior Courts Act 10 of 2013 (“SC Act”) also governs leave to appeal against a decision of a judge, and provides;

*“17(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 reasonable prospects of success; or*

*(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration...”*

5. From the argument, even if it was not specifically mentioned by Mr Moeng on behalf of the applicant, the applicant is relying on the provisions of section 17(1)(a)(i) of the SC Act, in that the appeal *“has reasonable prospects of success”*.

6. In ***S v Smith 2012 (1) SACR 567 (SCA)*** at 570 paragraph 7, when dealing with the concept of “reasonable prospects of success”, the court stated;

*“[7] What the test of reasonable prospects of success 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. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be*

*categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”*

## AD MERITS

7. Criticism was levelled at the fact that the court accepted the evidence of the complainant, T[...], who was a single witness in the matter. T[...] is the daughter of the deceased and the applicant. At the time of the shooting, T[...] was six (6) years old, and ordinarily her evidence must be admitted with caution.

8. It is not the applicant's version nor the State's that there was another person in the room, where the shooting incident took place, who was in possession of the firearm, meaning that the only firearm which was present in that room, was the firearm which shot and killed the deceased. It was further suggested by Mr. Moeng that, taking into account the age of T[...], there is a possibility that she might have been influenced and lied against the applicant.

9. After the death of her mother and the incarceration of her father, T[...] has been living with her paternal aunt. If she was influenced, then it must have come from the applicant's side. T[...]’s evidence on the shooting was clear, even though in other aspects she contradicted herself. She is adamant that it was her father who shot at the deceased after coming from outside. Without saying any word, he shot at the deceased and her and she was injured on her leg.

10. All the witnesses, who happen to be the applicant's neighbors, testified that the applicant, after the shooting, said that he killed his wife. There is no witness who said that the applicant said to them that he “accidentally shot his wife”, that he had a fight with his wife over a firearm that resulted in the shooting and killing of his wife.

11. The applicant did not have any bad blood with his neighbors before the shooting, and there is no reason for them to lie against the applicant. The evidence of Lieutenant-General Mangena, who did the crime scene reconstruction, is to a large extent unchallenged. He found no evidence of a struggle over the firearm, as no certain characteristics were found on the dress of the deceased, as the

applicant's version said that there was a tussle over the firearm before a bullet was discharged, which means that the applicant was not more than a meter from the deceased when the firearm was discharged. Based on this, and other findings I made in my judgment, I am not of the view that another court will come to a different conclusion.

## SENTENCE

12. Despite being empowered by section 51(1) of Act 105 of 1997 to impose a sentence of life imprisonment for the murder charge, this court deviated from the imposition of such. I also deviated from the imposition of the prescribed minimum sentence of the possession of an unlawful firearm.

13. The personal circumstances of the applicant were thoroughly considered, so were the interests of the community and the nature of the seriousness of the crime committed. The offense was committed in a very confined space, and it is a matter of luck that there was only one deceased in this matter. The children of the deceased could have been easily killed, but through luck, it was only T[....] who was shot and injured. I am alive to the fact that T[....] and her younger brother will grow up without the benefit of being raised by their parents, as the applicant is currently in custody serving a very lengthy sentence.

14. The deceased died of a callous, cold-blooded murder. An argument which was not of the deceased's making, resulted in her death.

15. Mr. Moeng contended that I applied the principle laid down in **S v Kekana** incorrectly and the current matter is distinguishable from the **Kekana** matter. I found that the murder was not premeditated or planned. In **Kekana (supra)**, the court emphasized the fact that murder remains murder, whether it is in terms of section 51(1) or section 51(2) of Act 105 of 1997 makes no difference, and the court is vested with inherent jurisdiction to impose a sentence which is more than a prescribed minimum sentence in the event of a murder conviction. It might be true that the facts in the **Kekana** matter are not the same as in the current matter, but the principle remains the same.

16. It was further contended by Mr. Moeng that the applicant did not receive a fair trial, in that accused persons in this position are sentenced to fifteen (15) years imprisonment, whereas the applicant was sentenced to twenty-five (25) years imprisonment. Each case must be approached on the circumstances that it relates to, as circumstances differ from one case to another.

17. I find no reasonable prospects on appeal in this matter, and in my considered view, no other court will come to a different conclusion than which was arrived at by this court.

### ORDER

18. In the consequence, the following order is made;

1. The application for leave to appeal against both conviction and sentence is hereby refused.

**MJ MOSOPA**  
**JUDGE OF THE HIGH**  
**COURT, PRETORIA**

### Appearances:

For the applicant: Mr. S Moeng  
Instructed by: Legal Aid South Africa.

For the respondent: Adv J Makgwatha  
Instructed by: The DPP

Date of hearing: 16 February 2022  
Date of judgment: Electronically delivered