



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: CC16/2022

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

27/01/2025
DATE

In the matter between:

ISAAC SIKHAKHANE

FIRST APPELLANT

NKOSINATHI RADEBE

SECOND APPELLANT

v

THE STATE

RESPONDENT

JUDGMENT

MOSOPA, J

1. On the 13 July 2023, this court convicted the applicants on various counts which includes murder, conspiracy to commit murder, attempted murder, unlawful possession of firearms and ammunition and malicious damage to property. The

applicants were sentenced to various sentences ranging from 12 months imprisonment to life imprisonment terms. Aggrieved by such convictions the applicants brought leave to appeal applications against such convictions and the applications were heard on the 02 December 2024, when judgment was reserved. This is judgment on the applications for leave to appeal by the applicants.

2. In these proceedings the applicants are represented by Mr Voster who was not their counsel in the trial matter. The applications were brought out of court times but application for condonation for the late filing of applications for leave to appeal was granted when the matter was heard on the 02 December 2024.
3. The application for leave to appeal is governed by section 316(1) of the Act 51 of 1977, which provides that;

“[316] (1) Subject to section 84 of the Child Justice Act, 2008, any accused convicted of any offence 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(1)(a) - (c) of the Superior Court's Act 10 of 2013 (“SC Act”) makes the following provision;

“[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 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) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

5. In bringing the applications for leave to appeal on convictions against them, the applicants rely either on section 316 (1) of Act 51 of 1977 and/or section 17(1)(a)(i) of the SC Act, in that the appeal would have a reasonable prospect of success.
6. In the ***Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others LCC 14R/2014***, the court when dealing with the concept of “reasonable prospects of success” stated that;

“[6] It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”

7. It is further trite that leave to appeal, ought to be granted only where there was a sound and rational basis for doing so.
8. In ***S v Smith 2012 (1) SACR 567 (SCA)*** when dealing with what “reasonable prospects of success” constitutes, the court said the following;

"[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."

9. Given the above legal principles, it is clear that the onus is on the applicant to prove that the appeal has a reasonable prospect of success, and there must be sound and rational basis raised by applicants for such application for leave to appeal to succeed.
10. Criticism is levelled on the fact that this court erred in admitting the evidence of Ms Buhle Ndlovu, the wife of the deceased in count 1, without interrogating the veracity and truthfulness of the witness, more especially in witnessing the murder incidents and latter on phoning the applicants, despite allegedly killing her husband. Both the applicants are known by Ms Ndlovu and the first applicant is related to her husband. The second applicant would also attend the family gatherings at her husband's place of residence in Kwazulu-Natal province. The issue of identity never arose. It is also not disputed that before the killing of the deceased mentioned in count 1, the first applicant phoned the deceased to come to a meeting. It was never a point of dispute that the witness could make a proper observation of the scene from where she was observing the scene.
11. Ms Ndlovu accompanied the deceased to that meeting even though she did not enter the premises where the meeting was held but went to her colleague who

was residing three houses from where the deceased was shot and killed. The aspect was also not disputed. She heard the noise of people who appeared to her as if they were fighting and she could observe the whole incident from where she was.

12. It is correct that she did call the applicants later during the night on the day of the incident. She gave an explanation as to why she made those telephone calls which were at that stage not answered as she wanted to tell them that she saw everything. In addition to that, she confronted the first applicant the following day of the incident about what he did or his role in the incident which was denied. She also gave an explanation as to why she did not depose to the affidavit immediately after the incident and as to why she used the names Karabo Nkadimeng in her statement as she wanted to protect her identity as she realised that she was already in trouble. The alibi witness called by the first applicant, his brother who is also a police officer in the Kwazulu-Natal province could not confirm the alibi of the first applicant.
13. Criticism is also levelled on the fact that this court allowed the prosecutor to divulge the nature of the consultation he had with Mr Thusi. Mr Thusi is a state witness who testified mainly outside the statement he made to the police. The state made an application for him to be declared as a hostile witness. Mr Thusi despite being a witness changed his residential address without informing the Investigating Officer in the matter and as a result, a subpoena to appear at court could not be served on him. To the surprise of the prosecutor, Mr Thusi came to court in the company of Advocate Lusiba who was by then representing the second applicant and having travelled in the same vehicle enroute to court.
14. This is a kind of conduct bordering on the ethical conduct of counsel. It also appeared later in evidence, that he was employed by the first applicant and they were travelling in the same vehicle from the Kwazulu-Natal province on the date of the arrest of the first applicant. Despite overwhelming evidence of the police finding the firearm and ammunition at the time of the arrest of the first applicant, Mr Thusi testified that no firearm was found by the police at the time of their

arrest. This court in convicting applicants decided to ignore the evidence of Mr Thusi for the reasons stated above.

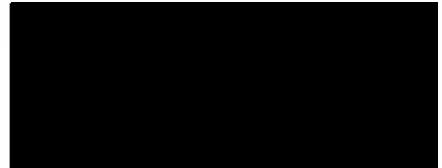
15. With regard to counts 7, 8 and 9 relating to the killing of Mr Makhafola, criticism is levelled to the fact that this court relied on hearsay evidence when convicting the second applicant. This contention in my respectful view, lacks merit. Mr Matlatse who was sitting in a taxi with the deceased, witnessed the incident which happened when visibility was clear as it was still early in morning. He knew the second appellant for period of 3 years before the incident and at the time of the shooting, amongst the shooters, it was only his face which was not covered. He also knows that the second appellant is referred to as "Sga", evidence which was also not disputed.
16. With regard to attempted killing of Mr Mosia count 13, criticism is levelled to the fact that this court did not take adequate discrepancy of the time it is alleged the incident happened and when Mr Mosia was examined at the hospital, in terms of the J88. He did have an explanation for that and said that the person who made an entry on the J88 made a mistake. This incident happened in daylight. Before the shooting incident, there is a vehicle which came to stand parallel to his vehicle and he could clearly observe the first applicant sat on the front passenger's seat and fired approximately 15 shots towards his direction. Before the time he has been knowing the first applicant and described him as one of the people who were operating their taxis at the taxi rank without taxi permits.
17. No criticism is levelled to the firearm seized from the first applicant on the N3 highway and it is accepted by this court that the first applicant abandoned leave to appeal on those counts.
18. It is therefore my considered view that the applicants failed to pass the test as set out in section 17(1)(a)(i) of the SC Act and more especially the "reasonable prospects of success" on appeal as espoused in *In S v Smith (supra)*. No sound and rational basis is made for the applications to succeed.

19. No leave to appeal is brought against sentences and as a result, this leave to appeal applications lies only against convictions and ought to fail on the basis that there is no "reasonable prospects of success" on appeal.

ORDER

20. In the result, the following order is made;

1. Leave to appeal by the first and second applicants against their convictions is hereby refused.



M.J MOSOPA

**JUDGE OF THE HIGH
COURT, PRETORIA**

APPEARANCES:

FOR THE 1ST & 2ND APPELLANT : MR VORSER

INSTRUCTED BY : LUANDO VORSTER ATTORNEYS

FOR THE RESPONDENT : ADVOCATE MASIKWAMENG

INSTRUCTED BY : THE DIRECTOR OF PUBLIC PROSECUTIONS