

SOUTH AFRICA / JUDGMENT

Khoza v S (Leave to Appeal) (CC2/22)

[2025] ZAGPPHC 493 (16 May 2025)

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COURT

North Gauteng High Court, Pretoria

BEFORE

T J Monyemangene

CASE / FILE NUMBER

CC2/22

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE No: CC2/22

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

DATE: 16 May 2025

SIGNATURE:

In the matter between

MVUSI KHOZA

Applicant

And

THE STATE

RESPONDENT

JUGDMENT

MONYEMANGENE, AJ

1. This is an application for leave to appeal against judgment and sentence imposed by this court sitting at Benoni Circuit Court on 14 September 2022.

the appellant was convicted on the following charges:

- a) Robbery with Aggravating Circumstances: Count 1, 3,5,12 and 14.
- b) Common Robbery: Count 18.
- c) Rape in Contravention of Section 3 Act 32 of 2007; Count 2'4'8, 9, 10, 11, and 13. Count no 8 to 11 the state relied on the provisions of Section 51(1) Act 105 of 1997. The indictment was amended to incorporate the said provisions.
- d) Assault with intent to do grievous bodily harm: Count 16.

The Test

- 2. An appellant who applies for leave to appeal must satisfy the Court that there is a reasonable prospect of success on appeal. This is now trite.
- 3. In *S v Mabena and Another* 2007 (1) South African Criminal Reports at page 492 at paragraph 22 the Supreme Court of Appeal stated thus:

"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."

- 4. In *S v Smith* 2012 (1) South African Criminal Reports at page 567 at paragraph 7 the Supreme Court of Appeal further held that:

"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"

- 5. The application for leave to appeal was lodged with the registrar timeously on 3 October 2022. The application for leave to appeal is premised on the following grounds

Ad Conviction

- a. That the court erred in finding that the state succeeded in proving the guilt of the applicant beyond reasonable grounds
- b. Except where the identity of the appellant was linked by DNA evidence, that the state failed to properly identify the appellant as there was no meaningful description that could assist the police in the search and arrest of the applicant.

- c. That the court erred in relying on the evidence of identification as the appellant was not legally represented during the parade, that it was fraught with errors as one of the witnesses, Christinah Modiba passed the appellant sitting on the court bench while coming to court, and she confirmed this in her testimony.
- d. That the court erred in convicting the appellant of rape in count 2 by inserting his finger as the intention to rape was not there. The appellant inserted his finger in order to confirm if the complainant was indeed on her menstrual circle.
- e. That the court erred in rejecting the evidence of the applicant as false and giving importance to minor discrepancies in his evidence.
- f.
- 6. I had the opportunity to reflect on the judgment I delivered on the merits. I respectfully stand by my judgment in respect of the above-mentioned matters raised. These issues were dealt with extensively in my judgment and reasons were given for the findings I made. I gave full reasons why I am convinced that the state succeeded in proving the guilt of the accused beyond reasonable doubt. In my judgment I dealt in great detail with the evidence of identification,

how each of the witnesses identified the accused. I also explained that minus corroboration the way the witnesses identified the

accused, it would not have been sufficient enough to sustain a conviction. For fear of repetition and burdening the record with

analysis as to how I concluded that the state succeeded in proving the identity of the accused beyond reasonable doubt I do not propose to deal with the aspect once again.

- 7. 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 appeal. I accordingly find conviction and there are no reasonable prospects of success in 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 the leave to appeal in respect of conviction is dismissed.

Ad sentence

- a. Regarding sentence it is argued that the sentence imposed is strikingly disproportionate in that it is out of proportion with to the accepted facts in mitigation.
- b. That the court erred in underemphasizing the personal circumstances of the appellant and overemphasized the nature and the seriousness of the offence and the interest of the community.
- c. That the court erred in finding that there were no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence.

- d. Lastly that the court did not take into account the time spent in custody and thus overemphasized that there were aggravating circumstances in the matter.
8. As regards sentence, this I 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 in respect of count 8 to 12.
9. 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.
10. 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.
11. In the matter of *S v Malgas* 2001 (1) South African Criminal Reports at page 478d the Supreme Court of Appeal held thus:

"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'."
12. I am not entirely satisfied that the appellant has satisfied me that the sentence is disturbingly inappropriate or that he has reasonable prospects of appeal on sentence. In the result, leave to appeal in respect of the sentences I imposed is accordingly dismissed as well.

T J MONYEMANGENE

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 27 September 2024

Date of order: 16 May 2025

APPEARANCES

On behalf of the applicant: Adv M B KGAGARA

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