

SOUTH AFRICA / JUDGMENT

Molise v S (43/2020) [2024]

ZAFSHC 155 (22 May 2024)

[2024] ZAFSHC 155

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman

CASE / FILE NUMBER

43/2020

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IN THE
HIGH COURT OF
SOUTH AFRICA
FREE STATE PROVINCIAL
DIVISION

Reportable: YES/NO
CASE
NO.: 43/2020
In

the matter between: MOLEFI
MOLISE
Applicant[1]
and
THE
STATE
Respondent

Coram: Opperman J

Hearing: 1 March 2024

Order: 1 March 2024

Reasons: 22 May 2024

Judgment: Opperman J

Summary: Application for
leave to appeal
- criminal trial
- convictions and
sentences

JUDGMENT

- [1] On 25 March 2024 I granted an order for leave to appeal to Molefi Molise, that was accused one, in this case a quo on all the charges he was convicted of and the subsequent sentences[2] to the Supreme Court of Appeal.
- [2] Seven accused stood trial and only accused 1 and 6 were ultimately convicted. They lodged separate applications for leave to appeal on separate occasions since they were represented by different counsel and their instructions supposedly came at different times. Leave to appeal was granted to accused six also and similarly to the Supreme Court of Appeal.
- [3] I indicated in some earlier judgments in this case pertaining to the interlocutory issue of the hostile witness and the application in terms of section 174 of the Criminal Procedure Act 51 of 1977 that the case took many twists and turns and what was supposed to be a strong case for the State turned into a sudden quandary and impasse when the pivotal key witness ("Letsotso"), that was apparently closely and directly involved in the crimes, turned hostile and pleaded ignorance of any crimes or knowledge thereof.
- [4] What distinguishes this case from the other cases is that Letsotso also stated his case when he pleaded guilty in terms of section 105A of the Criminal Procedure Act 51 of 1977. This is the elephant in the room; the hostile witness and the previous alleged inconsistent statements he made. Is it admissible against co-accused and what is the value of the statements at the end of the trial? Was it strong enough to convict the accused?
- [5] The case of the State against accused 1 and 6 is reliant on the evidence of Letsotso as adduced in statements and not viva voce under oath to be tested under cross examination. There is also the peripheral evidence that supports his evidence in the statements. It is imperative that the Supreme Court of Appeal rule on the admissibility of the evidence of Letsotso against accused one and
- six. Apart from the cases I referred to in the judgments during the trial the matter of Kapa v The State [2023] ZACC 1 has also seen the light.[3]
- [6] The facts are also entwined to the extent that leave had to be granted on all the convictions and the sentences.
- [7] I undertook to write a judgement in addition to the ex-tempore judgment and other judgments that eventuated as the case progressed that will encompass all the evidence, the interlocutory issues and all other challenges and issues that occurred in the trial and the most current law before the matter is submitted to the Supreme Court of Appeal. I am

awaiting the transcribed records for this purpose. The ex-tempore judgment in 2023 was forced due to the delays in the case and the workload at the time. The matter started on 24 May 2021 and was only finalised in 2024 due to numerous challenges that presented; expeditious finalisation was essential.

- [8] The contemporary test that must be applied when an application for leave to appeal is considered and that forms the background to this application is based on the following:
1. The right to appeal is, among others, managed by the application for leave to appeal. It may not be abused but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post- constitutional era. Access to justice is access to justice.
 2. The final word was spoken in the Supreme Court of Appeal in *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA) in March 2021. It also added the issue of "compelling reasons which exist why the appeal should be heard such as the interests of justice":

Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in *Caratco*, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the Court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that "but here too the merits remain vitally important and are often decisive". I am mindful of the decisions at High Court level debating whether the use of the word "would" as opposed to "could" possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates 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 other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist. (Accentuation added)

3. The fact remains that the judicial character of the task conferred upon a presiding officer in determining whether to grant leave to appeal is that it should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate Court.

[9] These are the grounds for leave to appeal more specifically noted by counsel for accused one, Mr. Molise, in their heads of argument in the application for leave to appeal:

1. The court a quo erred in finding that the State proved its case beyond reasonable doubt against Applicant 1.
2. That the court a quo erred by not properly analyzing and evaluating the evidence of state witnesses.

Counts 1 to 5

2.1. The state only relied on the evidence of circumstantial evidence to convict the accused. There was no eye witness (sic) except for the statements of Mr. Letsoso that he disavowed during his evidence (exhibits CC and S). Mr. Letsoso also recanted on the S105A plea agreement (exhibit R).

2.2 The court should approach Mr. Letsoso's statements with caution as the truthfulness and reliability of the statement is in dispute. Exhibits CC and S amounts to confessions. It's the writer's submission that the statements cannot be used against the Applicant and accused 6.

2.3 Mr. Letsoso is an accomplice to the offences pertaining to counts 1 to 6.

2.4 The cellphone record provided that there were communications between the cellphone numbers of the Applicant and Accused 6 however, it does not provide content to such communication.

2.5 The Applicant's cellphone number was in the range of the 19Atlas tower in Thaba-Nchu on 25 March 2019, however according to the expert the range can be about 30 km.

Counts 6 to 9

2.6 The Applicant was not found in possession of the Norinco firearm or ammunition. No fingerprints or DNA was found to link him to the said firearm.

2.7 According to Warrant Officer Kemp he could not say who placed the firearm on the floor of the vehicle behind the driver. The Applicant was sitting in the front seat and not near the Norinco firearm.

2.8 There were also no fingerprints or DNA found on the Rifle found. Mr. Letsoso evidence was that the blue bag was in the boot at the time when the police stopped the vehicle and therefore not with the Applicant.

3.

Relevant Case Law

3.1 The case of *Mabaso v The State* (67712020) [2021] ZASCA 98 (09 July 2021) deals with the statements of an accomplice who was also declared a hostile witness as in *casu* and whether or not it can be used against a co accused.

3.2 In contrast to *Makhala & Another v The State* (438/2020) [2021] ZASCA 19 (18 February 2022) the Mabaso (supra) matter deals with an accomplice that pleaded guilty (Section 112 of Act 51 of 1977). Mabaso (supra) is in more than one way similar to the applicant's case as it relates to counts 1 to 5.

3.3 The court in Mabaso par 24, referred to the *S v Mathonsi* 2012 (1) SACR 335 (KZP) matter as it relates to prior inconsistent statements and when it will be admissible "In Mathonsi the full bench held that evidence contained in a prior inconsistent statement is such that it would only be admissible if given in court. The high court failed to follow this important guideline prior to admitting Mr Mvubu's prior inconsistent statements."

3.4 Therefore our submission is that the coun erred in relying on the statements of Mr. Letsoso, who was an accomplice, in as far as it incriminates the Applicant as Mr. Letsoso did not testify same under oath.

3.5 *Litako and Others v S* 2015 (3) SA 287 (SCA) para 65

" it is difficult to see how one accused's extra curial statements can bind another. Co-accused more often than not, disavow extra-curial statement made by them and often choose not to testify. They cannot be compelled to testify, and in the event that an extra-curial statement made by one co-accused and implicating the others ruled admissible and he or she chooses not to testify, the right of the others to challenge the truthfulness of incriminating parts of such statement is effectively nullified. The right to challenge evidence enshrined in section 35(3) of the Constitution is thereby rendered nugatory. "

3.6 Mr. Letsoso did not incriminate 1 Applicant in any of the offences and therefore Applicant one was unable to cross examine him on the merits. Furthermore, due to the fact that he disavowed the statements, Applicant 1 was unable to challenge the truthfulness of Mr. Letsoso's statements.

4.

4.1 Subjectively the court need not believe the Applicant, his version only needs to be reasonably possibly true. If there is doubt, he be given the benefit of the doubt.

5.

AD SENTENCE:

5.1 That an effective term of life imprisonment is strikingly inappropriate in that:

a) The sentence is excessive and induces a sense of shock.

5.2 Having said the above, it is submitted that the Honorable Judge erred on the following:

5.2.1 In finding that there were no substantial and compelling reasons present to deviate from the prescribed minimum sentences for counts 3 and 4 and 5;

5.2.2 The type of sentence imposed on the Applicant does not afford him an opportunity to rehabilitate;

5.2.3 The court a quo did not adequately consider the Applicant's personal circumstances;

5.2.4 The court a quo overemphasized the seriousness of the offence, interest of the society, the effect of the offence on the complainants, the deterrent and retributive effect of sentencing.

6.

The Applicant humbly submit that on the grounds mentioned above there are prospect of success and another will come to a different conclusion on both convictions and sentence. The Applicant hereby respectfully apply to the Honorable Court to grant the Applicant Leave to Appeal to the full bench of the High Court, against convictions and sentences imposed.

[10] Reading of the grounds for leave to appeal with due cognisance to the nature of the evidence and considering the law applicable, I am convinced that a sound rational basis for the conclusion that there are prospects of success on appeal exists. The Supreme Court of Appeal must give final clarity on the issues.

ORDER

[11] Leave to appeal is granted and to the Supreme Court of Appeal against the convictions and sentences imposed.

M OPPERMAN J

APPEARANCES Counsel for applicant ADVOCATE V ABRAHAMS Legal Aid: South Africa
Bloemfontein Counsel for respondent ADVOCATED MPEMVANE Office of the Director: Public Prosecutions, Free State Bloemfontein

[1] Also “accused 1”.

[2] 1: MOLEFI MOUSE 1. CONVICTIONS AND SENTENCES Count 1: GUILTY (1 DECEMBER 2023): Attempt robbery with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act 51 of 1977. SENTENCE (9 FEBRUARY 2024): In terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 the accused is sentenced to 7 (seven) years' imprisonment. (Botshabelo cas 254/1/2019) Count 2: GUILTY (1 DECEMBER 2023): Attempted murder. SENTENCE (9 FEBRUARY 2024): In terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 the accused is sentenced 12 (twelve) years' imprisonment. (Botshabelo cas 254/1/2019) Count 3: GUILTY (1 DECEMBER 2023): Murder read with the Provisions of Section 51(1) and Part I of Schedule 2 of Act 105 of 1997. SENTENCE (9 FEBRUARY 2024): Life imprisonment. (Botshabelo cas 254/1/2019) Count 4: GUILTY (1 DECEMBER 2023): Murder read with the Provisions of Section 51(1) and I of Schedule 2 of Act 105 of 1997. SENTENCE (9 FEBRUARY 2024): Life imprisonment. (Thaba Nchu cas 79/3/2019) Count 5: GUILTY (1 DECEMBER 2023): Murder read with the Provisions of Section 51(I) and Part I of Schedule 2 of Act 105 of 1997. SENTENCE (9 FEBRUARY 2024): Life

imprisonment. (Thaba Nchu cas 79/3/2019) Count 6: GUILTY (1 DECEMBER 2023): Contravening of Section 3 read with Section 1, 103, 117, 120(1)(a), 121 and read with Schedule 4 of Act 60 of 2000 and read with Section 51(2) and Schedule 2 Part II of Act 105 of 1997, Possession of a Semi-Automatic Firearm without a licence. SENTENCE (9 FEBRUARY 2024): In terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 the accused is sentenced to 15 (fifteen) years' imprisonment. (Fouriesburg cas 129/06/2019) Count 7: GUILTY (1 DECEMBER 2023): Contravening of Section 90 read with Section 1, 103, 117, 120(1)(a), 121 and read with Section 8 of Schedule 1 and with Schedule 4 of Act 60 of 2000 and further read with Section 150(1) of Act 51 of 1997. SENTENCE (9 FEBRUARY 2024): In terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 the accused is sentenced to 3 (three) years' imprisonment. (Fouriesburg cas 129/06/2019) Count 8: GUILTY (1 DECEMBER 2023): Contravention of Section 4(1)(a) and Section 4(1)(f)(iv) read with Section 1, 103, 117, 120(1)(a) and Section 121 read with Schedule 4 of Act 60 of 2000. SENTENCE (9 FEBRUARY 2024): In terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 the accused is sentenced to 25 (twenty-five) years' imprisonment. (Fouriesburg cas 129/06/2019) Count 9: GUILTY (1 DECEMBER 2023): Contravening of Section 90 read with Sections 1, 103, 117, 120(1)(a), 121 and read with Section 8 of Schedule 1 and with Schedule 4 of Act 60 of 2000 and further read with Section 250(1) of Act 51 of 1997. SENTENCE (9 FEBRUARY 2024): In terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 the accused is sentenced to 10 (ten) years' imprisonment. (Fouriesburg cas 129/06/2019)

2. IN TERMS OF SECTION 280(2) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 COUNTS 6, 7, 8 & 9 SHALL BE SERVED CONCURRENTLY.
3. NO ORDER IS MADE IN TERMS OF SECTION 103(1) OF THE FIREARMS CONTROL ACT 60 OF 2000.

[2] 1: MOLEFI MOUSE

1. CONVICTIONS AND SENTENCES

Count 1: GUILTY (1 DECEMBER 2023): Attempt robbery with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act 51 of 1977.

SENTENCE (9 FEBRUARY 2024): In terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 the accused is sentenced to 7 (seven) years' imprisonment.

(Botshabelo cas 254/1/2019)

Count 2: GUILTY (1 DECEMBER 2023): Attempted murder.

SENTENCE (9 FEBRUARY 2024): In terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 the accused is sentenced 12 (twelve) years' imprisonment.

Count 3: GUILTY (1 DECEMBER 2023): Murder read with the Provisions of Section 51(1) and Part I of Schedule 2 of Act 105 of 1997.

SENTENCE (9 FEBRUARY 2024): Life imprisonment.

Count 4: GUILTY (1 DECEMBER 2023): Murder read with the Provisions of Section 51(1) and I of Schedule 2 of Act 105 of 1997.

(Thaba Nchu cas 79/3/2019)

Count 5: GUILTY (1 DECEMBER 2023): Murder read with the Provisions of Section 51(I) and Part I of Schedule 2 of Act 105 of 1997.

Count 6: GUILTY (1 DECEMBER 2023): Contravening of Section 3 read with Section 1, 103, 117, 120(1)(a), 121 and read with Schedule 4 of Act 60 of 2000 and read with Section 51(2) and Schedule 2 Part II of Act 105 of 1997, Possession of a Semi-Automatic Firearm without a licence.

SENTENCE (9 FEBRUARY 2024): In terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 the accused is sentenced to 15 (fifteen) years' imprisonment.

(Fouriesburg cas 129/06/2019)

Count 7: GUILTY (1 DECEMBER 2023): Contravening of Section 90 read with Section 1, 103, 117, 120(1)(a), 121 and read with Section 8 of Schedule 1 and with Schedule 4 of Act 60 of 2000 and further read with Section 1 50(1) of Act 51 of 1997.

SENTENCE (9 FEBRUARY 2024): In terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 the accused is sentenced to 3 (three) years' imprisonment.

Count 8: GUILTY (1 DECEMBER 2023): Contravention of Section 4(1)(a) and Section 4(1)(f)(iv) read with Section 1, 103, 117, 120(1)(a) and Section 121 read with Schedule 4 of Act 60 of 2000.

SENTENCE (9 FEBRUARY 2024): In terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 the accused is sentenced to 25 (twenty-five) years' imprisonment.

Count 9: GUILTY (1 DECEMBER 2023): Contravening of Section 90 read with Sections 1, 103, 117, 120(1)(a), 121 and read with Section 8 of Schedule 1 and with Schedule 4 of Act 60 of 2000 and further read with Section 250(1) of Act 51 of 1997.

SENTENCE (9 FEBRUARY 2024): In terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 the accused is sentenced to 10 (ten) years' imprisonment.

2. IN TERMS OF SECTION 280(2) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 COUNTS 6, 7, 8 & 9 SHALL BE SERVED CONCURRENTLY.
3. NO ORDER IS MADE IN TERMS OF SECTION 103(1) OF THE FIREARMS CONTROL ACT 60 OF 2000.

[3] De Rebus, Archive 2023, The Kapa case: The Kapa case: A landmark ruling redefining the admissibility of hearsay evidence in criminal trials. July 1st, 2023

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