

SOUTH AFRICA / JUDGMENT

S.M v S (Leave to Appeal) (CC1/2025) [2025] ZAECMKHC 50 (10 June 2025)

[2025] ZAECMKHC 50

COURT

Eastern Cape High Court, Makhanda

BEFORE

Laing

CASE / FILE NUMBER

CC1/2025

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, MAKHANDA

CASE

NO. CC 1/2025

In

the matter between:

S[...]

M[...]

Applicant

and

THE

STATE

Respondent

JUDGMENT

LAING J

- [1] This is an application for leave to appeal against the sentence of life imprisonment imposed on the applicant after his conviction on a charge of murder.
- [2] The main ground of the application was that the court erred in under-emphasising several mitigating factors. These are as follows: the applicant was a 51-year-old first offender; he acted out of character; he consumed alcohol prior to the commission of the offence; and he was in a state of emotional upheaval at the time. Counsel contended that the above factors were, cumulatively, substantial and compelling circumstances. Furthermore, argued counsel, the court erred in over-emphasising the seriousness of the offence and the interests of the community at the expense of the applicant's personal circumstances. A sentence of life imprisonment was also disproportionate to the offence.
- [3] The usual test in relation to an application for leave, within a criminal context, is whether the appeal has reasonable prospects of success. In *S v Smith*,^[1] the Supreme Court of Appeal stated as follows:

‘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.’^[2]

- [4] The test set out in section 17 of the Superior Courts Act 10 of 2013 has been accepted as the legislative benchmark.^[3] Consequently, an application for leave to appeal can also be granted if a court is of the view that there is some other compelling reason why the appeal should be heard.
- [5] The fact that the applicant was a 51-year-old first offender is of little assistance. It is, however, the remaining grounds that deserve closer examination. A question that went unanswered was the role that alcohol played in the commission of the offence. In its verdict, the court found that the evidence regarding the extent to which the applicant consumed alcohol on the day in question was inconclusive. Nevertheless, it seemed to have been common cause that the applicant consumed at least a single unit. The clinical psychologist, Ms Karen Andrews, who investigated the applicant's criminal responsibility, found that:

‘[The applicant’s] physical appearance on the Mental State Examination was observed to indicate yellowing of the eyes, consistent with long-term alcohol use and/or abuse. His use of alcohol played a disinhibiting role in his behaviour in this case.’

[6] The expert went on to say that:

‘He was able to appreciate wrongfulness and able to act accordingly during the commission of murder of his three-year-old daughter. In the context of unresolved anger, and under the disinhibiting effects of alcohol, he made the “split second” decision to act out his rage by harming his daughter.’

[7] Ms Andrews testified that, considering the applicant’s probable abuse of alcohol, it would not have required much to have triggered his conduct. Furthermore, she confirmed that a combination of alcohol and the applicant’s emotional upheaval served as the catalyst for the events that followed.

[8] In *S v Smith*,^[4] the erstwhile Appellate Division considered the impact of factors such as mental strain, anger, frustration, and humiliation. If one or more of these substantially reduced an accused person’s power of restraint and self-control, then that was highly relevant to the question of sentence.^[5] A few years later, in *S v Shapiro*, the Appellate Division observed that:

‘Section 78(7) of the Criminal Procedure Act 51 of 1977 relates to cases where the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect. In such a case, the court may take the fact of such diminished responsibility into account when sentencing the accused. But apart from “pathological reduced criminal responsibility”, as it has been called, it has been recognised that it is possible for there to be non-pathological temporary reduced criminal responsibility, which would likewise be relevant to sentence.’^[6]

[9] In the present matter, the state led the evidence of a social worker, Ms Nomonde Stamper, who conducted a victim impact assessment. She testified that members of the community could not understand why the applicant had killed his own daughter; it had been entirely out of character. At least one of the state witnesses expressed the same bewilderment, too.^[7] Viewed against Ms Andrews’s scenario of alcohol abuse and unresolved anger, this was an additional factor for the determination of an appropriate sentence.^[8]

[10] The court found that the role of alcohol, the applicant’s emotional upheaval (as termed by counsel), and evidence to the effect that he acted out of character were insufficient, either on their own or cumulatively, to have constituted substantial and compelling circumstances. The abhorrent nature of the offence, entailing horrific injuries inflicted on the applicant’s three-year-old daughter, as well as the community’s sense of complete outrage, outweighed the applicant’s personal circumstances.

[11] Nevertheless, the court cannot say that there are no reasonable prospects of success on appeal. Another court may well find that alcohol served as the necessary disinhibitory trigger to unleash the rage displayed by the applicant, resulting in non-pathological, temporarily reduced criminal responsibility at the time. This could have given rise to the substantial and compelling circumstances required for a departure from the prescribed minimum sentence.

[12] In the circumstances, the application for leave to appeal is granted.

JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE

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Date heard:

2 June 2025.

Date delivered:

10 June 2025.

[1] 2012 (1) SACR 567 (SCA).

[2] At paragraph [7].

[3] See the comments made by Chetty J in *S v Panayiotou* 2018 JDR 0661 (ECP), at paragraph [1].

[4] 1990 (1) SACR 130 (A).

- [5] At 135f–g. The court held, nevertheless, that such a factor did not affect the accused person’s criminal liability.
- [6] At 120d–f. Emphasis added.
- [7] In his testimony, the applicant’s cousin, Mr Nanina Dini indicated that he had been ‘very surprised’ at the applicant’s behaviour.
- [8] See *S v Romer* 2011 (2) SACR 153 (SCA), where the appeal court held that a lighter sentence was not inappropriate where the respondent had been in a state of diminished responsibility at the time of the offence.

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Prepared on 10 October 2026 · Esheria