

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: YES / <u>NO</u>
(2) OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3) REVISED
<u>1/11/2018</u>
DATE
<u>[Signature]</u>
SIGNATURE

CASE NUMBER : SS163/2017

In the matter between:

GIGULETHU HLATSHWAYO

APPLICANT

and

THE STATE

RESPONDENT

JUDGMENT LEAVE TO APPEAL

DOSIO AJ:
INTRODUCTION

- [1] The Applicant was charged in the High Court, Gauteng Local Division, Johannesburg with 5 counts. Count 1 was a charge of murder, count 2 was a charge of attempted murder, count 3 was a charge of robbery with aggravating circumstances, count 4 was a charge of possession of a semi-automatic firearm and count 5 was a charge of possession of unlicensed ammunition.
- [2] The Applicant was legally represented throughout the proceedings.
- [3] The State and Applicant entered into a formal plea and sentence agreement in terms of Section 105A of the Criminal Procedure Act 51 of 1977 (Hereinafter referred to as The Act).
- [4] On the 8th of February 2018 the Applicant was convicted and sentenced as follows:
- | | |
|--|------------------------|
| 1. Count 1: Murder | 25 Years imprisonment; |
| 2. Count 2: Attempted murder | 7 years imprisonment; |
| 3. Count 3: Robbery | 10 years imprisonment; |
| 4. Count 4: Unlawful possession of firearm | 3 years imprisonment; |
| 5. Count 5: Unlawful possession ammunition | 1 years imprisonment; |
- [5] In terms of Section 280(2) of the Act the sentences on count 2 – 5 were ordered to run concurrently with the sentence on count 1. The effective sentence therefore is 25 years imprisonment.
- [6] The leave to appeal is in respect to sentence only.
- [7] Condonation is granted for the late filing of the leave to appeal.

AD RIGHT TO APPEAL

- [8] The Applicant is entitled to apply for leave to appeal in terms of the provisions of section 316 of the Act.
- [9] An Applicant who applies for leave to appeal must satisfy the court that there is a reasonable prospect of success on appeal. (see *S V Ackerman en n' ander* 1973 (1) SA (A) 765 G-H.)

- [10] In the case of *Matshona v S* 2008 (4) SA 69 SCA at paragraph 4, the Supreme Court of Appeal stated that the test to determine whether leave to appeal should be granted is “simply whether there is a reasonable prospect of success in the envisaged appeal”.
- [11] The conviction and sentence flow from a formal agreement between the State and the Applicant in terms of Section 105A of the Act.
- [12] Section 105A of The Act sets out clearly the steps that must be followed in order for the plea and sentence agreement to be valid. Prior to the Applicant pleading on the day, this court also complied with the provisions of section 105A (5) and (6) and enquired from the applicant if he confirmed the agreement and the admissions made, furthermore, whether he admitted all the allegations contained in the charge to which he was pleading guilty and also whether he was pleading guilty freely and voluntarily. The Applicant confirmed he understood the admissions made and that he was pleading guilty freely and voluntarily. Prior to the Applicant pleading this court also apprised him of the minimum sentences of life imprisonment in respect to count 1 and 15 years imprisonment in respect to count 3. The agreement in the present case complied with all of the requirements as set out in section 105A.
- [13] In the case of *S v de Koker* 2010 (2) SACR 196 (WCC) the Honourable Breitenbach AJ in his judgement stated that there was no clearer case of peremption “than one where an accused duly concludes a plea and a sentence agreement with the State in terms of section 105A of the CPA, confirms the agreement to the court before which he is arraigned, asks the court to convict and sentence him in accordance with the agreement, and is thereupon duly convicted and sentenced in accordance with the agreement. By following the process created by s 105A of CPA, the appellant settled the *lis* between the State and him once and for all”.
- [14] In the matter of *S v Armugga and others* 2005 (2) SACR 259 (N) the court was also faced with a leave to appeal imposed after consideration of a plea bargain agreement. At page 264e the learned Msimang J held “that it had always been contemplated that the right of appeal in cases such as the present, would be a limited one, and that the appellants in those cases would be granted relief only in exceptional circumstances”.
- [15] Notwithstanding the contents of the decided case of *S v De Koker supra*, this court has still considered what the Applicant’s grounds are for a reduction in sentence. His legal representative has argued that the Applicant has assisted the police in tracing his co-accused and played a vital role in their apprehension. In addition, the Applicant testified

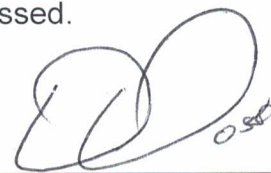
in the trial against his co-accused. According to the counsel for the State these are all factors that were already known at the time of concluding the formal agreement, and were considered at the time of entering the formal agreement. These factors were the reason why the State did not insist on a sentence of mandatory life imprisonment on count 1. The Applicant has also through his legal representative placed an additional factor which was not known to the State at the time the formal agreement was entered into and that is, that he assisted the police to trace a third accused. Counsel for the State has argued that this aspect has not conclusively been established as yet. Accordingly, the latter issue raised by the Applicant, which was not available at the time the agreement was entered into, does not amount to an exceptional circumstance.

[16] The offences which the Applicant pleaded guilty to are serious. The sentences imposed on count 2-5 were ordered to run con-currently with the sentence imposed on count 1.

[17] After having heard the arguments raised by the Applicant's counsel and the State advocate, I do not find that there is a reasonable possibility that another court will arrive at a different conclusion in regard to the conviction of the Applicant on count 1. Life imprisonment should have been imposed on count 1, however, based on the formal agreement a term of 25 years imprisonment was imposed.

CONCLUSION

[18] In the absence of any exceptional circumstances raised by the Applicant there is no reason why another court will come to a different conclusion regarding sentence and accordingly the leave to appeal in regard to sentence is dismissed.



D DOSIO

ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the applicant	Mr Nobangule
On behalf of the Respondent	Adv Buitendag

Date Heard:	1 November 2018
Handed down Judgment	1 November 2018