Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBELEY)

Case No: K/S 2/2014
Heard On: 23/10/2014
Delivered: 05/11/2014

In the matter between:

MERVIN JACOBUS **APPLICANT**

AND

THE STATE **RESPONDENT**

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

PAKATI J

[1] The applicant, Mr Mervin Jacobus, was on 28 May 2014 convicted of one count of rape. On 19 June 2014 he was sentenced to life imprisonment. He now applies for leave to appeal against conviction and sentence. He is represented by Mr S Nel on the instructions of Legal Aid South Africa, Kimberley. He also applies for condonation for the late filing of the application for leave to appeal.

[2] The applicant, in his application for condonation, explained that his family instructed the attorneys, Van De Wall and Partners, to lodge this application. However, he was informed that an advocate should be instructed to draft and argue the application hence Mr Nel represents him on the instructions of Van De Waal and Partners' Attorneys. On 10 July 2014, Mr Nel consulted with him. He advised that it was necessary for him to study the record parts of which were then transcribed. He only received the transcribed record on 06 August 2014 but the record was incomplete. He then requested that the applicant's evidence be transcribed, which was done and forwarded to Mr Nel on 01 September 2014. In the interests of justice I condoned the non-compliance.

[3] In his notice of appeal dated 14 October 2014, the applicant listed the following grounds with regards to conviction:

3.1 That I erred in not taking into account that the only evidence the respondent produced in the trial within a trial, to determine if the confession made by the applicant is admissible, was the evidence of Captain Pogisho Oliphant;

3.2 The applicant gave evidence in the trial-within-a-trial pertaining to the admissibility of the alleged confession;

3.3 The applicant did not contradict himself on material aspects during his evidence in the trial-within-a-trial;

3.4 That although there are improbabilities in the applicant's testimony in the trial-within-a-trial, his version is not so improbable that it can been said that his version is not reasonably possibly true;

3.5 That I erred in admitting the confession as evidence; and

3.6 That I erred in convicting the applicant on count one of rape.

[4] With regards to sentence he relied on the following grounds; that I erred in:

4.1 Under emphasizing the favourable personal circumstances of the applicant;

4.2 Under emphasizing the fact that the applicant was found guilty on one count of rape and hold it against the applicant that the deceased was brutally murdered;

4.3 Over emphasizing the seriousness of the offence as well as the interest of the community;

4.4 Under emphasizing the period the applicant was detained awaiting his trial;

4.5 Over emphasizing the previous convictions of the applicant;

4.6 Not taking into account that the applicant's co-accused was convicted on two counts of rape yet he has a number of previous convictions;

4.7 Not finding that there are substantial and compelling circumstances present justifying the imposition of a lesser sentence than the prescribed sentence of life imprisonment; and

4.8 Imposing a sentence that induces a sense of shock which can be described as disturbingly inappropriate.

[5] Capt Oliphant was a single witness in the trial-within-a-trial. S 208 of the Criminal Procedure Act, 51 of 1977, provides that an accused may be convicted of any offence on the single evidence of any competent witness. (See the warning of **Megent J** in **S v Van der Meyden 1999 (1) SACR 447 (W)** at **449-50** which was approved by the Supreme Court of Appeal in **Naude & Another v S [2011] 2 All SA 517 (SCA)** at **[29].**

[6] Adv S Nel, on behalf of the applicant, conceded that the applicant was a poor witness during cross-examination in the trial-within-a-trial. He nevertheless submitted that when balancing the evidence of the applicant and Captain Oliphant another court would arrive at a different decision. Adv Van Heerden, on behalf of the State, argued that the applicant has no prospects of success on appeal. His statement was the only evidence in placating him in the commission of the offence. In **S v Mkhwanazi 1965 (1) SA 736 (A) at 745G-H Williamson JA** stated:

"The confession in such a case is not necessarily "suspect" but the circumstances may be such as to call for a particularly careful assessment by the presiding Judge of the question of the freedom and voluntariness of the confession. All the factors mentioned were the subject of careful examination and cross-examination during evidence and must have been pertinently present to the mind of the presiding Judge. It cannot be said that, on the record, he was wrong in deciding that these factors, in this case, raised no reasonable doubt as to the freedom and voluntariness of the confession."

[7] Captain Oliphant disputed that he instructed the applicant what to say. He testified that he did not influence the applicant in any way. He stated in cross-examination that if he intended to falsely implicate the applicant or unduly influence him he would have taken down the statement himself considering his rank as a captain. In **S v MAHLANGU 2011 (2) SACR 164 (SCA)** at **171B-D Shongwe JA** enunciated:

"The court can base its finding on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect, or if there is corroboration. The said corroboration need not necessarily link the accused to the crime…Corroboration is also to be found in the improbability of the appellant's version."

[8] In my view the evidence of Capt Oliphant was satisfactory and did not affect the reliability of the statement or the weight to be attached to it. The applicant did not manage to convince the court how Capt Oliphant would have known certain aspects in his statement. He did not know "Ouma Baby" who the applicant mentioned in his statement. Without that knowledge he would not have been able to connect "Ouma Baby" with the deceased. Importantly the appellant is the one who referred to Ms Sarah Julius as "Ouma Baby". The detailed account of what took place and the chronology in which he related it could not have been told to him. He could not explain why he supplemented what he was told to say by Captain Oliphant. What is strange is that alleged that Capt Oliphant wanted him to implicate accused 3. During cross-examination he stated that if Capt Oliphant had instructed him to implicate himself he would not have complied. However, he did not only implicate himself but also accused 2, 3 and 5 in the commission of rape. When confronted with this inconsistency he explained that he implicated them because they were his friends. This is not only improbable but nonsensical. There is no doubt that the information **contemned** in the statement is consistent with the proven **facts** for an example the fact that his co-accused were in his company on the day of the incident. The applicant's statement was not only admissible but also reliable.

[9] Once his statement was admitted as evidence a strong *prima facie* case was established against the applicant. His failure to testify in those circumstances strengthened the State case (**S v Nkombane and Another 1963 (4) SA 877 (A)** at **893 F-G; S v Mthetwa 1972 (3) SA 766 (A)** at **769B-H; S v Francis 1991 (1) SACR 198 (A)** at **206b).**

[10] As far as sentence is concerned I reiterate what I said in my judgment for sentence that there were no substantial and compelling circumstances justifying the deviation from the imposition of the prescribed sentence. In **S v MATYITYI 2011 (1) SACR 40** at 53d-f Ponnan JA quoted with approval the case of **MALGAS 2001 (1) SACR 469 (2001 (2) SA 1222; [2001] 3 ALL SA 220)** and held:

"As Malgas makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and, like other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypothesis that appear to fit the particular sentencing officer's personal notion of fairness."

[11] In **S v SMITH 2012 (1) SACR 567 (SCA) 570** at para 7 Plasket AJA stated:

"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."

[12] In my view, there are no prospects of success on appeal. There is also no reasonable possibility that another court might come to a different decision on both conviction and sentence. The application for leave to appeal must therefore fail.

ORDER

The applicant's application for leave to appeal against conviction and sentence is dismissed.

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BM PAKATI
JUDGE

On Behalf of the Applicant:	*ADV S NEL*
Instructed by:	*Van De Wall and Partners*
On Behalf of the Respondent:	*ADV A VAN HEERDEN*
Instructed by:	*Director Of Public Prosecutions*