SUMMARY ***REPORTABLE***

CASE NO.: CA 51/2005

LASARUS TUTU NOWASEB Applicant

and

THE STATE Respondent

PARKER, J *et* SILUNGWE, AJ

2007 October 23

Criminal procedure Appeal – Leave to appeal – When application to be granted – Principles and tests to be applied – Judge to give reasons unless such appear from the record – Failure to show reasonable prospect of success on appeal – Application for leave to appeal refused.

REPORTABLE CASE NO.: CA 51/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LASARUS TUTU NOWASEB Applicant

and

THE STATE Respondent

CORAM: PARKER, J, *et* SILUNGWE, AJ

Heard on: 2007 October 8

Delivered on: 2007 October 23

JUDGMENT

PARKER, J

[1] This is an application for leave to appeal. It has been stated in a long line of cases that in an application of this kind, the applicant must satisfy the Court that he or she has a reasonable prospect of success on appeal (See, e.g., *Rex v Nxumalo* 1939 AD 580; *Rex v Ngubane and Others* 1945 AD 185; *Rex v Ramanka* 1948 (4) SA 928 (O); *Rex v Baloi* 1949 (1) SA 523 (A); *Rex v Chinn Moodley* 1949 (1) SA 703 (D); *Rex v Vally Mahomed* 1949 (1) SA 683 (D & CLD); *Rex v Kuzwayo* 1949 (3) SA 761 (A); *R v Muller* 1957 (4) SA 642 (A); *The State v Naidoo* 1962 (2) SA 625 (A); *S v Cooper and Others* 1977 (3) SA 475 (T); *S v Sikosana* 1980 (4) SA 559 (A).) The first ten sample of cases adumbrated

above were decided before the coming into operation of the new Criminal Procedure Act, 1977 (Act 51 of 1977) (CPA), but the test remains unchanged. (*Sikosana*, *supra*, at 562D)

[2] Thus, an application for leave to appeal should not be granted if it appears to the Judge that there is no reasonable prospect of success. And it has been said that in the exercise of his or her power, the trial Judge (or, as in the present case, the appellate Judge) must disabuse his or her mind of the fact that he or she has no reasonable doubt as to the guilt of the accused. The Judge must ask himself or herself whether, on the grounds of appeal raised by the applicant, there is a reasonable prospect of success on appeal; in other words, whether there is a reasonable prospect that the court of appeal may take a different view (*Cooper and Others*, *supra*, at 481E; *Sikosana*, *supra*, at 562H; *Muller*, *supra*, at 645E-F). But, it must be remembered, "the mere possibility that another Court might come to a different conclusion is not sufficient to justify the grant of leave to appeal." (*S v Ceaser* 1977 (2) SA 348 (A) at 350E)

[3] One of the talismans that the applicant hangs his application relates to para. [36] of this Court's judgment (delivered on 28 July 2006). It is there stated, "But there is no mention of this in the record." The applicant then refers the Court to pp. 143-147 of the record of the appeal. The view of this Court was that there was no mention in the entire record, including the aforementioned pp. 143-147, that the Prosecutor-General, who, in terms of our law, as Mrs. Rakow for the State correctly submitted, is the only authority responsible for charging persons, did charge Mr. Ndakalako (one of the State witnesses).

[4] The applicant takes issue also with a sentence in para. [33] of this Court's judgment where it is stated, "The appellant had no reply to this forthright accusation." The accusation is contained in Mr. Ndakalako's statement that after the collision, he confronted

the applicant and told him that "if he (the applicant) did not drive through red traffic lights, then the accident wouldn't have occurred." Mr. Ndakalako testified further, "He (the applicant) was just arguing there and with the victim who was bumped" (at pp. 71-72 of the record of appeal). Mr. Narib, counsel for the applicant, misreads these excerpts and my conclusion and comes up with the retort in his heads of argument (at para. 27): "The Court's reasoning begs the question: What was he (the applicant) arguing about if regard is had to the quote 'He (the applicant) was just arguing there and with the victim who he bumped'." It is irrefragably plain that the applicant had no response to his accuser's (Mr. Ndakalako's) accusation. The applicant was arguing with the victim of his action: the applicant alone knows what he was arguing about with his pedestrian victim.

[5] Another alleged irregularity relates to this Court's use of the word "complainant" to describe Mr. Ndakalako, the driver of the other vehicle that was involved in the collision and who was, as alluded to previously in this judgment, one of the State witnesses. The use of the word "complainant" was, admittedly, wrong and unfortunate. But, in any case, as Mrs Rakow, counsel for the respondent correctly submitted, it is not shown by the applicant in what manner the description of Mr. Ndakalako as a "complainant" could reasonably possibly have made this Court (or the lower court) come to a wrong conclusion as to the guilt of the applicant. A related matter is the use of the word "appellant's" in this Court's judgment (at para. [31], the last line). This is definitely a typographical error. If para. [31] is read contextually with the three next preceding paragraphs, i.e. paras. [28], [29] and [30], it should be seen that the correct word is "State's". In sum, *a priori*, I do not see how the description of Mr. Ndakalako as a "complainant" and the typographical error can reasonably possibly amount to a failure of justice in the proceedings.

[6] Another alleged irregularity relates to whether the charge was amended in the lower court. The view taken in this Court's appeal judgment was that the excision of the meaningless phrase "anything to that effect" in the further particulars – meaningless in law – could not have possibly amended the charge, which remained, throughout the trial, negligent or reckless driving within the meaning of s. 80 of the Road Traffic and Transport Act, 1999 (Act 22 of 1999).

[7] In *Sikosana, supra,* at 562H-563A, Diemont, JA states – in my view correctly:

> If he (the Judge) decides to refuse the application he must give his reasons (see s. 316 (6) of Act 51 of 1977). It may be that his reasons for his refusal will appear from the reasons for convicting (*R v White* 1952 (2) SA 538 (A) at 540) but where he decides to grant the application his reasons for so doing are less likely to be found in his judgment.

[8] I respectfully adopt the dicta by Diemont, JA in this case. This Court gave a fully-reasoned judgment when it dismissed the applicant's appeal against conviction and sentence, and in my opinion, it is otiose to relate that judgment to the grounds of the present application *seriatim*; otherwise the present judgment will be a sheer rehash of the appeal judgment of this Court. Suffice to mention that each and every relevant ground of appeal relied on by the appellant (in the appeal), i.e. applicant in the present application, was dealt with sufficiently and fully, I believe, by this Court. Thus, with the greatest deference, contrary to the submission of Mr. Narib, this Court's judgment in the appeal case did not parrot the lower court's judgment; if that was the case this Court's judgment could not practically and as matter of simple logic covered 24 pages (of 'A-4-sized' sheets of paper), compared with one and a half pages (also of 'A-4-sized' sheets of paper) that the lower court's judgment covered.

[9] I have given considerable thought objectively to the application and, disabusing my mind, as far as is humanly possible, of the fact that I had no reasonable doubt concerning the guilt of the applicant, I am not at all satisfied that there is a reasonable prospect that the Supreme Court may take a different view about the guilt of the applicant on the offence as charged and the sentence that was imposed by the lower court, and confirmed by this Court. It follows that in my judgment the applicant has failed to show that he has a reasonable prospect of success on a further appeal.

[10] In the result, the application for leave to appeal is dismissed.

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Parker, J

I agree.

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Silungwe, AJ

ON BEHALF OF THE APPLICANT:	Mr. G. Narib
Instructed by:	The Government Attorney
ON BEHALF OF THE RESPONDENT:	Adv. E. Rakow
Instructed by:	The Prosecutor-General