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

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

CASE NO: K/S 39/2018

In the matter between:

FREDDY XELESILE **Applicant (Third Accused)**

and

THE STATE **Respondent**

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

Mamosebo J

[1] On 01 March 2021 the applicant and his three co-accused were convicted of murder dolus *eventualis*, committed with a common purpose, and assault with intent to do grievous bodily harm (assault GBH). He was sentenced to 18 years' imprisonment for murder and five years for assault GBH, on 29 April 2021. The sentences were ordered to run concurrently. He now applies that leave be granted to the Full Bench of the Northern Cape Division against his conviction. For the applicant appears Mr H Steynberg, from Legal Aid South Africa while Adv. R Makhaga represents the State. The parties have agreed that the application can be determined merely on the papers.

[2] Since the coming into operation of the Superior Courts Act,[1] an application for leave to appeal is governed by section 17, which stipulates:

> *"17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –*
> *(a)*
> *(i) The appeal would have a reasonable prospect of success; or*
> *(ii) There is some other compelling reason why the appeal should be heard, including conflicting judgements on a matter under consideration;*
> *(b) The decision sought on appeal does not fall within the ambit of section 16(2)(a); and*
> *(c) ....."*

[3] It is now trite that since the enactment of section 17(1)(a) of the Superior Courts Act, the threshold for determining whether to grant leave to appeal is higher and more stringent[2]. Our courts have interpreted the word "*would*", found in section 17(1)(a)(i) of the Act as indicative of some form of certainty or realistic chance of success. See *The Mont Chevaux Trust v Tina Goosen & 18 Others*[3] and *MEC for Health, Eastern Cape v Mkhitha and Another*[4].

[4] The application is premised on the grounds that the Court had erred:

4.1. In not evaluating all the evidence with regard to the identity of the perpetrators;

4.2. In finding that the applicant was part of the group who had assaulted the deceased and the complainant;

4.3. In finding that the applicant had acted in concert with his co-accused in killing the deceased;

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[1] Act 10 of 2013
[2] See Notshokovu v S [2016] ZASCA 112 (7 September 2016) at para 2
[3] 2014 JDR 2325 (LCC) at para 6
[4] [2016] ZASCA 176 (25 November 2016) at paras 16-17

4.4 In finding that the applicant had had the requisite intent, in the form of *dolus eventualis,* and thus convicting him of murder; and

4.5. In erroneously applying the test relating to murder *dolus eventualis* as form of intent.

Ad ground 1: Identity of the applicant:

[5] The identity of the accused was never placed into dispute. He, the deceased and the complainant, Mr David Tsotetsi, were friends who lived together at accused 2's place. They knew each other well. They were all patrons at the shebeen during the day of the incident. The same protagonists were later in each other's presence outside accused 2's house around the fire. They later entered the house and into accused 2's bedroom which was well illuminated.

[6] Mr Steynberg, referring to the Court's finding in respect of accused 1's evidence, that although he placed the applicant on the scene, the Court has rejected his evidence stating at para 45 of the judgment "*His version, however, is porous and fabricated. It is in fact, blatantly false and I reject it* ***in as far as it is in conflict with that of the State.***" The fact that accused 1 has placed the applicant and his co-accused on the scene was not rejected because it was congruent with the evidence of the State. The issue of identity relied on by Mr Steynberg invoking the facts in S *v Charzen*[5] is distinguishable in as far as the facts in this case are concerned. The four accused were not strangers to the deceased and the complainant. Mr Tsotetsi's evidence was credible and unassailable in as far as the identity of the accused from the shebeen, to around the fire and in the bedroom where the offences were committed is

[5] 2006 (2) SACR 143 (SCA)

concerned. Accused 3 failed to testify. The State's evidence was supported by accused 1's on this aspect.

[7] Mr Steynberg submitted that there was an error made in the evaluation of the evidence. That cannot be so. The Court evaluated the evidence in its entirety. See *S v Chabalala*[6] on the correct approach in evaluating evidence. The contradictions in the evidence of the state witnesses as far as they went, were not of a material nature. It therefore follows that the submission in respect of the identity of the applicant and the evaluation of the evidence stands to fail.

Ad grounds 2 and 3 of common purpose in respect of the assault GBH and murder counts.

[8] Paras 37 and 38 dealt with the doctrine of common purpose as articulated by the Constitutional Court. Para 5 of the judgment clarifies the roles each accused played in acting in concert. This aspect is explained at para 38 with reference to *S v Mgedezi*[7]. The applicant was with the other three accused when they poured water over the complainant and the deceased, dragged them inside the house and into the bedroom where the offences were committed. The applicant and his co-accused's intention was to extract a confession from the deceased through severe assault hence the finding that there was no direct intention to kill the deceased. I therefore find that the contention by the applicant of not being part of the group does not have merit and stands to fail.

Ad grounds 4 and 5 of *dolus eventualis* as a form of intent relates to the murder charge.

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[6] 2003 (1) SACR 134 (SCA)
[7] 1989 (1) SA 687 (A) at 705I – 706C

[9] Paras 39, 40 and 41 deal with the aspect with specific reference to *Director of Public Prosecutions, Gauteng v Pistorius*[8] pertaining to the pronouncements by Leach JA. The submission by Mr Steynberg is unclear and unnecessarily conflates issues. He argues that because the State had alleged that the accused had murdered the deceased and attempted to murder the complainant, they had acted with the same intent. However, the court convicted them of murder dolus *eventualis* and assault GBH. Which means the accused had two different forms of intent. The injuries that the accused sustained were not life threatening; nonetheless, they were inflicted with intent and not negligently as contended on behalf of the applicant. See para 43 of the main judgment.

[10] Paras 39, 40 and 41 of the main judgment clearly followed the pronouncements in the *Pistorius*[9] case when determining the form of intent associated with the murder. Undoubtedly, the applicant and his co-accused foresaw the possibility of death resulting, I base that on the following, which are already dealt with in the main judgment

10.1 First, the deceased and the complainant were stripped naked before the assault, consequently allowing the whipping to be in direct contact with their skin;

10.2 Secondly, the assault was not fleeting in nature, as testified to by the complainant and confirmed by Dr Tebogo Kanaomang, the forensic pathologist;

10.3 Thirdly, the assault was carried out by a group of people on defenceless victims (the applicant and his co-accused);

10.4 Fourthly, the injuries sustained by the deceased were very serious and, as opined by Dr Kanaomang, the deceased's life could not be saved through any form of medical

[8] 2016 (2) SA 317 (SCA) at para 26
[9] Director of Public Prosecutions, Gauteng v Pistorius 2016 (2) SA 317 (SCA) para 26

intervention. The doctor expressed the opinion, that was not contested, that extensive force was used to carry out the assault; and

10.5 Fifthly, and more importantly, the accused's cries and pleas that 'they are killing him' did not deter the applicant and his co-accused from further beating.

[11] The aforementioned taken together and the utterances by accused 2 after their severe beating calling them to stop until the following day, indicates that they foresaw the possibility that death may result. Further, they reconciled themselves with that possibility. None of them disassociated themselves from the incident before, during or after the beating. There can therefore be no gainsaying that the form of intent was *dolus eventualis.*

[12] Mr Steynberg seems to downplay the insightful remarks by the Constitutional Court in *S v Boesak*[10] pertaining to the right to remain silent. The following comments by Langa DP are worth repeating:

"The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial"; [in the face of prima facie implicatory evidence, it must be added].

[13] I have dispassionately considered each ground raised by the applicant in an effort to consider whether there are reasonable prospects that another court would come to a different finding than this court whose judgment is sought to be appealed against. I have deemed none. In the result, the application for leave to appeal stands to fail.

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[10] 2001 (1) SACR 1 (CC) para 24

[14] The following order is made:

The application for leave to appeal is dismissed.

M.C. MAMOSEBO
JUDGE OF THE HIGH COURT

DATE OF HEARING:	The application for leave to appeal was considered on papers following an agreement between the parties
DATE OF JUDGMENT:	04 June 2021
Counsel for the Applicant:	Mr. H Steynberg
Instructed by:	Legal Aid South Africa
Counsel for the Respondent:	Adv. R. Makhaga
Instructed by:	Office of the Director Public Prosecutions