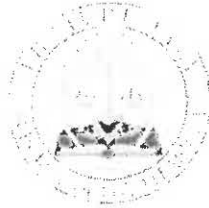


Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



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

**Case No: K/S 07/2015
Heard on: 18/11/2016
Delivered on: 07/12/2016**

In the matter between:

**KEARABETSWE McNULTY MABEJANE
KITLANO OCCASION MABEJANE
GADIEHELE PATRICIA KGOMOELELA
TSHEPISO SHADRACK MODUTWANE
PATRICK MOGAPI
SIPHO GIFT KEOGATILE**

**1st Applicant/accused 1
2nd Applicant/accused 2
3rd Applicant/accused 3
4th Applicant/accused 4
Accused 5: No A/L/A
5th Applicant/accused 6**

and

THE STATE

Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

MAMOSEBO J:

- [1] The applicants were accused 1, 2, 3, 4, and 6. They were convicted on 29 August 2016 of murder with *dolus eventualis* as the form of intent and assault with intent to cause grievous bodily harm (Assault GBH) and sentenced on 16 November 2016. Each one of the six accused was sentenced to 15 years imprisonment on the murder charge and two years' imprisonment in respect of the Assault GBH charge. The two sentences in respect of each one of them were ordered to run concurrently. They now seek leave to appeal against their conviction to the Supreme Court of Appeal alternatively, the Full Bench of the Northern Cape Division. The State opposed the application.
- [2] None of the accused testified in the trial. There is no valid reason why the uncontested evidence of the state witnesses should not be accepted. In *S v Boesak* 2001 (1) SACR 1 (CC) at 11d; 2001 (1) BCLR 36; [2000] ZACC 25 (para 24) the following was said:
- "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. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in Osman and Another v Attorney-General, Transvaal, when he said the following:*
- 'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused*

who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."

- [3] On 14 November 2014 Mr Thapelo Bacwadi and the deceased, Seiso Brady Madito, attempted to steal an electric pump belonging to accused 2. The deceased was immediately accosted inside the toilet but within the premises of accused 2's tavern while Mr Bacwadi was apprehended later at his home. It is common cause that the deceased travelled with accused 1 and 2 and Mr Tebogo Sentle, a witness in terms of s 204 of the Criminal Procedure Act, 51 of 1977 (the CPA), to the police station presumably with the aim of laying theft charges against him.

- [4] During cross-examination counsel for accused 1 and 2 put it to Sentle that the accused will testify that Sentle was in possession of a pellet gun and used it to inflict injuries on the deceased's head an accusation which Sentle vehemently denied. The accused never entered the witness box to testify on the aspect of the pellet gun, as already stated.

- [5] Sentle placed all accused on the scene where the deceased and Bacwadi were brutally assaulted indiscriminately and the deceased was observed by Bacwadi in a paralytic state. Counsel now submits that I should have rejected the evidence of Sentle in its entirety because he was a s 204

witness and a possible accomplice. I have dealt with counsel's submissions on these aspects in the main judgment and my reasons for accepting Sentle's testimony were also explained. I have further dealt with the aspects of contradictions in the state witnesses' testimony referring to *S v Mafaladiso en andere* 2003 (1) SACR 583 (SCA) at 593e – 594h. I have also touched on the aspect that it is permissible to accept a witnesses' evidence on one aspect and reject it on another relying on *S v Francis* 1991 (1) SACR 198 (A) at 205e – f and *S v Mkohle* 1990 (1) SACR 95 (A) at 98f – h.

- [6] What was disconcerting was that no charges were laid against the deceased and Bacwadi. There was no Occurrence Book (OB) entry made at the police station upon the arrival of the deceased of any injuries noted on him. Bacwadi was never taken to the police station. Both were severely beaten at accused 2's tavern at different stages. The deceased was forced to make a confession or admission during the beating completely contrary to the provisions of the Constitution. After the beating of Bacwadi, he was instructed to singlehandedly carry and remove the deceased from the back of the police van at Bacwadi's place. They were both not given any medical assistance contrary to the South African Police Standing Orders. The deceased was simply left to die. Indeed, he died the same afternoon at the hospital where he and Bacwadi were admitted.
- [7] Counsel seems to suggest that the entire evidence rests solely on the evidence of Mr Tebogo Sentle, Dr Anizoba and Mr Thapelo Bacwadi. However, there were more witnesses who testified whose evidence was also considered in the assessment of evidence. See *S v Hadebe and*

Others 1998 (1) SACR 422 (SCA) at 426e-h. Counsel also argued that causation in the case was missing, a submission made on an incorrect analysis of the facts.

- [8] In *S v Van Heerden* 2010 (1) SACR 539 (ECP) at para 17 Liebenberg J, dealing with an application for leave to appeal, held that the principles set out in relation to a civil application for leave in *Songono v Minister of Law and Order* 1996 (4) SA 384 (E) apply equally to criminal cases. I agree. Leach J in *Songono* said the following at 385C – E:

“In attempted compliance therewith the applicant filed a document headed 'Application for leave to appeal', in which he purported to set out the grounds upon which leave to appeal was to be sought. These so-called 'grounds' constitute a diatribe of some 17 pages criticising the judgment, analysing (at times incorrectly) certain of the evidence and the findings made, putting forward certain submissions and quoting various authorities. This lengthy, convoluted and at times disjointed criticism of the judgment did not clearly and succinctly spell out the grounds upon which leave to appeal is sought in clear and unambiguous terms - indeed, it served more to deceive, particularly as, during the course of argument, there were several points which the applicant's counsel, Mr Bursey, sought to raise which were not indicated in the document.

I am not aware of any judgment dealing specifically with grounds of appeal as envisaged by Rule 49(1)(b); however, Rule 49(3) is couched in similar terms and also requires the filing of a notice of appeal which shall specify 'the grounds upon which the appeal is founded'. In regard to that subrule it is now well established that the provisions thereof are peremptory and that the grounds of appeal are required, inter alia, to

give the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet and to notify the Court of the points to be raised. Accordingly, insofar as Rule 49 (3) is concerned, it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court a quo, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet.”

- [9] Counsel for all the applicants in oral argument rehashed what was argued in the main judgment where findings have already been made, needlessly taking up precious time. They sometimes even got bogged down in statements put to the state witnesses which does not constitute evidence.
- [10] In terms of the provisions of s 17(1) of the Superior Courts Act 10 of 2013, leave to appeal may only be granted if the Judge or Judges concerned are of the opinion that:
- 10.1 The appeal would have reasonable prospects of success or if there is some compelling reason why leave should be granted;
 - 10.2 The decision sought on appeal does not fall within the ambit of s 16(2)(a) of the Act; and
 - 10.3 Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

[11] Section 17(6)(a) of the Act stipulates that, if leave is granted to appeal against a decision of a Division as a court of first instance consisting of a single Judge, the Judge or Judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider that the circumstances set out in s 17(6)(a)(i) and (ii) are applicable.

[12] In *S v Smith* 2012 (1) SACR 567 (SCA) para 7 Plasket AJA stressed:

“[7] 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.”

As reiterated by Leach JA in *S v Kruger* 2014 (1) SACR 647 (SCA) at 649d (para 3) the Courts should follow the aforementioned test scrupulously in the interests of justice.

[13] Having regard to the above and having dispassionately considered the application I am satisfied that the applicants have no reasonable prospects of success on appeal and the application stands to fail.

[14] In the result, the following order is made:

The application for leave to appeal is dismissed.



MAMOSEBO J

NORTHERN CAPE HIGH COURT

For 1st and 2nd Applicants:

Adv A Stanton

Instructed by:

Mr S Fourie

Oosthuizen Sweetman & Reits Attorneys

For 3rd and 4th Applicant:

Mr R Bode

Engelsman & Magabane Attorneys

For 5th Applicant:

Adv Van Zyl Nel

Kimberley Justice Centre

For the Respondent:

Adv NA Mxabo

Director of Public Prosecution