

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

SITE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
2009-11-23 DATE	 SIGNATURE

Petition No. 387/09
Case No.: SH 62/03
Date heard: 20/10/09
Date of judgment: 23/11/09

In the matter between:

ZAKHELE THEKISO AND 6 OTHERS

PLAINTIFF

and

THE STATE

DEFENDANT

JUDGMENT

DU PLESSIS J:

The applicant, who was accused 1, appeared with six other accused in the regional court on one charge of murder, one of attempted murder and on three charges of kidnapping. He was convicted on all five charges. Holding that all the accused acted with a common purpose, the applicant's six co-accused were also convicted on all the charges. On count 1 (murder) the applicant was sentenced

20 years imprisonment, on count 2 (attempted murder) he was sentenced to 10 years imprisonment and on each of counts 3, 4 and 5 (kidnapping) 5 years imprisonment. The effective sentence is 45 years imprisonment.

The applicant sought leave from the trial court to appeal against the conviction and the sentence. Leave was refused. Thereafter the applicant petitioned the Judge-President of this division for leave. The petition came before Legodi J and me. We refused leave. The applicant has now addressed to the President of the Supreme Court of Appeal a further petition for leave to appeal. (For the sake of convenience I attach a copy of the further petition to this judgment.) The further petition was sent to the registrar of this court and the matter was referred to Van den Heever AJ and me. we treated the further petition as an application for leave to appeal against the refusal of the first petition by Legodi and me (See *S v Khoasasa* 2003 (1) SACR 123 (SCA)).

It was the state's case that the applicant and his co-accused suspected the deceased in the murder charge of having robbed one of them (accused 6) of a cellphone. While walking in a street in Daveyton, the deceased and his lady friend were accosted by some of the accused and forcibly taken into a house. There the deceased and his lady friend were held captive and the deceased was repeatedly assaulted, amongst others by the applicant. The accused also brought a friend of the deceased into the house. He too was held captive and assaulted. The three were taken to another house where they were also held

captive and where the two men were further assaulted. From this house the two men and the lady were taken to a cemetery. There the applicant killed the deceased by stabbing him several times with a knife. The friend of the deceased was also stabbed and left for dead. The evidence indicates that the actions of the seven accused might have been part of gang-rivalry.

Each one of the accused testified in his own defence. They admitted to an incident on the day in question during which the deceased was confronted by a number of people and accused of having stolen a cellphone. The applicant, like most of his co-accused, denied involvement in the murder, attempted murder and kidnapping. In our view the learned trial magistrate correctly rejected the evidence of the applicant as false beyond reasonable doubt.

In our view there is no reasonable prospect that another court will grant the applicant leave to appeal against his conviction.

Regarding sentence, the applicant has one previous conviction of being in possession of an unlicensed firearm. At the time of his conviction he was 24 years old, unmarried and he had no dependants. The learned magistrate, rightly in our view, took into account that the crimes, the murder and attempted murder in particular, were exceptionally brutal and involved torturing the victims and holding them captive for several hours. The court also took into account that the

applicant was the one who had inflicted the fatal stab wounds and did so without any sign of mercy.

The other accused were effectively sentenced as follows: Accused 2 was sentenced to 30 years imprisonment; accused 3, 4, 6 and 7 was each sentenced to 25 years imprisonment and accused 5 to 15 years imprisonment.

While the individual sentences of the applicant seem to us to be appropriate, another court may reasonably hold that the cumulative effect of the applicant's sentence is inappropriate. Another court may also hold that applicant's sentence is disproportionately heavy when compared to the sentences his co-accused received. We conclude that another court may hold that the applicant should be granted leave to appeal against the sentence.

When we heard the application for leave to appeal, we thought that we might save considerable time and effort by using this court's review power under section 304(4) of the **Criminal Procedure Act, 51 of 1977** to set aside the trial court's sentence and by imposing a sentence more in proportion with that of the other accused. I mention it because I mentioned to the applicant, when he appeared before us in the application for leave to appeal, the possibility of this court exercising its review power.

On reflection we are of the view that it is not in the interests of justice now to exercise this court's review power. Doing that might prejudice the applicant's

right to seek leave to appeal and his further right, if leave is granted, to have the matter dealt with on appeal. We also do not believe that the matter warrants urgent intervention because, in our view, the applicant will, even if leave to appeal is granted and if he succeeds on appeal, still have to serve a relatively long term of imprisonment.

In the result the following order is made:

1. Leave is refused to appeal against this court's refusal of the applicant's petition for leave to appeal against the convictions.
2. The applicant is granted leave to appeal to the Supreme Court of Appeal against this court's refusal of his petition for leave to appeal against the sentence.



B R DU PLESSIS
JUDGE OF THE HIGH COURT

I agree:



B C VAN DEN HEEVER
ACTING JUDGE OF THE HIGH COURT