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**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

**Reportable: YES/NO**

**Of interest to other judges: YES/NO**

**Circulate to Magistrates: YES/NO**

Case no: 27/2017

In the matter between:

**JUNIOR JAMA**

First Applicant/Accused 1

**SABATHA MAHLOANE**

Second Applicant/Accused 2

**PASEKA SOLANE**

Third Applicant/Accused 4

**KOOS HAYI**

Fourth Applicant/Accused 6

and

**THE STATE**

Respondent

**CORAM:**

VANZYL, J

**HEARD ON:**

2 FEBRUARY 2024

**DELIVERED ON:**

6 JUNE 2024

- [1] This is an application for leave to appeal against the convictions and sentences imposed by Moloi, J on 9 June 2017 and 26 June 2017, respectively.
- [2] The applicants in this application are 4 of the 6 accused who were charged in the court a *quo* on two counts. I will refer to the parties as in the court a *quo*.
- [3] Count 1 is murder, read with the provisions. of Section 51 of Schedule 2 of the Criminal Procedure Act, 51 of 1977, in that upon or about 25 October 2015 and at or near Block [...], K[...], in the district of Odendaalsrus, the accused unlawfully and intentionally killed J[...] V[...] N[...], an adult male person. Count 2 is one of assault with the intent to do grievous bodily harm in that on the same date and at the same place mentioned in count 1, the accused unlawfully and intentionally assaulted T[...] M[...] by stabbing him with a knife with the intention of causing him grievous bodily harm.
- [4] All 6 accused pleaded not guilty on both charges and gave no plea explanation. However, all 6 accused were convicted on count 1 and accused 1 was also convicted on count 2, whilst the other accused were acquitted on count 2.
- [5] This application for leave to appeal was allocated to me on the basis of the provisions of Section 17(2)(a) of the Superior Courts Act, 10 of 2013 ("the Act"), in terms whereof an application for leave to appeal may be heard by any other judge of the Division when the judge against whose decision the appeal is sought to be made is not readily available. Moloi, J has since sadly passed on.
- [6] Section 17(1)(a) of the Act determines as follows:
- "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 judgments on the matter under consideration;

(b) ...

- [7] It is by now settled law that the word "*would*" in Section 17(1)(a)(i) has raised the bar for granting leave to appeal. See **Acting National Director of Public Prosecutions v Democratic Alliance In Re Democratic Alliance v Acting National Director of Public Prosecutions** (19577/09) [2016] ZAGPPHZ 489 (24 June 2016) at para [25]. In the judgment of **The Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others** 2014 JDR 2325 (LCC), the court held as follows at para [6]:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see **Van Heerden v Cronwright & Others** 1985 (2) SA 342 (T) at 343H. The use of the word '*would*' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

See also **Rohde v S** 2020 (1) SACR 329 (SCA) at para [8].

**Amended notice of application for leave to appeal:**

- [8] The grounds stated for the application for leave to appeal are the following:

**"Ad conviction**

2. The learned Judge erred in finding that the accused were guilty in that:

2.1 The State failed to discharge the onus of proof beyond reasonable ground about the guilt of the accused on all the counts proffered against them. There are contradictions between the state witnesses. The following contradictions came to the fore:

2.1.1 According to Thembisa Constance Radebe she saw that accused 1, 2, 4 and 6 and a Bongani stabbed the deceased with knives, however

Bonginkosi Wonderboy Makgetha who was with the deceased contradicted her by testifying that he saw accused 1, 2 and 4 and Bongani with knives.

2.1.2 Ms Thembisa Constance Radebe also contradicted her statement.

2.1.3 Ms Thembisa Constance Radebe was the only witness that described the clothing of accused 3.

2.1.4 Ms Thembisa Radebe contradicted Ms Nomalizo Mthingevu as to who told the group to chase the deceased. According to Ms Radebe accused 3 told the group, however according to Ms Mthingevu accused 4 told the group of the accused to catch the deceased.

2.1.5 According to Mr Thabo Motshukanye, his group had knives and they drew the knives when the accused drew theirs, however according to Mr Samkelo Yawa only the deceased had a knife and Thabo Motshukanye had a stick and none of the other members in their group had any weapons.

3. The Learned Judge misdirected himself in finding that the accused were guilty in that:

3.1 There were improbabilities in the evidence adduced by the State.

3.1.1 The fight earlier the day was between the deceased and another person. Accused 1 and 2 were present however from the evidence they wanted to stop the altercation because she even asked Mr Yawa to tell the deceased to stop.

3.1.2 The submission in this regard is that accused 1 did not have any reason to assault the deceased seeing that they were not arguing with the deceased.

4. The Learned Judge descended into the arena and cross-examined the accused and from the record it appears that the Honourable Judge made a credibility finding on evidence of accused 1 during his evidence.

5. The learned Judge ought to have found that:
  - 5.1 The versions of the accused were reasonably possibly true based on the contradictions in the State's case. The accused should have been acquitted on all charges.
  - 5.2 The evidence of the defence witnesses, Mr Chaka and Ms Palesa Hayi, corroborated the evidence of the accused as to their whereabouts on the said date.

### **Ad sentence**

6.
  - 6.1 The sentence imposed by the Learned Judge is shockingly harsh.
  - 6.2 The Learned Judge did not take the personal circumstances of the accused into account.
  - 6.3 The Learned Judge over emphasized the seriousness of the crime, interest of society above the mitigating factors and personal circumstances of the accused.
  - 6.4 The Learned Judge erred by finding that no substantial and compelling circumstances exist to deviate from the prescribed minimum sentence.

### **Conclusion**

7. The accused persons humbly submit that on the grounds mentioned above there are prospects of success and another court will come to a different conclusion on both convictions and sentence.

The accused therefore request that leave to appeal and condonation for the late be granted as aforesaid."

### **Consideration of the convictions:**

- [9] I have thoroughly read the record. However, despite this, I found the record to be difficult to read and the relevant events and roll players are not clear in all respects.
- [10] The events occurred as part of moving scenes which lead to a number of contradictions in identity. The cautionary rule which pertains to identity is settled law.
- [11] In my view there are reasonable prospects that a different court would come to a different conclusion in respect of the convictions in accordance with the grounds for the application for leave to appeal.

### **Consideration of the sentences:**

- [12] Ms Abrahams, on behalf of the accused, indicated that it is her instructions to submit that the court *a quo* erred in finding that there are no substantial and compelling circumstances present that necessitated a deviation from the prescribed minimum sentence on count 1. She also submitted in accordance with her instructions that the imposed sentences are shockingly harsh and inappropriate.
- [13] The court *a quo* gave a detailed judgment on sentence and dealt with all relevant factors. In my view there are no reasonable prospects that a different court would interfere with the imposed sentences on appeal.

### **Order:**

- [14] The following orders are made;

1. Leave to appeal against the convictions of the applicants/accused by the

late Moloi, J, dated 9 June 2017, is granted to the Full Court of this Division.

2. The application by the applicants/accused for leave to appeal against the sentences imposed by the late Moloi, J, dated 26 June 2017, is dismissed.

**C. VAN ZYL, J**

On behalf of the applicants/the accused:

Ms V Abrahams

Instructed by:

Legal Aid

BLOEMFONTEIN

On behalf of the respondent/the State:

Adv. A Ferreira

Instructed by:

Department:

Public Prosecutions

BLOEMFONTEIN