



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

CASE NUMBER: CC31/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES
17 January 2025 DATE	
 SIGNATURE	

In the matter between:

THE STATE

and

JACOB BHUTI MLAMBO	Accused 1
MISHACK MABUSA MATSHIYA	Accused 2
MFUNDO INNOCENT MLAMBO	Accused 3
PHILLIP MADODA JWARA	Accused 4
FIHLIWE LETTY MASANGO	Accused 5
THOMAS MOSES KABINI	Accused 6
PAULINAH ZANELE MASANGO	Accused 7
LANCELOT SIPHO MTHIMUNYE	Accused 8

SIMON PATRICK NXUMALO

Accused 9

PAULINAH NURSE SIBIYA

Accused 10

TRYPHINA NTOMBIFUTHI SIBIYA

Accused 11

**JUDGMENT ON APPLICATIONS FOR LEAVE TO APPEAL AGAINST
CONVICTION AND SENTENCE**

AVVAKOUMIDES AJ

1. The 11 accused were found guilty of the murder (read with the provisions of section 51(1) of the Criminal Law Amendment Act 107 of 1997) of Lehlohonolo Joseph Sekhotho (the deceased), in that they intentionally and unlawfully, acting in the execution, or furthering of common purpose, killed the deceased. In addition, accused 1, 2 and 3 were convicted by this court of kidnapping as charged.

2. Following the conviction they were sentenced as follows:

2.1 accused number 1 to life imprisonment and on the charge of kidnapping to 3 years imprisonment, both sentences to run concurrently.

2.2 accused number 2 to life imprisonment and on the charge of

kidnapping to 3 years imprisonment, both sentences to run concurrently.

2.3 accused number 3 to life imprisonment and on the charge of kidnapping to 3 years imprisonment, both sentences to run concurrently.

2.4 accused number 4 to life imprisonment.

2.5 accused number 5 to life imprisonment.

2.6 accused number 6 to life imprisonment.

2.7 accused number 7 to life imprisonment.

2.8 accused number 8 to life imprisonment.

2.9 accused number 9 to life imprisonment.

2.10 accused number 10 to life imprisonment.

2.11 accused number 11 to life imprisonment.

3. I do not intend dealing with all of the submissions made in the various applications for leave to appeal against conviction and sentence except to

highlight some issues that warrant attention.

4. On behalf of accused number 1 it was submitted that the court erred on the facts by convicting accused 1 on the basis of common purpose. The legal debate on this aspect, was whether accused 1 by watching the assault in his own property on his own version, as opposed to the evidence of the state witnesses, could be implicated and convicted by the application of the doctrine of common purpose. The state contended that even passive participation may be sufficient to so convict accused 1.
5. Accused 2 and 7 argued that the deathblow to the deceased could not be attributed to accused 2 and 7 because they were not present when the deceased passed on. Furthermore, the post-mortem report only concludes that the death was caused by severe head injury. The argument was aimed at showing that accused 2 and 7 were not present when the deceased died and that neither of them hit the deceased on the head.
6. Accused 7 submitted that the special entry made in terms of section 317 of the Criminal Procedure Act 51 of 1977 on 30 March 2023 about the accused not having received a fair trial, and noted by the court, is binding on the court because it was so noted. The thrust of the special entry is that at the end of the merits trial, I invited all counsel, after closing arguments, to file heads of argument, if they wished, on any aspect they may have overlooked, and which heads may assist their clients. Only Ms Monyakane

filed heads. The rest neglected to do so, and the special entry is aimed at me creating the impression to the accused that if they filed heads of argument, the trial would go well for them.

7. Accused 3 argued that the court misdirected itself by accepting the evidence of Percy when on the facts he could not have been present when the deceased was brought out of the yellow shack. Accused 3 on sentence argued that their sentence is shockingly inappropriate and that the court should have found that substantial and compelling circumstances to exist in order to deviate from the prescribed sentence. The latter being anchored on the attempted rape on the minor child by the deceased.
8. Accused 4 argued that the state witnesses contradicted themselves in material respects and that the court erred in convicting accused 4 by applying the doctrine of common purpose. The submissions went further to criticise the conviction judgment by failing to take the personal circumstances of the accused into account.
9. Accused 5 and 9 referred the court to section 17 (1) of the Superior Courts Act 10 of 2013 highlighting when a court should grant leave to appeal. Accused 5 submitted that her evidence was corroborated by Tshepo and that the court erred in accepting Tshepo's version as credible. Accused 5 submitted that the court failed to analyse the doctrine of common purpose and further the court erred in not recording why this crime took place in the

first place. It was submitted that the deceased played a pivotal role in his own murder (sic). It was submitted that the court failed to consider procedural errors and, in this regard, failed to take into account that accused 5 had left the scene of the crime with her daughter and Tshepo and that the deceased died only when accused 5 and Tshepo arrived at the SAPS. Mr Rakobela persisted with his submissions that the accused did not receive a fair trial based on the special entry and because the court noted the special entry, it is bound to grant leave to appeal because such an issue may only be dealt with by an appeal court.

10. In respect of accused 9 Mr Rakobela submitted that after he had assaulted the deceased he got onto his bicycle and left the scene of the crime and thus the doctrine of common purpose could not apply to accused 9.
11. Accused 6 and 11 submitted that the facts are straight forward and relied on *Mawela and Another v The State* (377/2021) (2022) ZASCA 18 (16 February 2022) in an attempt to show that the doctrine of common purpose and *dolus eventualis* cannot co-exist. Accused 6 and 11 submitted that the court failed to appreciate the circumstances of the case. It was submitted further that the court erred in applying the doctrine of common purpose because the accused did not "*sit down and decide to kill the deceased*" (sic). Accused 6 and 11 relied on the case of *Mawela* to show that the court erred to have found intent in the form of *dolus eventualis*.

12. Ms Mazimuko submitted further that the court erred by not considering and applying mercy because of the circumstances of the case and the sentence is shockingly inappropriate. The sentence is said to be detached from the facts of the case. Lastly the facts of the case do not take into account and appreciate the prevalence of rape of young girls and women in South Africa.
13. Accused 8 and 10 submitted that common purpose could not have occurred and that the state failed to prove beyond a reasonable doubt that the accused were guilty of murder as charged and the doctrine of common purpose was wrongly applied. Accused 8 and 10 relied heavily on the discrepancies of the states' witnesses' evidence insofar as they differed as to what they saw, heard and experienced.
14. Ms Kabini, on behalf of the state dealt with the requirements of common purpose in *Thebus v The State* (CCT36/02 (2003)ZACC 12 to show how the doctrine of common purpose finds applicability and in respect of the witnesses submitted that it is not required of witnesses evidence to be exact in every aspect unless such discrepancies are material and it can be shown that all the witnesses conspired to put forward a version.
15. I have concerns about the special entry noted by Mr Rakobela and Ms Mogale regarding the absence of a fair trial. In terms of section 17 (1) of the Superior Courts Act 10 of 2013, leave to appeal may only be granted

where the judge (s) are of the opinion that: "(a) (i) *the appeal would have a reasonable prospects of success*, (ii) ***there is some other compelling reason why the appeal or should be heard***, including conflicting judgments on the matter under consideration."

16. In considering all the facts and submissions whether to depart from the prescribed sentences, in particular the special entry so noted, I am of the view that leave to appeal should be granted on both the convictions and sentences. It is in the interests of justice for another court to examine whether this court erred on the facts and/or the law, and whether substantial and compelling circumstances should have been found, given the circumstances. I am acutely aware that the decision to depart from the prescribed sentence lies within the domain of the trial court, however, in this case, another court may find differently.

17. Under the circumstances I make the following order:

17.1 Leave to appeal against the convictions and sentences of all the accused to a full court of this division is hereby granted.

17.2 The accused who are currently incarcerated are to be released immediately. The Department of Correctional Services is hereby directed to do all such things necessary to give effect to this order.

17.3 The bail in respect of each accused is hereby reinstated on the same terms and conditions stated in the court order dated 30 March 2023, pending the full court appeal.

17.4 For the sake of clarity the bail conditions ordered by the relevant magistrate's court in which the accused first appeared will remain applicable. In addition to those conditions, the following conditions shall apply:

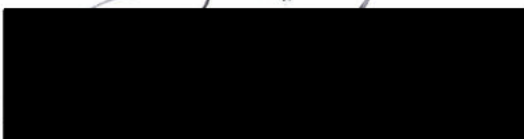
17.4.1 Save for accused 2 all other accused must report to the Bronkhorstspuit police station every Monday from and including 20 January 2025 between the hours of 07h00 and 19h00 until the pending appeal is finalised or the bail conditions are amended by a competent court.

17.4.2 In the case of accused 2 who works in Marble Hall, he must report to the Marble Hall police station every Monday between 07h00 to 19h00.

17.4.3 If any of the accused holds a passport, such passport to be handed in to the Investigating Officer, in the event that this had not already been complied with.

17.4.4 In the event that any of the accused wishing to leave the

province of Gauteng they will only be permitted to do so with the written consent of the investigating officer. This will similarly apply to accused number 2 should he continue to work in Marble Hall in which case the province of Limpopo will apply *mutatis mutandis*, but otherwise the province of Gauteng shall apply to accused 2.

A large black rectangular redaction box covering the signature of the judge.

G.T. AVVAKOUMIDES
ACTING JUDGE OF THE HIGH COURT
GAUTENG, PRETORIA

REPRESENTATION FOR PARTIES:

FOR THE STATE: Ms E Kabini

Instructed by: NDPP

FOR ACCUSED 1: Adv O Matshego

Instructed by: Legal Aid

FOR ACCUSED 2 AND 7: Adv Mogale

Instructed by: Legal Aid

FOR ACCUSED 3: Adv P D Motsweni

Instructed by: Legal Aid

FOR ACCUSED 4: Adv Mathunzi

Instructed by: Legal Aid

FOR ACCUSED 5 AND 9: Adv Rakobela

Instructed by: Legal Aid

FOR ACCUSED 6 AND 11: Adv N Mazibuko

Instructed by: Legal Aid

FOR ACCUSED 8 AND 10: Adv N Monyakarie

Instructed by: Legal Aid