



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

Case No: KS 3/2019

In the matter between:

MOTLALENTWA QHAUTSE
LIZBETH NDLALA
THEMBA LAWRENCE MAJA
SAMSON SAM MBOKANE
JABULANI WILSON ZUMA

1st Applicant/Accused 2
2nd Applicant/Accused 3
3rd Applicant/Accused 4
4th Applicant/Accused 6
5th Applicant/Accused 7

And

THE STATE

Respondent

In re:

THE STATE

And

MORAPEDI RANKALI

Accused 1

MOTLALENTWA QHAUTSE	Accused 2
LIZBETH NDLALA	Accused 3
THEMBA LAWRENCE MAJA	Accused 4
OUPA JEFFREY MAHOMANE	Accused 5
SAMSON SAM MBOKANE	Accused 6
JABULANI WILSON ZUMA	Accused 7

Coram: Lever J

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

LEVER J:

1. This is an application for leave to appeal where only 5 of the 7 accused who were convicted of various charges have applied for leave to appeal thus far. The accused were convicted of various charges on the 4 March 2025 and sentenced on the 11 March 2025.
2. For the sake of convenience and to avoid confusion I shall refer to the applicants as they appeared in the trial itself as accused 2, 3, 4, 6 and 7.
3. Accused 2 was convicted of housebreaking with intent to rob and robbery with aggravating circumstances, sexual assault and murder. He was sentenced to 20 years imprisonment in respect of the conviction for housebreaking and robbery, 5 years imprisonment in respect of the sexual assault conviction and life imprisonment for murder. All of which to run concurrently with the life sentence.

4. Accused 3, 4, 6 and 7 were convicted of housebreaking with intent to rob and robbery with aggravating circumstances. Accused 3, 4 and 6 were sentenced to 10 years imprisonment. Accused 7 was sentenced to 20 years imprisonment.
5. Accused 2, 3, 6, and 7 seek leave to appeal both their convictions and sentences.
6. Accused 4 seeks leave to appeal his sentence only.
7. Leave to appeal is regulated by section 17 (1) of the Superior Courts Act¹ (the Act). The said section reads as follows:

“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 chance of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration; ...”
8. On the face of it, the wording of the said section, of the Act as quoted above, indicates that the requirement for granting leave to appeal is thus more stringent than was previously required. This is in fact what Bertelsmann J held in the case of *MONT CHEVAUX TRUST v TINA GOOSEN AND OTHERS*². Bertelsmann J held that the test now is not whether another court might come

¹ Act 10 of 2013.

² 2014 JDR 2325 (LCC).

to a different conclusion but in using the word “would” in the said section of the Superior Court Act, the test now is that there is a measure of certainty that another court will reach a different conclusion to the court of first instance.

9. Having regard to the change from ‘another court might come to a different conclusion’ to ‘would’ brought about by section 17(1)(a)(i) of the Act there existed some differing approaches on how ‘reasonable prospects of success’ would be determined. Such controversy as might have existed appears to have been settled in the case of *RAMAKATSA & OTHERS v AFRICAN NATIONAL CONGRESS & ANOTHER*³, where Dlodlo JA set out the position as follows:

“...The test for reasonable prospects of success postulates 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 other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”⁴ (references omitted)

10. The test as set out in *Ramakatsa*’s case seems to confirm the approach of the SCA prior to the change in wording brought about by the section 17 of the Act

³ *RAMAKATSA & OTHERS v AFRICAN NATIONAL CONGRESS & ANOTHER* (Case No: 724/2019)[2021] ZASCA 31 (31 March 2021).

⁴ *Ramakatsa* case above., para [10].

in the case of *S v Smith*, which pre-dates the Superior Courts Act, where Plasket AJA set out the position as follows:

“[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 for 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.”⁵ (references omitted)

11. In fact, the SCA in *Ramakatsa*’s case refers directly to the judgment of Plasket AJA in *Smith*’s case. So, the change in the wording brought about by section 17 of the Act seems to have left the test to be applied largely unaffected.

12. I will deal with each of the accused and the grounds they raise for leave to appeal individually and sequentially on their respective convictions. For the sake of brevity, where the grounds raised for leave to appeal by the different applicants are the same or overlap, I will deal with such aspects collectively. Thereafter, I will turn to the grounds for leave to appeal on sentence.

⁵ *S v Smith* 2012 (1) SACR 567 (SCA) at para [7].

13. Accused 2, firstly attacks the reliability and credibility of the evidence of Warrant Officer (WO) Dibebe against him on *inter alia* the basis that WO Dibebe was a single witness. This argument as a ground for leave to appeal fails in circumstances where accused 2 failed to give evidence and he also failed to call witnesses. Furthermore, and most significantly much of WO Dibebe's evidence was not disputed in cross-examination. The State cannot fairly be expected to lead corroborating evidence on evidence that was not disputed or challenged. Nor can the court be expected to ignore the fact that these elements of the evidence placed before it were unchallenged.

14. Accused 2 also challenges the admissibility and constitutionality of WO Dibebe's evidence of what accused 2 told WO Dibebe at the time of his arrest. The admissibility of this evidence was not challenged at the time it was placed before the court. It was undisputed that WO Dibebe informed accused 2 of his rights before any 'admissions' were made. This was dealt with in my judgment on the merits at paragraph 103 of that judgment.

15. Accused 2 claimed ownership of the Puma tekkies on his arrest, yet there is no mention of the evidence of the expert who lifted the print that matched the Puma tekkie. The said print was found in the farmyard where the murder was committed just after the relevant crimes were committed on the property concerned. This evidence clearly called for an explanation from accused 2. No

such explanation was placed before the court. This aspect was dealt with at paragraph 105 of my judgment on the merits.

16. Accused 2 then raised the issue of how this court should have dealt with ‘the consequences of his failure to testify’ as a ground for leave to appeal. In the case of *S v Letsoko and Others* Holmes JA stated the position as follows:

“It would not be correct to say that an inference of guilt can be drawn from his failure to testify. The true position is that, in cases resting on circumstantial evidence, if there is a *prima facie* case against the accused which he could answer if innocent, the failure to answer it becomes a factor, to be considered along with other factors; and from the totality the Court may draw the inference of guilt. The weight to be given to this factor depends upon the circumstances of each case.”⁶

17. This approach was followed in the judgment on the merits and this can be seen from paragraphs 104 and 105 of the said judgment on the merits.

18. Accordingly, in respect of accused 2, on his convictions, I find that there is no rational basis that another court would reasonably come to a different conclusion and his application for leave to appeal on his convictions must fail. Also, although accused 2 did not rely on section 17(a)(ii) of the Act, I can find no compelling reason why an appeal in respect of his conviction should be heard.

⁶ *S v Letsoko & Others* 1964 (4) SA 768 (A) at 776C-D.

19. Turning now to deal with the position of accused 3 and accused 6 in respect of their convictions. Accused 3 and 6 were part of the so-called Mpumalanga group. Their versions were aligned in that they maintained that they only visited Kimberley to participate in the activities of performing rituals and digging for coins. On their version they had nothing to do with the robbery and had no knowledge of the robbery.

20. This version of accused 3 and accused 6 takes no account of the fact that all the members of the Mpumalanga group shared in the loot of the robbery. Both accused 3 and 6 received a substantial amount in cash which in the circumstances could only be derived from the robbery. Accused 3 received other items which on the evidence were shown to have belonged to the victims of the relevant robbery and these items were discovered at the house of accused 3 when she was arrested.

21. On the version of both accused 3 and 6 they were only there to perform rituals and dig for coins. Again, on their own evidence these activities did not take place, yet they were paid from the proceeds of the robbery. No credible explanation could be provided for this by either accused 3 or accused 6.

22. It is argued on behalf of accused 3 and accused 6 that the fact that accused 5 informed them what happened in the house of the deceased during the robbery in question does not make them participants in the commission of the said

robbery. However, their conduct in response to being informed of the robbery by accused 5 does show that they associated with the entire enterprise even after being informed of the brutal nature of the robbery concerned.

23. As the case law indicates, a court is fully entitled to consider the conduct of an accused after the event to determine 'association' and state of mind at the time of the event. One would have expected clear indications of disassociation from innocent co-travellers after being informed of the robbery and the nature of the assaults, if they were not part of the criminal enterprise.

24. In addition, the evidence showed that the other members of the Mpumalanga group, including accused 6, were in contact with accused 5 during the robbery itself. The only reason for such contact would be to receive information on the progress of the robbery itself. The explanations proffered to explain this contact were simply not credible given the circumstances.

25. It is a well-established principle that a robbery can be committed through the instrumentality of another acting as an agent.⁷

26. Accused 3 and 6 submit that the court misapplied the principle of 'instrumentality' and submit that their version was 'uncontroverted'. Not only was their version challenged, but it was shown to be untrue. The totality of the

⁷ See: Snyman's Criminal Law., 7th Ed., at pages 222-223.

evidence holistically assessed as well as the overwhelming probabilities established that their versions could not reasonably possibly be true. The evidence of accused 3 was assessed and analysed in paragraphs 112 to 130 in the judgment on the merits. The evidence of accused 6 was assessed and analysed in paragraphs 196 to 227 in the judgment on the merits. The said passages support the conclusions set out herein.

27. Both accused 3 and accused 6 were both shown and found to be poor witnesses. They could not credibly explain the numerous improbabilities in their respective versions.

28. Accordingly, on the grounds for leave to appeal raised by accused 3 and accused 6, there is no rational basis to conclude that another court could reasonably come to a different conclusion. Although accused 3 and accused 6 did not rely on section 17(a)(ii) of the Act, I can find no compelling reason why an appeal should be heard in their respective cases. In the circumstances their application for leave to appeal against their convictions stands to be dismissed.

29. Turning now to the position of accused 7 in respect of his application for leave to appeal against his conviction. Accused 7 argues that his cell number was obtained in an unlawful search and seizure and that the cell phone data

obtained in respect of this number was the fruit of the poisoned tree and accordingly could not be used against him.

30. Mr Mogwera who appears for accused 7 argues that the evidence that Colonel (Col) Conradie gave that she obtained the cell phone number of the accused that geolocates him to the scene of the crime at the relevant time should be called into question because as he argues in paragraphs 10.1.4 and 10.1.5 of his Heads of Argument the incident occurred on the 24 January 2018. The criminal complaint lodged by accused 7 where he listed the relevant cell number as his contact number was made some six months after the incident in July 2018. Therefore, Mr Mogwera argues the number was obtained by the State in an unlawful and unconstitutional manner.

31. This is simply a non-sequitur because the date of importance in this context is not the date of the complaint lodged by accused 7 at the Point Police Station in Durban, but the date of his arrest. The evidence adduced showed that accused 7 was arrested on the 16 March 2021. If somehow the complaint of accused 7 in an unrelated fraud case was lodged after the arrest of accused 7 Mr Mogwera's argument would be valid. However, as pointed out herein, in the circumstances it is simply a non-sequitur.

32. In any event Mr Mogwera was unable to point to anything sinister in the lapse of time between the incident itself and the date of the unrelated fraud complaint by accused 7 or the date of his arrest.

33.Mr Cloete, who appears for the State, points out that the lawfulness of the search was never disputed at the time when the officer who arrested accused 7 testified. Mr Cloete further points out that at that time the relevant cell phone evidence had been discovered and made available to all the accused, including accused 7. The importance and relevance of the cell phone evidence was already, at the time Col Conradie gave evidence, self-evident and clear for all the accused to see. If there was something untoward in the manner that such evidence was obtained it's admissibility ought to have been challenged at that time. This was not done.

34.Further, the evidence of Col Conradie showed that she obtained the relevant cell phone number of accused 7 independent from anything that happened during the arrest of accused 7. This evidence of Col Conradie was never challenged when she testified. A second cell phone number of accused 7 was obtained from one of his co-accused. I have dealt with this issue comprehensively at paragraphs 264 and 265 of my judgment on the merits.

35.Accused 7 did not challenge the credibility of Col Conradie's evidence nor did he challenge her expertise. Accused 7 also did not challenge the admissibility of such evidence when it was adduced before court.

36. Accused 7 was legally represented when Col Magugu and when Col Mbingo testified. The issues accused 7 now raises were never canvassed when the said police Colonels testified.

37. It is incorrect to argue that in my judgment on the merits that I based my findings and conclusions 'solely' on the cell phone evidence. Undoubtedly, the cell phone evidence played a central role. However, my findings in respect of accused 7 were based on the evidence in its entirety as it related to accused 7. The evidence in respect of accused 7 was assessed holistically.

38. I found that accused 7 was an unreliable and untruthful witness. My reasons for that conclusion are set out in paragraphs 266 and 267 of my judgment on the merits.

39. In these circumstances I must conclude that there is no rational basis to find that another court could reasonably come to a different conclusion. Although accused 7 did not rely on section 17(a)(ii) of the Act, I cannot find that there is any compelling reason that an appeal in respect of accused 7 should be heard. Accordingly, the application for leave to appeal on his conviction stands to be dismissed.

40. Going back to the respective sentences imposed. In respect of sentencing accused 2, he was directly involved in a vicious and brutal attack on two

elderly and vulnerable victims. As set out in the case of *S v Malgas*⁸ the statutorily prescribed sentence is to be considered ordinarily appropriate in the absence of weighty considerations not to impose such sentence and that such prescribed sentence is the benchmark in the sense of being the prescribed starting point. The sentences meted out to accused 2 were proper when considering the seriousness of the relevant offences.

41. The charge of murder in the circumstances carried a mandatory life imprisonment sentence and accused 2 did not establish any ‘substantial and compelling reasons’ to depart from the prescribed life sentence.

42. Accused 2 was also convicted of robbery in 2021. The sentences imposed on accused 2 in all the relevant circumstances were balanced, appropriate and called for. In the circumstances, there is no rational basis to find that another court could reasonably come to a different conclusion. Although accused 2 did not rely on section 17(a)(ii) of the Act I can find no compelling reason that his appeal on sentence should proceed.

43. Accused 4 only appealed on sentence but on this aspect his application falls to be considered together with the applications of accused 3 and 6 because in sentencing a similar approach on similar facts was followed in sentencing each of them.

⁸ 2001 (1) SACR 469 (SCA) at paras [25]B and [25]J.

44. A measure of mercy was shown to accused 3, 4 and 6. The prescribed minimum sentence in their cases demanded a sentence of 15 years imprisonment. I found 'substantial and compelling' reasons to impose the lesser sentence of 10 years imprisonment on each of them. In doing so I considered all the mitigatory factors that could reasonably be relied upon by each of them individually.

45. In the circumstances, I cannot find that there is a rational basis to conclude that another court could reasonably come to a different conclusion on the sentences imposed.

46. Accused 3, 4 and 6 did not rely on section 17(a)(ii) of the Act. Nonetheless, I cannot find that there is a compelling reason that the appeals of accused 3, 4 and 6 in respect of sentencing should proceed on appeal.

47. Turning now to the application of accused 7 for leave to appeal the sentence imposed on him. In the case of accused 7 the fact that he has three relevant previous convictions and the fact that he was still on probation when the crime for which he was sentenced was committed simply precludes any other sentence. The said previous convictions under the relevant legislation called for a period of imprisonment of 25 years. Due to the relatively advanced age of accused 7 and the fact that he had already spent almost four years in prison awaiting trial I found substantial and compelling circumstances to depart from

the prescribed sentence of 25 years imprisonment. In all the circumstances I could not go any lower than the 20 years imprisonment imposed on accused 7.

48. In the circumstances, I can find no rational basis to find that another court could reasonably come to a different conclusion. Accused 7 in his application for leave to appeal did not rely on section 17(a)(ii) of the Act. Nonetheless, I can find no compelling reason why in respect of accused 7 an appeal on sentence should proceed.

In the circumstances, the following order is made:

1. In respect of accused 2 his application for leave to appeal his conviction and sentence is dismissed.
2. In respect of accused 3 and accused 6 their applications for leave to appeal their convictions and sentences are dismissed.
3. In respect of accused 4 his application for leave to appeal his sentence is dismissed.
4. In respect of accused 7 his application for leave to appeal his conviction and sentence is dismissed.

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[REDACTED]
L.G. Lever

Judge

Northern Cape Division, Kimberley

REPRESENTATION:

For the Applicants/Accused 2,3 & 6:	Adv T Diba oio Legal Aid SA, Kimberley
For the Applicant/Accused 4:	Adv JJ Schreuder oio Legal Aid SA, Kimberley
For the Applicant/Accused 7:	Mr M Mogwera oio Legal Aid SA, Kimberley
For the Respondent/State:	Adv JJ Cloete oio The Director of Public Prosecutions, Kimberley.
Date of Hearing:	22 August 2025
Date of Judgment:	29 August 2025