



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION: BHISHO)**

Case No: CC 09/2023

In the matter between:

Mluleki Xulu	Accused 1
Dumisani Mpofana	Accused 3
Bantu Marali	Accused 4
Lindi Mbinyashe	Accused 5
Unathi Kakalala	Accused 6
Mfuniseli Mbinyashe	Accused 7
Nombulelo Kitise Bukani	Accused 8
Zwelandile Boy-Boy Kitise	Accused 9
Yanga Solani	Accused 10
Nkosinathi Dyantyi	Accused 11
Nombuzo Mbinyashe	Accused 14
Mvelisi Xulu	Accused 15
Thobani Vena	Accused 16

and

The State

Respondent

JUDGMENT

On application for leave to appeal

NORMAN J:

Introduction

- [1] The applicants herein were accused persons in the criminal trial that resulted in their convictions and sentence. The State relied on the doctrine of common purpose in proving their guilt and on the provisions of section 51 (1) of the Criminal Law Amendment Act , 105 of 1977 , that the murders were premeditated and were committed by a group of persons acting in furtherance of a common purpose . The 4 deceased persons (3 males and 1 woman) were kidnapped and burnt to death by a group consisting of the accused persons , the applicants herein, who were positively identified by the witnesses that knew them well.
- [2] They were convicted on 4 counts of murder , 4 counts of kidnapping and 1 count of public violence. In respect of each murder counts (Counts 1 to Count 4) they were each sentence to undergo life imprisonment. In respect of each of the kidnapping charges (Counts 5 to 8) they were sentenced to 8 years imprisonment; and for public violence (Count 9), they were each sentenced to undergo 3 years imprisonment. All the sentences were ordered to run concurrently. They were each effectively sentenced to life imprisonment.

A. Application for leave to appeal by accused No's 1 and 15 (against sentence only ; accused no's 6 ,10 and 14(against both conviction and sentence)

- [3] The applicants herein were accused numbers 1 and 15 , 6,10 and 14 at the trial (the applicants). I shall refer to them by the same numbers they retained at the trial. Applicants numbers 1 and 15 seek leave to appeal

against sentence only whereas applicants numbers 6, 10 and 14 seek leave to appeal against both their convictions and sentence.

- [4] Mr Tshingana submitted that in respect of applicants 1 and 15 this court failed to take into account the ages of the applicants in that they were relatively young when the offences were committed; the court ought to have taken into account the fact that in cases of mob justice not everyone contributes to the crime the same; the court failed to take into account the fact that accused numbers 1 and 15 tried to intervene although it was too late at the time they tried to do so and that ought to have warranted a deviation from the prescribed minimum sentence; that the court erred in finding that there was prior planning of the killing of the deceased persons and the court over-emphasised the punishment over rehabilitation; the court failed to take into account that applicant numbers 1 and 15 had suffered a lot as a result of the incident because they also lost their father who committed suicide; the court ought to have taken into account the time spent in prison awaiting trial; that accused number 15 had a child born whilst he was incarcerated and that ought to have been considered as a mitigating factor; that applicant number 1 was a breadwinner; these factors looked at cumulatively ought to have constituted substantial and compelling circumstances justifying an imposition of a lesser sentence; the court erred in finding that the State had proved its case beyond reasonable doubt considering the fact that Mr Kongo, one of the main witnesses of the State, had smoked dagga on the day in question; that in so far as applicant number 6 is concerned, even Mr Kongo stated that he did not see him at the scene.

B. Applications for leave to appeal by accused numbers 3,4,5 and 7

- [5] Mr Dengana who appeared for applicants numbers 3, 4, 5 and 7 applied for their leave to appeal against both conviction and sentence on the basis that: The court erred in its application of the doctrine of common purpose and in this regard relied on *S v Mgedezi*¹. He submitted that there was no evidence proving that accused numbers 3, 4, 5 and 7 were parties to the prior agreement to kill cable thieves as testified by Mr Kongo. He submitted that any conviction based on common purpose constituted an error. The court ought to not have found applicant number 3 guilty as he was not implicated in any criminal act. That all of the accused persons, the fact that they were mentioned by the witnesses does not mean that they satisfied all the requirements set out in *Mgedezi* that would apply to accused numbers 4, 5 , and 7 as well. He also relied on *Mabaso v S*² and argued that the fact that there were some contradictions between the witness's evidence and the statements that they have made to the police ought to have resulted in the court finding them to be untrustworthy witnesses. He submitted that some of the contradictions made by Mr Kongo were sufficient to disqualify him as a reliable witness. He made the submissions in relation to the evidence of Mr Makinana and Ms Lamani. The pouring of petrol could never have been part of the plan. He submitted that the accused should have been acquitted on all the counts.
- [6] In so far as the sentence is concerned, he submitted that the evidence did not prove active participation in the commission of the offences by accused numbers 3 and 4 and the evidence implicating number 5 and 7 is untrustworthy. The evidence does not meet the requirements in Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 and therefore that part of the Act does not find application.

¹ *S v Mgedezi* 1989 (1) SA 687 (A) at para 65 – 66.

² *Mabaso v S* [2021] ZASCA 98 at para 29.

C. Application for leave to appeal by accused numbers 8,9,11 and 16 against sentence only.

[7] Mr Nabela appeared for applicants numbers 8, 9, 11 and 16 and their application for leave to appeal is directed against sentence only. He submitted that the court erred in finding that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence especially in the light of the fact that the court had found that house breaking and theft of cable wires were rife at Ndidwa Administrative Area, Middledrift, that the community of that area was concerned about the continued housebreakings and theft of cable wires; that the court had accepted that stolen cable wires were found from one of the deceased, namely, Lwando Makinana; the court erred in not taking into account that the applicants have been in custody for almost three (3) years before the finalisation of the case. All the offenders were treated as first offenders, personal issues of the applicants ought to have been taken into account, especially number 11 who is seventy-seven (77) years of age. Another court may take these factors cumulatively and confirm that they constitute substantial and compelling circumstances which justify a lesser sentence. He prayed for the granting of the application for leave to appeal against sentence.

D. Opposition by the State

[8] Mr Philisane for the State relied on *S v Bailey*³ that the court of appeal will not interfere with the findings of the court where it is the trial court that had observed the witnesses and taken the evidence and evaluated all the factual evidence as correct. He also relied on *S v Kgosimore*⁴ that the duty to impose sentence is primarily the prerogative of the trial court and the court of appeal would not likely interfere with the sentence imposed unless it is clear from the facts of the case that the trial court failed to exercise its discretion properly or the sentence induces a sense of shock. He submitted that the sentences imposed are appropriate in the circumstances because the killing of four (4) human beings in the manner in which they were killed deserved the kind of sentence as ordained by the legislature. He submitted that the court should dismiss all applications seeking leave against both conviction and sentence.

E. Discussion

Test for granting leave to appeal

[9] It is trite that in order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act (the Act) ⁵, an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard.

[10] If the Court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal.

³ *S v Bailey* 2007 (2) SACR 1 (C).

⁴ *S v Kgosimore* 1999 (2) SACR 238 (SCA).

⁵ Section 17(1)(a)(i) and (ii) provides:

‘(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.’

A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes. The merits remain vital and are often decisive.⁶

[11] It is worth mentioning that all of the matters raised herein were raised at trial and were all considered in both judgments on conviction and sentence. The applicants were all identified positively by the State witnesses. They were identified by the people that they reside with in the community and are well known to them. The deceased persons were taken to one place where they were burnt alive. That evidence was met with a bare denial from all the applicants. At trial how the deceased were burnt was never placed in issue although now in this application an attempt was made to say the pouring of petrol over them could not have been part of the plan. The age of the applicants, including the elderly ones and the roles they played in the killing of the deceased were all addressed in the main judgment. This court dealt with the issue of whether life sentence was disproportionate considering the personal circumstances of the accused and the seriousness of the crime and it found that it was not. There is nothing on the address by all Counsel in this application that has not been addressed in the main judgments on conviction and sentence.

[12] The reliance on the *Mabaso* decision as authority on contradictions made by witnesses in police statements, is with respect misplaced. That case is distinguishable from the facts of the case on several grounds. First, in *Mabaso* the statements that were found to have been unreliable were made by a Mr Mvubu, who was an accomplice and a single witness against the appellant. It was in that decision that the Supreme Court of

⁶ *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA); 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA) paras 23 and 24.

Appeal found that the high court failed to exercise caution in evaluating Mr Mvubu's evidence. Second, the State had relied on a confession of a Mr Ngomane who implicated Mr Mvubu as the person who recruited him to partake in the killing of the deceased. The Supreme Court of Appeal found that, that evidence was clearly inadmissible in terms of section 119 of the Criminal Procedure Act and that it constituted hearsay evidence which was not corroborated by any other evidence. The contradictions that were referred to in all the three (3) statements that Mr Mvubu had made and his testimony were found to be have been material and it is for that reason that the Supreme Court of Appeal concluded that the high court ought to have found the evidence of Mr Mvubu to be unreliable as a single witness.

- [13] Third, the dangers that were present in *Mabaso* case did not feature in the case before this court for these reasons: the State had called several witnesses whose evidence was corroborated by other witnesses, by some of the accused persons and by medical evidence. The witnesses had identified the applicants as they knew them and were known to the applicants. The judgment on the merits spells out clearly, as testified by the witnesses what the role of each of the accused persons was from the time the deceased persons were removed from their homes or where they were, up to the time when they were burnt to death. The evidence as a whole showed the intent and the planning of how the deceased persons were taken, some taken from the comfort of their homes, beaten up, surrounded by the group, some tied up, the cutting of the ligaments of the woman who tried to flee, all 4 put in one place and burnt alive. That evidence was evaluated together with the evidence of the accused persons who had denied any involvement and had distanced themselves from the killing of the deceased persons. The applicants were positively identified

by the State witnesses. This court dealt with areas where there were some contradictions in some of the evidence and found that those were not material. In respect of sentence in relation to all the applicants , their personal circumstances were all considered individually in the main judgment .

[14] The principles set out in *Mgedezi* and how they were met in this case are discussed in the main judgment.

[15] In *S v Smith*⁷ , referred to with approval in , *MEC for Health , Eastern Cape v Mkhitha at para 17* , the Supreme Court of Appeal held that :

“[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”⁸

[16] The finding that there was stealing of cable wires did not assist the accused persons because they distanced themselves from the killing of the deceased and the reasons therefor. There were no factors that would have influenced this court to deviate from the imposition of life imprisonment as clearly stated in the main judgment. The period of incarceration prior to conviction was also addressed in the judgment and the reason that this court did not consider it as a compelling and substantial circumstance to warrant a deviation from the minimum sentence.

[17] Having considered the grounds advanced for impugning the decisions on conviction and sentence , I am satisfied that the applicants in each of the instances have not met the threshold that is set out in section 17 of the

⁷ *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

⁸ *MEC for Health, Eastern Cape v Mkhitha* (unreported SCA case no. 1221/2015 dated 25 November 2016) at para [17].

Superior Courts Act, above, that the appeal against both conviction and sentence in respect of the applicants , where applicable, would have a reasonable prospect of success.

[18] I do not find any compelling reason to grant leave on any basis. It is for that reason therefore that all the applications for leave to appeal must fail.

ORDER

[19] In the result I make the following order:

Each of the applications for leave to appeal (in paragraphs A,B and C) is dismissed.

T.V NORMAN
JUDGE OF THE HIGH COURT

APPEARANCES:

For Applicants – 1, 15, 6, 10, 14 : Mr Tshingana
Instructed by : Zibula and Krwempe Attorneys
King Williams Town

For Applicants – 3, 4, 5 and 7 : Mr Dengana
Instructed by : F.T.Dengana Attorneys
King Williams Town

For Applicants – 8, 9, 11 and 16 : Mr Nabela
Instructed by : Mankayi-Masoka Attorneys
King William's Town
King Williams Town

For the Respondent : Adv Philisane
Instructed by : Director of Public Prosecutions
King Williams Town

Matter heard on : 07 April 2026

Judgment delivered on : 08 April 2026