REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: SS 8/2023

(1) REPORTABLE: Yes☐/ No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 24 November 2023 WJ du

In the matter between:

KHUMALO, NQOBILE	**APPLICANT 1**
NCUBE, WELLINGTONG	**APPLICANT 2**

and

THE STATE	**RESPONDENT**

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

DU PLESSIS AJ

[1] Mr Khumalo and Mr Ncube applied for leave to appeal against the conviction and sentencing imposed by me on 20 October 2023 and 2 November 2023, respectively. The State opposes the application.

[1] Mr Khumalo

[2] Mr Khumalo was convicted on:

i. Count 1, 9 and 13: Robbery with aggravating circumstances read with s 51(2) of the Criminal Procedure Act 105 of 1997;

ii. Count 2 and 5: Attempted murder;

iii. Count 6: Discharge of a firearm in a built-up area of any public place;

iv. Count 7, 11 and 14: Unlawful possession of an arm;

v. Count 8, 12, 15 and 16: Unlawful possession of ammunition;

vi. Count 10: Murder.

[3] Mr Khumalo pleaded not guilty on all counts, and no plea explanation was given.

[4] He was acquitted on count 3 (unlawful possession of an arm) and count 4 (unlawful possession of ammunition).

[5] Mr Khumalo was sentenced:

i. For count 1, 9 and 13, 15 years' imprisonment each;

ii. For count 2 and 5, 8 years' imprisonment each;

iii. For count 7, 11, 14 and 6: 10 years' imprisonment cumulatively;

iv. For count 8, 12, 15 and 16: 3 years' imprisonment cumulatively;

v. For count 10: life imprisonment.

[6] All counts are to run concurrently in terms of the provisions of s 280(2) of the Criminal Procedure Act 51 of 1977. He was also declared unfit to possess a firearm.

[2] Mr Ncube

[7] Mr Ncube was convicted on:

i. Count 1, 9 and 13: Robbery with aggravating circumstances read with s 51(2) of the Criminal Law Amendment Act;[1]

ii. Count 2 and 5: Attempted murder;

iii. Count 11 and 14: Unlawful possession of an arm;

iv. Count 12 and 15: Unlawful possession of ammunition;

v. Count 10: Murder.

[8] Mr Ncube was sentenced:

i. For count 1, 9 and 13, 15 years' imprisonment each;

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[1] 105 of 1997

ii. For count 2 and 5, 8 years' imprisonment each;

iii. For count 11, 14 and 6: 10 years' imprisonment cumulatively;

iv. For count 12 and 15: 3 years' imprisonment cumulatively;

v. For count 10: life imprisonment.

[9] All counts are to run concurrently in terms of the provisions of s 280(2) of the Criminal Procedure Act.[2] He was also declared unfit to possess a firearm.

[3] Leave to appeal

[10] In determining whether leave to appeal is granted, section 17(1)(a) of the Superior Courts Act[3] provides as follows:

> "Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
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> (a) (i) the appeal would have a reasonable prospect of success; or
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> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."

[11] In recent years, many an applicant for leave have argued that the amendment to the Superior Courts Act[4] did not change the threshold for leave to appeal, while many a respondent argued that it did: from a *might* to a *would* in s 17(1)(a)(i) means that the test for leave to appeal is now higher than previously applied.[5]

[12] Be that as it may, it must be more than a mere possibility that another court might come to a different conclusion from that of the trial court.[6] As the Supreme Court of Appeal stated in *S v Smith*[7]

> "What is the test of reasonable prospects of success postulants 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 of 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."

[13] It is for the court then to, with an open mind and honest reflection on the facts and the law, reconsider the evidence and the appellant's arguments in deciding whether to grant leave. When

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[2] 51 of 1977

[3] 10 of 2013.

[4] 10 of 2013.

[5] See for instance *MEC for Health, Eastern Cape v Mkhitha* [2016] ZASCA 176 paras 16 – 18.

[6] *S v Kruger* 2014 (1) SACR 647 (SCA).

[7] 2012 (1) SACR 567 (SCA) para 7.

considering this, the Applicants, relying on *S v Ngubane*,[8] request that the court adopt a holistic approach in evaluating the evidence.

[14] The Applicants, in general, argue that the court erred in finding that the State proved its case beyond reasonable doubt and in accepting the evidence of the witnesses as reliable and truthful. The Applicants then address what they regard as errors concerning the separate incidents, which I will discuss separately below. The answer to the separate incidents will address whether the State has proven its case beyond reasonable doubt.

(i) Counts 1 – 2

[15] The Applicants aver that the court erred in accepting the evidence of Const Leketi as credible, even though his evidence did not place the Applicants at the scene. As a single witness it was subject to the cautionary rule, and a court should not easily convict upon such evidence unless it is substantially satisfactory in all material aspects or corroborated.[9]

[16] However, in *S v Sauls*,[10] it was clarified that there is no rule-of-thumb test or formula to apply when considering single witnesses. The trial court should weigh the evidence and its merits (or lack thereof) and decide whether it is satisfied that the truth has been told despite shortcomings or defects in the evidence. My reasons for accepting the evidence of the single witness are set out in my judgment and need not be repeated here. There is no reasonable prospect of success on this ground, and leave to appeal is thus dismissed.

[17] The Applicants further avers that the commission of the robbery offence with aggravating circumstances was not completed, as Const Leketi threw his phone on the ground, and police officers found it.

[18] Robbery requires an act of appropriation, in respect of a certain type of property, that takes place unlawfully, with the intention to appropriate, and the use or the threat of violence to take the property or to submit someone to the taking of the property. Snyman[11] explains the appropriation element as the form of removal of property, where the act consists of i) depriving the lawful owner or possessor of his property and ii) himself exercising the rights of an owner in respect of the property. This was confirmed in *S v Nkosi*[12] where the court stated that

> "[…] the mere assumption of control over the property is not yet sufficient to constitute theft, but that it should further be required that the owner effectively be excluded from his property."

[19] There is, at times, a fine line between property being appropriated and cases where there is an assumption of control, even if a person was not deprived of their property (i.e. attempted theft or robbery, depending on whether there was violence involved). These are questions of fact.

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[8] 1945 AD 185 at 186 and 187.

[9] *S v Ganiel* 1967 (4) SA 2003 (N); *R v Mokoena* 1932 OPD 79 at 80.

[10] 1981 (3) SA 172 (A) 180.

[11] P 479.

[12] 2012 (1) SA SACR 87 GNP para 20.

[20] The judgment sets out Const Leketi's testimony that a man with a firearm at his gate demanded his cell phone and other possessions, which he threw on the ground before running for cover at the house and being shot in the back. In considering the evidence, I was satisfied that this was a robbery, since the only reason he departed from his phone was due to the threat made. There are no reasonable prospects of success on appeal on these counts.

(ii) Counts 5 – 8

[21] Mr Khumalo states that the court erred in finding that he shot the witness in Afghanistan Street. While it is true that Mr Mokoena only testified about one suspect, Mr Ngewnya testified about two suspects. Mr Mokoena explained that as he was walking behind Mr Ngewnya, he did not see the other suspect. Both identified Mr Khumalo at the identity parade. I stand by my analysis in the judgment. An appeal would not have a reasonable prospect of success on this ground and is therefore dismissed.

[22] The Applicants further argue that the court erred in rejecting the applicants' version that their rights to legal representation were not explained before attending the identification parade. However, the judgment dealt with the admissibility of the identity parade as evidence, namely once there is evidence on how the parade was conducted, which there was. The absence of legal representation does not per se infringe on the Applicants' fundamental rights and is not a ground for rejecting the evidence. It merely impacts on the weight of the evidence. The reasons for accepting the evidence are set out in the judgment, and there is no reasonable prospect of success.

[23] The judgment furthermore deals with the visibility and proximity of the victims who were shot by the Applicants in detail and need not be repeated here. The court was satisfied that on all the occasions, the complainants had an opportunity to see the Applicants, which enabled them to identify them at the identity parade. There is no reasonable prospect of success on this ground either.

(iii) Counts 9 – 15

[24] As for the robbery and the shooting at the church, the Applicants argued that the court erred in accepting the evidence of Ms Mpofu and Ms Banda regarding the identity of the Applicants. Furthermore, Ms Mpofu, as a single witness to the pastor's murder, could not tell who shot the pastor and that the shot came from a third person who was not apprehended. Also, Ms Banda's car and keys were not taken, and she was thus not robbed.

[25] The question of appropriation as a requirement of robbery is set out above. On the facts, Ms Banda was forced out of her vehicle, which she abandoned with the car keys. Once outside the car, she was assaulted, and she fainted, after which she ran into a veld leaving her car. During that time, the three robbers seemingly abandoned their plan to drive away with the vehicle for reasons that we do not know. In my evaluation of the evidence, even the short appropriation period is enough to constitute robbery. Still, there may be a reasonable prospect of success on this count.

[26] As for identifying the Applicants, I have dealt with the evaluation of the observation and the identity parade in my judgment. There is no prospect of success as far as the identification is concerned.

[27] As for the third person shooting the pastor, the doctrine of common purpose applies. It is exactly for such instances that the doctrine is necessary: where it is difficult to find with certainty who in the group killed the person. For reasons set out in the judgment,[13] I accepted that the doctrine of common purpose applied in this case, and that for that reason, the Applicants can be held liable for the murder of the pastor, as well as the attempted murders in count 2 and 5.

[28] The Applicants, in the leave to appeal application, stated that the State charged the Applicants in count 10 for premeditated murder in terms of s 51(1) of the Criminal Law Amendment Act[14] and that the judgment on the merits did not state how the Applicant committed the offence of premeditated murder. The court, however, did deal with the murder of the pastor by common purpose. The evidence that the pastor died of gunshot wounds was common cause, and from the discussion, it is clear that the pastor was shot during the armed robbery, which killed him. The issue of premeditation or not only becomes an issue on sentencing. In the end, upon sentencing, the court placed the murder under Schedule 2 part 1 (c)(ii), which also attracts the minimum sentence as per s 51(1). There is no reasonable prospect of success on this ground.

(iv) Count 16

[29] As for the arrest of Mr Khumalo, the first Applicant states that the court erred that the witnesses' accounts corroborated one another, as they contradicted one another on how the search was conducted. While there were slight differences, for reasons set out in my judgment, I accepted that these were not material and that it did not detract from the fact that they largely corroborated one another. This ground must, therefore, also fail.

(v) Sentence:

[30] Sentencing is at the discretion of the trial court. It requires careful, and often anxious, consideration of all the charges proven, with a careful weighing up between the interests of society, the individual's interest and the seriousness of the crimes committed. One aspect cannot be unduly emphasised at the cost of another. Likewise, one element cannot be unreasonably ignored to favour another.

[31] The minimum sentence regime binds a court to impose specific minimum sentences that the legislature deems appropriate for the crime committed. Whether the court deems the sentence a sledgehammer, it can only deviate if substantial and compelling circumstances exist. I have not found any substantial and compelling evidence to deviate from the minimum sentencing. The sentence of lifelong imprisonment is a consequence of the conviction as set out above and in the judgment. There is no prospect of success.

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[13] Para 133 onwards.

[14] 105 of 1997.

[4] Order

[32] I, therefore, make the following order:

1. Leave to appeal for conviction and sentencing are dismissed

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WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the Applicants:	Ms S Bovu
Instructed by:	Legal Aid South Africa
Counsel for the respondent:	Ms A de Klerk
Date of the hearing:	15 November 2023
Date of judgment:	21 November 2023