

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED

25/1/2023  
DATE

\_\_\_\_\_  
SIGNATURE

CASE NUMBER: SS53/2021

In the matter between:

SIMPHIWE THANDO NDIMANDE  
PHINDA TATI  
ANDILE NDWE  
BONGINKOSI MASANGO

1<sup>st</sup> APPELLANT  
2<sup>nd</sup> APPELLANT  
3<sup>rd</sup> APPELLANT  
4<sup>th</sup> APPELLANT

and

THE STATE

RESPONDENT

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**JUDGMENT LEAVE TO APPEAL**

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**DOSIO J:**

## INTRODUCTION

[1] The appellants have been found guilty of 2 counts. Count one is the crime of murder read with the provisions of s51(1) and Part 1 of schedule 2 of Act 105 of 1997 ('Act 105 of 1997'). Count two is a charge of robbery read with the provisions of s51(2) and part II of schedule 2 of Act 105 of 1997.

[2] The application is for leave to appeal against their convictions and respective sentences.

## AD RIGHT TO APPEAL

[3] An appellant is entitled to apply for leave to appeal in terms of the provisions of section 316 of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977') as amended.

[4] An appellant who applies for leave to appeal must satisfy the court that there is a reasonable prospect of success on appeal. (see *S v Ackerman en n' ander*<sup>1</sup>)

[5] In the case of *Matshona v S*<sup>2</sup>, the Supreme Court of Appeal stated that the test to determine whether leave to appeal should be granted is:

'simply whether there is a reasonable prospect of success in the envisaged appeal'.

[6] In the case of *S v Mabena and another*<sup>3</sup>, the Supreme Court of Appeal held that:

'...the test for reasonable prospects of success is a dispassionate decision based upon the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court.'

[7] In the case of *S v Smith*<sup>4</sup> the Supreme Court of Appeal held that:

'What the test of Reasonableness prospect 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 of success on appeal and that those prospects are not

<sup>1</sup> 1973 (1) SA (A) 765 G-H.

<sup>2</sup> 2008 (4) SA 69 SCA at paragraph 4

<sup>3</sup> 2007 (1) SACR 482 (SCA) at paragraph 22

<sup>4</sup> 2011 ZASCA 2012 (1) SACR 567 (SCA) at paragraph 7

remote, but have a realistic chance of succeeding...There must in other words be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

## **AD CONVICTION**

[8] The grounds for leave to appeal in respect to the first and second appellants are that the Court erred in finding that:

- (a) there was evidence suggesting that there was communication between the occupants of the Volkswagen Polo and the BMW;
- (b) that the occupants of the VW Polo motor vehicle, which registration is unknown, were actively involved in the robbery and murder;
- (c) that there was no evidence presented regarding the network service providers to prove that there was communication between the occupants of the VW Polo motor vehicle and the BMW and that the mere fact that accused two was seen at the mall does not mean he was involved in the crime;
- (d) that as regards the first appellant, with the specific reference to the DNA evidence that the court failed to take into consideration the fact that there is a possibility that Sgt. Kwenaithe collected the clothes which contained blood and that Sgt. Kwenaithe could've done anything with those clothes.

[9] The grounds for leave to appeal in respect to the third appellant are that the Court erred in respect to the following:

- (a) that the third appellant was a spotter in the bank and that his reasons afforded for being in the bank were reasonably possibly true;
- (b) that his reason for being at Zamokuhle hospital with accused one was reasonably possibly true and that he was not involved in any prior agreement with the other robbers;
- (c) that it was his BMW that was parked at the engine garage and that it had his registration number, this is because the video evidence was unreliable and furthermore that Mrs. Coetzee in her testimony never mentioned she saw a registration number plate on the BMW at the engine garage;
- (d) that it was his vehicle that followed the deceased's vehicle and the VW Polo, thereby negating any presence of a prior agreement.

[10] The grounds for leave to appeal in respect to the fourth appellant are that the Court erred in respect to the following:

- (a) that the fourth appellant was in the FNB bank at Northmead Square mall;

- (b) that the footage depicting the person at Northmead Square mall showed a person whose face was covered and that the only features visible was his bodily appearance and that the Court made a mistake in finding that it was the fourth appellant. Furthermore, that the fourth appellant does not have knock knees and neither was he wearing a black jacket as stated by Patrick Dingindlela;
- (c) that the fourth appellant's alibi was true and that the court should not have regarded it as false;
- (d) that the fourth appellant was in FNB bank, at the Zamokuhle hospital or at the crime scene in Chlookop.

[11] I respectively stand by my judgment in respect to the above-mentioned matters raised. These issues were dealt with fully in my judgment and reasons were given for the findings made. I carefully approached all the evidence that was presented by the State and the defence.

[12] In light of the reasons given in my judgment, it is my respectful submission that another court will not reach a different decision regarding the conviction and that there are no reasonable prospects of success on appeal.

[13] I accordingly find that the appellants have not satisfied me that they have a reasonable prospect of their appeal succeeding in respect to the convictions.

[14] In the result, leave to appeal in respect to the convictions of all four appellants is dismissed.

#### **AD SENTENCE**

[15] The first and second appellant's counsel has raised the following grounds in respect to sentence. They are:

- (a) That both the sentence of life imprisonment and 15 years imprisonment induces a sense of shock and that this Court failed to take into consideration the personal circumstances of the appellants;
- (b) that there are prospects that another court would come to a different conclusion regarding the sentence.

[16] The third appellant's legal representative has raised the following grounds in respect to sentence. They are:

- (a) that another court would come to a different finding regarding the sentence of the third appellant as he was awaiting trial in prison for a long time and furthermore that he was not at the scene when the shooting occurred. As a result his degree of participation should have been considered by this Court.

[17] The fourth appellant's legal representative has raised the following grounds in respect to sentence. They are:

- (a) that another court would come to different finding regarding the sentence of the fourth appellant due to the fact that he is a first offender and spent a considerable time in prison awaiting trial.

[18] In respect to the personal circumstances of the appellants, I did consider them and also explained fully in my judgment why a term of life imprisonment was imposed in respect to count 1 and why 15 years imprisonment was imposed on count 2.

[19] An Appeal Court's ability to interfere with the sentence imposed by the trial court is very limited and unless an appellant can point to a misdirection on the part of the Court, or that the sentence imposed is not in accordance with justice, the application for leave to appeal must be dismissed.

[20] The imposition of sentence is in the discretion of the trial court and the court of appeal must not interfere with this discretion for frivolous reasons. The Court of Appeal must not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently. A decisive question facing a Court of Appeal on sentence is whether it is convinced that the court which had imposed the sentence being adjudicated upon, had exercised its discretion to do so unreasonably. If the discretion was exercised unreasonably then a Court of Appeal may interfere and, if not, it cannot interfere.

[21] In *S v Malgas*<sup>5</sup> the principles applicable to an appeal against sentence were set out by the Supreme Court of Appeal as follows:

'A court exercising appellate jurisdiction...may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'....'

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<sup>5</sup> 2001 (1) SACR 469 (SCA) at 478d

[22] The appellants have not satisfied this Court that they have reasonable prospects of success on sentence.

[23] In the result leave to appeal in respect to the sentences imposed in respect to all four appellants is dismissed.

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**D DOSIO**  
**JUDGE OF THE HIGH COURT**

Appearances:

On behalf of the First Appellant	Adv Le Roux
On behalf of Second Appellant	Adv Moloï
On behalf of the Respondent	Ms Simpson

Date Heard:	25 January 2023
Handed down Judgment	25 January 2023