**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF GAUTENG DIVISION,**

**SOUTH AFRICA PRETORIA**

**CASE NO: CC71/2020**

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

**21-02-2024** **PD.**

**In the matter between:**

**MERRIOD NDEBELE** **1 ST**

**APPLICANT**

**TSHEPO MOKWENA** **2 ND**

**APPLICANT**

**PIET MONYAI** **3 RD**

**APPLICANT**

**And**

**THE** **STATE**

**RESPONDENT**

**LEAVE TO APPEAL JUDGMENT**

**PHAHLANE, J**

[1] This is an opposed application for leave to appeal by all three applicants against the judgment and order granted by this court on 31 January 2024. Leave to appeal is sought in terms of section 17(1) of the Superior Courts Act 10 of 2013. The section provides that: *"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"*.

[2] For the sake of convenience, I will refer to the applicants as they were referred to during the trial proceedings. On behalf of accused 1, leave to appeal is sought against sentence only on the following grounds:

a) *"That the court erred in fact and/or in law, in not considering the cumulative factors presented by accused 1 in relation to sentence, specifically that court erred in not ordering counts 2 to 5 to run concurrently with count 1.*

b) *The court erred in finding that there are no prospects of rehabilitation. In this regard, it is contended that the court did not have the legal basis for coming to such a conclusion and that the finding of the court is contrary to the fact that accused 1 has a clean record. Further that the accused admitted the count of unlawful possession of a firearm and ammunition, and thus showing that she regretted her actions during the sentencing proceedings.*

c) *The court erred in not considering that the accused had already spent four years and eight months in custody awaiting finalisation of her case. It was argued that State failed to call the deceased's family members in aggravation of sentence, and thus ignoring the impact of the killing of the deceased on the accused.*

d) *The court erred in overemphasising the seriousness of the offences and disregarded the accused's degree of participation in the commission of the offences.*

*e) The court erred in ignoring the argument that the personal circumstance of the accused constitutes substantial and compelling circumstances.*

*f) There are reasonable prospects of success in the appeal in that another court would come to a different conclusion and order the sentences imposed on accused 1 to run concurrently".*

[3] In considering the application for leave to appeal, it is imperative that this court remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted[1]. Therefore, there must exist more than just a mere possibility that another court will, not might, find differently on both facts and law.

[4] The Supreme Court of Appeal in ***Smith v S***[2] considered what constituted 'reasonable prospects of success in section 17(1)(a)(i) and held that:

> *"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 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 than there are prospects of success on appeal".* (underlining added for emphasis)

[1] In The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others 2014 JDR 2325 (LCC) Bertelsmann J, held: "It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act….The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

[2] 2012 (1) SACR 567 (SCA) at para 7. See also MEC Health, Eastern Cape v Mkhitha [2016] ZASCA 176 at para 16 and at para 17 where the court held: "…A mere possibility of success, an arguable case or one that is not hopeless, is not enough".

[5] Ms Mogale appearing for accused 1 submitted that: *"the submission on behalf of the accused is not that the court should have deviated from imposing the prescribed sentences. The defence accepts the sentence imposed by this court, but it is submitted that the court should have ordered the sentences to run concurrently"*.

[6] With regards to the applicable legislative prescript in section 17(1)(a)(i) to which this application is based, Mr. Sibanda appearing for the State argued that accused 1 has failed to demonstrate and persuade the court that there are reasonable prospects of success on appeal, and that the court did not misdirect itself in imposing the sentence it imposed. The basis of this argument is that accused 1 played a big role in the commission of the offences in that the offence, particularly of murder, was motivated by her jealous boyfriend where there was no justification for committing the offence.

**6.1** It was submitted that the court did not err in not ordering the sentences to run concurrently because the court is vested with and was exercising its judicial discretion whether to order the sentences to run concurrently having considered all the facts before it. It was further submitted that the sentence imposed on counts 1; 2 and 4 are not shockingly inappropriate because they were prescribed by legislation.

[7] It is clear from the grounds raised on behalf of accused 1 that they relate to her personal circumstances which, strangely enough, it was argued - should have been regarded as constituting substantial and compelling circumstances. This argument is a contradiction of what had already been submitted that: "the submission on behalf of the accused "**is not"** that the court should have deviated from imposing the prescribed sentences because the defence accepts the sentence imposed by this court".

[8] The concept of "*substantial and compelling circumstances*" relates to the fact that the court may deviate from imposing the prescribed minimum sentence. The grounds for

leave to appeal in my view are misplaced, considering the submission made as indicated *supra*[3].

[9] With regards to first ground set out at paragraph **(a),** it is stated in vacuum that "the court erred in fact and/or in law" without specifying those "facts or the law" which it is alleged the court misdirected itself on. Accordingly, there is no basis for this ground of appeal considering that leave to appeal is only on sentence and not conviction.

9.1 There is no basis for me to find that there is a reasonable prospect that another court would come to a different conclusion. Accordingly, I cannot find that on this ground the appeal, if allowed, would have a reasonable prospect of success.

[10] With regards to the ground set out at paragraph **(b),** it is significant to mention that accused 1 pleaded "Not Guilty" to all counts and exercised her right to remain silent and not give any plea explanation. The evidence before court shows that accused 1 had always maintained her innocence as far as the death of her husband is concerned and had to that end, stated that she does not know how the firearm she had procured from Ndebuo ended up killing the deceased. In my view, the explanation she gave that she had borrowed the firearm to threaten a certain woman in Johannesburg cannot be equated to an admission to the unlawful possession on the count itself (ie. On count 2) when accused 1 was clearly trying so hard to justify her reason for having borrowed the firearm. Be that as it may, accused 1 has never expressed any regret or remorse to show that she is a candidate for rehabilitation – as suggested by Ms Mogale. Having said that, the aspect of remorse has been dealt with in my judgment[4] and same will not be repeated herein.

[11] It was therefore misleading for counsel to state that the accused admitted the count of unlawful possession of a firearm and of ammunition, and thus showing a regret for her

[3] At para 5.
[4] See Judgment at para 30-35.

actions. Had that been the position, accused 1 would have pleaded otherwise **or** at the very least, acted in line with what Ponnan JA described as genuine remorse in ***S v Matyityi***[5]**.** Consequently, there is no merit on the second ground which seek to suggest that the court had no legal basis for coming to a conclusion that accused 1 has no prospects of rehabilitation. This is so because the accused fails the test on the strength of the decision in ***S v Matyityi***[6]**.**

[12] On the other hand, this court took into account the purposes of punishment and was mindful of the warning given by the Supreme Court of Appeal in ***S v Swart***[7] that: "Retribution and deterrence are proper purposes of punishment which must be accorded due weight in any sentence that is imposed. Further that serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role".

[13] In ***S v Vilakazi***[8] the Supreme Court of Appeal stated that "once it becomes clear that the crime is deserving of a substantial period of imprisonment the question whether the accused is married or single, whether he has two children or three, whether or not he is employed, are in themselves largely immaterial to what that period should be, and those seem to be the flimsy grounds that ***Malgas*** said should be avoided". Once again, the Supreme Court of Appeal in ***S v Ro and Another***[9] warned that: *"to* elevate the personal circumstances of the accused above that of society in general and the victims in particular, would not serve the well-established aims of sentencing, including deterrence and retribution".

[14] Having regard to the above, there is also no basis to find that there are reasonable prospects that another court would come to a different conclusion. Accordingly, I cannot find that on this ground the appeal, if allowed, would have a reasonable prospect of success.

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[5] [2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA) at para 13.
[6] See also: S v Brand 1998 (1) SACR 296 (C).
[7] 2004 (2) SACR 370 (SCA)
[8] 2012 (6) SA 353 (SCA) at para 58.
[9] 2010 (2) SACR 248 (SCA)

[15] As far as the third ground relating to a misdirection in respect of the time spent by accused 1 in custody awaiting finalisation of her case, there is no rule of thumb test in respect of the calculation of the weight to be given to the time spent by an accused awaiting trial. The Supreme Court of Appeal in ***S v Livanje***[10] considered the role played by the period that a person spends in detention while awaiting finalisation of the case. The court preferred to reiterate what it had held in ***S v Radebe***[11] namely that: 'the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crime committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one. (Emphasis added).

[16] The court in ***Radebe*** *supra* rejected what was previously suggested in the case of ***S v Brophy***[12] **– (**'that a convicted person should be credited, not only with the period spent in detention awaiting completion of the trial, but double this period'**) –** and stated that, instead of a so-called mechanical approach, a better approach…is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified, and whether it is proportionate to the crime committed.

[17] The court in ***S v Dodo***[13] and ***S v Vilakazi***[14] emphasized that the aggravating or mitigating factors should not be taken individually and in isolation as substantial or compelling circumstances. Nugent JA in ***S v Vilakazi*** *supra* stated as follows at para 15: *'It is clear from the terms in which the test was framed in* ***Malgas***[15] *and endorsed*

[10] 2020 (2) SACR 451 (SCA).
[11] 2013 (2) SACR 165 (SCA) at para 14.
[12] 2007 (2) SACR 56 (W).
[13] [2001] ZACC 16; 2001 (3) SA 382; 2001 (1) SACR 594 (CC)
[14] 2012 (6) SA 353; 2009 (1) SACR 552 (SCA)
[15] S v Malgas 2001 (1) SACR 469 (SCA)

*in **Dodo** that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence."*

[18] Having regard to the above authorities and the applicable principles, it is my considered view that the time spent by accused 1 in custody awaiting finalisation of her case did not justify a departure from the sentence of imprisonment imposed as it is not proportionate to the crimes she committed, considering that the sentence imposed on her is prescribed by the legislature.

[19] In these circumstances as well, there is no basis for me to find that there is a reasonable prospect that another court would come to a different conclusion. Accordingly, I cannot find that on this ground the appeal if allowed, would have a reasonable prospect of success.

[20] As far as the issue raised that the State failed to call the deceased's family members in aggravation of sentence, and that such a failure ignored the impact of the killing of the deceased on the accused, the State had during the sentencing stage correctly submitted that the only family member who was supposed to speak on behalf of the deceased's family was the accused herself, but she chose not to do so. In this regard, this court was mindful of the submission made on behalf of accused 1 that "she accepts the consequences of her actions simply because the court has found her guilty".

[21] On the same token, the submission that the court erred in not taking the aforesaid aspect into consideration, is without merit because the evidence before court points to accused 1 being one of the people who came up with a plan to kill the deceased and

even sourced out the firearm that killed the deceased. She also made sure that accused 2 was paid for his services. It is inexplicable that accused 1 would refer to her pre-sentence detention as being more significant than failure to call witnesses in aggravation of sentence on behalf of the deceased, while she is responsible for the death of the deceased.

[22] Having considered the above authorities and principles, I am of the view that on this ground of appeal, there is no basis for me to find that there is a reasonable prospect that another court would come to a different conclusion than the one arrived at by this court. Accordingly, I cannot find that on this ground the appeal, if allowed, would have a reasonable prospect of success.

[23] Referring to the decision in ***S v Mthethwa,***[16] counsel on behalf of accused 1 insisted that the court erred in not making an order that the sentences should run concurrently. The principle was considered in ***Mopp v State***[17] where the court stated that: "failure by a trial court to order the sentences imposed to be served concurrently in terms of section 280 of Criminal Procedure Act, does not constitute a misdirection where the court exercised its sentencing discretion reasonably, and that in such a case, there was no basis for the appeal court to interfere with the sentence, and accordingly, the appeal was dismissed". Section 280 provides as follows:

> *"(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence as the court is competent to impose.*
>
> *(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court* may *direct, unless the court directs that such sentences of imprisonment shall run concurrently". (emphasis added)*

[16] 2015 (1) SACR 302 (GP) para 22.
[17] [2015] ZAECGHC 136 (25 November 2015).

[24] The above provision plainly confers upon a sentencing court the competence or the discretion to direct that the sentence it imposes may be served concurrently. In deciding whether or not to exercise its discretion, the court will then also consider the overall objects of the sentence it imposes and will seek to achieve a balance between the competing interests at the stage of sentencing.

[25] The basic principle on appeal remains that a court of appeal will only interfere with the sentence of the trial court if the sentence is vitiated by an irregularity; a material misdirection; or where the sentencing discretion was not judicially exercised.

[26] There were new issues raised for the first time during this application for leave to appeal which were not raised either during the address on the merits or in mitigation of sentence. These relate to the link between the offences. Counsel on behalf of accused 1 conceded that the issues were indeed not raised, and submitted that the accused should not be allowed to undergo an unjustifiable severe sentence due to the errors made by counsel.

[27] In my view, if this notion were to be allowed at this stage of the proceedings, it would not serve the interest of justice and would defeat the purpose for which the triad factors pertaining to sentence were considered as pronounced by the court in ***S v Zinn***[18] **,** but most importantly, it would be prejudicial to the State. Nonetheless, the sentences imposed on accused 1 in respect of counts 1, 2, and 4 are not out of the ordinary, but are sentences prescribed by the legislature.

[28] Having had regard to the grounds and issues raised in the application for leave to appeal on behalf of accused 1 and having considered the submissions made by Ms. Mogale and Mr. Sibanda for the State, I can find no compelling reasons to persuade

[18] 1969 (2) SA 537 (A).

this court to grant leave or that another court will find that this court erred. Consequently, I am of the view that there are no reasonable prospects of success on appeal. It is also my considered view that no other court would come to a different finding than the one reached by this court.

[29] On behalf of accused 2, leave to appeal is sought against conviction on the count of murder and on sentence. The argument advanced was that Koketso contradicted himself and only testified that there was a plan to look for a firearm and not the plan to murder the deceased. This argument in my view is misplaced because from the very onset when Koketso was asked what happened in June of 2019, he specifically stated that "*there was a planning of killing Mr. Farai Ndebele, and a searching for a firearm*". This aspect was canvassed in detail during argument in the main trial and on sentence where counsel was referred to what is reflected on the transcribed record provided to counsels.

[30] With regards to conviction, leave to appeal is based on the ground that the court erred in not considering that when Koketso was shooting at the deceased, accused 2 was not present at the spot where the deceased was shot at, but that he had moved to the bedroom of the deceased to look for the phones. Further that the court erred in finding that accused 2 was in common purpose with Koketso.

[31] The State argued, and correctly so, that accused 2 participated in the offence from the time the firearm was procured, to the time when he was dropped off at Mochoma tavern with Koketso, up until the time he got into the house of the deceased because by his own version, he was present in the house when the deceased was killed. In this regard, the State argued that even if one were to accept his version, he did not stop Koketso from pulling out the firearm and shooting the deceased, but that he made common cause with the actions of Koketso.

[32] Mr. Sibanda further argued that there was no act of withdrawal from the common purpose, meaning, accused 2 did not do anything to disassociate himself with what was happening but instead reconciled himself with the actions of what was happening in the house of the deceased and did nothing when he saw accused 1 in the house. It was also argued that accused 2 participated in the robbery as proof that he was part of the plan from the beginning.

[33] It was submitted that the court did not err in convicting accused 2 of murder and that like accused 1, he failed to meet the threshold as required by section 17(1)(a)(i) of the Superior Court's Act, and that no other court would come to a different conclusion because there are no prospects of success.

[34] It is on record that accused 2 was aware, at least on his own version, that Koketso was in possession of a firearm when they went to the house of the deceased. He testified that they were both wearing balaclavas and when he saw Koketso pointing the deceased with a firearm, he went to the bedroom to rob the items belonging to the deceased. What is of importance is that when he was cross-examined on why he did not leave if truly he was not in common purpose with Koketso, he responded that: "I was there to do what I came out to do". The court already accepted the evidence of Koketso in that regard which was specifically that the plan for them to be at the house of accused 1 was to kill the deceased. And that is exactly what happened when accused 2 was inside the house of the deceased.

[35] Even if one were to accept that accused 2 did not personally pull the trigger, by his own version, he actively and voluntarily robbed the phones belonging to the deceased and the deceased was killed in the process of that robbery. Accordingly, he would still be liable and convicted on the count of murder because the deceased died in the process of that robbery. Mr. Sibanda correctly submitted that – not only did accused 2 take part in the killing of the deceased, but he was also paid a sum of R3000 at the instance of accused 1 after the deceased was killed.

[36] In the circumstances, the argument under this ground for leave to appeal has no merit. In my view, there is no basis to find that there are reasonable prospects that another court would come to a different conclusion regarding the conviction on the count of murder. Consequently, I cannot find that on this ground the appeal, if allowed, would have a reasonable prospect of success.

[37] With regards to sentence, the argument advanced is similar to the one made on behalf of accused 1. Counsel on behalf of accused 2 informed the court that he aligns himself with the submission made on behalf of accused 1 in that the court erred in not ordering the sentences to run concurrently. It was submitted that a sentence of life imprisonment on the count of murder is shockingly inappropriate and that it induces a sense of shock because it will break the accused. It was also submitted that although the accused has previous convictions of robbery and is conceded that all the counts the accused has been convicted and sentenced for are independent, the court should have been lenient to the accused by ordering that the sentences should run concurrently.

[38] The State submitted that the sentence imposed on accused 2 is not shockingly inappropriate because in addition to the fact that he has previous convictions of robbery, he committed the offences while on parole and specifically that the murder of the deceased was executed in the act of common purpose where there was prior planning. The State further submitted, and correctly so, that no other court would deviate from the sentence imposed by this court because the court exercised its judicial discretion having considered all the facts before it.

[39] Accordingly, the reasons of this court for the refusal to grant leave to appeal on sentence in favour of accused 1, will also apply to accused 2. Consequently, I am of the view that there are no reasonable prospects of success, and no other court would come to a different conclusion than the one arrived at by this court.

[40] Leave to appeal on behalf of accused 3 is sought in respect of both conviction and sentence on the following grounds:

1. That the court erred in convicting accused 3 on common purpose, and for taking part in the premeditation of the murder of the deceased. In this regard, it was argued that the court erred in finding that accused 3 was part of the planning because when the plan was made to kill the deceased, accused 3 was not present.

2. That the court erred in believing that accused 3 was the master mind, where there is no such evidence before court.

3. It was argued that accused 3, by paying a sum of money to accused 2 after the deceased was killed does not make him the perpetrator who conspired and planned with the co-accused and Koketso to kill the deceased.

[41] It was submitted that there are prospects of success whereby another court would come to a conclusion that there are substantial and compelling circumstances when considering the fact that (1) he is a first offender at age 62; (2) that he has been in custody for 1 year and 1 month awaiting finalisation of his case; and (3) that when these personal circumstances which are referred to as traditional factors are taken together – another court may come to a different conclusion - than the one arrived at by this court and consequently deviate from imposing a sentence of life imprisonment.

[42] The State opposed the application and submitted that accused 3's application does not meet the threshold or requirements in terms section 17 of the Superior Court's Act, and that there are no prospects of success in the application, and that the application should as such be dismissed.

[43] It was further submitted that the court did not misdirect itself when convicting accused 3 on the count of murder because accused 3 was involved in the murder of the deceased in the following respect: **(a)** that he is the common denominator between accused 1 and accused 2 in that he made sure that there was a connection between them – which involved the discussion of procuring a firearm; **(b)** that when the plan was finally executed, he was there to transport Koketso and accused 2 to the crime scene; **(c)** that he later went to fetch them - after the two had killed the deceased; **(d)** that he paid accused 2 so that accused 2 can release the firearm; and **(e)** that he manifested a plan and played a big role in the execution of common purpose. Accordingly, that no other court that would come to a different conclusion than the one arrived at by this court.

[44] In respect of sentence, it was submitted that the court did not misdirect itself because the sentence imposed is not harsh or shockingly inappropriate as it is prescribed by the legislature, and that no other court would come to a different conclusion as regards sentence because the court exercised its judicial discretion correctly, having considered all the facts before it.

[45] With regards to the grounds for leave to appeal, they are all intertwined as they relate to the facts and evidence, and I will deal with them simultaneously. The concept of common purpose was thoroughly dealt with in the judgment in that the evidence of Koketso that was accepted by this court as being truthful and reliable, shows that accused 3's involvement in the furtherance of a common purpose was in line with the scenarios explained by the court in ***S v Thebus and Another***[19] that where there was a prior agreement to commit a crime, either expressed or implied, such will be inferred from all the circumstances of the case[20], and that liability of an accused person in this regard does not necessarily mean that the accused is required to be present at the scene of the crime at the time of the commission of the crime, but that the agreement

[19] [2003] ZACC 12; 2003 (2) SACR 319 (CC).

[20] See also: Tshabalala v S; Ntuli v S (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC) (11 December 2019).

can also be formed spontaneously, or it may arise extemporaneously during the execution of a crime for which the parties had a common purpose.

[46] This description fits snuggly with the evidence of the State which does not only relate to accused 3 paying accused 2 an amount of money for the job done and for the firearm to be returned to its owner, but that it is evident from his common intention with the others in that:

(1) He told Koketso that accused 1 has a job for him.
(2) He told accused 2 to accompany Koketso to where the job was to be done so that he can threaten the deceased.
(3) The same person who was to be threatened – the action of which the State has argued that it is an offence on its own – ends up being murdered.
(4) Apart from being the driver of the getaway vehicle transporting Koketso and accused 2 to and from the scene of crime, he instructed Koketso to get rid of the firearm used to kill the deceased, which Koketso did, by hiding it at their neighbour's house.
(5) He continuously, and persistently so, made several telephone calls to accused 2 wanting to make sure that accused 2 was paid as requested by accused 1.

[47] This court is mindful of the evidence of Mr. Mudau, the former investigating officer of this case who testified that when he met with accused 1 with the aim of interviewing her, accused 1 started to scream and said Mr. Monyai killed her husband, and explained that she was referring to the older Monyai, being accused 3. On the other hand, accused 1 testified that accused 3 was a jealous boyfriend who has made threats most of the times when she wanted leave him, and would utter the words: "*go tla thuntsha lerole*", loosely translated to mean: "there will be trouble". It is on record that accused 1 had told the court that there is no way that accused 3 would give his own money to another man for free or without good reason.

[48] Having said that, the evidence of accused 2 is on record that after being requested by accused 3 to confront the man who was cheating with his wife and it became apparent that accused 3 wanted to remain in his vehicle after dropping them off at Mochoma tavern, accused 3 told him that he should go with Koketso to this man's place because Koketso knows everything and that he (accused 2) "was following the instructions of accused 3". He further testified that it was clear that both Koketso and accused 3 had planned on shooting the deceased and that is why he did not report the murder to the police. His evidence was also that it was strange that he was told by accused 3 to wear a balaclava when going to confront the deceased and further strange that he found accused 1 in the very house where accused 3 had sent him out to threaten the deceased who ended up being killed. He further testified that accused 3 was telling lies to the court when he said he knows nothing about what was going to happen at the deceased's house.

[49] As the State had correctly submitted as regards conviction, this court considered all the facts and circumstances of this case, and the evidence presented before coming to its decision. Accordingly, all factors relating to sentence were also considered by this court in the exercise of its sentencing discretion, having regard to the fact that the sentence imposed is prescribed by the legislature.

[50] In my view, the argument presented in respect of the grounds for leave to appeal has no merit. There is no basis for this court to find that there are reasonable prospects that another court would come to a different conclusion regarding the conviction on the count of murder. Accordingly, I cannot find that on these grounds of the appeal, if allowed, would have reasonable prospects of success.

[51] In respect of sentence, based on the principles and authorities stated above which I referred to in respect of accused 1, the same principles and authorities are applicable to accused 3 as it relates to the **(a)** period spent in detention prior to conviction and sentencing, **(b)** the purposes of punishment and the triad factors pertaining to

sentencing, **(c)** issues relating to a determination of whether there are substantial and compelling circumstances, taking into account his age – have all been considered by this court.

[52] Having regard to the above, I am of the view that no other court would come to a different conclusion to find that the sentence imposed by this court is harsh and shockingly inappropriate. Therefore, I cannot find any basis that there are reasonable prospects of success and that another court would come to a different conclusion regarding sentence. Consequently, I cannot find that leave to appeal if allowed, would have a reasonable prospect of success.

[53] In the circumstances, the following order is made:

1. The application for leave to appeal on behalf of accused 1 in respect of sentence is refused.
2. The application for leave to appeal on behalf of accused 2 in respect of the murder conviction and on sentence is refused.
3. The application for leave to appeal on behalf of accused 3 in respect of conviction and sentence is refused.

PD. PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

| | |
|---|---|
| For the State | : Adv. Sibanda |
| Instructed by | : Director of Public Prosecutions, Pretoria |
| For Accused 1 | : Adv. K. Mogale |
| For Accused 2 | : Adv. Qwabe |
| For Accused 3 | : Adv. C.N. Ndalane |
| Instructed by | : Legal Aid South Africa |
| Heard | : 6 February 2024 |
| Judgment Delivered | : 21 February 2024 |