IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)

CASE NO: CC100/06

In the matter between:

JAMES NZIMANDE Applicant

and

THE STATE Respondent

APPLICATION FOR LEAVE TO APPEAL

DATE OF APPLICATION : 29 JUNE 2007

DATE OF JUDGMENT : 12 JULY 2007

COUNSEL FOR THE APPLICANT: ADV ZWIEGELAAR

COUNSEL FOR THE RESPONDENT: ADV JOHNY

JUDGMENT

HENDRICKS J:

[A] Introduction:-

[1] This is an application for leave to appeal to the Supreme Court of Appeal, against the conviction and sentence imposed on the Applicant on 04 September 2006. The Applicant, who was accused number 3, stood trial with his two co-accused on a charge of murder.

[2] He was convicted of assault with intent to do grievous bodily harm as a competent verdict to the charge of murder and he was sentenced to two (2) years imprisonment.

[3] It is trite law that in an application of this nature, the Applicant must proof that a reasonable possibility exist that another court may come to a different decision than that arrived at by the trial court. To put it differently, there must be reasonable prospects of success on appeal.

[B] The Conviction:-

[4] It was submitted on behalf of the Applicant that the court erred in rejecting the Applicant's version solely because he could not advance any reason why the two state witnesses Catherine Mbebe and Winnie Monnana, would falsely implicate him.

[5] The court, in evaluating the evidence tendered, considered the probabilities and improbabilities. After evaluating the totality of the evidence tendered, the court made strong

credibility findings in favour of the state witnesses and accepted their evidence and rejected the version of the Applicant, on the basis that it is not only not reasonably possibly true but also highly improbable. No judgment can be all inclusive and the fact that certain words were not used in the judgment does not mean that a wrong approach was adopted. The judgment should be read holistically.

[6] It was further submitted that there was not sufficient evidence tendered to substantiate a conviction of assault with intent to do grievous bodily harm because of the absence of:-

[a] evidence indicating any injuries observed by the witnesses after the two blows;

[b] any medical evidence indicating the presence of any injuries to the back of the deceased and to the extent thereof;

and

[c] any further facts from which an intention to do grievous bodily harm could be inferred.

I now turn to deal with these submissions.

[a] **<u>Absence of evidence indicating injuries observed by the witnesses after the two blows</u>**:-

[7] Though the ***viva voce*** evidence does not deal with the fact that injuries could be observed on the body of the deceased after the Applicant administered the two blows on the back of the deceased, the photo album which was handed in by

consent as exhibit “C” (the contents thereof being admitted), depicts that the deceased had clothes on, also on his upper body. It stands to reason that the two state witnesses would not have been in a position to observe the injuries inflicted. They did not went and inspect the body of the deceased immediately after the two blows were administered.

[8] Regard must also be had to the fact that the state witnesses as well as the Applicant found the deceased at the soccer field after he had already been assaulted. The state witnesses would not have been in a position to differentiate between the injuries caused by the Applicant or those caused by the other perpetrators. Suffice to say that the evidence that Applicant did assault the deceased with a stick on his back was accepted by the court.

[b] Absence of medical evidence indicating the presence of any injuries to the back of the deceased and to the extent thereof:-

[9] The evidence indicates that it was not only the Applicant that assaulted the deceased, nor was the deceased taken to a medical doctor immediately after the assaults were perpetrated on him by the Applicant. The deceased passed away the morning after the incident and a post mortem

examination was conducted on the body of the deceased three days thereafter. It is understandable that it is not possible to differentiate and indicate the injuries caused as a result of the assaults perpetrated by the Applicant from those perpetrated by the others. Furthermore, it is quite possible that due to the passage of time, no marks was visible on the back of the deceased's body.

[c] Absence of any further facts from which an intention to do grievous bodily harm could be inferred:-

[10] Mrs Zwiegelaar, on behalf of the Applicant, submitted that there is no evidence indicating the exact details of the stick as well as the degree of forced used by the Applicant, to substantiate a finding that the Applicant intended to cause grievous bodily harm. She argued that it may well have been a twig that Applicant used to assault the deceased.

[11] With the greatest of respect, I am unable to agree with this submission made by Mrs Zwiegelaar. The evidence by the two state witnesses is clear that the Applicant used a stick and not a twig (or toothpick) to assault the deceased. On the evidence of Monanna he even advanced as a reason why he assaulted the deceased that deceased was stealing from them. It defies all logic that under these circumstances a person would use a twig to "gently" touch an alleged thief. It is highly improbable that it could have happened in this

manner.

[12] I am of the view that there are no reasonable prospects that another court may come to a different conclusion than what this court arrived at as far as the conviction is concerned. The application for leave to appeal against the conviction should therefore fail.

[C] <u>The Sentence</u>:-

[13] It is submitted that the court misdirected itself by failing to take cognisance of the personal circumstances of the Applicant. This submission is with respect incorrect. The court specifically mentioned <u>all</u> the personal circumstances and did take it into account in imposing a suitable sentence.

<u>See</u>:- **<u>Record</u>** Volume 4 page 157.

[14] It is furthermore submitted that the court misdirected itself in stating that the actions of the Applicant cannot be seen in isolation and that he was part of the group that assaulted the deceased. The judgment should be read holistically and certain sentences or parts thereof should not be singled out in an attempt to convey an incorrectly message. Looking at it in its totality, the actions of the Applicant coincided with that of the co-perpetrators up to a certain point and did not go beyond. Thus, though there was no common purpose found to be present to substantiate a conviction of murder, the

circumstances under which the Applicant perpetrated the assaults on the deceased cannot be ignored.

[15] I am of the view that no other court would come to a different conclusion than what this court had arrived at with regard to sentence. The application for leave to appeal against the sentence should also fail.

[D] <u>Conclusion</u>:-

[16] In the result I make the following order:-

The application for leave to appeal to the Supreme Court of Appeal against the conviction and sentence is refused.

R D HENDRICKS

JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE APPLICANT: HERMAN SCHOLTZ