REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBERS: SS65/2021

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

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M. MALANGENI **18** **March** **2024**

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS, JOHANNESBURG Applicant

and

KEKANA, TSHEPISO First Respondent

MOTSEOTHATA, CIDRAAS BOITUMELO Second Respondent

LEGODI, MADUMETSA Third Respondent

MOHAMMED, VICTOR NKOSINATHI Fourth Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and/or by uploading it to the electronic file of this matter. The date for hand-down is deemed to be 10h00 on 18 March 2024.

JUDGMENT
(LEAVE TO APPEAL)

MALANGENI AJ

Introduction

[1] The respondents were prosecuted by the applicant before this court for one count of murder and three counts of attempted murder. Mr Sekgatja, who was a legal representative of the fourth respondent was not available during the trial stage. I need to mention that there was no direct evidence led by the applicant against all the respondents. The applicant's case against them was derived from circumstantial evidence.

[2] After the closure of the applicant's case, the respondents moved an application for discharge in terms of Section 174 of Criminal Procedure Act 51 of 1977. That application was vehemently opposed by the applicant and later granted by this court. Disturbed by the court's decision, the applicant has lodged leave to appeal in terms of Section 319 of the Criminal Procedure Act 51 of 1977 to the Supreme Court of Appeal.

[3] The leave to appeal is preceded by the application for condonation for late filing of the application. All the parties filed comprehensive heads of arguments in respect of both condonation and the application for leave to appeal. They also addressed this court orally. I am so grateful for their kind assistance. Their heads of arguments coupled with oral submissions assisted me a lot in making an informed decision in these proceedings.

Factual background

[4] The Condonation application is phrased in the following manner:

> KINDLY TAKE NOTICE that abovementioned Applicant will make application for an order in the following terms:
>
> a. Condonation of late filing of the applicant's application for leave to appeal.
>
> b. Granting the applicant further or alternative relief.

[5] The notice of application for leave to appeal in terms of section 319 of the Criminal procedure Act 51 of 1977 reads as follows:

> "BE PLEASED TO TAKE NOTICE THAT the Applicant will on the day of hearing of the application apply for an order in the following terms:
>
> 1. The questions of law be reserved by the honourable Malangeni A.J.

2. Further that the Director of the Public Prosecution be granted leave to appeal against the Judgement (Discharge of the respondents in terms of Section 174 of Act 51 of 1977) by the honourable Malangeni A.J.

3. Further and /or alternative relief."

[6] The issues for determination in this leave to appeal are as follows:

6.1 Whether the trial court correctly applied the test in terms of section 174 of the Criminal Procedure Act to the evidence that was led by the Applicant.

6.2 Whether the trial court applied the principles of circumstantial evidence correctly in deciding the facts as they were presented by the Applicant.

6.3 Did the Honourable court adjudicate fairly by disregarding certain evidence as per the testimony of Applicant's witnesses.

Applicable law

[7] Section 319 provides that:

(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.

(2) The grounds upon which any objection to an indictment is taken shall, for the purposes of this section, be deemed question of law.

(3) The provisions of sections 317 (2), (4) and (5) and 318 (2) shall apply mutatis mutandis with reference to all proceedings under this section."

[8] In *Director of Public Prosecutions: Limpopo v Molope and Another*[1] the court stated the following about how section 319 of the Criminal procedure operates

"The provisions of s 319 of the CPA are peremptory and require strict compliance, as its purpose is to limit appeals by the State. It should be mentioned that s 319 has been subjected to a detailed analysis in a number of

[1] 2020(2) SACR 343 (SCA) at para 39-41

judgments, both by this Court and the Constitutional Court. Its principles have accordingly been firmly established in our law".

[9] The Appellate Division in *Director of Public Prosecutions, Natal v Magidela and Others*[2] eloquently and commendably set out the position of the relevant law stating that:

> "The provisions of section 319 and its predecessors have been the subject of judicial interpretation over the years and in order to see whether the requirements of the section were complied with in this case it is important to consider how the section has been construed. The first requirement is not complied with simply by stating a question of law. At least two other requisites must be met. The first is that the question must be framed by the Judge "so as accurately to express the legal point which he had in mind" (*R v Kewelram* 1922 AD 1 at 3). Secondly, there must be certainty concerning the facts on which the legal point is intended to hinge. This requires the court to record the factual findings on which the point of law is dependent (*S v Nkwenja en 'n Ander* 1985 (2) SA 560 (A) at 567B-G). What is more, the relevant facts should be set out fully in the record as part of the question of law (*S v Goliath* 1972 (3) SA 1 (A) at 9H-10A). These requirements have been repeatedly emphasised in this Court and are firmly established (see, for example, *S v Khoza en Andere* [1990] ZASCA 142; 1991 (1) SA 793 (A) at 796E-I). The point of law, moreover, should be readily apparent from the record for if it is not, the question cannot be said to arise "on the trial" of a person (*S v Mulayo* 1962 (2) SA 522 (A) at 526-527). *Non constat* that the point should be formally raised at the trial: it is sufficient if it "comes into existence" during the hearing (*R v Laubscher* 1926 AD 276 at 280; *R v Tucker* 1953 (3) SA 150 (A) at 158H-159H). It follows from these requirements that there should be certainty not only on the factual issues on which the point of law is based but also regarding the law point that was in issue at the trial."

[10] Furthermore, the authors *Du Toit et al in* the Commentary on the Criminal Procedure Act state:

> "The trial court must refer to those facts in its judgment as part of the reserved question of law (*S v Nkwenja en 'n ander* 1985 (2) SA 560 (A) 567B). Furthermore, whenever the State has a question of law reserved which rests on particular facts, the State must have those fact. As decided by this Court in *S v Basson* 2003(2) SACR 373 SCA Paras 10-11 "When a question of law arises as aforesaid, the trial court, or, where it refuses to do, this court has to decide on application by the state whether to reserve a question of law for consideration for leave to appeal, it will only exercise its discretion in favour of

[2] [2000] 2 All SA 337 (A)

the state where there is a reasonable prospect that if the mistake of law had not been made, the accused would have been convicted".

[11] In the *Director of Public Prosecutions: Western Cape v Schoeman and Another*[3] it was stated that:

> "The state has a right of appeal only against a trial court's mistakes of law, not its mistakes of fact. Indeed, Du Toit, De Jager, Skeen and Vander Merwe stress that this" restriction will not be relaxed by the fact: The approach in Magidela has been endorsed by this court in Director of Public Prosecutions: Western Cape v Schoeman and Another [2019] 158; 2020 (1) SACR 449 (SCA), where the court said at para 39: The State has a right of appeal only against a trial court's mistakes of law, not its mistakes of fact. Indeed, Du Toit, De Jager, Paizes, Skeen and Van der Merwe stress that this 'restriction will not be relaxed by the fact that the trial judge considered the facts incorrectly'. Before a question of law may be reserved under s 319 three requisites must be met. First, it is essential that the question is framed accurately leaving no doubt what the legal point is. Secondly, the facts upon which the point hinges must be clear. Thirdly, they should be set out fully in the record together with the question of law."

[12] The court further said:

> "Unless the State does this, it may not be possible for a court of appeal to establish with certainty what the conclusions on the legal point, which the trial court arrived at, are. Where it is unclear from the judgment of the trial court what its findings of fact are, it is therefore necessary to request the trial judge to clarify its factual findings. Where this is not done, the point of law is not properly reserved."

Application of the law and evaluation

[13] Section 319 does not set out a time frame within which one has to reserve a question of law after an acquittal or conviction. In this matter judgment was delivered on 5 July 2022. The state then filed its application for leave to appeal on 17 October 2022.

[14] Condonation is not just for a mere asking. In *Grootboom V National Prosecuting Authority and Another*[4] it was held that**:**

> "[I]t is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's

[3] 2020(1) SACR 449 (SCA) at para 39.
[4] 2014(2) SA 68 (CC) at Para [23]

indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default".

[15] The factors that are taken into account in that inquiry include:

15.1 the length of the delays;

15.2 the explanation for, or cause for, delays

15.3 prospects of success for the party seeking condonation;

15.4 the importance of the issue(s) that the matter raises;

15.5 the prejudice to the other party or parties; and

15.6 the effect of the delay on the administration of justice.

[16] Whether to grant or refuse condonation is discretionary. The Constitutional Court in *Grootboom v National Prosecuting Authority and Another*[5] stated that:

> "…. It is axiomatic that condoning a party's non-compliance with the rules or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation".

[17] In applying for condonation, the state submitted that it was not easy to get the full transcribed record of the trial proceedings. I am mindful to the fact that this case was in the public domain that is why there was a media coverage. I am satisfied that the delay to noting an appeal was not occasioned by the state but the latter was delayed by the transcribers. In other words, the applicant has shown good cause as to why there was a delay in filing/noting the appeal. As such, I cannot find any prejudice on the side of the respondents if the condonation application succeeds. Therefore, I see no need to refuse condonation. I must allow it in the interests of justice.

[18] The law dictates that the state can only appeal on a question of law and not on a wrong factual findings by a trial court. In *S v Basson*[6] the court said court said:

> "The only way in which the state can appeal against the decision of the trial court in terms of the act is therefore by way of the reservation of a question of law in terms of section 319. The state has no right of appeal in terms of the Act in respect of erroneous findings of fact by the trial judge. Only if the trial

[5] 2014 (2) SA 68 (CC) at para 20.
[6] 2003 (2) SACR 373 (SCA) at para 6.

court has given a wrong decision due to a legal error can the state appeal. In order to determine whether the trial court committed an error of law, it must be determined on what factual basis it based its decision. After all, another factual basis cannot give an indication as to whether the judge committed a legal error. Whether the trial court's findings of fact are right or wrong is therefore totally irrelevant in order to determine whether he erred in law. It follows that a legal question arises only when the facts on which the trial court bases its ruling may have a different legal consequence than the legal consequence that the trial court found. For the aforesaid reasons (a) there must be certainty as to the point of law at issue and of the facts on which the trial judge based his finding; and (b) when a question of law is reserved, it must be clearly stated, not only which point of law is involved, but also the facts on which the trial court based its findings (See *Director of Public Prosecutions, Natal v Magidela and Another* 2000 (1) SACR 458 at para 462g-463c). when the state has such a legal question reserved, it is therefore necessary for the state to compile the specific facts properly and in full as part of the exposition of the question of law (see S v Goliath 1972 (3) SA 1 (A) at 9H)"

[19] In terms of section 319, the Appeal Court is not allowed to entertain the appeal on the merits. The Supreme Court of Appeal observed, in *DPP, WP v Schoeman,*[7] that:

> "If we were to entertain the appeal on the merits, we would face the task of having to ascertain the relevant facts. To this end, we would have to read the entire record and re-evaluate all of the evidence, thereby second-guessing the trial judge who was best placed to do this. We would thus have to approach the matter as if this were a full appeal on the merits. The problem does not end there. Having embarked on this task, we would have to decide whether the facts established by us accord with those found by the trial court. It is only if we find that the factual findings of the trial court were wrong and the result of a legal error would we be obliged to interfere with the decision of the trial court. This is why courts of appeal require strict adherence to the requirement for the State to set out the factual basis for the reservation of any point of law before it will entertain it. Here the State has not even attempted to comply with this requirement. We thus hold that the State has not properly reserved its four points of law. That ought to be the end of the matter. We consider it necessary, however, to deal further with the issue".

[20] On the same breath, in *Director of Public Prosecutions, Free State v Mokati*[8] that it is pertinent to many complaints by the state about mistakes made by the trial courts:

[7] 2020 (1) SACR 449 (SCA) at para 45-46.
[8] 2022 (2) SACR 1 (SCA) at para 17.

"The mere fact the judicial process flawed, by the way trial court goes about assessing the evidence before it, does not justify permitting section 319 to be used by the prosecution to reserve a point for what is in truth misdirection of fact".

[21] To differentiate between questions of law and question of fact is not an easy subject. In *Mokati* it was held that the distinction between questions of law and questions of fact is notoriously difficult to draw.[9] My section 174 judgment detailed the state's shortcomings that resulted in the discharge of the four respondents (formally accused persons). My judgment is to the effect that the state's case is derived or premised from circumstantial evidence.

[22] In *S v Faku and Others*[10] it was stated that the words "no evidence" have on numerous occasions, been interpreted to mean no evidence, upon which a reasonable man, acting carefully may convict. Circumstantial evidence consists of facts from which a fact in dispute may be inferred. It has been held that where the uncontradicted evidence of the State is circumstantial and more than one inference may be drawn, a discharge should be refused. The general rule regarding the drawing of inferences is that a court may only draw inferences that are consistent with all the proven facts, and where one or more are possible, it must satisfy itself that the inference sought to be drawn is the only most probable inference.

[23] The Appellate Division in *R v Blom*[11] set out two "cardinal rules of reasoning" to be considered when reasoning by inference in criminal trials:

23.1 the inference sought to be drawn must be consistent with all proved facts. If it is not, then the inference cannot be drawn.

23.2 The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

[24] Since this case is premised from circumstantial evidence, in the inferential reasoning, I combined a number of pieces of evidence, to mention the few, video footage that I viewed in court, the scene was contaminated, evidence of ballistic expert, contradictions between evidence of state witnesses on the issue whether a rubber bullet is lethal or not.

[25] In respect of the video footage, after having listened from evidence of other state witnesses who viewed a certain video footage at the offices of IPID, I indicated that

[9] *Id* at para 10.
[10] (2004) 3 ALL SA 501 (CK) at 504 i-j.
[11] 1939 AD 188 at 202.

the one I viewed was different from the one viewed from the offices of IPID. The issue of the pocket book in relation to fourth respondent is reflected at para 81on page 32 of my judgement. In this regard, my judgement reads as follows:

> "There is exhibit AB, alleged to be a pocket book of accused 4. This piece of evidence cropped out during testimony of Ms Thwala. During her cross examination by legal representative of accused 4, it was put to her that it was not accused 4 who wrote there. Her answer was that she asked Captain Moeketsi as to who wrote that entry, she said accused 4. Colonel Moeketsi never testified about this issue, meaning that what was said by Ms Thwala was never corroborated. It is clear that the so-called author of this pocket book disputes having made an entry on it. The state failed to prove authenticity in the form of for example expert evidence so this issue remains hearsay. This court does not have any reason to attach any weight on exhibit AB."

[26] The applicable law on the factual findings are very clear from my section 174 judgment. I correctly applied the relevant law dealing with circumstantial evidence. What has been raised by the state as points of law or questions of law is just facts. Furthermore, what has been raised by the state in its grounds of appeal will not change the colour of the proceedings or are not essential ingredients to the offences. Therefore, I do not see any prospects of success on appeal by the applicant.

Order

[27] In the result, I make the following order:

1. The late delivery of the application for leave to appeal is condoned.

2. The applicant's application to appeal to the Supreme Court of Appeal is refused.

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M. MALANGENI
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard:	18 January 2024
Judgment:	18 March 2024

Appearances:

Applicant:	Adv EM Moseki
Instructed by:	NPA
First Respondent:	Mr TM Mohope
Instructed by:	Mohope Thomas Attorneys
Second Respondent:	Mr E Netshipise
Instructed by:	Mudau and Netshipise Attorneys
Third Respondent:	Mr BP Ndaba
Instructed by:	Ndaba (BP) Inc.
Fourth Respondent:	Mr MW Sekgatja
Instructed by:	Sekgatja Attorneys