IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: ~~YES~~
(4)

08/01/24
DATE

SIGNATURE

Case Number: A117/2016

In the matter between:

SIBUSISO MOKOENA Appellant

and

THE STATE Respondent

JUDGMENT

Summary: In the last two appeal hearings, all the appellant's convictions and sentences were set aside. There was a concession that the court a quo misdirected itself on convicting and sentencing the appellant on this appeal. Issues to be addressed is whether the appeal courts have inherent jurisdiction in terms of section 173 of the Constitution to *mero motu* release the appellant after reading the record of the appeal and becoming aware of a miscarriage of justice, even though the appellant had not lodged the appeal together with his co-accused. Why should the appeal court hear this appeal when there are two different decisions by the appellant co-accused? Section 10 of the Judicial Matters Amendment Act is an automatic grant of leave to appeal and not an appeal. The appeal court has the duty to dispense Justice in terms of Section 322(1)(a) of the Criminal Procedure Act. The appeal against conviction and sentence set aside.

KJ MOGALE AJ

Introduction

[1] This is the fifth time this appeal come before the Court of Appeal in the Pretoria High Court. Initially, it appears that in the Court a quo, there were the six accused who were charged with twelve counts of raping three female persons and robbery of items belonging to them. The prosecutor withdrew counts 10,11 and 12 against all the accused. Before the commencement of the trial, the first accused, Lawrence Sithole, also known as Happy Sithole, passed away. As the first accused was no longer involved, the remaining five accused moved one position up as it appears from the Court a quo record.

[2] Counts 1 to 6 were all robberies with aggravating circumstances, as it was alleged that a firearm was used during the commission of these offenses. Counts 7 to 9 are rape charges, with the complainants being Olivia Mokoena, in counts 1 and 7, Sylvia Maniane complainant in counts 2 and 8, and Thelma Mokoena, a complainant in counts 3 and 9.

[3] The appellant and his co-accused were convicted and sentenced to life imprisonment for rape (counts 1, 2,3, and 6) and 15 years for robbery with aggravating circumstances (counts 8 and 9), respectively on 25 September 2012. It was further ordered that the sentences run concurrently. The accused were declared unfit to possess a firearm in terms of the provisions of section 103(1) of the Firearms Control Act 60 of 2000. They were all acquitted on counts 4, 5, and 7. The accused had an automatic right of appeal in terms of section 10 of the Judicial Matters Amendment Act 42 of 2013.

ISSUES

[4] There is a concession from both the state and the respondent's legal representative that there is a misdirection of the law, and the appeal should succeed. The appellant co-accused's appeals were dealt with by different appeal courts and there are two different decisions below. The issue of interest raised by the respondent is that the previous appeal courts failure to mero motu release the appellant with his co-accused constituted a miscarriage of justice. This court will also decide whether a judge in a criminal appeal has the power to decide issues related to co-accused who did not appeal. First, it may be appropriate to consider what occurred in the appeals that precede the present one relating to the appellant's co-accused.

The Matter Before van Der Westhuizen J and Lingenfelder AJ

[5] The chronology outlined by the appeal court is significant. Reading from the Judgment of Van der Westhuizen J dated 10 June 2021, in the same matter that served before him and Lingenfelder AJ, the history was summarized as follows[1]:

> "The initial appeal came before my brothers Tuchten J and Strydom AJ. The appeal was removed from the roll, and an order was granted directing that the record be properly reconstructed as there was missing evidence. At some stage, the appeal came before the full bench of this division. It was postponed *sine die*, and it is not clear for what reason. According to the respondent's heads of argument, there are four appellants, the first being Collin Mdluli, who was the third accused in the court a quo. The second appellant is identified as Njikeni Dingaan Sibambo, who was the accused 2 in the court a quo. The third appellant is indicated as Wendy Majane, who was the fourth accused. It is then stated that one Patrick Mokoena, who has accused five before the court a quo, is also an appellant in the appeal."
>
> "From the five accused convicted and sentenced, it appears that four contest their convictions and sentences. The first accused in the court a quo has not taken the

[1] See caselines page 0001-07(Judgment of 10 June 2021)

matter further and presumably accepts his conviction and sentence. Mr. More, who appears on behalf of the respondent, conceded that in respect of the third appellant, who was the accused 4 in the court a quo, there is no evidence linking him to the crimes perpetrated. Hence, he should not have been convicted nor sentenced."

"In respect of the third appellant, Wendy Majane, being the fourth accused in the court a quo, the complainants did not identify him at all. The court concluded that they should interfere with the conviction of the third appellant on both his conviction and sentence as he already has been incarcerated for several years and, in view of the court, wrongly so. With regard to the first appellant, Collin Moluli, who was designated as accused 3 in the court a quo, his appeal should also succeed as he was not implicated at all by any of the complainants."

[6] The judgment continues:

"The reconstructed record is still incomplete, particularly regarding evidence that led to an identity parade. It is not transcribed, albeit the court held that the identity parade, or the evidence in respect thereof, would not be accepted in evidence. However, the court relied on certain photographs taken during the identity parade. There is no indication why that aspect was not transcribed initially or during the reconstruction process. Mr Kgagara submitted, and Mr More confirmed that it appears that some of the evidence was never recorded."

The court hearing the appeal upheld the appeals of both Collin Mdluli and Wendy Majane."

The Proceedings Before De Vos J And Matshitse AJ

[7] Reading from the Judgment of De Vos J, in the same matter that served before him and Matshitse AJ dated 17 May 2023, the judgment is summarized as follows[2]:

[2] See caselines pages 0001-18 (Judgment dated 18 May 2023)

"The main issue in this appeal is whether the identity of the first appellant, Sibusiso Sibambo, and Patrick Mokoena, the second appellant, has been proved beyond a reasonable doubt. The appellant contends that the court of first instance erred in convicting and sentencing them on all the counts as there is no evidence linking them to the commission of the offenses. The court a quo relied on common purpose and circumstantial evidence convicting them. The complainant, Thelma Mokoena, gave a statement after the incident that she could not identify the suspect. She only identified Sibusiso Sibambo as Shimbondyane during identity parade and didn't know any other assailants".

"It is further contended that regarding counts 1, 2, 7, and 8, the State has not proved the quilt of the appellant beyond reasonable doubt. Olivia Mokoena and SylviaManiane testified about these counts. Both made a statement to the police on the sameday of the incident. In the statement, they mentioned that they do not know the four rapists."

"Constable Violet Dikeledi Motseo testified that she took statements from the complainants. She testified that the victims told her that they could not identify the assailants on the day of the incident because when they were raped their faces were covered with their clothes. She further testified that if indeed what she reduced to writing might have been incorrect, the victims could have informed the doctor who assisted them. She was present in the consultation room and that did not happen."

"The DNA were obtained in the investigation of the commission of the crimes. The complainant's swabs were compared with the accused's blood samples and that the results were negative. The so-called reconstructed record is further incomplete in respect of evidence relating to an identity parade. It is not transcribed. The court relied on certain photographs taken during the identity parade. These photographs were used to confirm the evidence of the three complainants regarding the identity of the accused. In my view this is inadmissible. If part of the identity parade is inadmissible all the evidence relating to that fact follows suit and cannot be referred to at all.

[8] The judgment continues.

"The evidence of Dudu Mokoena and Thelma Mokoena, Dingaan Masuku, Captain Davis Motseo, Lydia Moreni, and Constable Morenu is not transcribed, the records cannot be traced. The matter was heard in 2012 and it appears that both the prosecutor and the defence counsel have lost their notes, the magistrate had incomplete notes. Having further regard to the time lapse since the appellants were convicted and sentenced, and the failure of one's memory over a long period I must consider the Respondent's request that we dispose of this appeal."

" It is incumbent on the appeal court to ensure that the values set out in the constitution be upheld. The most important function of the Court of Appeal is required to perform is to dispense justice. Justice is dispensed through the mechanism of a fair trial. In as much as the appeal is part of the fair trial and cannot be properly adjudicated with an original record or at least a properly reconstructed record, it stands to reason that as far as the appeal against sentence is concerned the appellants cannot be given a fair trial. In these circumstances, justice would be best served if the sentences were to be set aside and the matter referred to the trial court to sentence the appellants afresh.

[9] The judgment continues.

"Furthermore, to use of photographs taken during the ID parade which is inadmissible creates the impression that reasons were sought as to why the evidence of the complainants should be accepted. In my view, these irregularities are of such a nature that it can be said that the two appellants before us did not receive a fair trial"

"Perusing the original record, I also could not find the doctor's original report when they were examined. The absence of these medical reports is of significance. In my view, the absence of these documents negates the state's argument. If the doctor's report was available, it could have clarified this issue."

"Due to the weakness in the state's case, no negative inference can be drawn against the appellant's failure to testify. The inability to reconstruct the record makes it impossible to dispense fair justice as required by the Constitution. The record of the trial is incomplete and cannot be rectified. Therefore, the appellant did not receive a

fair trial, the available record shows that. It is my conclusion that the state has failed to prove the guilt of the accused on all counts beyond a reasonable doubt."

[10] The court hearing the appeal upheld the appeals of Mjikeni Dingaan Sibambo and Patrick Mokoena. The conviction and sentences of life imprisonment for the counts of rape and 15 years for the counts of robbery with aggravating circumstancesimposed are set aside.

The Present Appeal

[11] Once again, the matter is on the roll on the same issue, whether the identity of the appellant, Sibusiso Mokoena has been proved beyond a reasonable doubt.

[12] The appeal of the appellant is brought after the appeals against the convictions of all his co-accused have succeeded, having their convictions and sentences set aside. Both Mr. Kgagara of Pretoria Justice Centre and Mr. More of the Director of Public Prosecutions Pretoria once again appeared before this court. Mr. Kgagara informed the court that, the appellant's application was not brought with his co-accused because the appellant had not made an application with the Legal Aid Board, as a result, he did not have a mandate to act on his behalf.

[13] Both counsels made submissions that this appeal emanates from the same facts, of the same complainants, and was committed on the same day. That the court a quo misdirected itself on convicting and sentencing the appellant.

[14] The State conceded that the appeal against conviction imposed on all the counts should succeed and the appellant should be found not guilty and discharged. The sentences imposed on all counts should also be set aside.

[15] The stakes are always incredibly high when dealing with criminal cases. One always seeks to ensure that those convicted of crimes are those who truly deserve it. After, the costs of incarceration on the person are so vast even on the guilty, that it is unthinkable to impose the severe trauma of the carceral system on those who are innocent. However, once the court of first instance has determined that guilt has been proven, the appeal court does not easily interfere with it unless it can see that there is on balance, a miscarriage of justice or a misdirection.

[16] I find that the court a quo misdirected itself on convicting and sentencing the appellant. I also concur with the other court's findings that heard this matter as stated *supra*. The identification of the appellant was not proven beyond a reasonable doubt, the identification parade was flawed, and the DNA results were negative. The record of the trial court is incomplete and the inability to reconstruct the record makes it impossible to dispense a fair trial as envisaged by the Constitution

[17] I find that the State has failed to prove the guilt of the appellant on all counts beyond a reasonable doubt and the appeal should succeed. Having decided this, there was a subsequent issue that needs addressing.

Issue Of Interest

[18] Mr. Kgagara submitted Supplementary Heads of Arguments raising the following issues:

[19] The previous appeal courts had inherent jurisdiction in terms of section 173 of the Constitution to *mero motu* release the appellant even though he had not lodged the appeal together with his co-accused. This is the third time this matter has been brought on appeal on a similar fact of issues. It is undesirable that three sets of Judges with the workload in the Division had to spend hours reading the same record of proceedings and having to write judgments on the issue of identity raised by the same appellants, facts emanating from the same complainants about the offenses committed on the same day and only dealt with the matter in piecemeal. In the last two appeal hearings, all the appellant's convictions and sentences were set aside.

[20] The court's failure to mero motu release the appellant with his co-accused constituted a miscarriage of justice.

[21] The appellant has an automatic right of appeal in terms of section 10 of the Judicial Matters Amendment Act 42 of 2013.

Legal Questions

[22] Based on the issues raised by Mr. Kgagara on his supplementary Heads of Arguments, this court will consider the three legal questions:

[23] What are the confines of a judge's law-making power in terms of section 173 of the Constitution?

[24] Can a judge in a criminal appeal decide issues related to co-accused who did not appeal?

[25] Given section 10 of the Judicial Matters Amendment Act, does an accused still need to appeal?

What are the confines of a judge's law-making power in terms of section 173 of the Constitution?

[26] The exercise of judicial power is an exercise of public power. Out of the tripartite powers, the others being executive and legislative, it is the only power which is exercised by an unelected entity. However, its centrality to democracy and public accountability is beyond doubt. What being unelected does mean though, as it exercises its powers, the courts need to be very wary that they do so in a way that does not strip the elected branches of government of their powers thereby keeping a healthy respect for the separation of powers.[3]

[27] In the pre-democratic era, South Africa had parliamentary sovereignty. This meant that the powers of the judiciary were subservient to those of parliament. However, this is no longer the case as the Constitution is supreme.[4] The Constitution has now given judicial authority specifically to the courts to allow them to resolve disputes.[5] Further, the Constitution gives the courts the powers to declare any conduct or legislation that is inconsistent with the Constitution invalid and make any

[3] Section 165 of the Constitution of the Republic of South Africa, 1996
[4] Section 2 of the Constitution.
[5] Section 165 of the Constitution.

consequential orders thereto.[6] In this way, courts are the protectors of the constitution and democracy.

[28] Section 173 of the Constitution also gives the superior courts inherent powers limited by what the interest of justice may require, which reads as follows:

> "The Constitutional Court, the Supreme Court of Appeal, and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[29] There are three features to this section to be considered. The first is that it is a broad power vesting in these courts in any issue relating to their own process and the development of the common law, the second is the power of a court to regulate its own proceedings. The third feature is the overriding criterion of the interests of justice.

a. The power to develop the common law

[30] The power to develop the common law is not newly granted by the Constitution and section 173. It was a power that courts had always possessed as the law was developed and refined by the courts. The Supreme Court of Canada in *R v Salituro*[7] explained this as follows:

> "Judges can and should adapt the common law to reflect the country's changing social, moral, and economic fabric. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law... In a constitutional democracy such as ours, it is the Legislature and not the courts that has the major

[6] Section 172 of the Constitution.
[7] (1992) 8 CRR (2d) 173.

responsibility for law reform... The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."

[31] This is thus a power exercised with deference and in an incremental manner. This means that it does not involve making wholesale changes to the law but rather small changes in line with changing societal *mores*. The power to develop the common law is the power to make incremental developments in a way that accords with the developing *boni mores* of the society. It is not a blank cheque to make law. That is why developments to the common law have always been very small scale. The power to make law is the power vested in Parliament.

However, the South African developments since the Constitution mean that this power, read with section 39(2) of the Constitution may require more drastic interventions into the common law.[8] While section 39(2) of the Constitution develops the common law to promote the spirit, purport, and objects in line with the Bill of Rights.

[32] The Supreme Court of Appeal and High Court have "always had an inherent jurisdiction to develop the common law to meet the needs of a changing society". If section 39(2) were to be read to have removed the power of courts to develop the common law where its shortcomings do not implicate the Constitution, that would be a retrograde step and absurd. That would mean, that even if it were clear that the common law needed to be developed on a non-constitutional basis, courts would not be able to do anything. That, even though for centuries in the era before the advent of

[8] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at paragraph 36.

our constitutional democracy – courts have always been able to develop the common law.

b. The power of a court to regulate its own proceeding

The power in section 173 of the Constitution must be understood in the context of the full scope of judicial authority in the Constitution. This section allows for a court to regulate its own processes to ensure proper functioning and independence.[9] Understood in context then, the power is an exceptional one rather than one that can be leveraged in the day-to-day running of the courts.

[33] *In South African Broadcasting Corporation Limited v National Director of Public Prosecutions (SABC[10])*, the court described this as

> "The power in section 173 vests in the judiciary the authority to uphold, to protect, and to fulfill the judicial function of administering justice in a regular, orderly, and effective manner. Said otherwise it is the authority to prevent any possible abuse of process and to allow a court to act effectively within its jurisdiction."[11]

[34] Having considered the extent of the powers, I will turn to consider whether a judge in the criminal appeal may mero motu consider or decide issues related to the co-accused who did not lodge the appeal while relying on these powers.

[35] The question of what process a court may follow in determining who is a beneficiary of an appeal before it is a question of procedure and not one found in the common law. At best, a court may invoke section 39(2), rather than section 173, to interpret the rules and legislation relating to appeals in a way that is consistent with

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[9] *Parbhoo v Getz NO*1997 (4) SA 1095 (CC) at paragraph 4; *S v Pennington* 1997 (4) SA 1076 (CC) at paragraph 22.
[10] 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC).
[11] Id at paragraph 90.

the purport and objects of the Bill of Rights. It is trite that wrongful imprisonment impacts rights to dignity, freedom, and security amongst others. Thus, the purports and objects in these instances would require that the correct person be detained. An interpretation of any rules and legislation that favours this would be preferable.

[36] However, the difficulty with this is that section 39(2) is an interpretive exercise. Interpretation is constrained by what appears in the text. There is no rule either in terms of the Superior Courts Act, the Criminal Procedure Act, or the Uniform Rules of Court that can be interpreted to mean that an appeal court can make an order bringing a party to court if they fail to do so. If the court does that, this would be doing more than interpreting but modifying, *mero motu*, those provisions. Therefore, section 39(2) is interpretive and thus cannot perform this purpose.

[37] In considering whether this is something a court can do in line with its power to regulate its own processes, a discussion of *S v van der Merwe*[12] is apposite. The appellant in this case had been convicted and sentenced in the regional court. When leave to appeal was considered, it was granted only in relation to the sentence. When the matter went on the appeal, the appeal court was not persuaded that the convictions should stand either. Thus, a part of what the court had to consider was whether the power in section 173 to regulate its own processes extended to the power to interfere with the conviction which was not before them as well.

[38] The court held that a court's inherent power did not include the power to assume jurisdiction it did not have. The leave to appeal decision denied the court had that jurisdiction, even though it had serious misgivings about the conviction.[13] The court

[12] 2009 (1) SACR 673 (C).
[13] Id at para 14 – 15.

could further not find that no reasonable procedure exists to protect the accused's rights to justify taking on an additional regulatory procedure of section 173.

[39] A court only has jurisdiction to decide the rights of a party before it.[14] I find that deciding the rights of a party not before the court is a rescindable error of law. As such, the court cannot mero motu assume jurisdiction to decide their matter. Therefore, the appeal court's failure to mero motu decide or release the appellant with his co-accused cannot constitute a miscarriage of justice.

c. The Interest of Justice

[40] Section 322(1)(a) of the Criminal Procedure Act empowers the appeal court to allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice.

[41] This intention is for a court of appeal to dispense justice. An appeal court cannot close its eyes to a patent injustice simply because the injustice is not the subject of the appeal.[15]

[42] It is my view that in the situation where the appeal court after reading the records of the proceedings and becoming aware of the miscarriage of justice relating to the co-accused who is not the subject matter of the appeal, the appeal court cannot mero motu decide or release the co-accused. In dispensing justice, and avoiding

[14] See *Absa v Dlamini* above.
[15] *S v Toubie* 2012 (4) ALL SA 290.

multiple judgments, the appeal court may make a recommendation to Legal Aid South Africa to advise the co-accused about their rights to appeal.

The accused right to appeal in terms of section 10 of the Judicial Matters Amendment Act 42 of 2013.

[43] This section was an amendment to section 309 of the Criminal Procedure Act, which provides that any person sentenced to life imprisonment by a regional court automatically has leave to appeal and need not apply for it. Should they wish to pursue the appeal, they need to note it. What is import is that this is an automatic grant of leave to appeal and not an appeal. The distinction is that leave to appeal is a right to lodge an appeal. One still must lodge the appeal before the case can be said to be before the appeal court. An accused who has not lodged their appeal is not before the appeal court and the appeal court cannot make decisions relating to them.

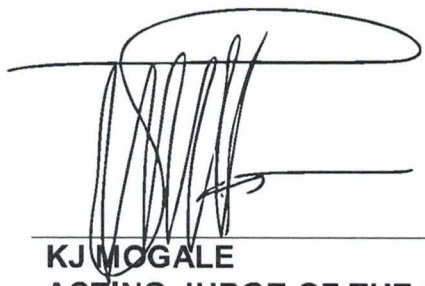
Conclusion

[44] The inherent power to regulate a court's own proceedings is the power to ensure proper functioning over matters within its jurisdiction. This means that it must be a case before it in the first instance. Secondly, there must be a failure in the existing architecture legal procedures which means that the party before it is unable to obtain substantial relief. The Criminal Procedure Act has made it easy for persons to come before the court by automatically granting leave to appeal to similarly placed persons. Thus, while it may be sad that the accused remains in prison longer than they had to, the provision of section 173 is simply not a way to come to their rescue. This court still had to hear and decide the appeal even though there were already two different judgments relating to the appellants co-accused.

[45] Consequently, the following order is hereby made:

1. The appeal against the conviction imposed on all the counts is upheld and the appellant is found not guilty and discharged.

2. The sentences imposed on the counts of Rape and Robbery with Aggravating Circumstances are set aside.



KJ MOGALE
ACTING JUDGE OF THE HIGH COURT
PRETORIA

I agree, and it is so ordered.

PD PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION,
PRETORIA

Electronically submitted.

Delivered: This Judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and uploading to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 08 January 2024

Date of hearing: The matter was heard via video conferencing or otherwise. The matter may be determined accordingly. The matter was set down for a court date on 23 November 2023

Date of Judgment: 08 January 2024

Appearances:

For the Appellant:	Adv. B Kgagare
Instructed by:	Legal Aid South Africa, Pretoria
For the Respondent:	Adv. L More
	The Director of Public Prosecutions,
	Pretoria