Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case number: KS 19 / 2016
Date Heard: 08 / 08 / 2022
Date delivered: 7 / 10 / 2022

In the matter between:-

THE DIRECTOR OF PUBLIC PROSECUTIONS
APPELLANT
NORTHERN CAPE

and

FRANK SWARTS **FIRST**
RESPONDENT

FRANK ITUMELENG **SECOND**
RESPONDENT

Coram: Nxumalo J, Stanton AJ and Kgopa AJ

JUDGMENT

STANTON AJ

INTRODUCTION:-

[1] The respondents were arraigned before his Lordship Matlapeng AJ, in the Kgalagadi Circuit Court, in Kathu, on the following charges: -

1.1 Contravention of s 3 of the Firearms Control Act, Act 60 of 2000, the unlawful possession of a firearm;

1.2 Contravention of s 90 of the Firearms Control Act, Act 60 of 2000, the unlawful possession of ammunition; and

1.3 Murder, read with the provisions of s 51(1) of the Criminal Law Amendment Act, Act 105 of 1997.

[2] The respondents, without giving evidence, were acquitted on all the charges on 26 May 2017.

[3] Subsequent to the acquittal, the appellant applied to the trial court to have certain questions of law reserved in terms of the provisions of s 319 of the Criminal Procedure Act, Act 51 of 1977 ("the CPA"). This application was dismissed on 26 February 2018.

[4] The applicant proceeded to lodge a petition to the President of the Supreme Court of Appeal, on 23 April 2018, for leave to appeal against the dismissal of the application in terms of the provisions of s 319 of the CPA.

[5] On 23 May 2018, the Supreme Court of Appeal ordered that leave to appeal be granted to the Full Bench of this Court.

SECTION 319 OF THE CPA:-

[6] S 319(1) of the CPA stipulates:-

"Reservation of question of law.

(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."*

[7] According to the appellant, the term "*question of law*" relates to the application of a legal principle to an established set of facts and the determination of whether or not a crime has been committed. The appellant submits that the three questions of law that require determination are:-

7.1 Whether the trial court failed to properly consider and appreciate relevant evidence or erroneously approached or treated relevant evidence presented by the State against both the respondents;

7.2 Whether the trial court correctly appreciated and applied the legal principles relating to circumstantial evidence by not applying these legal principles in consideration to all the relevant evidence presented by the State; and

7.3 Whether the trial court disregarded the established legal principles of liability, particularly the doctrine of common purpose, by not applying such principles to the relevant and proven evidence against the first respondent.

[8] In support of its argument that the trial court incorrectly applied various legal principles to the evidence, the appellant comprehensively lists a wide range of examples in its heads of argument. In my view, it is not necessary to traverse them here, but they can be distilled as follows, namely that the trial court failed to: -

8.1 Properly appreciate and consider the full content of exhibit “W” in conjunction with other evidence presented by the State, and consequently failed to appreciate all the relevant circumstantial evidence;

8.2 Properly evaluate the evidence against the second respondent, namely the cap found on the scene and the presence of the cell phone in the vicinity of the farm, and such phone being in his possession; and

8.3 Establish the liability of the first respondent on the evidence before it.

APPLICABLE LEGAL PRINCIPLES:-

[9] I turn to consider whether the questions raised by the appellant are indeed questions of law or of fact.

[10] The Supreme Court of Appeal in the recent judgment of the ***Director of Public Prosecutions, Gauteng Division, Pretoria v RP***[1](“the RP judgment”), comprehensively dealt with the legal principles relating to the application of s 319 of the CPA. In the *RP judgment*, the State sought to reserve four questions, all pertaining to the evaluation of evidence before Hattingh AJ. In its judgment, the Supreme Court of Appeal reaffirmed the judgment of ***Director of Public Prosecutions: Limpopo v Molope and another*** [2] where the Court held:-

"*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 judgments, both by this Court and the Constitutional Court. Its principles have accordingly been firmly established in our law. Two decades ago, in Director of Public Prosecutions, Natal v Magidela and*

[1][2021] JOL 50296 (SCA).

[2][2020] 3 All SA 633 (SCA) at paragraphs [44] and [45]; [also reported at 2020 (2) SACR 343 (SCA)].

others this Court 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 [also reported at [1985] 1 All SA 70 (A) – Ed]). 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 [also reported at [1972] 3 All SA 69 (A) – Ed]). These requirements have been repeatedly emphasised in this Court and are firmly established (see, for example, S v Khoza en andere 1991 (1) SA 793 (A) at 796E-I [also reported at [1991] 3 All SA 971 (A) – Ed]). 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 [also reported at [1962] 2 All SA 492 (A) – Ed]). 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 [also reported at [1953] 3 All SA 258 (A) – Ed]). 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.' [Original emphasis.]*

[11] The approach in ***Director of Public Prosecutions: Natal v Magidela and others*** *("Magidela")*[3] was endorsed by the Supreme Court of Appeal in ***Director of Public Prosecutions: Western Cape v Schoeman and another*** [4] *("Schoeman")* where it is stated:-

"***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***

[3][2000] JOL 6331 (A) at paragraph [9].

[4][2019] ZASCA 158; [also reported at 2020 (1) SACR 449 (SCA) at paragraph [39]].

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." [5]

[12] In ***Schoeman***[6], the Supreme Court of Appeal, with regard to the consequences of not meeting the three requisites, stated that:-

"***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.*"[7] (Footnotes omitted.)

[13] The Supreme Court of Appeal in ***S v Basson***[8] reaffirmed that:-

"*When a question of law arises as aforesaid, the trial court, or, where it refuses to do so, this court has to decide on application by the state whether to reserve a question of law for consideration by this court. When this court considers an application by the state for leave to appeal against a refusal to reserve a question of law by the trial court, as with any other application for leave to appeal, it will only exercise its discretion in favour of the state where there is a reasonable prospect that if the mistake of law had not been made, the accused would have been convicted.*"

"*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 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 finding (see Director of Public Prosecutions, Natal v Magidela and another 2000 (1) SACR 458 at paragraphs 462g-463c [also reported at [2000] JOL 6331 (A) – Ed]). When the state has such a*

[5] Emphasis supplied and footnotes omitted.

[6] *Supra* at paragraph [40].

[7] Emphasis supplied.

[8] 2003 (2) SACR 373 (SCA) paragraphs 10 – 11 [also reported at [2003] 3 All SA 51 (SCA); [2003] JOL 11111 (SCA)].

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 [also reported at [1972] 3 All SA 69 (A) – Ed])."[9]

[14] I also take heed of what the Supreme Court of Appeal confirmed in ***DPP, WP v Schoeman*** at paragraphs 45 – 46:-[10]

"*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." *(My emphasis.)*

[15] Mr Rosenberg, on behalf of the appellant, submitted that the trial court's failure to correctly consider and evaluate all the relevant evidence, constitute an error of law, and not fact. In support of his argument that a disregard of relevant circumstantial evidence, is an error of law, much reliance was placed on the judgment of the Supreme Court of Appeal in the matter of ***DPP, Gauteng v Pistorius***[11].

[16] In contrast, counsel for the respondents argued that the appellant had failed to comply with the requirements of s 319 of the CPA, and that all of the questions raised, were questions of fact.

[9] *Supra* at paragraph [6].
[10] 2020 (1) SACR 449 (SCA).
[11] 2016 (1) SACR 431 (SCA) at paragraph [40].

[17] In many cases, the decision of whether a question is one of fact or of law poses considerable difficulty. In ***Schoeman***,[12] the Supreme Court of Appeal, having found that the court had erred in the matter of ***Director of Public Prosecutions, Gauteng v Pistorius***, stated that:-

> "*It seems, therefore, that this court in Pistorius erred, with respect, in finding, albeit obiter in our view, that where a trial court ignores evidence or displayed a lack of appreciation of its relevance, that this amounted to an error of law. As we have demonstrated, this conclusion is at odds with a long line of authority in this court, endorsed by the Constitutional Court. We do not agree that the test for the applicability of s 319 is whether the judicial process is adversely affected by the error made by the trial court. That test would have the effect of making almost every material error of fact an error of law. That is not what is envisaged by s 319. As Corbett CJ pointed out in Magmoed, even where there are 'strong indications' from the evidence that there were cogent reasons to convict an accused '[t]hese considerations must not . . . be allowed to obscure one's perception of the legal and policy issues involved in permitting s 319 to be utilized in the manner the prosecution in this case wishes to use it; or to weaken one's resolve to maintain what appears to be sound legal practice. Put simply, the mere fact the judicial process has become flawed by the way a trial court goes about assessing the evidence before it, does not justify permitting s 319 to be used by the prosecution to reserve a point of law for what is in truth misdirection of fact. That impermissibly undermines the clear language of the section and the deliberate choice of the legislature to restrict appeals in terms of the section to questions of law. The law as reflected in Canadian cases cited in Pistorius does not reflect the position in our law.*"

[18] It is clear from the judgment of the trial court that it was satisfied from a totality of the evidence that the State had not proved its case beyond a reasonable doubt against the respondents. The judgment confirms that the evidence led by the State was accounted for and due weight was accorded to it. The conclusion to which the trial court arrived was that the evidence was not sufficient to establish the guilt of the respondents.

[19] It is clear from ***Schoeman*** that even if a trial court ignored evidence or displayed a lack of appreciation for its relevance, this does not amount to an error of law. The appellant is in essence, requesting the Court to approach the matter as if this were a full appeal on the

[12] Supra at paragraphs [73] - [74].

merits. In my view, and for the reasons set out above, I find that the questions raised by the appellant are questions of fact and not of law.

[20] In addition to my finding above, the three questions with enough precision to leave no doubt as to what the legal point is, or that the facts on which the points hinge, are clear and succinct.

[21] In view of all the aforegoing, the appellant's application in terms of s 319 of the CPA, falls short of what is required and stands to be dismissed.

WHEREFORE THE FOLLOWING ORDER IS MADE:

THE APPEAL IS DISMISSED.

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STANTON A
ACTING JUDGE

I concur.

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NXUMALO J
JUDGE

I concur.

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KGOPA AJ

ACTING JUDGE

On behalf of the appellant:	Adv. J.J.D. Rosenberg
On instruction of:	The NDPP
On behalf of the first respondent:	Mr. R. Ishmael
	Private instruction
On behalf of the second respondent:	Adv. J.J. Schreuder
	Private instruction