THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 220/2015
Not reportable

In the matter between:

GINO LUIGI SELLI **APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation: *Selli v The State* (220/15) [2015] ZASCA 173 (26 November 2015)

Coram: Bosielo, Tshiqi and Swain JJA

Heard: 04 November 2015

Delivered: 26 November 2015

Summary: Criminal appeal against a sentence of 15 years' imprisonment imposed by the regional magistrate – whether substantial and compelling circumstances present to justify a departure from the prescribed minimum sentence – whether regional magistrate competent to order a non-parole period.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mothle and Kollapen JJ sitting as a court of appeal).

a) The appeal is upheld.
b) The order of the court below refusing the appellant leave to appeal against his sentence is set aside and replaced with the following:
'The appellant is granted leave to appeal against the sentence imposed on him by the regional magistrate to the Gauteng Division of the High Court, Pretoria.'

JUDGMENT

Bosielo JA (Tshiqi and Swain JJA concurring)

[1] The appellant was convicted on his plea of guilty on three counts. The first count is robbery with aggravating circumstances (read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (CLA) read further with s 1 of the Criminal Procedure Act 51 of 1977 (CPA), during which a motor vehicle and a cellular phone worth approximately R21 000 was taken from the complainant, through the unlawful use of a firearm. The second count is the unlawful possession of a firearm (a revolver 38 special). The third count is the unlawful possession of ammunition (1 live round of a revolver 38 special).

[2] He was sentenced as follows:
(a) Robbery – 15 years' imprisonment;
(b) Unlawful possession of a firearm – 5 years' imprisonment, and

(c) Unlawful possession of ammunition – 6 months' imprisonment.

All the sentences were ordered to run concurrently. The regional magistrate made a further order that 'in terms of the provisions of the Act on the minimum sentences you serve at least 4/5 of that sentence in other words 12 years'.

[3] The appellant applied unsuccessfully for leave to appeal against his sentence to the regional magistrate. His petition to the North Gauteng High Court, Pretoria (Botha J and Mothle AJ) was refused on 2 December 2008. Aggrieved by the refusal of his petition for leave to appeal, he filed an application for leave to appeal against the refusal of his petition to the court below. On 21 November 2013, the court below (Mothle and Kollapen JJ) made the following order:

'That the application for leave to appeal to the Supreme Court of Appeal be and is hereby granted against the decision of this Court refusing the petition to appeal.'

[4] As I will demonstrate hereunder the court order referred to above is incompetent. As at 21 November 2013, the Superior Courts Act 10 of 2013 (the Act) had already come into operation on 23 August 2013. This Act replaced the old Supreme Court Act 59 of 1959. The result is that the appeal was governed by s 16(1)(*b*) of the Superior Courts Act which provides that 'an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal.' Faced with this conundrum, we requested the Registrar of this Court to request the parties to file supplementary heads of argument regarding whether, in the light of the provisions of s 16(1)(*b*) of the Act, this Court had jurisdiction to hear the appeal on the merits.

[5] Both counsel conceded, correctly in my view, that based on the provisions of s 16(1)(*b*) of the Act, the court below did not have jurisdiction to hear the appeal against the refusal of the petition for leave to appeal nor the power to grant leave to appeal to this Court. It is only this Court that has the power to grant special leave to appeal to it from a decision by the court below given on appeal to it. This legal position has been recently endorsed by this Court in various judgments, which includes *Potgieter v S* (20109/2014) [2015] ZASCA 15 (17 March 2015) paras 2 and 3; *Johannes Windvogel v The State* (20091/2014) [2015] ZASCA 63 (8 May 2015) para 8 and *Hattingh v S* (20099/2014) [2015] ZASCA 84 (28 May 2015).

[6] The order made on 21 November 2013 was therefore a nullity. Logically, this meant that what is before us is not an appeal on the merits but an appeal against the judgment of the court below (Botha J and Mothle AJ) refusing the appellant's petition for leave to appeal the judgment of the regional magistrate. See *S v Matshona* (509/2007) [2008] ZASCA 58; 2013 (2) SACR 126 (SCA); *S v Kriel* (483/10) [2011] ZASCA 113; 2012 (1) SACR 1 (SCA).

[7] Essentially, what we are called upon to decide is the crisp issue whether the court below erred in finding that there are no reasonable prospects that another court might interfere with the sentence imposed.

[8] The appellant's counsel launched a two pronged attack against the sentence imposed on the appellant. Firstly, he contended that the regional magistrate erred in failing to find that the cumulative effect of the appellant's personal circumstances amounted to substantial and compelling circumstances, justifying a departure from the minimum prescribed sentence of 15 years' imprisonment. Secondly, he attacked the regional magistrate's decision to

impose a further condition that the appellant must serve at least 4/5 of the sentence amounting to 12 years, the so-called non-parole period as being improper as it is not sanctioned by s 276B(1)(*b*) of the CPA.

[9] Section 276B provides:

'276B Fixing of non-parole-period

(1) *(a)* If a court sentences a person convicted on an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.

(b) Such period shall be referred to as the non-parole period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

(2) If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1)(*b*), fix the non-parole-period in respect of the effective period of imprisonment.'

[10] The respondent's counsel conceded that, although this case has aggravating features, there are reasonable prospects that another court might find that the appellant's personal circumstances, taken cumulatively, qualify as substantial and compelling circumstances to justify a sentence less than the prescribed minimum sentence of 15 years' imprisonment. Regarding the order for the non-parole part of the sentence, once again the respondent's counsel conceded, correctly in my view, that s 276B(1)(*b*) of the CPA does not support such an order.

[11] It is trite that we can only grant the appellant leave to appeal against the judgment of the regional magistrate if we are satisfied that there are reasonable prospects of success on appeal. See *S v Smith* (475/10) [2011] ZASCA 15; 2012 (1) SACR 567 (SCA).

[12] The approach by the regional magistrate to the existence or otherwise of substantial and compelling circumstances is a serious cause for concern. He failed to make a proper enquiry into the existence of substantial and compelling circumstances. The record reflects the following cryptic comment by the regional magistrate: ‘Mr Selli, clearly there is no compiling (sic) and material circumstances’. Furthermore, neither counsel was ever requested or given an opportunity to address the court on the existence or otherwise of substantial and compelling circumstances.

[13] Section 51(3) of the CLA requires a purposeful enquiry by a sentencing officer into such circumstances. Self-evidently, this is intended to avoid visiting an accused with the severest sentence except in circumstances where there are no weighty or cogent facts which call for a less severe sentence. A failure by a sentencing officer to be diligent, conscientious and punctilious in his or her search for substantial and compelling circumstances might result in a sentence which is disturbingly inappropriate and amounts to an injustice. Undoubtedly, such a failure amounts to a serious misdirection. This is what happened in this case. Justice and fairness requires that this matter be referred back to the court below so that an appropriate enquiry into the existence of substantial and compelling circumstances can be launched.

[12] Regarding the second leg as indicated earlier, it suffices that the respondent's counsel conceded that it was improper for the regional magistrate to make an order for the non-parole part of the sentence as this is not provided for in s 276B(1)(*b*) of the CPA. I agree that the regional magistrate erred in this regard.

[13] In the result, the following order is made:

a) The appeal is upheld.

b) The order of the court below refusing the appellant leave to appeal against his sentence is set aside and replaced with the following:

‘The appellant is granted leave to appeal against the sentence imposed on him by the regional magistrate to the Gauteng Division of the High Court, Pretoria.’

L O Bosielo
Judge of Appeal

APPEARANCES:

For Appellant:	R Gissing
	Instructed by: Nichole Landman Attorneys, Fonteinriet Symington & De Kok, Bloemfontein
For Respondent:	S Scheepers
	Instructed by: Director Public Prosecutions, Pretoria Director Public Prosecutions, Bloemfontein