THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 723/2020

In the matter between:

LUCKY THOMAS KHUMALO **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Lucky Thomas Khumalo v The State* (723/20) [2022] ZASCA 39 (04 April 2022)

Coram: MOLEMELA, MBATHA and CARELSE JJA, SMITH and WEINER AJJA

Heard: 15 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 04 April 2022.

Summary: Criminal procedure – appeal against refusal in a high court of a petition seeking leave to appeal against convictions and sentences – reasonable prospects of success found in respect of the sentences – merits of appeal against the sentences to be determined by the high court.

ORDER

On appeal from: The Gauteng Division of the High Court, Johannesburg (Preller J and Fourie AJ sitting as court of appeal):

1 The appeal is upheld in part.

2 The order of the High Court dismissing the applicant's application for leave to appeal is set aside and substituted with the following:

> 'The applicant's application for leave to appeal in terms of s 309C of the Criminal Procedure Act 51 of 1977 is granted only in respect of the sentences.'

JUDGMENT

Molemela JA (Mbatha and Carelse JJA and Weiner and Smith JJA concurring):

[1] On 22 May 2012, Mr Khumalo ('the applicant') appeared at the Regional Court, Nigel (the trial court), where he faced the following charges: (i) robbery with aggravating circumstances read with the provisions of ss 51(2) and 52(2) of the Criminal Law Amendment Act of 1997; (ii) attempted murder; (iii) contravention of s 3 read with ss 1, 103, 117, 120(1)*(a)* and 121, read with Schedule 4 and s 151 of the Firearms Control Act 60 of 2000, read with the provisions of s 250 of the Criminal Procedure Act 51 of 1977 (CPA) (possession of an unlicensed firearm) and (iv) contravention of s 90 read with ss 1, 103, 117 and 120(1)*(a)*, s 121 read with Schedule 4 and s 151 of the Firearms Control Act 60 of 2000 read with s 250 of the CPA (possession of unlicensed ammunition). The applicant was found guilty as charged and sentenced as follows: (i) count 1, 15 years' imprisonment; (ii) count 2, 10

years' imprisonment; (iii) count 3, 5 years' imprisonment and (iv) count 4, 1-year imprisonment. The sentences were not ordered to run concurrently, such that the applicant's effective sentence was 31 years' imprisonment.

[2] Dissatisfied with the outcome of the trial, the applicant, within the contemplation of s 309(1)*(a)* of the CPA, sought the trial court's leave to appeal against the convictions and the sentences imposed on him. That application was dismissed. A subsequent petition to the North Gauteng Division of the High Court, Pretoria (the High Court), as contemplated in s 309C of the CPA, was similarly unsuccessful. With the special leave of this Court, the applicant now appeals against the high court's refusal of his petition.

[3] In this matter, the parties agreed that the appeal be disposed of without oral arguments as contemplated in s 19*(a)* of the Superior Courts Act 10 of 2013. A reading of both parties' heads of argument, however, revealed that they had mischaracterised the issue for determination by this Court, insofar as they submitted that the issue for determination was the appropriateness of the sentences imposed upon the applicant. It bears mentioning that this court, in *S v Khoasasa*,[1] held that a sentence imposed in the trial court can only be appealed against in this Court when an appeal against such sentence has failed in the high court. Significantly, in *S v Matshona*,[2] this Court held that where an accused person obtains leave to appeal to this Court against the high court's refusal of a petition seeking leave to appeal against a conviction of sentence, 'the issue before this Court is whether leave to appeal should have been granted by the high court and not the appeal itself'. It held that 'this court cannot determine the merits of the appeal but must confine itself to the issue before it, namely whether leave to appeal to the high court should have been granted'.[3]

[4] A plethora of judgments of this Court have re-confirmed the principles laid down in the two seminal judgments mentioned in the preceding

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[1] *S v Khoasasa* 2003 (1) SACR 123 (SCA). See also *S v Matshona* [2008] ZASCA 58; [2008] 4 All SA 68 (SCA); 2013 (2) SACR 126 (SCA) para 3.
[2] See *Matshona* fn 1 para 5.
[3] *Ibid* para 7.

paragraph.[4] It is therefore well established that in an appeal against the refusal of a petition in the high court, like the present, the ambit of the appeal to this Court is confined to only what the high court could have granted, with the result that in the event of reasonable prospects of success being found to be present in relation to either the convictions or sentences or both, the only relief open to be granted by this Court would be to set aside the order dismissing the petition and to remit the matter back to the high court. That is the crisp issue that falls for determination in this matter.

[5] Given the parties' misconception that this Court was at large to deal with the merits of the appeal, the trite position set out in the preceding paragraph was brought to the parties' attention. As the heads of argument were in any event confined to the merits of the appeal pertaining to the sentences, counsel was duly directed to file supplementary heads of argument addressing whether there were prospects of success in relation to the convictions. The directions issued also called upon the applicant to, in the event of him no longer being intent on pursuing the appeal in relation to the convictions, expressly indicate his abandonment of that leg of the appeal.

[6] In the supplementary heads submitted in response to this Court's directions, the State Advocate conceded that this Court cannot delve into the merits of the appeal. As regards the necessity to file supplementary heads addressing the convictions, the nub of the response was couched as follows:

'We realized that the proposed Appeal could entail the conviction, as well as sentence. In the result we requested our correspondent to obtain a copy of the Petition the Appellant filed in person, prior to drafting the heads of argument. (Attached)

Although the Appellant's Notice of Motion does not specify whether he is seeking to Appeal the conviction, or only the sentence; the body of his affidavit makes clear that the Special Leave to Appeal would be sought only against the sentence.

This is stated clearly in paragraph 21 as follows "This appeal against sentence" and it could leave no doubt that the intended Appeal is directed only at the sentence.

Further, the headings at paragraphs 24 and 28 specifically refers to the sentence.

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[4] *Van Wyk v State, and Galela v S* [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA); *Chauke v S* [2020] ZASCA 68; *Grifhs v S* [2021] ZASCA 112.

In addition, the body of the affidavit throughout refers to the sentence and make no submissions apropos the conviction.

Moreover, the conclusion at paragraph 75 could leave no doubt that the Special Leave to Appeal would only be sought on the sentence.

Considering the concession, the Appellant makes at paragraph 28:

"My deep regret and remorse for my deviant conduct, and the seriousness of the crimes **I have committed**, is acknowledged without reservation." (My emphasis.)

It would have been unethical to put up submissions apropos the conviction.

We discussed this issue amongst our practitioners and came to the conclusion that it would not be appropriate to address the conviction in heads of argument.'

[7] As stated before, the applicant's petition to the High Court was directed at the convictions and sentences. In his petition to this Court, the unrepresented applicant indicated that he was applying for leave to appeal against the high court's order refusing to grant leave to appeal. He inter alia stated that he is 'entitled to special leave where the matter, though depending mainly on factual issues, is of great importance'. To the extent that this statement may be considered an oblique reference to the convictions, this Court will, *ex abudanti cautela* (for the abundance of caution), also address itself to prospects of success in relation to both the convictions and sentences.

Are there prospects of success in relation to the convictions?

[8] It is appropriate to preface this leg of the enquiry with a brief summary of the evidence adduced before the trial court. Themba Charles Tshabalala (the complainant) testified that on the night of 22 March 2011, he and his girlfriend, Ms Malefani, were walking to his place of residence after spending some time at a stokvel. They were approximately a block away from the stokvel place, when a gun-wielding man suddenly emerged from around a corner and ran in their direction. I interpose to mention that on the version presented by the State, the complainant's assailant turned out to be the applicant before us. Accordingly, the complainant's assailant will hereafter be referred to as the applicant. After emerging from around the corner, the

applicant, who was being followed by a number of companions, immediately started shooting at the complainant without saying anything. The injured complainant ran into a yard with the applicant in hot pursuit. The applicant caught up with the complainant and tried to search his pockets. Mindful that he had a large sum of money in his pockets, the complainant resisted the search by grabbing the applicant's hands. The applicant bit the complainant on the chest, which resulted in the complainant releasing the applicant's hands. The applicant then fired two shots at the complainant. The applicant's accomplices then pinned the complainant to the ground while the applicant searched the complainant's pockets. An amount of R27 000 was forcibly removed from the complainant's pockets during the scuffle, whereafter the applicant and his accomplices fled the scene.

[9] The complainant's girlfriend, Ms Malefani, corroborated the complainant's version regarding how the complainant was shot and how he fled into the yard of a certain house. She stated that she witnessed the struggle for the firearm and saw the person who had shot at the complainant trying to search his pockets. It was at that point that she fled the scene and ran into a nearby yard, where she hid behind the outbuildings. She could hear the complainant screaming and protesting that he was being robbed of his money and that they were killing him. She stated that the person who had shot at the complainant was unknown to her, but she was later able to give his description to the police.

[10] Warrant Officer Mkhatshane John Shilenge testified that he was on duty on 22 March 2011 and attended to a complaint regarding a shooting incident. He found the complainant at the scene, lying in a pool of blood. Based on the report received at the scene, he proceeded to the applicant's home. The applicant denied any involvement in the shooting. He decided to search the applicant's room. He found an amount of R1 600 under the pillow. At a later stage, the applicant took the police to his car, removed a door panel on the driver's side and pointed out a firearm that was hidden behind the door panel.

[11] Mr Sabelo Simelane turned out to be a key state witness in the trial. He testified that on the night of 22 March 2011, he was one of the patrons enjoying liquor at a stokvel. As he had consumed a lot of liquor and was under the influence, he asked his uncle for a lift to his place of residence. His uncle, who was standing next to a Mazda sedan at that stage, agreed to give him a lift. At a later stage, his uncle came to him and told him that he and his friends were leaving. He accompanied his uncle to a vehicle parked outside, which was a Fiat Uno. He noticed that the applicant was in the driver's seat. He and his uncle boarded the vehicle and sat at the back seat. The applicant then drove off.

[12] The applicant stopped the vehicle in Khumalo Street and alighted from the vehicle. He (Mr Simelane) noticed that the applicant was brandishing a firearm. Thereafter three shots were fired. In the intervening period, one person who had been sitting in the front seat moved to the driver's seat. Before the Uno drove off, he (Mr Simelane) saw the applicant running into a yard. The Uno vehicle drove slowly and then stopped next to a filling station. After a short while, the Mazda that he had seen at the stokvel earlier on appeared, flashed its lights, whereupon the Uno vehicle started following it. He noticed that the applicant was one of the passengers in the Mazda sedan. The Uno drove into the garage of a certain house. The applicant and the driver of the Mazda then alighted from their vehicle and boarded the Uno. The applicant then gave money to everyone who was in the Uno, including his uncle. Thereafter, the applicant gave him (Mr Simelane) an amount of R800, which he accepted.

[13] The applicant testified in his defence. He stated that he did not know the complainant before the date of the incident. He also denied knowing Mr Simelane. He denied having driven the Uno on the night of the incident. He also denied firing any shots on the night in question. The applicant admits that he and the complainant wrestled for a firearm on that night but denies having shot at or robbed the complainant. His version was that prior to that incident, he had visited a stokvel where he had enjoyed drinks with his friends. After some time, the police arrived at the stokvel and instructed everyone to

disperse. It was at that juncture that he noticed his girlfriend, Ms Malefani, leaving the stokvel in the company of the complainant. He followed them and confronted Ms Malefani about the matter. According to the applicant, the complainant suddenly pulled out a firearm and cocked it, as a result of which, a cartridge fell on the ground. He and the complainant were then involved in a physical struggle for possession of the firearm, and shots went off. He noticed that the complainant became weak, and the firearm fell to the ground. He (the applicant) immediately grabbed the firearm and put it in one of the pockets of his trousers.

[14] According to the applicant, he then returned to the stokvel to look for his vehicle (the Uno sedan) but could not find it there. He then boarded his friend's Mazda. His friend drove to a filling station, only to find that his Uno sedan was parked there. Thereafter, he and his friend went to his (the applicant's) house. He intended to hand the firearm in question to the police but ended up not doing so. He went to his residence to go and sleep but could not enter the house with the firearm because he knew that his girlfriend was scared of firearms. That was what prompted him to hide the firearm behind the door-panel of his vehicle.

[15] The trial court rejected the applicant's version and accepted that of the state witnesses. The reason for this is not hard to find, as there were many inconsistencies and improbabilities in his version. The applicant's first difficulty is that his version about him being Ms Malefani's boyfriend was denied by Ms Malefani during the trial. She categorically stated that the applicant was unknown to her prior to the trial, but this was not taken any further under cross-examination.[5] This aspect casts serious doubt on the applicant's version.

[5]It is settled law that if an aspect of a witness' evidence is left unchallenged in cross examination, the party calling the witness is entitled to assume that the unchallenged evidence may be considered as correct. See *S v Thebus* 2003 2 SACR 319 CC a paras 56 - 59; *The President of SA v SA Rugby Union and Others* 2000(1) SA 1 (CC) at paras 61-65.

[16] The second difficulty is that the applicant's counsel did not seriously dispute Mr Simelane's version under cross-examination. It was only in his evidence in chief that the applicant, for the very first time, stated that he had not seen Mr Simelane before the date of the trial. This is very surprising, considering that Mr Simelane seriously implicated him in a detailed account of events and pertinently stated that he was brandishing a firearm immediately before three shots were fired in the vicinity of the place where the complainant was shot.

[17] The version narrated by the complainant and Ms Malefani tallies with the account of events as narrated by Mr Simelane, which is that the shooting was not preceded by any exchange of words or wrestling over a firearm. His evidence that the applicant immediately fired three shots after alighting from the Uno tallies with the complainant's evidence that he sustained three gunshots wounds before fleeing to a nearby yard. Significantly, Mr Simelane's version about the Uno being parked at a garage and the applicant being a passenger in the Mazda sedan happens to accord with the applicant's own account of events. How else would Mr Simelane have known about this detailed account of events if his version was false?

[18] Notably, the applicant placed himself at the scene of the shooting. If his account of events is to be believed, during the scuffle, the complainant, who, according to the applicant was the aggressor, shot himself five times but did not manage to shoot the applicant even once. This is highly improbable. Moreover, having gained possession of the complainant's firearm after such a close shave, he simply left the scene and ultimately went home without reporting the incident to the police. Instead of handing over the firearm to the police, he decided to hide it behind his car's door panel.

[19] Considering all the circumstances of this case, I am of the view that the evidence tendered by the State weighs so heavily as to exclude any

reasonable doubt about the applicant's guilt.[6] Expressed differently, the mosaic of the evidence as a whole is, beyond reasonable doubt, inconsistent with the applicant's innocence.[7] The inescapable inference is that the applicant was the aggressor on the night of the incident; that he shot at the complainant, chased him into a yard, fired more shots at the complainant and then robbed him of his money.

The trial court rightly rejected the applicant's version as false beyond a reasonable doubt. The high court, therefore, correctly dismissed the petition against the convictions. It follows that there are no prospects of success in respect of the applicant's convictions.

Are there any prospects of success regarding the applicant's sentences?

[20] Before us, it was argued that the applicant had good prospects of success on this leg of the appeal, as the trial court had failed to take into account the cumulative effect of the sentences imposed. It was submitted that an effective sentence of 31 years' imprisonment was disproportionate and harsh, thus instilling a sense of shock, given that all the offences were committed as part of the same transaction. This called for the sentences to run concurrently, so it was contended.

[21] The state submitted that the high court had rightly dismissed the petition directed at the sentences, as the applicant had two relevant previous convictions. It was also submitted that the sentence imposed in respect of attempted murder was not too harsh, considering the violence perpetrated against the complainant.

[22] It is indeed so that all four offences for which the applicant was convicted may be considered to have been committed in a single sequence of criminal conduct. Consequently, this is an aspect that bears consideration in

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[6] *Cornick and Another v S* 2007 (2) SACR 115 (SCA); [2007] 2 All SA 447 (SCA); [2007] ZASCA 14 para 42; *S v Van den Meyden* 1999 (1) SACR 447(W) at 449d-e, cited with approval in *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at 101a-f.

[7] *R v Blom* 1939 AD 188 at 202.

this matter.[8] On that basis, I am of the view that there are reasonable prospects that another court could find that the trial court did not properly consider the cumulative effect of the sentences and that it might, consequently, order some sentences to run concurrently, which might, in turn, reduce the term of the effective sentence.[9] On this ground alone, the application for leave to appeal stands to succeed.

[23] In the result, the following order is granted:

1 The appeal is upheld in part.

2 The order of the High Court dismissing the applicant's application for leave to appeal is set aside and substituted with the following:

'The applicant's application for leave to appeal in terms of s 309C of the Criminal Procedure Act 51 of 1977 is granted only in respect of the sentences.'

M B Molemela
Judge of Appeal

[8] See *S v Fourie* 2001 (2) SACR 118 (SCA); [2001] 4 All SA 365 para 20.
[9] See *S v Dlamini and Others* [2012] ZASCA 207 para 14.

Appearances:

For applicant:	L A van Wyk
Instructed by:	Legal Aid South Africa, Pretoria
	Legal Aid South Africa, Bloemfontein Local Office
For respondent:	LA More
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein