



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case no:

1025/2022

In the matter between:

VUMANI OSCAR NTULI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Vumani Oscar Ntuli v The State* (1025/2022) [2023] ZASCA 150
(10 November 2023)

Coram: GORVEN, HUGHES AND MATOJANE JJA AND KOEN AND MASIPA
AJJA

Heard: No oral hearing in terms of s 19(a) of the Superior Courts Act 10 of
2013.

Delivered: 10 November 2023.

Summary: Appeal to the Supreme Court of Appeal against the refusal of the high
court of a petition seeking leave to appeal against conviction and sentence imposed

by a regional court – special leave granted by this court in terms of s 16(1) of the Superior Courts Act 10 of 2013 in respect of sentence only – conceded misdirection or misdirections – reasonable prospect of success on appeal against sentence.

ORDER

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

(a) The appeal succeeds.

(b) The order of the court below to the extent that it refused the petition against the sentences imposed is set aside and replaced with the following:

‘The application for leave to appeal against the sentences imposed on the applicant succeeds and the applicant is granted leave to appeal against his sentences to the Gauteng Division of the High Court, Johannesburg.’

JUDGMENT

Hughes JA (Gorven, Matojane JJA and Koen and Masipa AJA concurring)

[1] This is an appeal where special leave to appeal was granted by this Court in respect of sentence only, against the dismissal of a petition. The appellant was one of three accused. He was charged before the regional court, Lenasia, Gauteng (regional court) and was convicted on two counts of robbery with aggravating circumstances, one of unlawful possession of a firearm, and one of attempted murder. He was acquitted on a further count.

[2] For each of the first three counts he was sentenced to 15 years’ imprisonment and was sentenced to ten years’ imprisonment for the attempted murder count. The sentence in the first count was ordered to run concurrently with that imposed for the second count. Ten years of the sentence for the third count was ordered to run

concurrently with that imposed for the first. The cumulative effect was thus that the appellant was sentenced to an effective term of thirty years imprisonment.

[3] In terms of s 309B of the Criminal Procedure Act 51 of 1977 (CPA) the appellant applied for leave to appeal against conviction and sentence which was refused by the magistrate in the regional court. He then petitioned the Gauteng Division of the High Court, Johannesburg in terms of s 309C(2) for leave against his convictions and sentences. Mabesele J and Vorster AJ dismissed the petition. The appellant applied for special leave to appeal from this Court in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013, which leave was duly granted only in respect of the sentences.

[4] As the appeal does not concern the merits of the matter, I set out very briefly the background facts that culminated in the charges preferred. The appellant and his co-accused attacked and robbed the complainant, Ms Regina Siyabela, in Meadowlands, of about R14 000 at gunpoint. He was identified as the person who was in possession of the firearm. In addition, they robbed two Makro workers, of their personal belongings, whilst they were delivering goods at Ms Siyabela's premises. The appellant fled the scene with his co-accused in a Toyota Tazz, the police gave chase and a shootout ensued between the appellant, his co-accused and the police. Ultimately, the appellant and his co-accused abandoned the vehicle and fled on foot. They were arrested shortly after the incident.

[5] In sentencing the appellant, the magistrate imposed the minimum sentences prescribed in terms of the CPA for each count, having found that there were no substantial and compelling factors to deviate from them. The appellant submitted that his personal circumstances and, in particular the three and a half years that he was in custody awaiting trial, were not considered and that the cumulative effect of the sentences was too harsh.

[6] This Court has held that 'a petition for leave to appeal to the high court is, in effect, an appeal against the refusal of leave to appeal by the court of first instance'.¹ This means that, in refusing such a petition, the high court decided a matter on

¹ *Smith v S* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) (*Smith*) para 2.

appeal to it. Section 16(1)(b) of the Superior Courts Act 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’. ‘[T]he issue to be determined at this stage is “whether leave to appeal should have been granted by the High Court and not the appeal itself”. As a result the test to be applied “is simply whether there is a reasonable prospect of success in the envisaged appeal . . . rather than whether the appeal . . . ought to succeed or not”.²

[7] The appellant contends, that indeed, reasonable prospects of success exist for this court to grant leave to appeal. He submitted that the three and a half years spent awaiting trial ought to have been taken into account when he was being sentenced, as this would have reduced his cumulative sentence. The respondent conceded that the magistrate should have considered the time spent by the appellant in custody while awaiting trial. In *Radebe and Another v S*,³ Lewis JA held: ‘A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years’ imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.’⁴

[8] The failure of the magistrate to take into account the time spent by the appellant in custody while awaiting trial thus amounted to a misdirection on the part of the learned magistrate. In my view, had the magistrate engaged in that exercise, this could have had a bearing on the sentences imposed. This omission is apparent from the record and conceded by the respondent. As such there are reasonable

² Ibid para 3, citing *S v Matshona* [2008] ZASCA 58; [2008] 4 All SA 68 (SCA); 2013 (2) SACR 126 (SCA) (*Matshona*) para 8.

³ *Radebe and Another v S* [2013] ZASCA 31; 2013 (2) SACR 165 (SCA).

⁴ Ibid para 14.

prospects that the appellant could be successful on appeal against sentence.⁵ The high court erred in failing to grant the appellant that leave.

[9] I accordingly make the order set out below.

(a) The appeal succeeds.

(b) The order of the court below to the extent that it refused the petition against the sentences imposed is set aside and replaced with the following:

‘The application for leave to appeal against the sentences imposed on the applicant succeeds and the applicant is granted leave to appeal against his sentences to the Gauteng Division of the High Court, Johannesburg.’

W HUGHES
JUDGE OF APPEAL

Appearances

⁵ *Smith* paras 2-3; *Matshona* para 8.

For the Appellant:

Instructed by:

Heads of argument prepared by EA Guarneri

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For the Respondent:

Instructed by:

Johannesburg

Heads of argument prepared by EHF Le Roux

The Director of Public Prosecutions,

The Director of Public Prosecutions, Bloemfontein