



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 393/2021

In the matter between:

CLIFFORD MATHUTHU **FIRST**
APPELLANT

MBIZO KHUMALO **SECOND**
APPELLANT

CHRISTOPHER SIBANDA **THIRD**
APPELLANT

BHEKIMPILO NDLOVU **FOURTH**
APPELLANT

and

THE STATE **RESPONDENT**

Neutral citation: *Mathuthu and Others v The State* (393/2021) [2024] ZASCA 50
(17 April 2024)

Coram: MOKGOHLOA, NICHOLLS, MOTHLE and HUGHES JJA and
BAARTMAN AJA

Heard: 29 February 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 17 April 2024 at 11h00.

Summary: Criminal procedure – appeal against conviction and sentence – leave to appeal refused by regional magistrate – petition in terms of s 309C of the Criminal Procedure Act 51 of 1977 refused by the high court – special leave to appeal against the dismissal of the petition granted by this Court – test is whether appellants have shown reasonable prospects of success on appeal.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mokgoatheng and Janse Van Rensburg JJ sitting as court of appeal):

- 1 Leave to appeal of the refusal of the petition in respect of the conviction is dismissed.
- 2 Leave to appeal of the refusal of the petition in respect of sentence is granted.
- 3 The matter is remitted to the high court in respect of sentence.

JUDGMENT

Hughes JA (Mokgohloa, Nicholls and Mothe JJA and Baartman AJA concurring):

[1] This is an appeal against a refusal of a petition for leave to appeal by the Gauteng Division of the High Court, Johannesburg (the high court) (per Mokgoatheng and Janse Van Rensburg JJ). The appellants appeared before the Newlands Regional Court, Johannesburg (the regional court) on a number of counts, to wit eleven in total. They were convicted and sentenced. I will return to the sentences imposed upon each appellant later in the judgment.

[2] The appellants, aggrieved by the convictions and sentences imposed, sought leave to appeal, which the regional court refused. An application to the high court for leave to appeal by way of petition in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA) was refused. This Court subsequently granted special leave to appeal to this Court, the refusal of the petition seeking leave to appeal in respect of both the conviction and sentence.

[3] Counsel for the appellants laboured under the impression that he was at this Court to argue the merits of the appeal against both the convictions and sentences imposed by the regional court. This Court enquired from counsel whether he understood the task at hand, since it was evident from his heads of argument that he

had adopted the incorrect approach. From the bar, counsel responded that he placed reliance on a decision of this Court, *Van Wyk v S, Galela v S*,¹ where special leave to appeal had been granted in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 (the Superior Courts Act).

[4] It would be well to bear in mind that the threshold in terms of s 16(1)(b) is that it permits leave to appeal being granted on the basis that 'special circumstances' exist to do so. This threshold is much higher than that required by the high court when it considered the petition, for there the threshold was that there were 'reasonable prospects of the contemplated appeal succeeding'.²

[5] The confusion as to where an appeal lies from the magistrates' court under s 309 of the CPA at this juncture is disappointing, to say the least. From as far back as *S v Khoasasa*;³ *S v Matshona*;⁴ *Tonkin v S*;⁵ *Dipholo v S*;⁶ *Mthimkhulu v S*⁷ to the latest *De Almedia v S*,⁸ it has been reiterated that 'the issue to be determined is not whether the appeal against conviction and sentence should succeed but whether the high court should have granted leave, which in turn depends upon whether the appellant could be said to have reasonable prospects of success on appeal'.⁹ It is the decision of the high court refusing the petition, and the question whether it was correct in dismissing the petition in terms of s 309C of the CPA, that is before this Court.

[6] The appellants stood trial on several charges in the regional court. The counts ranged from robbery with aggravating circumstances read with s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Act) to attempted murder, unlawful possession of unlicensed firearms in term of ss 3 and 90 of the Firearm Control Act 60 of 2000 and contravention of s 36 of the General Law Amendment Act 62 of

¹ *Van Wyk v S, Galela v S* [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA).

² *Ibid* para 39.

³ *S v Khoasasa* [2002] ZASCA 113; 2003 (1) SACR 123 SCA; [2002] 4 All SA 635 (SCA).

⁴ *S v Matshona* [2008] ZASCA 58; [2008] 4 All SA 68 (SCA); 2013 (2) SACR 126 (SCA) (*Matshona*).

⁵ *Tonkin v S* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA) (*Tonkin*).

⁶ *Dipholo v The State* [2015] ZASCA 120.

⁷ *Mthimkhulu v S* [2016] ZASCA 180.

⁸ *De Almeida v S* [2019] ZASCA 84.

⁹ *Tonkin* para 3 quoting *Matshona* para 4; *Ntuli v The State* [2018] ZASCA 164 para 4; *S v Kriel* [2011] ZASCA 113; 2012 (1) SACR 1 (SCA) para 11-12; *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 2-3.

1935, being in possession of a motor vehicle which was reasonably suspected to have been stolen. They were all convicted on counts one to four and the third appellant was convicted on count five, whilst the fourth appellant was convicted on count six. The sentences were ordered to run concurrently.

[7] It is not desirable to deal with the merits in detail when dealing with an application of this nature. However, it is necessary for me to set out the facts of this case in more detail. I will be referring to those parts that will assist in establishing whether there are reasonable prospects of success on appeal. In summary, the facts giving rise to the appellants' convictions follow below.

[8] On 9 February 2015, Thatoya Malimo Molefe (Mr Molefe) was on his way home to Midrand, having attended a meeting in Parkmore when he was robbed of his Toyota Camry motor vehicle at gun point by the appellants. Following upon the aforesaid incident, on 17 February 2015 at 11h25 at the Worldware shopping mall, in Fairlands, the appellants entered an MTN store and robbed the store of cellphones at gun point, to the value of R380 000 and cash in the amount of R2000. In an attempt to flee from the MTN store, the appellants fired shots at the security personnel in the shopping mall and proceeded to their getaway vehicles, being the Toyota Camry, a Volkswagen Polo and a Kia Rio RS. This is the same Toyota Camry which was taken from Mr Molefe in Parkmore. Significantly, the cellphones were recovered in the vehicles at the scene of the shopping mall.

[9] A shoot out ensued between the security personnel and the appellants. In an attempt to flee the scene, one of the appellants was apprehended at the scene as he injured himself whilst trying to climb over a high wall. Another appellant fled into a nearby field, and was apprehended by the security personnel in the field after he shot at the security guard and eventually surrendered himself.

[10] Police on patrol, stationed at Fairlands, were informed of a Toyota Quantum fleeing the scene. They spotted the vehicle and gave chase. As the vehicle, which was in their sight at all times, attempted to evade the police on the N1, volumes of traffic hindered their progress. The driver and the passenger exited the vehicle and

fired shots at the police. At some point, the driver of the vehicle got back into the vehicle and abandoned the passenger, who was eventually apprehended by the police.

[11] The last appellant to be arrested was apprehended when he pretended to seek assistance from a home in the area close to the scene. A security guard on patrol noticed the altercation between this appellant and the gardener of the home. A shoot out ensued between them and the security guard sought cover outside of his vehicle. The appellant managed to drive away with the security guard's vehicle until he came to a *cul de sac* and was arrested by the security guards.

[12] The appellants' counsel challenged the evidence of the eye-witnesses and the reliability of these witnesses as single witnesses. The appellants submitted that the trial court did not exercise the necessary caution required when dealing with the evidence of a single witness.

[13] Regarding the convictions, the offences were committed from different moving scenes. Even so, the difficulty that the appellants have is that they were in one way or the other apprehended on the scene or in close proximity of the different scenes with the stolen cellphones from the MTN store and had firearms. In addition, they were positively identified by the witnesses as being there when the offence was committed. I have no difficulty with the manner in which the trial court applied the cautionary rule to the evidence of the single witnesses, having found the evidence to be satisfactory in all respects.

[14] It is unfortunate that the magistrate profiled the appellants when he commented that 'the fact that you have four Zimbabwe nationals, linked to the same event, they all speak the same language. It is remarkable that the police could find four individuals, on their versions so far removed from each other and yet attempt to falsely implicate them in the commission of the crime in this matter, it is highly unlikely'. Nonetheless, the hypothesis advanced by the magistrate bore credence and did not detract from the trial court's findings of fact on the evidence. It is trite that an appeal court's interference with a trial court's finding of facts in the absence of any misdirection by the trial court, is limited. The high court's dismissal of the petition

for leave to appeal the convictions was thus correct as there was no misdirection by the trial court.

[15] The Constitutional Court, in *S v Bogaard*,¹⁰ said the following about this Court's power to interfere with a sentence imposed by a lower court:

'It can only do so where there has been an irregularity that resulted in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

[16] The sentences imposed by the magistrate are not clearly set out and require clarification for a definitive sentence to emerge. Both counsel for the appellants and for the State conceded that there was confusion arising from the manner in which the magistrate imposed the sentences. Hence, both parties had different interpretations on what sentence had actually been imposed on the appellants. To illustrate the point made above, I set out the sentence imposed as per the record of the proceedings.

[17] The sentence reads:

' In respect of count 1 all four of you are sentenced to 15 years imprisonment in terms of section 51(2) of the Criminal Law Amendment Act. In respect of count 2 you are all four sentenced to 15 years imprisonment in terms of section 51(2) of the Criminal Law Amendment Act.

In respect of count 3 you are all four sentenced to 15 years imprisonment in terms of section 51(2) of the Criminal Law Amendment Act. In respect of count 4 you are all sentenced to 5 years imprisonment in terms of section 51(2) of the Criminal Law Amendment Act. Count 5 you are all sentenced to 5 years imprisonment in terms of the minimum legislation. Accused 3 in respect of count 7 five years imprisonment, that is for the possession of the firearm, and accused 4 in respect of count 6, 5 five years imprisonment.

So in short accused 1 and 2 then [indistinct] 55 years imprisonment and accused 3 and 4 60 years imprisonment each In respect of count 1 and 3 the sentences to run concurrently, 10 years of the sentence to run concurrently with the sentence in respect of count 2. Count 4

¹⁰ *S v Bogaard* [2012] ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC) para 41.

and 5 taking together for the purpose of sentence, 5 years imprisonment I think your conduct clearly demonstrate that you can never be trusted with the [indistinct] of licenced firearms and therefore you remain unfit in terms of Section 102 of the Firearm Control Act. Thank you.'

[18] From the aforesaid, it is clear that the judgment of the regional court on sentence is not particularly helpful and is incoherent. In addition, the high court did not deal with the confusion as set out in the sentences above. Regarding petitions, the high court is not obliged to give reasons for its refusal. It is trite that in terms of s 19(d) of the Superior Courts Act, an appellate court exercising appeal jurisdiction may 'confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require'.

[19] In my view, there was a clear misdirection by the sentencing court in imposing a sentence that is confusing, incoherent and clearly not comprehensible. The high court was obliged to deal with this confusion and failed to do so when it refused the petition. Thus, this Court is none the wiser and is constrained to remit the matter to the high court to deal with the issue of sentence.

[20] Court orders must be framed in unambiguous terms, practical and enforceable. In *Eke v Parsons*,¹¹ the Constitutional Court stated that there ought to be no doubt or confusion regarding what the order states. The Constitutional Court explained this as follows:

'If an order is ambiguous, unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. It is a fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done. The order may not be framed in a manner that affords the person to whom it applies, the discretion to comply or disregard it.'¹²

[21] It follows that the refusal of the petition for leave to appeal against sentence must succeed.

¹¹ *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 64.

¹² *Ibid* para 74.

[22] In the result, I make the following order:

- 1 Leave to appeal of the refusal of the petition in respect of the conviction is dismissed.
- 2 Leave to appeal of the refusal of the petition in respect of sentence is granted.
- 3 The matter is remitted to the high court in respect of sentence.

W HUGHES
JUDGE OF APPEAL

Appearances

For the appellants:

M Khonou

Instructed by:

Mosiapoa Attorneys, Protea Glen

Reynard & Associates Inc., Bloemfontein

For the respondent:

J F Masina

Instructed by:

The Director of Public Prosecutions,

Johannesburg

The Director of Public Prosecutions,

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