



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 14 FEBRUARY 2022

Status: Immediate

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Phumlani Nicholas Khathide v The State (840/2020) [2022] ZASCA 17 (14 February 2022)

Today the Supreme Court of Appeal (SCA) handed down judgment and upheld an appeal against the decision of the KwaZulu-Natal Division of the High Court of South Africa, Pietermaritzburg (the high court).

On 24 November 2014, the appellant, Mr Phumlani Nicholas Khathide (Mr Khathide) and his co-accused, Mr Sibusiso Ndaba (Mr Ndaba) appeared in the regional court and pleaded guilty to a charge of robbery with aggravating circumstances. They were convicted as charged. Mr Khathide was sentenced to 15 years imprisonment and Mr Ndaba to 17 years imprisonment. Four years later, on 18 October 2018, the two men lodged applications before the trial court, requesting leave to appeal the sentence. The regional court declined their request. They turned to the high court. On 19 February 2019, the high court issued an order, refusing to grant Mr Khathide leave to appeal against the sentence, but granted Mr Ndaba leave to appeal to the high court against the sentence. On 9 July 2020, Mr Khathide lodged with this Court an application for special leave to appeal the refusal by the high court to grant him leave to appeal the sentence. On 9 September 2020, the SCA granted Mr Khathide special leave to appeal the high court's refusal to grant Mr Khathide leave to appeal against his sentence. Thus, the crisp issue in this appeal, was whether the high court was correct in refusing to grant Mr Khathide leave to appeal the sentence imposed on him.

Mr Khathide's grounds for leave to appeal stood, amongst others, mainly on two points of law. First, that whereas the offence relating to the sentence under consideration was committed on 4 March 2013, the trial court misdirected itself by taking into account Mr Khathide's conviction of an offence committed on 28 July 2011 of theft and robbery with aggravating circumstances, in respect of which Mr Khathide was convicted on 13 November 2013. Second, Mr Khathide contended that the trial court misdirected itself when, during sentencing, it considered as evidence an oral statement made by the prosecutor after conviction, which was at variance with the facts as set out in the written statement which accompanied his guilty plea submitted in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (s 112 statement).

The SCA held that there were no prospects of success on appeal based on the first ground. It reasoned that the trial court was entitled to consider the theft and robbery convictions against Mr Khathide. With regard to the second ground of appeal, the SCA held that the statement of the prosecutor came at the time when Mr Khathide had already been convicted on the facts as stated in his s 112 statement, which made no mention of any exchange of gunfire. Thus, the trial court should have ignored the remark by the prosecutor, as both the prosecutor and the court were bound by the version set out in Mr Khathide's s 112 statement. The trial court therefore misdirected itself by relying on the prosecutor's remarks regarding the shooting and considering it as an aggravating factor in relation to Mr Khathide sentencing. Thus, the SCA held that there were reasonable prospects of success in relation to the second ground. As a result, the SCA granted the appeal and set aside the high court's refusal to grant leave to appeal.

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