



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 1135/15
Not reportable

In the matter between:

VUSUMUZI CHRISTOPHER MTHIMKHULU

APPELLANT

and

THE STATE

RESPONDENT

Neutral Citation: *Mthimkhulu v The State* (1135/15) [2016] ZASCA 180
(28 November 2016)

Coram: Seriti, Mathopo, Van der Merwe and Mocumie JJA and
Nicholls AJA

Heard: 11 November 2016

Delivered: 28 November 2016

Summary: Criminal Procedure – appeal against conviction – leave to appeal refused by regional magistrate – petition refused by the court a quo – special leave to appeal against conviction granted by the Supreme Court of Appeal – Section 309 of the Criminal Procedure Act – whether leave to appeal ought to have been granted.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg
(Seegobin J and Barnard AJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the KwaZulu-Natal Division of the High Court, Pietermaritzburg is set aside and replaced with the following:

‘The appellant is granted leave to appeal to the KwaZulu-Natal Division of the High Court, Pietermaritzburg against his conviction of robbery with aggravating circumstances.’

3 The registrar is directed to forward a copy of the judgment to the Legal Aid Board with the request that the Legal Aid Board take steps as might be necessary to bring before the KwaZulu-Natal Division of the High Court, Pietermaritzburg, appeals by Gxekathini Bernard Ngubane and Sibusiso Ngqulunga against their convictions and sentences of robbery with aggravating circumstances.

JUDGMENT

Mathopo JA (Seriti, Van der Merwe and Mocumie JJA and Nicholls AJA concurring):

[1] The appellant and his two co-accused were arraigned in the regional court, Pietermaritzburg on a charge of robbery with aggravating circumstances read with the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act). They were convicted and sentenced to 15 years’ imprisonment, the magistrate having found that there were no substantial and compelling circumstances justifying a lesser sentence. The magistrate refused the appellant leave to appeal against conviction and

sentence. On petition to the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court) in terms of s 309C of the Criminal Procedure Act 51 of 1977, Seegobin J and Barnard AJ granted him leave to appeal against sentence only. As regards the conviction the high court refused him leave to appeal 'on the basis that the reasons of the learned magistrate cannot be faulted in any way and there are no prospects that another court will come to a different conclusion'.

[2] Aggrieved by this decision the appellant lodged an application for special leave in this court against his conviction in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013.

[3] It bears mentioning that when the petition served before the high court the record of the proceedings was incomplete in that parts of the appellant's evidence including the second part of his cross-examination as well as the whole of his re-examination was missing. Attempts to have the record reconstructed failed because the magistrate lost or misplaced his notes. In addition the appeal's clerk could not locate the prosecutor's notes in the docket. To compound the problem the attorney who represented the appellant and his two co-accused before the regional court also could not be located. Notwithstanding these difficulties the high court dealt with the petition and refused the appellant's leave to appeal against the conviction. This appeal is against that finding with the special leave of this court.

[4] The question whether this court has jurisdiction to entertain the appeal on the merits under the circumstances of this case was considered by this court in various decisions which include: *S v Khoasasa* [2002] ZASCA 113; 2003 (1) SACR 123 (SCA), *S v Matshona* [2008] ZASCA 58; 2013 (2) SACR 126 (SCA), *S v Tonkin* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA), and *Van Wyk v S, Galela v S* [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA), *Dipholo v S* [2015] ZASCA 120 and most recently in *Lubisi v S* [2015] ZASCA 179.

[5] This court has in a number of decisions stated that what is to be adjudicated upon is whether the decision of the high court dealing with the refusal of the petition was correct in terms of s 309C of the CPA and if it is, *cadit quaestio*. However, if the court erred in holding that there were no reasonable prospects of success then leave to the full bench will have to be granted on the merits to be adjudicated by the court. The test in an application of this nature is whether there are reasonable prospects of success in the envisaged appeal. It is not desirable to traverse the merits in detail. I shall only refer to certain parts of the evidence which indicate that there are reasonable prospects of success.

[6] Before us it was contended on behalf of the appellant that regard being had to the missing parts of the record, the high court should have allowed the petition. Properly understood the gravamen of the appellant's argument is that the missing parts of the appellant's evidence were crucial to the determination of whether the State had succeeded in proving its case beyond reasonable doubt against the appellant and his co-accused. Counsel for the State, in his heads of argument, conceded that the record was incomplete but argued that despite the deficiencies a finding or decision not to grant the appellant's leave to appeal could still be made. Counsel failed to advance any cogent submission as to how this could be achieved as it was obvious that the court was at a patent disadvantage due to an incomplete record.

[7] As regards the conviction, counsel for the State conceded, correctly, in my view that he could not support a finding that there were no reasonable prospects of success. In view of the discrepancies and the mutually contradictory evidence of various witnesses, I consider that concession to have been properly made. On the other hand, counsel for the appellant took aim at the regional magistrate's improper evaluation of the evidence of the various State witnesses and submitted that the regional magistrate inversed the onus by requiring the appellant to rebut the *prima facie* case against him. This was clearly not the test. This court has repeatedly cautioned against placing an onus on the accused to disprove his guilt. It is trite that in a criminal case the onus remains with the State and does not shift.

[8] The issue in this case is whether the incident that occurred was an armed robbery of the complainant by the appellant and his co-accused or whether it was merely a fight between the appellant and the complainant and the role played by his co-accused. Various witnesses have given different accounts as to what transpired on the day in question. In my view the appellant should be granted an opportunity to ask the high court to make a proper assessment and analysis of all the evidence by, amongst others, weighing the strength and the weakness of the State's case vis-à-vis that of the appellant and his witnesses, including probabilities and improbabilities of both versions of events.

[9] Another matter that requires attention is the fate of the appellant's co-accused who did not appeal. In view of our attitude that there are reasonable prospects of success it would seem to me proper that they should be assisted to commence their appeal processes. In this regard, the registrar of this court should be directed to refer this judgment to the Legal Aid Board with the request that appropriate steps be taken to bring their appeals before the high court together with that of the appellant.

[10] Accordingly the following order is made:

1 The appeal is upheld.

2 The order of the KwaZulu-Natal Division of the High Court, Pietermaritzburg is set aside and replaced with the following:

'The appellant is granted leave to appeal to the KwaZulu-Natal Division of the High Court, Pietermaritzburg against his conviction of robbery with aggravating circumstances.'

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Ngqulunga against their convictions and sentences of robbery with aggravating circumstances.

R S MATHOPO
JUDGE OF APPEAL

APPEARANCES:

For appellant:

G H Penzhorn SC

Instructed by:

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Webbers, Bloemfontein

For respondent:

J du Toit

Instructed by:

Director of Public Prosecutions, Pietermaritzburg

Director of Public Prosecutions, Bloemfontein