



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No:487/2016

In the matter between:

JAMES SELLO MATHEKOLA

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Mathekola v State* (487/2016) [2017] ZASCA 100 (21 August 2017)

Coram: Lewis and Mathopo JJA, Plasket, Tsoka and Schippers AJJA

Heard: 16 August 2017

Delivered: 21 August 2017

Summary: Section 17(2)(f) of the Superior Courts Act 10 of 2013 – reconsideration of dismissal of petition for leave to appeal – co-accused of applicant having been granted leave to appeal on petition and having succeeded in his appeal – applicant’s prospects of success on appeal strong – leave to appeal granted.

ORDER

Application for reconsideration referred by Mpati P in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013:

The application succeeds and the order dismissing the applicant's petition for leave to appeal is varied to read:

'The applicant is granted leave to appeal to the Gauteng Division of the High Court, Pretoria against conviction and sentence in respect of counts 2, 4, 6 and 8.'

JUDGMENT

Plasket AJA (Lewis and Mathopo JJA, Tsoka and Schippers AJJA concurring):

[1] This is an application, brought by Mr James Sello Mathekola (the applicant) for the reconsideration of the refusal of a petition for leave to appeal. It is brought in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013.

[2] The basic facts are these. On the night of 17 September 2005, a group of armed men entered the home of the Swanepoel family in Pretoria. They forced four members of the family into the lounge where the applicant guarded them while his comrades ransacked the house in search of items of value. One of the complainants had, prior to being forced from her room, called the police. The police arrived while the robbers were still in the house. The robbers scattered but one, accused 1 in the subsequent trial, was arrested inside the house. The applicant was one of the robbers who managed to escape. He was arrested later.

[3] The applicant was subsequently convicted, along with a co-accused, Mr Peter Maphakela (who was accused 1), of four counts of robbery with aggravating circumstances (counts 1, 3, 5 and 7), four counts of kidnapping (counts 2, 4, 6 and 8), the unlawful possession of a firearm (count 14) and the unlawful possession of ammunition (count 15). (A third accused was also charged and convicted of less serious, but related offences.)

[4] Both accused were sentenced to 15 years imprisonment in respect of each of counts 1, 3, 5 and 7, to seven years imprisonment and one year of imprisonment respectively in respect of counts 14 and 15. All of these sentences were ordered to run concurrently. They were sentenced in respect of each of counts 2, 4, 6 and 8 to five years imprisonment. These sentences were ordered to run concurrently with each other. The result was that the two accused were sentenced to effective terms of 20 years imprisonment.

[5] Both accused applied unsuccessfully for leave to appeal. Their petitions to the Gauteng Division of the High Court, Pretoria were also unsuccessful. In this court, Mr Maphakela's petition was successful. He was granted leave to appeal to the Gauteng Division of the High Court, Pretoria against the convictions and sentences in respect of counts 2, 4, 6 and 8. The applicant's petition, considered by a different pair of judges to those who considered Mr Maphakela's petition, was unsuccessful.

[6] On learning of Mr Maphakela's success, the applicant applied to the President of this court for the reconsideration of the refusal of his petition. Section 17(2)(f) of the Superior Courts Act provides that in circumstances such as this, the President of this court 'may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation'.

[7] Mpati P referred the refusal of the applicant's petition to this court for reconsideration. In so doing, he found exceptional circumstances to be present.¹

[8] Mr Maphakela's appeal succeeded before a full court of three judges of the Gauteng Division of the High Court, Pretoria. In the judgment, Davis AJ held that the kidnapping convictions amounted to a duplication of convictions. The intention of the robbers, he said, was not to kidnap the Swanepoel family but to enable them to dispossess their victims of their property: the sole intention throughout was to rob.²

[9] In order to be granted leave to appeal, an applicant must convince a court 'on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding'.³

[10] In this instance, the applicant's prospects of success are strong: he already has a full court decision in his favour that would have to be followed unless the court hearing his appeal is convinced that the earlier judgment is clearly wrong. In the nature of things, that tends to occur but rarely. Special circumstances are present because to refuse the applicant leave to appeal, given his co-accused's success on appeal and the judgment in his favour, would be unjust.

[11] In the result, I make the following order.

The application succeeds and the order dismissing the applicant's petition for leave to appeal is varied to read:

'The applicant is granted leave to appeal to the Gauteng Division of the High Court, Pretoria against conviction and sentence in respect of counts 2, 4, 6 and 8.'

¹ *S v Mathekola* (487/2016) [2016] ZASCA 106 (14 July 2016) para 3.

² *Maphakela v S* (A257/2016) ZAGPHC 978 (29 November 2016) para 3.7.

³ *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

C PLASKET
Acting Judge of Appeal

APPEARANCES:

For the Appellant:

HL Alberts

Instructed by:

Justice Centre, Pretoria

Justice Centre, Bloemfontein

For the Respondent:

CP Harmzen

Instructed by:

Director of Public Prosecutions, Pretoria

Director of Public Prosecutions, Bloemfontein