THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 380/2018

In the matter between:

JEFFREY BOB NARE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Nare v The State* (380/2018) [2019] ZASCA 72 (30 May 2019)

Coram: Navsa ADP and Saldulker JA and Eksteen AJA

Heard: 16 May 2019

Delivered: 30 May 2019

Summary: Application for leave to appeal against the refusal by the High Court to grant leave to appeal against conviction — Interpretation of the order of this court granting leave to appeal – Whether reasonable prospects of success established.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Raulinga and Molefe JJ):

1 The appeal in respect of count 12 is dismissed.

2 The appeal in respect of counts 2 and 13 is upheld.

3 The order of the Gauteng Division of the High Court, Pretoria refusing leave to appeal is set aside and replaced with the following:

'The appellant is granted leave to appeal to the full bench of the Gauteng Division of the High Court, Pretoria, against his conviction of attempted murder (count 2) and possession of ammunition without holding a licence, permit or authorisation (count 13).'

JUDGMENT

Eksteen AJA (Navsa ADP and Saldulker JA concurring):

[1] The appellant was convicted in the Regional Court Gauteng, Pretoria, of attempted robbery with aggravating circumstances (count 1), attempted murder (count 2), unlawful possession of a firearm (count 12) and unlawful possession of ammunition (count 13) and sentenced to various terms of imprisonment. An application for leave to appeal against his convictions and sentences was refused. On petition to the Judge President, Gauteng, in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA) he obtained leave to appeal against his sentences, but not against his convictions. The appeal against the sentences is currently pending in the high court.

The present appeal is against the decision of the high court to refuse him leave to appeal against his convictions.

[2] Before us there was some debate in relation to the extent of the issues before us. It has its origin in the history of the rulings made in this court. An application in terms of s 17 (2) (b) of the Superior Courts Act 10 of 2013 (the Act) was made for leave to appeal against the decision of the high court not to grant leave to appeal against his convictions. This application was considered by two judges of this court (the panel judges) in accordance with s 17(2)(c) of the Act. On 20 October 2017 they granted the appellant leave to appeal in respect of counts 2, 12 and 13 (the first order) in the following terms:

'1. The application for condonation is granted.

2. Special leave to appeal against conviction is granted to the Supreme Court of Appeal.

3. The leave to appeal is limited to the following:

Counts 2, 12 and 13.'

The application in respect of count 1 was accordingly refused. Dissatisfied with the refusal of the application in respect of count 1 the appellant applied to the President of this court to reconsider or vary the first order as envisaged in s 17 (2)(f) of the Act. On 27 March 2018 she refused the application (the second order).

[3] On 12 July 2018, however, a further 'order' emanated from this court in the name of the panel judges (the third order) in the following terms:

'1 The application for condonation is granted.

2 Special leave to appeal is granted to the Supreme Court of Appeal against the dismissal of a petition in terms of s 309 C of the Criminal Procedure Act 51 of 1977.'

This appears to have been the result of the belated realisation that the first order ought to have expressed more clearly that the application for leave to appeal was granted only in relation to the refusal in the high court of the application for leave to appeal. Simply put, that means that it ought to have been in the terms of paragraph 2 of the third order.

[4] Counsel on behalf of the appellant submitted that the third order constituted an 'amended order' granting him leave to appeal against the dismissal of the petition in

respect of all four counts of which he had been convicted. The argument is misplaced. Section 17(2)(f) of the act provides that the decision of the panel judges 'to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal 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'. Self-evidently, once a decision has been taken by the panel judges it is final. The panel judges are *functus officio* thereafter. The only remaining remedy available to an appellant is to apply to the President of this court to refer the matter to the court for reconsideration or variation of the first order. This the appellant did, without success. The application for leave to appeal against the ruling of the high court in respect of count 1 was therefore finally dismissed when the second order was issued.

[5] In relation to a refusal by the high court of a petition against conviction and sentence by a magistrates' court, the appeal lies to this court. This court would then decide on whether the petition ought to have been granted and if the answer is in the affirmative it would make an order to that effect and remit the matter to the high court for consideration of the merits. This was clearly stated in *S v Matshona* 2013(2) SACR 126 where Leach AJA summarised the possession as follows:

'It is clear . . . that where . . . and accused obtains leave to appeal to this court against the refusal in a high court of a petition seeking leave to appeal against a conviction or sentence in the regional court, the issue before this court is whether leave to appeal should have been granted by the high court, and not the appeal itself which has been left in limbo, so to speak, since the accused first sought leave to appeal to the high court. After all, in the present case, the appellants' appeal against his sentence has never been heard in the high court and, . . . the power of this court to hear appeals of this nature is limited to its statutory power. Section 309(1) prescribes that an appeal from the magistrates' court lies to the high court, and an appeal against the sentence imposed on the appellant in the regional court is clearly not before this court at this stage'.[1] Clearly, what the panel judges intended with the first order was to grant leave to appeal against the decision of the high court refusing leave to appeal on

[1] At para [5] page 127.

counts 2, 12 and 13. This is how their order must be construed. They could not do otherwise. There is therefore no appeal before us in respect of count 1.

[6] I turn to consider whether the application for leave to appeal in respect of counts 2, 12 and 13 ought to have been granted by the high court. The complainant, one Rossouw, together with members of his family and friends had gathered socially in a lapa at his homestead on a small holding in Kameeldrift East, Tshwane. A vehicle arrived at his home with seven men who pretended that they wanted to buy sheep. At first, Rossouw was reluctant to sell any sheep, but they persisted and he ultimately agreed. He, together with three or four of the men, proceeded away from the homestead to the sheep kraal. After some conversation an agreement in respect of the purchase of sheep was arrived at. At that stage the men suddenly produced firearms and demanded money and 'plasmas'. Rossouw noticed a scuffle occurring at the lapa where the remaining intruders attacked his family and guests. He resisted and grabbed one of his assailants around the neck in order to use him as shield while gun shots were fired around them. One of the robbers, armed with a firearm, began to retreat while pointing his firearm at Rossouw. Then, suddenly, he lowered his weapon and shot Rossouw in the leg. As Rossouw fell to the ground the men ran to their vehicle and fled.

[7] The appellant denied any participation in the events. Although an identification parade was subsequently held, the record of the parade was mislaid and no evidence was tendered at the trial in respect of the identification parade. In court, by way of a dock identification, Rossouw identified the appellant as one of the men who had accompanied him to the kraal. The appellant, he says, was the person who did most of the talking and was one of the men armed with a firearm. He was, however, not the person who fired the shot. Rossouw's identification was corroborated by the fact that the appellant's finger print was lifted from the vehicle in which the men arrived and fled. The appellant's endeavours to explain the time at and manner in which the fingerprint came to be on the vehicle was rightly rejected by the magistrate. In the circumstances the application for leave to appeal in respect of count 1 was correctly dismissed.

[8] In respect of count 2, there is little doubt that the assailants acted with a common purpose to rob Rossouw. It is argued, however, that the appellant should only have been convicted of assault with intent to do grievous bodily harm. The evidence, it is argued, shows that the assailant had pointed his firearm at Rossouw for some time, but then intentionally lowered the firearm before shooting. It was further argued, accordingly, that there is a reasonable prospect that a court of appeal may find that the facts, properly construed, do not establish either *dolus directus* to kill or *dolus evantualis* on the part of the assailant. This question is a matter for argument before the court of appeal. Suffice it to say that there is, in my view, a reasonable prospect that a court of appeal would come to a different conclusion to that arrived at by the magistrate.

[9] In respect of count 12 Rossouw testified that he had formerly been in the defence force, he was a reservist and a member of the 'commandos' and was trained in this regard. He accordingly had a sound knowledge of firearms. During cross-examination on behalf of the appellant he testified that the appellant was the first person who had put a firearm in his face and instructed him to return to the homestead. There is accordingly direct evidence that the appellant was in possession of a firearm.

[10] It is argued on behalf of the appellant that there is a reasonable prospect that a court of appeal would find that it has not been proved that it was not in fact an imitation firearm or, if it was indeed a firearm, that it was not licenced. In view of Rossouw's training and experience of firearms and their proximity to one another during the incident which occurred during broad daylight, I do not think that there is a reasonable prospect that another court would hold that the object might have been an imitation firearm.

[11] This bring me to the question of the licence. The material portion of s 250(1) of the CPA, that the state relied on in the indictment, provides:

'If a person would commit an offence if he . . . had in his possession . . . or used any article . . . without being a holder of a licence, permit, . . . or other authority . . ., an accused shall, at

criminal proceedings upon a charge that he committed such an offence, be deemed not to have been the holder of the necessary authority, unless the contrary is proved''.

The effect of this section is that a presumption is created in favour of the prosecution. It was therefore incumbent upon the appellant to establish that he did have a licence to possess the firearm. He testified at the trial that he was not present on the scene. He did not suggest that he was licenced to possess a firearm. In the circumstances there are no reasonable prospects of success and the appeal in respect of count 12 must fail.

[12] Count 13 relates to the unlawful possession of ammunition. I recorded earlier that the evidence does not establish that the appellant discharged his firearm at any stage. In these circumstances it is argued that, even if he did have a firearm, it has not been proved that there was any ammunition in the firearm. The state sought to counter this argument with reference to the probabilities arising from the circumstances which prevailed. This is a matter for argument, but I consider that there is a reasonable prospect that another court would find that the state has failed to discharge the onus of establishing that the appellant was in unlawful possession of ammunition.

[13] In the result I find that the high court erred in refusing the appellant leave to appeal in respect of counts 2 and 13. It correctly dismissed the petition for leave to appeal in respect of count 12. There is no appeal before us in respect of count 1 and the petition in respect of this count was correctly dismissed by the high court and the panel judges.

[14] Accordingly the following order is made:

1 The appeal in respect of count 12 is dismissed.

2 The appeal in respect of counts 2 and 13 is upheld.

3 The order of the Gauteng Division of the High Court, Pretoria, refusing leave to appeal is set aside and replaced with the following:

'The appellant is granted leave to appeal to the full bench of the Gauteng Division of the High Court, Pretoria, against his conviction of attempted murder (count 2) and possession of ammunition without holding a licence, permit or authorisation (count 13).'

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J Eksteen

Acting Judge of Appeal

APPEARANCES:

For the Appellant:	A B Booysen
Instructed by:	SMO Seobe Inc, Bloemfontein
For the Respondent:	E Leonard SC
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein