THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Non Reportable

In the matter between:

Case No: 529/19

KUMBULANE VUKANI ZULU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Zulu v The State* (529/19) [2019] ZASCA 166 (29 November 2019)

Coram: Cachalia, Molemela and Dlodlo JJA

Heard: In chambers

Delivered: 29 November 2019

Summary: Appeal from decision of the high court dismissing a petition in terms of s 309C of the Criminal Procedure Act 51 of 1977 – appeal against the refusal of leave to appeal by the high court is appealable with special leave of this Court – the order appealed against is the refusal of leave – accordingly this Court cannot decide the merits of the appeal. Matter was considered in chambers.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Balton and Bezuidenhout JJ sitting as a court of appeal):

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following:

'The applicant is granted leave to appeal to the KwaZulu-Natal High Court, Pietermaritzburg, against his convictions in respect of counts 4, 5, 6 and 7.'

JUDGMENT

The Court (Cachalia, Molemela and Dlodlo JJA)

[1] This is an application for special leave to appeal against the decision of the high court denying the appellant leave to appeal against his convictions on three counts of unlicensed possession of a firearm and one count of unlawful possession of ammunition.

[2] The facts giving rise to the applicant's conviction are substantially undisputed. The applicant and his co-accused appeared at the Verulam Regional Court (regional court) on three counts of robbery with aggravating circumstances, three counts of possession of an unlicensed firearm and one count of possession of ammunition. On 11 April 2016, they were all convicted as charged. The appellant was sentenced to 10 years imprisonment on each count of robbery with aggravating circumstances, 5 years imprisonment on each count of possession of unlicensed firearm and 2 years for possession of ammunition. Several sentences were made to run concurrently, with the result that his effective sentence was 17 years imprisonment.

[3] Aggrieved by the decision of the regional court, he applied to that court for leave to appeal against all his convictions and sentences. His application was dismissed. He

thereafter directed his application for leave to appeal to the KwaZulu-Natal High Court, Pietermaritzburg (the high court) as contemplated in s 309C of the Criminal Procedure Act 51 1977 (the Criminal Procedure Act). His petition was refused by two judges of the high court (Balton and Bezuidenhout JJ) on 21 August 2018. Having accepted that he had no prospects of success in respect of his convictions on the three counts of robbery with aggravating circumstances, the applicant applied to this Court in terms of s 16(1)*(b)* of the Superior Court Act 10 of 2013 (Superior Courts Act) for special leave to appeal to this Court against the refusal of the high court to grant leave against the three counts of possession of unlicensed firearms and one of possession of unlicensed ammunition (charge 4, 5, 6 and 7). The State did not file papers opposing the application. In terms of s 16(1)*(b)* of the Superior Courts Act, an appeal against any decision of the High Court, on appeal to it, lies to this court with its (this Court's) special leave. The application for special leave to appeal to this Court was considered by two judges of this court in chambers. Having formed the view that the 'the prospects of success are so strong that the refusal of leave to appeal would probably result in manifest injustice',[1] they granted the appellant special leave on 15 July 2019.

[4] I interpose to reiterate the legal principles enunciated by this Court in relation to applications for leave to appeal to this Court following the high court's refusal to grant leave to appeal against the decision of a magistrate, as contemplated in s 309C of the Criminal Procedure Act. In *S v Khoasasa,*[2] this Court held that a refusal of leave to appeal by two judges of the provincial division constitutes a 'judgment or order' or 'a ruling' of that Court on appeal to it.[3] In *Reno Moyo v The State*[4] this Court in turn held that where leave has been refused by the high court in the circumstances described above, the only order appealed against is the refusal of leave and not the appeal on the merits, with the result that this court could not, upon the granting of special leave, decide the merits of an appeal that were not considered by the high court.

[5] Against the background of the afore-mentioned authorities, it is clear that the only issue before us is whether leave to appeal to the high court should have been

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[1] *Van Wyk v S*, *Galela v S* 2015 (1) SACR 584 (SCA) para 21.
[2] *S v Khoasasa* 2003 (1) SACR 123 (SCA) paras 14 and 19-22.
[3] This was within the contemplation of s 20(1) or s 21(1) of the Supreme Court Act 59 of 1959, which has since been repealed by the Superior Courts Act.
[4] [2018] ZASCA 157 (23 November 2018) para 7.

granted or not. If such an appeal is successful, the matter should be referred back to the high court so that it can consider the appeal on the merits.

[6] The Registrar of this Court was directed to contact the representatives of both parties to enquire whether they would have any objection if the appeal were to be dealt with without the hearing of oral argument as contemplated in s 19 of the Superior Courts Act, bearing in mind that no heads of argument had been filed. None of the parties objected to the proposed approach.

[7] I now proceed to consider whether the high court was correct in dismissing the applicant's application for leave to appeal against his convictions relating to his unlicensed possession of firearms and ammunition, respectively. The regional court's judgment in respect of those charges was very scanty. It stated that:

'Insofar as counts 4, 5, 6 and 7 are concerned, they involve the unlawful possession of firearms. There were three firearms that were actually found in this car and all these firearms were actually connected to the passengers in the car and not the driver. So the state is asking the Court to draw an inference that they all possessed the firearm and that would be a reasonable inference bearing in mind that these same people were involved and seen with firearms the same people during the robbery, so even if the one had the firearm the other also possessed . . .[indistinct]

The Court finds therefore that all five accused before court have been incriminated and proved to have been involved in the commission of the robberies which are count 1, count 2, count 3 and therefore the Court finds the five accused before court guilty on all counts as pleaded.'

[8] It was on the basis of this passage of the regional court's judgment that the applicant contended that he was wrongly convicted on the doctrine of joint possession. As at the time of the appellant's conviction, the legal position pertaining to the doctrine of joint possession had already been clarified as follows in *S v Kwanda*:[5]

'The fact that the appellant conspired with his co-accused to commit robbery, and even assuming that he was aware that some of his co-accused possessed firearms for the purpose of committing the robbery, does not lead to the inference that he possessed such firearms jointly with his co-accused. In *S v Nkosi*, Marais J said that such an inference is only justified

[5] *Kwanda v S* 2013 (1) SACR 137 (SCA) para 5. Also see *Ramoba v S* [2017] ZASCA 74; 2017 (2) SACR 353 (SCA) (1 June 2017) para 13; *Makhubela v S, Matjeke v S* 2017 (2) SACR 665 (CC) para 55.

where “the state has established facts from which it can properly be inferred by a Court that: (a) the group had the intention (a*nimus*) to exercise possession of the guns through the actual detentor and (b) the actual detentors had the intention to hold the guns on behalf of the Group”. Nugent JA, in *S v Mbuli*, referred to the above quoted passage from *Nkosi* and commented that Marais J had “set out the correct legal position”. In *Mbuli*, the appellant and his two co-accused were charged with and convicted of being in possession of a hand grenade that had been found in their vehicle shortly after they had robbed a bank (this is the only charge of relevance to this matter). Nugent JA found that the evidence did not establish that the appellant and his co-accused had possessed the hand grenade jointly and that it was possible that the hand grenade had been possessed by only one of them. Nugent JA concluded with these words:

“I do not agree that the only reasonable inference from the evidence is that the accused possessed the hand grenade jointly. It is equally possible that, like the pistols, the hand grenade was possessed by only one of the accused. Mere knowledge by the others that he was in possession of a hand grenade, and even acquiescence by them in its use for fulfilling their common purpose to commit robbery, is not sufficient to make them joint possessors for purposes of the Act. The evidence does not establish which of the accused was in possession of the hand grenade and on that charge, in my view, they were entitled to be acquitted”.’ (footnotes omitted)

[9] On the face of it, it appears that the trial court was not aware of the judgments referred to in the aforegoing paragraph. It appears from the regional court judgment that it may have not identified evidence linking the applicant to the firearms found. There is therefore a reasonable possibility that another court could uphold the appeal on the conviction for the unlawful possession of firearm.

[10] For all the reasons mentioned above, the following order is made:

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following:

‘Leave to appeal in respects of counts 4, 5, 6 and 7 is granted’.

‘The applicant is granted leave to appeal to the KwaZulu-Natal High Court, Pietermaritzburg, against his convictions in respect of counts 4, 5, 6 and 7.’

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A Cachalia

Judge of Appeal

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MB Molemela

Judge of Appeal

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DV Dlodlo

Judge of Appeal

Appearances:

For Appellant:	T Mpanza Attorneys
	Durban
	c/o Blair Attorneys
	Bloemfontein
For Respondent:	Director of Public Prosecutions, Pietermaritzburg