



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 1262/2017

In the matter between:

SANELE SELBY KHUMALO

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Khumalo v The State* (1262/2017) ZASCA 161 (28 November 2018)

Coram: Ponnann, Seriti, Saldulker and Mbha JJA and Mothle AJA

Heard: 8 November 2018

Delivered: 28 November 2018

Summary: Criminal law and procedure – conviction – unlawful possession a firearm – appeal against conviction – leave to appeal refused by trial court – petition in terms of s 309C of the Criminal Procedure Act 51 of 1977 – evidence establishing that firearm was a semi-automatic – no prospects of success in contemplated appeal against conviction.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tlhapi and Louw JJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Mbha JA (Ponnan, Seriti, Saldulker JJA and Mothle AJA concurring):

[1] The appellant was convicted in the regional court sitting in Piet Retief, Mpumalanga (the trial court) on three counts. On count 1, theft of a Norinco 9 mm firearm and six rounds of ammunition, he was sentenced to four years' imprisonment. On count 2, unlawful possession of an unlicensed firearm in terms of s 3 read with ss 1, 103, 117, 120(1)(a) and s 121 read with schedule 4 and s 151 of the Firearms Control Act 60 of 2000 (the Act), he was sentenced to ten years' imprisonment. On count 3, unlawful possession of ammunition, he was sentenced to one year imprisonment. The court ordered the sentences to run concurrently and the appellant is therefore currently serving a sentence of ten years' imprisonment.

[2] The appellant's application to the trial court for leave to appeal against conviction was dismissed. He then petitioned the Gauteng Division of the High Court, Pretoria (the

high court) in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA) for leave to appeal. Leave to appeal was granted in respect of sentence only by Tlhapi and Louw JJ.

[3] The appellant thereupon petitioned this court in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013¹ for special leave to appeal the high court's order dismissing the petition for leave to appeal against the conviction. On 2 November 2017 the two judges of this court, who considered the petition, granted the appellant special leave to appeal against the dismissal by the high court of his petition against conviction.

[4] The issue to be determined by this court is thus whether the appellant's application for leave to appeal to the high court ought to have succeeded. Accordingly, what this court has to decide is whether or not the high court was correct in dismissing the appellant's petition to it. If that court erred, then this court will set aside the order of the high court; grant the appellant leave to appeal and refer the matter back to the court a quo to hear the appeal in respect of conviction on its merits.

Put differently, what we are required to determine is whether or not there are reasonable prospects of the appellant's appeal against his conviction succeeding. The test has been framed in the following terms:²

'What the test of reasonable prospects of success postulates is a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different

¹ Section 16(1)(b) states:

'Subject to s 15(1), the Constitution and any other law –

...

(b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal....'

² *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

to that of the trial court. In order to succeed therefore, the appellant must convince this 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. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[5] At the commencement of the hearing before this court, counsel for the appellant correctly conceded that the convictions in respect of counts 1 and 3 for theft and the unlawful possession of ammunition respectively were proper and that the contemplated appeal to the high court against conviction would be directed solely in respect of count 2. I turn briefly to consider the facts giving rise to the conviction. It is common cause that the appellant, a taxi driver, was in the employ of the complainant Mr Mzuleki Daniel Nkosi. On the morning of 19 March 2014, Mr Nkosi left his firearm containing six rounds of ammunition inside his Nissan Tiida motor vehicle. He then returned to his house to collect money for petrol from his wife. In the meantime the appellant moved the vehicle from inside the yard and parked it outside the premises. He similarly moved other taxi vehicles and thereafter left in his assigned minibus taxi. Upon discovering that the firearm was missing, the complainant then went to the police station to lay a charge of theft of the firearm against the appellant.

[6] On 21 March 2014 the complainant returned to the police station and reported that the appellant had been seen in possession of the stolen firearm at the taxi rank. He then accompanied members of the South African Police Service to the taxi rank. The

police officers searched the appellant's vehicle in his presence but did not find the firearm. The appellant was taken to the police station and upon being told that he well knew what the police were looking for, he took them back to the vehicle where he produced the firearm and handed it to the police. In the presence of the appellant and the police, the complainant positively identified the firearm as his property, which now contained four live rounds of ammunition.

[7] The appellant's version was that he discovered the complainant's firearm in his assigned minibus taxi while he was looking for a wheel spanner in the process of changing a tyre. His intention was to return it to the complainant but was arrested before he could do so. He speculated that the complainant's grandson may have placed the firearm in the taxi.

[8] The basis of the challenge against the conviction in respect of count 2 is that although the appellant admitted he was in possession of the complainant's firearm, the State failed to prove beyond a reasonable doubt that the firearm in question was a semi-automatic firearm. Counsel for the appellant submitted that the admission notwithstanding, it was still incumbent upon the magistrate to satisfy himself that the firearm was indeed a semi-automatic as defined in the Act.³

[9] In my view this submission cannot succeed. The charge sheet provided:

³ 'Semi automatic' means self-loading but not capable of discharging more than one shot with a single depression of the trigger.

'... the accused did unlawfully have in his possession the following firearm to wit Norinco 9mm without holding a licence, permit or authorization issued in terms of the Act to possess that firearm. **Possession of Semi Automatic Firearm.**' (my emphasis)

The State thus clearly alleged that the firearm was a semi-automatic. The formal admission by the appellant was an admission in respect of the firearm, the subject of the charge, namely a semi-automatic firearm. In addition, immediately after the firearm was found in the appellant's possession, the complainant positively identified it through the serial numbers.

[10] In light of these facts, it was no longer necessary, in my view, for the State to lead further evidence to prove that the firearm was a semi-automatic firearm. (See *S v Thembaletu* [2008] ZASCA 9; [2008] 3 All SA 417 (SCA) para 13).

[11] It is clear that there are no reasonable prospects of the proposed appeal against the conviction in respect of count 2 succeeding.

[12] In the result the appeal against the high court's refusal of the appellant's petition against conviction, is dismissed.

B H Mbha

Judge of Appeal

APPEARANCES:

For Appellant:

M van Wyngaard

Instructed by:

B P Ndaba Attorneys, Benoni

c/o Legal Serve Centre, Bloemfontein

For Respondent:

P W Coetzer

Instructed by:

Director of Public Prosecutions, Johannesburg

Director of Public Prosecutions, Bloemfontein