THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case no: 186/2002

In the matter between:

MBONENI ZULU **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: MARAIS, NAVSA and CLOETE JJA

HEARD: 17 MARCH 2003

DELIVERED: 26 MARCH 2003

Summary: A provincial or local division cannot hear an appeal from the magistrate's court in a criminal matter in the absence of compliance with ss 309B and 309C of the Criminal Procedure Act, 51 of 1977, where those sections were applicable.

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] On 7 November 1999 the appellant was convicted of attempted murder by a regional magistrate and sentenced to seven years' imprisonment. The Witwatersrand Local Division dismissed an appeal against the conviction and sentence but granted the appellant leave to appeal to this Court.

[2] The appellant was obliged to seek leave to appeal to the Court *a quo* from the magistrate in terms of s 309B of the Criminal Procedure Act, 51 of 1977 ('the Act'), and, if leave was refused, to petition the Judge President in terms of s 309C of the Act. Both sections were inserted into the Act by s 3 of Act 76 of 1997 with effect from 28 May 1999. Both were declared unconstitutional by the Constitutional Court in *S v Steyn* 2001 (1) SA 1146 (CC), but the declaration of invalidity was suspended for six months 'from the date of the order'.[1] The order was made on 29 November 2000. The period of suspension accordingly operated up to and including 28 May 2001. Within that period the appellant did apply for leave to appeal. It is not entirely clear whether the application related to his conviction as well as to his sentence, but what is clear is that the magistrate on 25 August 2000 granted leave to appeal against sentence only and no petition was subsequently addressed to the Judge President

[1] Para 3 of the order in para [53] of the judgment at 1170E. The date of publication of the Constitutional Court's order under Government Notice R1328 in Government Gazette 21830 of 8 December 2000, recorded in an editorial note in the Butterworth Statutes after the text of s 309B in the volume which contains the Criminal Procedure Act, is therefore irrelevant.

for leave to appeal against conviction. The Witwatersrand Local Division nevertheless entertained an appeal on both aspects.

[3] In entertaining the appeal against the conviction and in granting leave to appeal to this Court, the Witwatersrand Local Division acted *per incuriam.* The Constitutional Court's suspension of the declaration of invalidity of ss 309B and 309C meant that those sections were operative and that the procedure which they prescribed had to be followed by the appellant.[2] As leave to appeal against conviction was not granted by the magistrate in terms of s 309B (or on petition, as contemplated in s 309C), there was no appeal before that Court on this aspect: *S v Langa en Andere* 1981 (3) SA 186 (A) at 189F.

[4] The appellant's counsel submitted that the failure of the respondent's counsel to object to the hearing of the appeal against conviction in the Court below conferred jurisdiction on that Court to hear the appeal, and relied in that regard on *S v Zachariah* 1956 (1) SA 220 (SR). In that matter, the appellant had given notice of appeal only against the severity of the sentence but some six days before the hearing of the appeal, he filed a notice to the effect that at the hearing, application would be made to amend the notice of appeal so as to appeal against the conviction as well. The Attorney-General did not oppose the

[2] It is unnecessary to deal with the question whether ss 309B and 309C applied to all appeals noted after 28 May 1999 irrespective of when the conviction or sentencing took place *S v Ramakgopola and Others* 2000 (2) SACR 213 (T); or whether, Parliament not having remedied the defect in s 309B within the period of suspension, appeals where the application and petition procedure had not been completed by the time that such period lapsed, fall to be dealt with as if the sections had not been enacted *S v Danster; S v Nqido* 2002 (2) SACR 178 (C).

application for amendment and for this reason, the application was granted and the appeal was entertained on the merits of the conviction although the Attorney-General was criticised by the Court because there was no application for condonation and no opportunity for the magistrate to comment on the ground of appeal which the application raised.

[5] However, the South African practice has for many years been to insist upon the magistrate being afforded an opportunity to comment on a new ground of appeal which raises a question of fact[3] and which is added by amendment to the notice of appeal, for the very reasons that the magistrate is entitled to an opportunity to comment on the amended ground and the appeal court is entitled to the benefit of such comment:[4] *S v Horne* 1971 (1) SA 630 (C) at 631G-632C and cases there cited; *S v Khoza* 1979 (4) SA 757 (N) at 758B-E. That apart, the provisions of a statute prescribing a particular procedure which is to be followed, cannot be ignored and if they are, even at the request of an accused, the proceedings may be set aside: *S v Lapping* 1998 (1) SACR 409 (W) at 411f-412h and cases there quoted. In the present matter, the failure of the respondent's representative to take the point that leave to appeal had not been granted as required by s 309B could not confer jurisdiction on the Witwatersrand Local Division when there was none.

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[3] Questions of law can be dealt with differently: see eg *S v Nel* 1987 (4) SA 276 (O) at 279F-I.

[4] Although it is the salutary practice in the Witwatersrand Local Division, at least, in the interests of expedition, to hear an appeal in the absence of such comment, if the magistrate has been given an adequate opportunity to comment but has not done so in such cases, it is assumed that the magistrate has nothing to add.

[6] The appellant's counsel further submitted that the Witwatersrand Local Division must be taken to have exercised its inherent jurisdiction to entertain the appeal against conviction and to grant leave to appeal to this Court. There is no merit in this argument either. Firstly, the learned Judges in the Court below obviously did not apply their minds to the question; and secondly, even if they had, they did not have the power to override the express provisions of the statute. Their jurisdiction to hear the appeal depended upon leave having been granted. As Hefer JA said in respect of this Court in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7E-I:

'I will first dispose of an alternative submission made on the petitioner's behalf. It is to the effect that an appeal against an order which is not otherwise appealable may be heard in the exercise of this Court's so-called inherent jurisdiction. The short answer is that the Court's 'inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice' (*per* Corbett JA in *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G), does not extend to the assumption of jurisdiction not conferred upon it by statute. As explained in *R v Milne and Erleigh (6)* 1951 (1) SA 1 (A) at 5 *in fin*,

> "(this) Court was created by the South Africa Act and its jurisdiction is to be ascertained from the provisions of that Act as amended from time to time and from any other relevant statutory enactment".

Nowadays its jurisdiction derives from the Supreme Court Act and other statutes but the position remains basically the same. (*Sefatsa and Others v Attorney-General, Transvaal, and Another* 1989 (1) SA 821 (A) at 833E-834F; *S v Malinde and Others*

1990 (1) SA 57 (A) at 67A-B.) The Court's inherent power is in any event reserved for extraordinary cases where grave injustice cannot otherwise be prevented (*Enyati Colliery Ltd and Another v Alleson* 1922 AD 24 at 32; *Krygkor Pensioenfonds v Smith* 1993 (3) SA 459 (A) at 469G-I). This is not such a case because the petitioner elected not to seek the Court *a quo's* leave to appeal against the final sequestration order which is appealable (with leave) in terms of s 150(1) of the Insolvency Act. '

[7] The remarks of the learned Judge of Appeal quoted in the previous paragraph of this judgment were made in a civil context, but are equally applicable in the matter before us; in *S v Abrahams* 1990 (2) SACR 420 (A), Friedman AJA said at 425g:

'[T]his Court's jurisdiction in criminal matters is determined by statute. It has no inherent jurisdiction to go beyond the terms of the relevant Acts (cf *Sefatsa and Others v Attorney-General, Transvaal, and Another* 1989 (1) SA 821 (A) at 831I-834E and 839C-H)',

and the same applies to a Provincial Division and the Witwatersrand Local Division.

[8] This Court cannot, as is frequently done in Provincial Divisions in cases which have merit but are not properly before the Court on appeal, deal with the matter on review in terms of s 304(4) of the Act: those powers are limited to Provincial and Local Divisions.

[9] To sum up: the Witwatersrand Local Division should not have dealt with the merits of the conviction; that Court was not entitled to grant leave to appeal to this Court on the conviction; and leave to appeal

further was in any event not warranted on the facts the present case is typically one which should have been dealt with finally in the Court below, if the necessary leave was obtained. The appeal against the conviction is therefore not properly before this Court and cannot be entertained.

[10] There is no merit in the appeal against sentence. No misdirection was relied upon. The submission on appeal was that 'the sentence imposed on the appellant is shockingly inappropriate in that it does not accord with sentences for first offenders in attempted murder cases' and the appellant's counsel relied on *S v Naidoo* 2000 (1) SACR 361 (SCA); *S v Khambule* 2001 (1) SACR 501 (SCA); and *S v Kok* 2001 (2) SACR 106 (SCA).

[11] It is trite that the judicial officer who imposes sentence has a discretion with the exercise of which an appeal court will be slow to interfere, and that each case depends on its own facts.

[12] Unfortunately, the appellant's personal circumstances did not appear adequately from the record. The magistrate's judgment on sentence begins:

'Ms Mogashwa has outlined your personal circumstances; the court takes them into account, especially the fact that you should be treated as a first offender . . .'

What Ms Mogashwa said on the appellant's behalf was not transcribed. We accordingly caused the tape recording of the proceedings in the

magistrate's court to be made available to counsel for both sides, and counsel agreed that the personal circumstances placed on record by the appellant's legal representative were the following: the appellant was 40 years old; he lived with the mother of his children who were aged 3, 5 and 7 years; he was the sole breadwinner, employed by the City Deep Market earning R1 100 per month; and he had never been to school. The record did not reflect the appellant's three previous convictions, but he was treated as a first offender by the magistrate.

[13] The facts in the present matter as they appear from the record can be stated briefly. The appellant had an argument with the complainant in a shack in a squatter camp after which he lay in wait for the complainant outside the shack. When the complainant emerged, the appellant shot him under the left armpit from a distance of about fifteen paces. The appellant's version, rejected by the magistrate, was that he had acted in self-defence. In consequence of the injury the complainant sustained, he was admitted to hospital initially for 30 days and thereafter for two weeks. A sentence of seven years' imprisonment in these circumstances is severe but does not justify interference on appeal: cf the sentence substituted by this Court in *S v Makondo* [2002] 1 All SA 431 (A).

[14] On the question of sentence as well, the Witwatersrand Local Division should not have granted leave to appeal to this Court. The purpose of the requirement for leave to appeal is to protect an appeal

court against the burden of having to deal with appeals in which there are no prospects of success, and further to ensure that the roll of this Court is not clogged with hopeless cases: *S v Rens* 1996 (1) SA 1218 (CC) at 1221A-B (par [7]) and 1225E-F (par [25]); *S v Twala (South African Human Rights Commission intervening)* 2000 (1) SA 879 (CC) at 888F (par [20]). The procedure applicable at the time did not entitle an accused as of right to have the sentence imposed reconsidered by one, much less two, appeal courts.

[15] The appeal against the conviction is struck off the roll. The appeal against sentence is dismissed.

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T D CLOETE
JUDGE OF APPEAL

Concur:

Marais JA
Navsa JA