THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 928/20
Not Reportable

In the matter between:

ZAKHELE DERRICK MBATHA Applicant

and

THE STATE Respondent

Neutral citation: *Mbatha v The State* (928/2018) [2020] ZASCA 102 (15 September 2020)

Coram: MAYA P, DAMBUZA, NICHOLLS JJA AND WEINER AND MABINDLA-BOQWANA AJJA

Heard: This matter was decided without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 15 September at 10h00.

Summary: Reconsideration of application for special leave to appeal against conviction and sentence – section 17(2)*(f)* of the Superior Courts Act 10 of 2013 – exceptional circumstances.

ORDER

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

1. Condonation for the late filing of the copies of the original application for leave to appeal and copies of the application in terms s 17(2)(*f*) of the Act is granted.

2. 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 (Johannesburg) against conviction in respect of count 3 and the sentences in respect of counts, 1, 2, 4 and 5.'

JUDGMENT

Weiner AJA **(**Maya P, Dambuza and Nicholls JJA and Mabindla-Boqwana AJA concurring):

Introduction

[1] The applicant was charged in the Magistrate's Court of the Regional Division of Gauteng, Lenasia, Gauteng with the following: count 1 - robbery with aggravating circumstances; count 2 - robbery with aggravating circumstances; count 3 - possession of an unlicensed firearm; count 4 - assault with the intent to do grievous bodily harm; and count 5 - attempted murder. He was acquitted on count 4 and convicted on counts 1, 2, 3 and 5 on 30 January 2013.

[2] On 25 February 2013, the applicant was sentenced on Count 1 to 15 years imprisonment; on Count 2 to 15 years imprisonment; on Count 3 to 15 years imprisonment; and on Count 5 to 10 years imprisonment.

[3] The magistrate ordered that the sentence imposed for count 2 run concurrently with the sentence imposed for count 1. In regard to count 3, it was ordered that 10 years of the 15 year sentence run concurrently with the sentence imposed for count 1. On count 5, the sentence was not to be served concurrently with any of the other sentences. The effective sentence imposed on the applicant was thus 30 years imprisonment.

[4] The applicant applied for leave to appeal against the sentence and the conviction on count 3. The magistrate dismissed the application due to a lack of prospects of success. The applicant then directed a petition to the Gauteng High Court, Johannesburg. The petition was dismissed on 13 March 2014. The applicant, in a further effort to secure leave to appeal, directed a petition to this Court for special leave. The petition was considered by two judges of this Court. On 22 May 2018, they dismissed the application on the ground that there were no exceptional circumstances meriting a further appeal. The applicant thereafter applied to this Court in terms of s 17(2)*(f)* of the Superior Courts Act (the Act) for reconsideration of this

Court's decision of 22 May 2018.

[5] Condonation for the late filing of the copies of the original application for leave to appeal and copies of the application in terms s 17(2)(*f*) of the Act was not opposed by the State. The appellant set out facts which show good cause why condonation should be granted.

[6] The State also did not oppose the application for reconsideration of this Court's refusal to grant leave to appeal. The State conceded that the conviction on count 3, cannot stand. It also conceded that the principles governing the cumulative effect of the sentences, taken together with the time spent awaiting trial, were incorrectly applied.

[7] The parties agreed that this matter could be disposed of without an oral hearing in terms of s 19(*a*) of the Act.

Factual background

[8] The applicant was convicted on the following facts:

(a) He was part of a group of three attackers who robbed the first complainant, Mrs Regina Siyabela, at gunpoint of R14 000 cash, at her home from which she ran a tavern;

(b) Two other complainants, Makro truck drivers, Mr Prince Jabulani Botsaki and Mr Thabo Phiri, who were delivering liquor at the house, were also robbed of their wallets and cellular phones;

(c) The firearm referred to in charge 3 was in the hands of accused 3;

(d) The applicant was the driver of the Toyota Tazz motor vehicle used by the robbers, who fled the scene in the vehicle;

(e) The police gave chase; a shootout followed between certain of the people in the Toyota Tazz vehicle and the police. Several other firearms were used by the robbers in the shootout;

(f) Accused 2 was injured in the shootout and the robbers abandoned the vehicle and fled on foot;

(g) The applicant and his co-accused were arrested sometime after the incident;

(h) The applicant was subsequently pointed out as one of the robbers at an identity parade.

[9] The applicant submitted that no evidence was placed before the trial court that he, at any stage, handled a firearm or had one in his possession. He contended that, although it is evident that the firearms were used for the benefit of the whole group, a mere intention on the part of the group to use the weapons for the benefit of them all is insufficient for a conviction of unlawful possession of a firearm.

Section 17(2)(*f*) of the Superior Courts Act

[10] The issues which form the basis of this reconsideration are:

(a) Whether the applicant was correctly convicted on count 3;

(b) whether, in imposing the sentences that it did, the court a quo, failed to take into account the time that he spent in custody awaiting trial; and

(c) whether the sentences should not all run concurrently.

[11] Section 17(2)(*f*) of the Act confers a discretion on the President of the Supreme Court of Appeal, in exceptional circumstances, to refer a decision of that Court, refusing an application for leave to appeal, to the Court for reconsideration and, if necessary, variation.

[12] On 25 February 2019, this court (Navsa AP) granted the following order in terms of s 17(2)(*f*):

1. Condonation as applied for is granted.

2. The decision of the court dated 22 May 2018 dismissing the applicant's application for leave to appeal with costs is referred to the court for reconsideration, and if necessary, variation.

3. The argument for special leave to appeal and condonation is referred for oral argument in terms of s 17(2)(*d*) of the Act.

4. The parties must be prepared, if called upon to do so, to address the court on the merits.

Exceptional circumstances

[13] The issue for reconsideration is whether the applicant should have been granted leave to appeal his conviction on count 3, on the basis that the conviction was clearly wrong, on a point of law. If so, exceptional circumstances would exist which would warrant a reconsideration of the conviction (and the consequent sentence imposed in respect of such conviction).

[14] In *Liesching and Others v S*,[1] the Constitutional Court stated:

'The courts have been reluctant to lay down a general definition, as each case is to be considered on its own facts. It has been held that it is neither desirable nor possible to lay down a precise rule or definition as to what would constitute exceptional circumstances. The meaning and interpretation given by the courts to the phrase has been wide-ranging . . . Ultimately, it is the function of the presiding officers to determine whether, on a case-by-case basis, the circumstances can be found to be exceptional.' (Footnotes omitted).

[15] The concept of exceptional circumstances, in terms of s17(2)(*f*), was dealt with in *Malele v S; Ngobeni v S*,[2] where it was stated that on a correct application of these principles, on the facts of that case, another court might reach a different conclusion.[3] It concluded that 'a grave injustice may otherwise result' if the decision dismissing the applicants' application for leave to appeal was not referred to the court for reconsideration, and that a grave injustice 'in itself constitutes exceptional circumstances enabling [the Court], *mero motu*, to refer the decision . . . to the court for reconsideration.'[4]

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[1] *Liesching and Others v S* [2018] ZACC 25; 2019 (4) SA 219 (CC) para 132. Although this was in a minority judgment, these principles were not refuted in the majority judgment

[2] *Malele v S; Ngobeni and Others v S* [2016] ZASCA 115.

[3] Ibid paras 8-9.

[4] Ibid para 12; see also *Gwababa v S* [2016] ZASCA 200 (SCA).

[16] In *Manyike v S,*[5] this Court dealt with the concept as follows:

'What constitutes exceptional circumstances depends on the facts of each case. …. Thring J in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H remarked that:

"1. What is ordinarily contemplated by the words 'exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . .

2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.

4. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional."

In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.' (footnotes omitted)

[17] The reconsideration is not the consideration of the merits of the appeal. It is the reconsideration of the decision of this Court refusing leave to appeal. This Court is required to decide whether the magistrate, the judges of the Gauteng Division, and the two judges of this Court should have found that reasonable prospects of success existed to grant leave to appeal.[6] For the purposes of this reconsideration, this Court is not called upon to make a decision on the merits of the appeal. However, for the purposes of assessing whether special circumstances exist, it is necessary to traverse the merits in order to decide whether there are reasonable prospects of success on appeal.

[18] The applicant was convicted on the basis of joint possession of the firearm. The applicant submitted that the fact that he was aware that accused 3 possessed

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[5] *Manyike v S* [2017] ZASCA 96 para 3.

[6] *Liesching* (note 1 above); *Notshokovu v S* [2016] ZASCA 112; 2016 JDR 1647 (SCA).

the firearm for the purpose of committing the robbery does not lead to the inference that he possessed the firearm jointly with his co-accused. He relied in this regard on this Court's decision in *Kwanda v S*,[7] and the decision of the Constitutional Court in *Makhubela v S*.[8]

[19] In *S v Kwanda* this court held:[9]

'The fact, that the applicant 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 where "the state has established facts from which it can properly be inferred by a court that: (a) the group had the intention (animus) 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 applicant 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 applicant 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."

Adopting the reasoning in *Nkosi* and *Mbuli*, and even if the applicant was aware that Mahlenche was in possession of the firearm, such knowledge is not sufficient to establish that he had the intention to jointly possess the firearm with Mahlenche. In this matter there are no facts from which it can be inferred that the applicant had the necessary intention to exercise possession of the firearm through Mahlenche or that the latter had the intention to hold the firearm on behalf of the applicant.'

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[7] *Kwanda v S* [2011] ZASCA 50; 2013 (1) SACR 137 (SCA).
[8] *Makhubela v S, Matjeke v S* [2017] ZACC 36; 2017 (2) SACR 665 (CC) para 55.
[9] *Kwanda v S* (note 7 above) paras 5-6.

[20] The test for establishing liability for the joint possession of a firearm was established in *S v Nkosi*,[10] and has been confirmed by the Constitutional Court in *Makhubela v S* where it was held:

'In convicting the applicants for unlawful possession of firearms and ammunition on the basis of the doctrine of common purpose, the trial court departed from settled jurisprudence. The test for establishing liability for the possession of firearms and ammunition was established in *S v Nkosi:*

"The issues which arise in deciding whether the group (and hence the applicant) possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a Court that:

(a) the group had the intention (animus) 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.

Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns."

…. In these judgments, the courts have found perpetrators guilty of a crime involving the use of firearms on the basis of the doctrine of common purpose, but nevertheless found that the perpetrators could not be found to be guilty of the unlawful possession of firearms on the basis of this doctrine. The test takes into account the fact that the application of the doctrine of common purpose differs in relation to "consequence crimes", such as murder, and in relation to "circumstance crimes", such as possession….'[11]

[21] The magistrate, in finding the applicant guilty of possession of the firearm on the basis of joint possession, held:

'[A]lthough the evidence places the firearm referred to in this charge in the hands of accused 3 the well-known Supreme Court of Appeal decision of *Nkosi*, refers to the possibility of a conviction in respect of more than one accused on the basis of joint possession if certain pre-requisites are present.

The court can safely infer from the evidence that all three . . . accused knew of this firearm and that it might be utilised upon confrontation. The evidence shows that more than one firearm was fired during the incident. All three accused are therefore also convicted of count three.'

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[10] *S v Nkosi* 1998 (1) SACR 284 (W).

[11] *Makhubela v S* (note 8 above) paras 46-47.

[22] The applicant contended that none of the complainants or the police witnesses testified that he was in possession of a firearm or that he fired at the police. While the applicant was driving the Toyota Tazz vehicle, and trying to evade the police, it seems unlikely that he would have been able to use a firearm at the same time. The question then is whether the only inference to be drawn from the evidence, is that those who used the firearms, to rob the complainants and to evade the police, possessed them on behalf of all of three accused.

Sentence

[23] The applicant spent 3 years and 6 months in custody awaiting trial. In *S v Vilakazi*,[12] this court held:

'While good reason might exist for denying bail to a person who is charged with a serious crime, it seems to me that if he or she is not promptly brought to trial, it would be most unjust if the period of imprisonment while awaiting trial is not brought to account in any custodial sentence that is imposed.'

[24] In addition, the cumulative effect of the sentences, taking into account that certain of the sentences were not to run concurrently, led to an effective sentence of 30 years.

Conclusion

[25] The prospects of success on appeal appear to favour the applicant, both in relation to the conviction on Count 3 and the effective sentence handed down. However, as was held in *Avnit v First Rand Bank Ltd*:[13]

'Prospects of success alone do not constitute exceptional circumstances. The case must truly *raise a substantial point of law*, or be of great public importance or demonstrate that without leave *a grave injustice might result*. Such cases will be likely to be few and far between because the judges who deal with the original application will readily identify cases of the ilk. But the power under section 17(2)(*f*) is one that can be exercised even when special leave has been refused, so "exceptional circumstances" must involve more than satisfying the requirements for special leave to appeal. The power is likely to be exercised

[12] *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 60.
[13] *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 para 7.

only when the President believes that some matter of importance has possibly been overlooked or a grave injustice will otherwise result.' [emphasis added]

[26] In my view, this matter raises a substantial point of law in relation a conviction based upon joint possession of a firearm. The sentences handed down by the Magistrate also overlook certain important principles. As the State properly conceded, a grave injustice might result if leave to appeal is not granted. Thus, the test for exceptional circumstances has been met.

[27] Accordingly, the following order is granted:

1. Condonation for the late filing of the copies of the original application for leave to appeal and copies of the application in terms s 17(2)(*f*) of the Act is granted.

2. 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 (Johannesburg) against conviction in respect of count 3 and the sentences in respect of counts, 1, 2, 4 and 5.'

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WEINER AJA

ACTING JUDGE OF APPEAL

APPEARANCES

For applicant: Bhengu & Rajagopal Attorneys, Cape Town

Instructed by: Blair Attorneys, Bloemfontein

For respondent: Director of Public Prosecutions, Johannesburg

Instructed by: Director of Public Prosecutions, Bloemfontein