THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 840/2020

In the matter between:

PHUMLANI NICHOLAS KHATHIDE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Phumlani Nicholas Khathide v The State* (840/2020) [2022] ZASCA 17 (14 February 2022)

Coram: MOLEMELA, MOKGOHLOA, MOTHLE JJA, and PHATSHOANE, MOLEFE AJJA

Heard: 8 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the website of the Supreme Court of Appeal and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 14 February 2022.

Summary: Criminal procedure – appeal against refusal of petition by high court – reasonable prospects of success on appeal against sentence on account of magistrate misdirecting himself in considering factors which were not contained in the appellant's plea of guilty — leave to appeal to high court granted

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ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Gyanda J and Van Zyl J, sitting as court of appeal):

1 The appeal succeeds.

2 The order of the high court dated 19 February 2019 is set aside and substituted with the following:

'The petition of the first petitioner for leave to appeal against sentence is granted.'

JUDGMENT

Mothle JA (Molemela and Mokgohloa JJA and Phatshoane and Molefe AJJA concurring)

[1] This is an appeal against the decision by the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court), refusing the appellant leave to appeal the sentence of 15 years' imprisonment, imposed on him by the Umzimkulu Regional Court, in the Regional Division of KwaZulu-Natal (the trial court). There is a long history to this matter. The following is a succinct background and trajectory of the litigation leading to this appeal.

[2] On 24 November 2014, the appellant, Mr Phumlani Nicholas Khathide (Mr Khathide) and his co-accused, Mr Sibusiso Ndaba (Mr Ndaba) appeared in the regional court and pleaded guilty to a charge of robbery with aggravating circumstances. They were convicted as charged. Mr Khathide was sentenced to 15 years' imprisonment and Mr Ndaba to 17 years' imprisonment.

[3] Four years later, on 18 October 2018, the two men lodged applications before the trial court, requesting leave to appeal the sentence. The regional court declined their request. They turned to the high court. On 19 February 2019, the high court issued an order, refusing to grant Mr Khathide leave to appeal against the sentence, but granted Mr Ndaba leave to appeal to the high court against the sentence.[1] On 9 July 2020, Mr Khathide lodged with this Court an application for special leave to appeal the refusal by the high court to grant him leave to appeal the sentence. On 9 September 2020, this Court granted Mr Khathide special leave to appeal the refusal to grant leave to appeal by the high court, to this Court. Thus, the crisp issue in this appeal, is whether the high court was correct in refusing to grant Mr Khathide leave to appeal the sentence imposed on him.[2]

[4] Section 17(1) of the Superior Courts Act 10 of 2013 (the Act) provides that:

'Leave to appeal may only be given where the judge or judges concerned are of the opinion that–

(a) (i) the appeal *would* have a reasonable prospect of success; or

(ii) There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) The decision sought on appeal does not fall within the ambit of section 16(2) *(a)*; and

(c) Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.' (My emphasis)

In considering an application for leave to appeal, a court must be alive to the provisions of s 17(1) of the Act as quoted above.

[5] As at the hearing of this appeal, this Court did not have the benefit of the reasons of the high court, as to why it had to differentiate between the case of

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[1] On 29 May 2020 the high court upheld Mr Ndaba's appeal on sentence. The sentence of the trial court was set aside and substituted with a sentence of 12 years' imprisonment ante-dated to 24 November 2014. It was further ordered that the 12 year sentence should run concurrent with the sentence on count 1 of the sentence imposed on a previous robbery on 13 November 2013.

[2] *Van Wyk v S, Galela v S* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA).

Mr Khathide and that of Mr Ndaba, by granting one leave to appeal and not the other. It is evident from the trial record, in particular the consideration of the sentence, the circumstances of Mr Khathide and Mr Ndaba, were essentially the same. The similarities are as follows: they corroborated each other; they were each in possession of a firearm during the robbery; they both claimed not to have discharged the firearm at the scene of the robbery; the magistrate's reasons for conviction and sentence were directed equally to them; the records of their conviction indicates that they were both involved in a previous charges of theft and robbery with aggravating circumstances in July 2011, for which each was convicted and sentenced to imprisonment for a period of 5 years and 15 years respectively;[3] in this matter they both lodged their application for leave to appeal at the same time before the trial court and subsequently the high court; and were represented by the same counsel throughout the proceedings.

[6] In essence, apart from different sentences (15 years and 17 years respectively), there is thus nothing on the record which stands out to suggest that before the high court, one applicant deserved leave to appeal and the other did not. This Court is therefore at large to consider Mr Khathide's application for leave to appeal in terms of s 17(1) of the Act.

[7] Mr Khathide's grounds for leave to appeal stand, amongst others, mainly on two points of law. First, that whereas the offence relating to the sentence under consideration was committed on 4 March 2013, the magistrate misdirected himself by taking into account Mr Khathide's conviction of an offence committed on 28 July 2011 of theft and robbery with aggravating circumstances, in respect of which Mr Khathide was convicted on 13 November 2013. Second, Mr Khathide contends that the trial magistrate misdirected himself when, during sentencing, he considered as evidence an oral statement made by the prosecutor after conviction, which was at variance with the facts

[3] The convictions and sentence on count 1 of that offence were set aside by the full court on 1 July 2020 under case no; CC 65/ 2012 in the Kwa-Zulu Natal Division, Pietermaritzburg. According to the full court, the appellant was effectively serving 20 years imprisonment. In addition, Mr Ndaba had more previous convictions on record, even though some were more than 10 years old.

as set out in the written statement which accompanied his plea of guilty submitted in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (s 112 statement). I turn to deal with the two main grounds supporting the application for leave to appeal.

[8] According to the charge sheet, the offence under consideration was committed on 4 March 2013, after the one of 28 July 2011. It is a matter of record that the trial court accepted as aggravation of sentence the conviction of the 28 July 2011 for theft and robbery in which Mr Ndaba was also involved. During sentencing for the offence under consideration in this appeal, the criminal records (SAP 69) of both Mr Khathide and Mr Ndaba, which had been admitted, indicated that they had committed the crimes of theft and robbery on 28 July 2011, for which they were convicted on 13 November 2013. They were each sentenced to 5 years and 15 years respectively for the two offences. In essence, Mr Khathide contends that he did not have the benefit of the retributive or rehabilitative effect of a previous conviction. If he had, the trial court would have properly assessed the kind of impact the punishment of the earlier offence would have had on him, when he committed the later offence.

[9] The facts and circumstances of this case are strikingly similar to those in *S v S*[4] heard in this Court. In that case an accused had been convicted of rape in a provincial division of the Supreme Court as it then was,[5] and a death sentence was imposed on him. He lodged an appeal to this Court. It transpired from the evidence, that when he committed the offence which attracted the death penalty, he was on bail and had not yet been convicted for an earlier rape, committed six weeks before the one in that appeal. The court *a quo*, nevertheless, considered the arrest for the earlier rape in imposing the death sentence. On appeal against the death sentence, this Court held that in an instance where the accused had committed a similar offence prior to the one under consideration, and for which he had not been convicted and experience the retributive effect, it will not be a misdirection by a court to take the earlier

[4] *S v S* 1988 (1) SA 120 (A).
[5] That court came to be known as the Western Cape Division of the High Court.

offence into account in aggravation of sentence. The rationale is that that factor of involvement in an earlier similar offence, raises the question of the accused's character and disposition.

[10] In this matter, the trial record indicated that Mr Khathide and Mr Ndaba were both on bail for the July 2011 theft and robbery charge at the time they committed the offence at issue in this appeal. Thus, the magistrate was, on the authority in *S v S*, entitled to consider the theft and robbery convictions against Mr Khathide, as to his character and disposition in committing the later crime. There would be no prospect of success on appeal, based on this ground.

[11] The other ground of appeal relates to Mr Khathide's s 112 statement to which the prosecutor, addressing the court from the bar during sentencing, added an oral allegation that there was exchange of shooting with the police during the robbery. The statement of the prosecutor came when Mr Khathide had already been convicted on the facts as stated in his explanation of guilty plea in terms of s 112 (2) of the CPA, which made no mention of such exchange of gunfire. The purpose of s 112 was stated aptly in *S v Witbooi*[6] as follows:

'Section 112 (1) (b) and s 112 (2) and (3) are primarily concerned with the facts of the case and to ensure that an accused person is guilty of the offence to which he has pleaded guilty and also to ensure that he is *properly sentenced on the true facts of the case.* It follows that, where a magistrate acts under the provisions of these sections, he should follow a course that would enable him to ascertain the true facts of the case. The course recommended is to question the accused himself with reference to the alleged facts of the case in order to ascertain what his version is so that the prosecutor can know whether the account of the accused agrees with the evidence which he has at his disposal. If his account does not agree with the evidence which the prosecutor has available, the prosecutor may then decide to place his evidence before the court and it will then be for the court to adjudicate on the facts of the case.' (My emphasis.)

[12] At the commencement of the trial in the regional court, Mr Ncwane, who legally represented both Mr Khathide and Mr Ndaba, presented on their behalf, written and signed statements in which there was a plea of guilty in terms of s

[6] 1978 (3) SA 590 (TPD) at 594H.

112(2) of the CPA. Mr Khathide's statement was the first to be read into the record. The magistrate then inquired from Mr Khathide whether he confirmed the statement, which he did. There was a debate between the magistrate and the prosecutor as to whether the accused would be charged with unlawful possession of a firearm and ammunition. The prosecutor stated emphatically that he is not proceeding with those charges. The s 112 statement which had anticipated those charges was, accordingly, amended to exclude reference to the charges of unlawful possession of a firearm and unlawful possession of ammunition.

[13] The magistrate then inquired from the prosecutor whether the written statement of plea was in line with the State's case. The prosecutor responded affirmatively and stated that he had no objection that it be handed in. The statement was admitted as exhibit A. The same process was followed in respect of Mr Ndaba and his statement was marked exhibit B. The prosecutor only handed a photo album of the crime scene, as exhibit 1, to which there was no objection. On inquiry from the magistrate, the defence and the prosecutor had no other evidence to present.

[14] The two s 112 statements were similar in content. The robbery had been planned with three other persons. Paragraph 7 of Mr Khathide's s 112 statement states as follows:

'I, (sic) Mdudusi Mwelase (Deceased) and Sibusiso Blessing Ndaba (Accused 4) pointed the security guards with the firearms as well as the lady who was inside the Post Office demanding money and cell phones. We managed to take with force [the] items mentioned in paragraph 2.3 above. Whilst we got out of the Post Office with bags, I noticed the police and shouted us to stop. We dropped down the bags and attempted to run away, but the police manage to arrest us. Mduduzi Mwelase (Deceased) fired shots and I later learnt that he shot himself and died. The other three (3) males managed to escape using our getaway vehicle, a grey Jetta 5.'

[15] Mr Khathide was thus convicted on the version of events as stated in the s 112 statement quoted above. Before conviction, the prosecution had nothing further to add to that version. It was during sentencing, that in addressing the

court on aggravating factors, the prosecutor made a startling statement as follows:

'PROSECUTOR As I was addressing, that this issue of remorse should be considered, that when they pleaded guilty to this offence, I ask that the Court take into consideration that the accused were found there, the police caught them, still there at the scene, *and they were shooting at that time*, *there was an exchange of shooting and as a result they were caught there, Your Worship, where they were committing the crime.*

COURT Shooting between the police and the accused?

PROSECUTOR That is correct.

COURT Oh, Mr Ncwane chose not to tell us that. Mmm yes.' (My emphasis)

[16] A lengthy debate ensued between the magistrate, prosecutor and the defence counsel, concerning the question whether the defence counsel deliberately withheld information from the trial court on the facts. In this regard and in passing sentence, the magistrate remarked as follows:

'We have been informed, and of course the defence has been trying to avoid this, that there was a shooting between the robbers and the police, and that is quite sad that when people are committing an offence and they are now being dealt with in terms of the law, they are trying to claim supremacy by firing at the law enforcement agents. That is definitely undermining the rule of law, that we should not have police but people committing robbery. . .'

[17] The magistrate spent considerable time dealing with attacks on the police; the fact that many policemen and women have died in the line of duty; and that memorial services are being held in honour of the police. He concluded by stating thus: '*Then, gentlemen, when you are being sentenced, the Court will take into account all what I have just said.'*(My emphasis)

[18] In accepting a statement of plea in terms of s 112(2) of the CPA, the prosecutor makes a choice. That choice binds the court to adjudicate the case in the next stage of the proceedings, on the basis of the facts alluded to in that statement**.** Cloete JA, in his concurring judgment in *State v Mnisi*[7] wrote:

[7] *State v Mnisi* [2009] ZASCA 17; [2009] 3 All SA 159 (SCA); 2009 (2) SACR 227 SCA para 33.

’33 It must be underlined that diminished responsibility consists in loss of restraint and self-control (which does not have to amount to sane automatism to amount to mitigation). That is what happened here… *And if the State considered that the plea explanation could be controverted by evidence at its disposal or by cross-examination of the appellant, it was free not to accept it. But the prosecutor did accept it, with the consequence that the facts it contains must be taken as correct*. (My emphasis)

[19] It is thus clear from the record that in passing sentence, the magistrate ignored the facts and version stated by Mr Khathide in his s 112 statement. He considered and accepted as an aggravating factor, a remark by the prosecutor, made from the bar *after* conviction and during sentencing, that Mr Khathide exchanged gunfire with the police. The prosecutor had not, prior to conviction, presented any evidence supporting this version. The trial court should have ignored the remark by the prosecutor, as both the prosecutor and the court were bound by the version foreshadowed in Mr Khathide’s s 112 statement. The magistrate therefore misdirected himself by relying on the prosecutor’s remarks regarding the shooting and considering it as an aggravating factor in relation to Mr Khathide.

[20] Since the only issue in this appeal is whether there are reasonable prospects of success in the appellant’s appeal, it suffices to mention, without prejudging the merits, that the magistrate’s misdirection appears to be of such a material nature as to vitiate the sentencing proceedings. Therefore, on this ground alone, the high court should have found that Mr Khathide had reasonable prospects of success in an appeal against sentence. Thus, his application for leave to appeal should have been granted.

[21] In the result, I make the following order:

1 The appeal succeeds.

2 The order of the high court dated 19 February 2019 is set aside and substituted with the following:

‘The petition of the first petitioner for leave to appeal against sentence is granted.’

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SP MOTHLE

JUDGE OF APPEAL

Appearances

For the appellant:	No appearance
Instructed by:	Hlengiwe Zondi and Associates, Pietermaritzburg Blair Attorneys, Bloemfontein
For the respondent:	No appearance
Instructed by:	The Director of Public Prosecutions, Pietermaritzburg The Director of Public Prosecutions, Bloemfontein