



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 787/2021

In the matter between:

SELLO NONG

FIRST APPELLANT

THOMAS MASINGI

SECOND APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Nong and Masingi v The State* (787/2021) [2024] ZASCA 25 (20 March 2024)

Coram: Mokgohloa, Nicholls, Mothle and Hughes JJA and Baartman AJA

Heard: 29 February 2024

Delivered: 20 March 2024

Summary: Criminal Procedure – appeal against conviction – leave to appeal refused by regional magistrate – petition in terms of s 309C refused by the high court – special leave to appeal against the dismissal of the petition granted by this Court – the test is whether the appellants have shown reasonable prospects of success on appeal.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mokgoatlheng J and Grant AJ sitting as a court of appeal):

The appellants' application for leave to appeal against the refusal of the petition on their conviction is dismissed.

JUDGMENT

Hughes JA (Mokgohloa, Nicholls and Mothe JJA and Baartman AJA concurring):

[1] The appellant and his co-accused were convicted in the Regional Court, Johannesburg on a count of robbery with aggravating circumstances read with s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act). On 6 November 2017 the first appellant was sentenced to 12 years' imprisonment and the second appellant was sentenced to 15 years' imprisonment. The magistrate, on 21 June 2018, refused the appellants leave to appeal against their conviction but granted leave to appeal in respect of sentence.

[2] Aggrieved by the outcome of their application for leave to appeal, the appellants lodged a petition for leave to appeal in respect of their conviction in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA), in the Gauteng Division of the High Court, Johannesburg (the high court). This petition was dismissed by the full bench of that division (Mokgoatlheng J and Grant AJ). It bears mentioning that on 21 June 2020 the appeal against sentence was heard by the high court and dismissed.

[3] In terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 (Superior Courts Act), the appellants lodged applications for special leave against the dismissal of their petitions seeking leave to appeal against their conviction. On 13 March 2021 the first appellant was granted special leave to appeal against the dismissal of his petition seeking leave to appeal against his conviction. The second appellant was granted special leave to appeal against the dismissal of his petition of his conviction on 28 September 2022.

[4] Appeals from the magistrate court under s 309 must be heard by the high court in terms of s 309(1)(a) of the CPA.¹ In law, no provision exists for this Court to hear an appeal on the merits directly from the magistrates' court. The issue of this Court's jurisdiction to entertain the appeal on the merits under the circumstances of this case was succinctly dealt with by this Court in a long line of cases, commencing with *S v Khoasasa* [2002] ZASCA 113; 2003 (1) SACR 123 (SCA); *Dipholo v S* (094/2015) [2015] ZASCA 120 (16 September 2015); *Lubisi v S* (230/2015) [2015] ZASCA 179 (27 November 2015); *Mthimkhulu v S* (1135/15) [2016] ZASCA 180 (28 November 2016) and most recently in *De Almeida v S* (728/2018) [2019] ZASCA 84 (31 May 2019).

[5] In *Dipholo*,² the ambit of appeals of a similar nature were dealt with, where the appellant had been granted special leave by this Court after his application for leave to appeal by way of petition had been refused and no appeal on the merits had been adjudicated by the high court. This Court went on to state as follows:

'It follows therefore that what is before us is not an appeal on the merits, as the high court has not heard the appeal on the merits, but an appeal against the refusal of leave to appeal by the high court. *S v Khoasasa* (supra) paras 14 and 19-22; *S v Matshona* [2008] ZASCA 58; [2008]

¹ 309: Appeal from lower court by person convicted

(1) (a) any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51 of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B.

² *Dipholo* para 6.

4 All SA 68 (SCA); 2013 (2) SACR 126 (SCA) para 4. In the circumstances, what this Court had to decide is simply whether the court below erred in finding that there were no reasonable prospects of success on appeal against the sentence imposed by the regional magistrate and thus refusing leave to the appellant to appeal against the judgment of the regional magistrate. *S v Tonkin* (2014 (1) SACR 583 (SCA) para 3.' [Footnotes omitted]

[6] This Court in dealing with the ambit of the appeal in *Van Wyk v S, Galela v S*³ endorsed the sentiments expressed in *S v Matshona*⁴ and *S v Khoasasa*.⁵ The issue herein is not the merits of the appeal but rather, whether the high court ought to have granted leave to appeal. Therefore the merits are curtailed to determining only whether the appellant has reasonable prospects of success and should accordingly be granted leave.⁶

[7] As regards what constitutes 'reasonable prospects of success' Plasket AJA in *S v Smith* describes it concisely:

'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 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.'⁷

[8] I now turn to consider whether leave to appeal to the high court against the conviction imposed by the regional court should have been granted. I will refer to certain parts of the evidence that demonstrates that there are no prospects of success.

[9] The complainant, Kwanele Arnold Dube, testified that he was robbed at gun point by two assailants. He was not aware that the gun being used was in fact a toy

³ *Van Wyk v S, Galela v S* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA); [2014] 4 All SA 708 (SCA) para 13 – 14.

⁴ *S v Matshona* [2008] ZASCA 58; 2013 (2) SACR 126 (SCA) para 5.

⁵ *S v Khoasasa* 2003 (1) SACR 123 (SCA); [2002] 4 All SA 635 (SCA) para 14.

⁶ *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 3.

⁷ *Ibid* para 7.

gun or air pistol. After being robbed he managed to follow his assailants and was present when they were apprehended and the toy gun retrieved. In order to apprehend them he sought assistance from one of his colleagues in the Community Policing Forum (CPF), Simphiwe John Mthembu (Simphiwe). After receiving a call from the complainant, Simphiwe arrived on the scene and assisted in the arrest of the appellants and retrieved the toy gun from one of the appellants. The complainant also testified that whilst he and Simphiwe were on the scene, Constable Ndaonde was in attendance and Simphiwe handed the toy gun to him.

[10] On appeal before us, counsel for the appellants, submitted that the trial court misdirected itself as it failed to take cognisance of the fact that the complainant was a single witness where the main issue in the trial was that of identification. In respect of both a single witness and that of identification, it was argued that the trial court ought to have demonstrated an awareness and an appreciation of the cautionary rule applicable in the circumstances. The appellants placed reliance on the fact that the incident happened very quickly, as per the testimony of the complainant, and as such he did not have an 'adequate opportunity to observe the assailants' who robbed him.

[11] Furthermore, the appellants challenged the trial court's reliance on Simphiwe's evidence as providing corroboration of the complainant's version, even though it acknowledged that there were some discrepancies in their evidence, for example who conducted the search of the appellants. As such, the appellants contended that the evaluation conducted by the trial court did not heed the applicable principles when dealing with such evidence.

[12] It is trite that an accused can be convicted on the evidence of a competent single witness's.⁸ In some instances contradictions in the evidence of a single witness maybe fatal,⁹ whilst in others they may not.¹⁰ Here the evidence of the complainant is corroborated by Simphiwe who arrived to assist. The identification of the perpetrators

⁸ Section 208 of the CPA.

⁹ *S v Ooshuizen* [2019] ZASCA 182; 2020 (1) SACR 561 (SCA) para 20; *S v Doorewaard* [2020] ZASCA 155; [2021] 1 All SA 311 (SCA); 2021 (1) SACR 235 (SCA) para 133.

¹⁰ *ICM v The State* [2022] ZASCA 108 paras 26-27.

is guided by the considerations expressed in *S v Mthetwa*¹¹ that, because of the fallibility of human observation, evidence of identification is approached by the courts with caution. Taking the aforesaid into account, the reliability of the evidence of a complainant must be tested, even though he or she comes across as being an honest witness. In the case at hand, the proximity of the complainant to the appellants during the incident and thereafter on the scene, the corroboration by Simphiwe on the apprehension of the appellants, coupled with the evidence advanced by the appellants themselves 'must be weighed up one against the other, in the light of the totality of the evidence, and the probabilities'.¹²

[13] On the other hand, the State, submitted that the trial court did not commit a misdirection. It contended that besides the single witness being honest, sincere and having exuded subjective assurance, there still had to be certainty beyond reasonable doubt that the identification made by that witness was reliable. The State conceded that identification evidence is generally unreliable and it must be approached with caution. However, counsel for the State submitted that its case relied on the complaints evidence as corroborated by Simphiwe and Constable Ndaonde who attended at the scene.

[14] The difficulty that the appellants have in respect of identification is that they placed themselves on the scene where the alleged robbery took place. On their own version they interacted in close proximity with the complainant when he wanted to search them. Further, the appellants in some material respects corroborated the complainant's version: they stated that Simphiwe was one of the persons who arrived on the scene, one of the persons who apprehended them, and that thereafter, Constable Ndaonde arrived on the scene. Their evidence that the toy gun was handed over by Simphiwe to the Constable Ndaonde in their presence corroborates the complainant's and Simphiwe's version of events which took place on the scene.

¹¹ *S v Mthetwa* 1972 (3) SA 766 (A).

¹² *Ibid* at 768C.

[15] Critically, for the appellants is the fact that their version as to what transpired in the presence of Constable Ndaonde only emerged when they gave evidence in chief and their versions were not put to him for his response thereto. Furthermore, the fact that their versions are contradictory as regards what in fact transpired when Constable Ndaonde was in attendance.

[16] The totality of the evidence reflects that the complainant was robbed at gun point. A toy gun was retrieved by Simphiwe on the scene, in the possession of the first appellant when they were apprehended. The account given by Constable Ndaonde was that a toy gun was recovered and handed directly to him on his arrival at the scene. This in my view is indicative that the appellants have failed to show that there are reasonable prospects of success on appeal.

[17] I am satisfied that the high court did not misdirect itself when it refused the petition to appeal against the conviction.

[18] In the result I make the following order:

The appellants' application for leave to appeal against the refusal of the petition on their conviction is dismissed.

W HUGHES
JUDGE OF APPEAL

Appearances

For the Appellant:

HL Alberts

Instructed by:

Legal Aid South Africa, Pretoria

Legal Aid South Africa, Bloemfontein

For the Respondent:

VT Mushwana

Instructed by:

The Director of Public Prosecution, Johannesburg

The Director of Public Prosecutions, Bloemfontein