



IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case Number: 127/15

In the matter between:

LUFUNO RADZILANE

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Radzilane v S* (127/15) [2016] ZASCA 64 (16 May 2016)

Coram: Lewis and Zondi JJA and Baartman AJA

Heard: 3 May 2016

Delivered: 16 May 2016

Summary: Criminal Procedure – sections 297(7) and (9) of the Criminal Procedure Act 51 of 1977 do not provide a mechanism to impose a new sentence pursuant to an application to enforce a suspended sentence – court a quo correct in finding that regional court exceeded its powers – matter remitted to trial court to consider application to enforce suspended sentence.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Zondo and Ismail JJ sitting as court of appeal).

The following order is made:

- 1 The application for special leave is granted.
 - 2 The appeal is dismissed.
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JUDGMENT

Baartman AJA (Lewis and Zondi JJA concurring):

[1] This is an application for special leave to appeal against the refusal by the court a quo of the applicant's application for leave to appeal. This court referred the application for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 (the Act).

Background

[2] The facts that gave rise to this application are largely common cause. The applicant pleaded guilty to one count of theft in the regional court, Makhado. He admitted that he had unlawfully and intentionally, while in the employ of ABSA Bank, between 18 September 2008 and 9 October 2008, withdrawn R560 000 from the accounts of various ABSA clients. The trial court convicted the applicant on the basis of his plea and sentenced him, in terms of s 297 of the Criminal Procedure Act 51 of 1977 (the CPA), to seven years' imprisonment, wholly suspended for five years on certain conditions including that he repay the amount stolen in instalments as directed in the court order.

[3] The applicant made an initial payment of R210 031.53, consisting of his pension due from ABSA Bank and money held in his accounts at the time of his arrest. He made a further payment of R4 000, after which he paid no further amounts. The respondent applied to have the suspended sentence put into operation. The trial

court, motivated by the substantial repayment he had already made and his personal circumstances, sentenced the applicant to three years' imprisonment in terms of s 276(1)(i) of the CPA (the new sentence). The applicant has served that sentence in full.

[4] The respondent appealed to the Gauteng Division, Pretoria against the imposition of the new sentence. Zondo and Ismail JJ upheld the appeal and set aside the new sentence and referred the matter back to the trial court to consider the application to put the suspended sentence into operation. On 20 September 2014, the court a quo refused the applicant's application for leave to appeal its order. The present application is against that order.

Special leave

[5] It is settled law that leave to appeal is only granted where there are reasonable prospects of success. A mere possibility of success is not sufficient. In *Van Wyk v S, Galela v S*,¹ this court emphasised the stringent requirements for granting special leave as follows:

'An applicant for special leave to appeal must show, in addition to the ordinary requirement of reasonable prospects of success, that there are special circumstances which merit a further appeal. This may arise when in the opinion of this court the appeal raises a substantial point of law, or where the matter is of very great importance, or where the prospects of success are so strong that the refusal of leave to appeal would probably result in a manifest denial of justice. . . .'

[6] The applicant has served the new sentence, irregularly imposed, and now faces the possibility of a further seven years' imprisonment. The apparent unfairness is of concern to both parties. In the circumstances of this matter, granting special leave is warranted. I deal with the grounds of appeal below to the extent necessary.

Legal representation

[7] The applicant was unrepresented at the appeal hearing; the court a quo had refused an application for postponement to obtain legal representation, reasoning

¹ *Van Wyk v S, Galela v S* [2014] 152 ZASCA; 2015 (1) SACR 584 (SCA), para 21.

that the applicant had had sufficient time, approximately 10 months, to obtain legal representation. The court below further considered that the matter had been ongoing since 2008 and ruled that in 2011, when it heard the appeal, it had been in the interests of justice that the matter be finalised. I cannot fault that finding.

Appeal procedure

[8] The applicant submitted that the court a quo was not competent to have upheld the appeal; instead, so the argument went, the respondent should have brought a review application. The court below dealt with the respondent's appeal as an appeal on a point of law: whether it was competent for the trial court to have imposed a new sentence pursuant to an application to enforce a suspended sentence. The court a quo held that it was not 'competent for the [trial court] to have imposed a new sentence ...'.

[9] The provisions of ss 297(7) and (9) circumscribe the court's power when the conditions of suspension are not met – it may enforce the suspended sentence or further suspend it, '...subject to any existing condition or such further conditions as could have been imposed at the time of such postponement or suspension'. (See E Du Toit et al *Commentary on the Criminal Procedure Act* – vol 2 at 28-41). It follows that as a matter of law, the trial court erred when it imposed the new sentence, making the respondent entitled to the order it obtained.

Just and equitable

[10] The applicant further contended that in the circumstances of this matter, as the applicant has already served the new sentence, it would be just and equitable to impose a lesser sentence. The CPA does not make provision for the trial court to impose a lesser sentence. However, the trial court will be at liberty to consider the deplorable delay in bringing this matter to finality and how it has prejudiced the applicant. The trial court imposed the new sentence on 24 March 2010 but the appeal was only heard in September 2011. The reasons for the delay appear from the condonation applications and it is not necessary to repeat them. Although the trial court found 'no good or sufficient reason' to further suspend the suspended sentence, it found good grounds to impose a lesser sentence. The applicant has

served the lesser sentence. The applicant made it clear when the respondent applied to put the suspended sentence into operation that he is unable to make any further payments to the complainant.

[11] It follows that putting the suspended sentence into operation will result in a harsher sentence than originally imposed or intended when the trial court imposed the new sentence. These are factors the trial court will take into account in deciding whether to effect the suspended sentence or further suspend it on the same or other appropriate conditions.

Conclusion

[12] It is so that the applicant has already served a period of imprisonment and that it would be patently unfair if he were to serve a further seven years' imprisonment. Although I am reluctant to make any suggestion that may appear to fetter the trial court's discretion, as it seems clear that the applicant is unable to further compensate the complainant, I consider it appropriate to express the view that the trial court should consider further suspending the sentence for a period of five years, on condition that the applicant is not convicted of theft or any crime entailing dishonesty during the period of suspension for which he has been sentenced to a period of imprisonment exceeding three years without the option of a fine.

Order

- 1 The application for special leave is granted.
- 2 The appeal is dismissed.

E D Baartman
Acting Judge of Appeal

Appearances

For Appellant:

H L Alberts

Instructed by:

Pretoria Justice Centre, Pretoria

Bloemfontein Justice Centre, Bloemfontein

For Respondent:

J J Kotzé

Instructed by:

Director of Public Prosecutions, Pretoria

Director of Public Prosecutions, Bloemfontein