THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 466/2021

In the matter between:

SIPHELELE GOODMAN NENE **Appellant**

and

THE STATE **Respondent**

Neutral Citation:	*Siphelele Goodman Nene v The State* (466/2021) [2022] ZASCA 120 (5 September 2022)
Coram:	ZONDI JA and WEINER and MOLEFE AJJA
Heard:	18 August 2022
Delivered:	5 September 2022
Summary:	Appeal against refusal of petition for leave to appeal by the high court – whether leave ought to have been granted.

ORDER

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

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following:

> 'The applicant is granted leave to appeal to the KwaZulu-Natal Division of the High Court, Pietermaritzburg, against his conviction and sentence by the Durban Regional Court.'

JUDGMENT

Zondi JA (Weiner and Molefe AJJA concurring):

[1] This is an appeal against the refusal by the KwaZulu-Natal High Court, Pietermaritzburg (the high court), of the appellant's application for leave to appeal to that court against his conviction and sentence. He was convicted in the Regional Court (Durban) of robbery with aggravating circumstances as read with s 51(2) of the Criminal Law Amendment Act 105 of 1997 (count 1), possession of goods suspected to have been stolen in contravention of s 36 of Act 62 of 1955 (count 6), unlawful possession of a firearm in contravention of s 3 of the Firearms Control Act 60 of 2000 (count 7) and unlawful possession of ammunition in contravention of s 30 of the same Act (count 8).

[2] After his conviction, the appellant was sentenced as follows: (a) in respect of robbery with aggravating circumstances (count 1), 15 years' imprisonment; (b) in respect of possession of stolen property in contravention of s 36 of Act 62 of 1955 (count 6), five (5) years' imprisonment; (c) in respect of unlawful possession of a firearm (count 7),15 years' imprisonment and; (d) in respect of unlawful possession of ammunition (count 8), two (2) years' imprisonment.

[3] It was ordered that the two (2) years' sentence imposed on count 6 run concurrently with the sentence imposed on count 1. It was further ordered that 11 years of the sentence imposed in count 7 and the whole sentence imposed on count 8 run concurrently with the sentence imposed on count 1. This means that the appellant's effective sentence was 22 years' imprisonment. The appellant's application to the trial court for leave to appeal to the high court against conviction and sentence, under s 309B of the Criminal Procedure Act 51 of 1977, did not succeed. Consequently, the appellant petitioned the Judge President of KwaZulu-Natal Division in terms of s 309C of the same Act for such leave. Van Zyl and Mnguni JJ dismissed his petition.

[4] Aggrieved by this decision, the appellant lodged an application for special leave in this Court against his conviction and sentence in terms of s 16(1)*(b)* of the Superior Court Act 10 of 2013. Such leave was granted by this Court on 8 February 2021. The issue before this Court is whether the appellant should have been granted leave to appeal to the high court against his conviction and sentence.

[5] The approach to be followed in cases such as the one under consideration where leave to appeal is sought against the refusal of the petition by the high court was authoritatively set out in *S v Khoasasa*.[1] In addition, this Court in *Mthimkhulu v S* held as follows:[2]

'This court has in a number of decisions stated that what is to be adjudicated upon is whether the decision of the high court dealing with the refusal of the petition was correct in terms of s 309C of the CPA and if it is, *cadit quaestio*. However, if the court erred in holding that there were no reasonable prospects of success then leave to the full bench will have to be granted on the merits to be adjudicated by the court. The test in an application of this nature is whether there are reasonable prospects of success in the envisaged appeal. It is not desirable to traverse the merits in detail.'

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[1] *S v Khoasasa* [2002] 4 All SA 635 (SCA); 2003 (1) SACR 123 (SCA). The latter has been followed in various cases such *S v Matshona* [2008] ZASCA 58; [2008] 4 All SA 68 (SCA); 2013 (2) SACR 126 (SCA), Tonkin v S [2013] ZASCA 179; 2014 (1) SACR 583 (SCA), *Van Wyk v S, Galela v S* [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA) and *Mthimkhulu v S* [2016] ZASCA 180.

[2] See *Mthimkhulu v S* [2016] ZASCA 180 para 5.

Consequently, this Court cannot determine the merits of the appeal but must confine itself to the question whether leave to appeal to the high court should have been granted.

[6] This Court in *S v van Wyk* held that:[3]

'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 to this court. 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 to the parties or of great public 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. See *Westinghouse Brake and Equipment v Bilger Engineering* 1986 (2) SA 555 (A) at 564H-565E.'

[7] With this background, I briefly set out the events which led to the appellant's conviction and sentence. On 4 November 2015, at Burlington Heights Drive (Marrianhill, Durban), the complainant, Mr Phakama Hlatshwayo, a sales representative of British Tobacco Corporation, was robbed at gunpoint of a VW Caddy vehicle with registration number ND 259564 valued at R250 000 and a Blackberry cellular phone valued at R1 500 by four unknown male suspects driving in a Hyundai Accent vehicle with registration number YKG 138 GP. The VW Caddy vehicle was loaded with boxes of an assortment of cigarettes to the value of R50 000.

[8] The Hyundai Accent overtook the complainant and blocked his path of travel. He was ordered to get out of the vehicle, and he complied. After loading the boxes of cigarettes into the Hyundai Accent, the suspects drove away with both vehicles. They abandoned the complainant's vehicle not far from the scene. The incident was reported to the police, who arrived at the scene shortly after the occurrence of the incident. The police found the complainant at the scene, and he related to them what had befallen him. He gave the police a description of the vehicle involved in the robbery. The police followed the direction in which both the vehicles had travelled. They saw a

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[3] *Van Wyk v S, Galela v S* [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA) para 21.

vehicle matching the description of the vehicle which was involved in the robbery. When the police signalled for it to stop, it sped off.

[9] The police gave chase, and one of the suspects in the vehicle, with his hands protruding through the window, fired shots at the police. After a high-speed car chase, the driver of the Hyundai Accent lost control, causing the vehicle to crash. About four male suspects got out of the vehicle and fled in the same direction. One of the suspects fired shots at the police as he ran away. The police returned fire hitting the suspect in the leg. The suspect threw an object into the bushes along the footpath and disappeared.

[10] With the assistance of the Durban Metro Police Dog Unit (Dog Unit), the suspect with a gunshot wound, who turned out to be the appellant, was tracked down by a police dog handled by Inspector Botha of the Dog Unit in one of the houses in the vicinity of the site where the Hyundai Accent had crashed. Inspector Botha apprehended the appellant and handed him to the police at the scene. The police arrested him, whereafter he was conveyed by ambulance to the hospital to be treated for dog bites and the gunshot wound. Sergeant Beckett proceeded to the spot where the appellant was seen dropping an object. He found a Glock firearm loaded with ammunition. It emerged during the police investigation that the Hyundai Accent vehicle had been reported stolen in Chatsworth under ‘CAS 517/10/2015 robbery’.

[11] In consequence of these occurrences, the appellant was charged, among others, with the offences set out above and after the trial, he was convicted and sentenced as set out in the preceding paragraphs. The appellant denied all the allegations against him. His version, in short, was that he was accidentally shot during a shoot-out between the police and the fleeing suspects while walking on the road. He was not one of the suspects, but a passer-by. Two of the police officers at the scene set a police dog on him, and it bit him.

[12] The appellant attacked his conviction by the trial court on a charge of possession of goods suspected of being stolen in contravention of s 36 of Act 62 of 1955 (the Act). He argued that the trial court misdirected itself regarding

the application of s 36 of the Act. His contention was that s 36 is aimed at instances where the state is unable to prove that the goods concerned were indeed stolen, and in support of this proposition, he referred to CR Snyman in Criminal Law 5 ed at 524, para 2. The appellant argued that, in the matter under consideration, the state had no difficulties in proving that the motor vehicle concerned had been stolen. Its difficulty was that the complainant was unable to identify the thieves. The appellant argued further that the elements of the crime under s 36 were not established in this matter, regard being had to the fact that at no stage was he ever asked by the police about the Hyundai Accent.

[13] In convicting the appellant of a crime of contravening s 36 of the Act, the trial court stated that it was satisfied that the evidence adduced established beyond reasonable doubt that 'all four accused were travelling in the said Hyundai Accent and that they failed to give a satisfactory account of their possession'. This finding cannot be supported in the absence of evidence by the police that after his arrest, the appellant was asked to give an account of his possession of the Hyundai Accent and that he failed to give a satisfactory account of such possession.[4] This needs to be established for a conviction under s 36 to be sustained.

[14] The second ground of the attack of the conviction was based on the contention that there was no evidence that the appellant was one of the occupants of the Hyundai Accent who exited it shortly after it capsized. This contention related to the sufficiency of the identifying evidence of the witnesses. In this regard, the trial court's finding was that the police did not lose sight of the suspects who exited the vehicle and fled. The appellant relied upon certain inconsistencies in the State case in this regard.

[15] As regards the sentence, it was submitted by the appellant that the effective sentence of 22 years induces a sense of shock. This was so, the appellant argued, because most of the loot was recovered; the complainant

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[4] *S v Kajee* 1965 (4) SA 274 (T) at 276. See also JRL Milton *South African Criminal Law and Procedure, Volume III, Statutory Offences*, Part Two 2 ed (2003) at 15-16 under the heading 'inability to give satisfactory account'.

was not harmed during the robbery, and he was relatively young when the offences were committed.

[16] As far as the sentence is concerned, the evidence was that the appellant was 30 years of age, single with five minor children; had a cleaning company, his income was between R6000 and R7000 per month, and he was a first offender. The armed robbery charge was subject to s 51(2) of the Criminal Law Amendment Act 105 of 1997, which prescribes a minimum sentence of 15 years' imprisonment upon conviction in the absence of substantial and compelling circumstances that would justify the imposition of a lesser sentence.

[17] The trial court considered the appellant's personal circumstances and concluded that they did not constitute substantial and compelling circumstances and for that reason, imposed a sentence of 15 years' imprisonment. It justified the sentence of 15 years it imposed in respect of the charge of unlawful possession of a 9mm calibre Glock semi-automatic pistol on the basis that such sentence was not out of proportion to the gravity of the offence committed. The appellant argued that the sentences should have all run concurrently, in the circumstances of the case.

[18] On the facts of this case, it could be said that the appellant does have reasonable prospects of success, and the high court should have granted him leave to appeal. In the result, the appeal must succeed.

[19] It is ordered that:

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following:

'The applicant is granted leave to appeal to the KwaZulu-Natal Division of the High Court, Pietermaritzburg, against his conviction and sentence by the Durban Regional Court.'

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DH Zondi

Judge of Appeal

Appearances

For appellant:	L Barnard
Instructed by:	T Mpanza Attorneys, Durban Blair Attorneys, Bloemfontein
For respondent:	Z Dyasi
Instructed by:	Director of Public Prosecutions, Pietermaritzburg Director of Public Prosecutions, Bloemfontein