

SOUTH AFRICA / JUDGMENT

Khoza v S (P143/09) [2014] ZAGPJHC 4; 2014 (2) SACR 236 (GJ) (11 February 2014) [2014] ZAGPJHC 4

COURT

South Gauteng High Court, Johannesburg

BEFORE

D S S Moshidi, P A Meyer

CASE / FILE NUMBER

P143/09

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REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: P143/09

DPP REF NO: JAP 2013/65

DATE: 11 FEBRUARY 2014

In the matter between:

KHOZA, HAMILTON.....Appellant

And

THE STATE.....Respondent

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

- [1] This is essentially an application for leave to appeal against the conviction and sentence imposed by the regional court. In more specific terms, the appellant seeks to appeal to the Supreme Court of Appeal against the dismissal of his subsequent petition for leave to appeal against the aforesaid convictions in circumstances described below.

- [2] The present application is also accompanied by an application for condonation for the late filing thereof. There is also a condonation application for the late making of a special entry in terms of the provisions of section 317 of the Criminal Procedure Act 51 of 1977 (“the Criminal Code”).

SOME FACTUAL

BACKGROUND

- [3] The factual background is indispensable. The appellant was originally charged in the Germiston Regional Court with five counts as follows:

Count 1 - Robbery with aggravating circumstances.

Count 2 - Unlawful possession of firearms.

Count 3 - Escaping from lawful custody.

Count 4 - Robbery.

Count 5 - Robbery with aggravating circumstances.

The State alleged that counts 1 to 5 were committed by the appellant in the Boksburg area on 18 July 2005, 17 August 2006, 18 August 2006, 18 August 2006 and 29 July 2006, respectively. The trial commenced on 16 February

2007. The appellant pleaded guilty to Count 3, but not guilty to all the other charges.

- [4] During March 2007, the appellant was convicted in respect of Counts 1, 3 and 5. He was acquitted on Counts 2 and 4. On 19 March 2007, the following sentences were imposed:

Count 1 - 15 years’ imprisonment.

Count 3 - 5 years’ imprisonment.

Count 5 - 20 years’ imprisonment.

However, the regional magistrate ordered that the sentence imposed in respect of Count 1 be served concurrently with the sentence imposed in respect of Count 5. The effective term of imprisonment was therefore 25 years. The regional magistrate later refused an application for leave to appeal against the convictions and sentences imposed.

APPELLANT’S PETITION, PROCEEDINGS AND THE REASONS FOR ITS REFUSAL

- [5] The appellant, feeling aggrieved by the decision of the trial court, petitioned the Judge President of the then Transvaal Provincial Division in terms of the provisions of section 309C of the Criminal Code for leave to appeal against both convictions and sentences. In due course, and on 11 June 2009, the petition was considered by my Brother Meyer J and myself. The petition was refused. However, when the instant application was initially launched this year (2013), Meyer J was not available as he was an acting Judge at the Supreme Court of

Appeal. In his place, my Brother Mabesele J, was assigned to assist me. However, Meyer J has since become available after the application was postponed twice.

- [6] In considering the petition, at the time, the sole consideration was whether there were reasonable prospects of success on appeal as set out in *R v Kuzwayo* 1949 (3) SA 761 (A) at 764-765. In *S v Khoasasa* 2003 (1) SACR 123 (SCA) at para [19], the consideration was stated as:

“Die aansoek om verlof om te appelleer teen ‘n skuldigbevinding of vonnis in a laer hof gerig aan die Regter-President van ‘n Provinsiale Afdeling nadat sodanige verlof deur die laer hof geweier is, word nie in art 309C beskryf as ‘n appèl nie maar is nogtans daarop gerig om ‘n regstelling te verkry van wat die aansoekdoener beskou as ‘n verkeerde beslissing in die laer hof. In effek is dit niks anders as ‘n appèl teen die landdros se weiering van verlof om te appelleer nie.”

THE STATE’S EVIDENCE AT THE TRIAL

- [7] Having in mind the above approach, the merits of the petition were considered at the time. In regard to Count 1, Mr Elias Mokwana (“Mokwana”), testified how he was robbed of his truck at about 15h00 on 18 July

2005. He was driving the truck and had just finished deliveries, with his assistant, a Mr Ledwaba. A white Corolla motor vehicle appeared and activated a siren. The occupants of the Corolla flashed police appointment cards and ordered Mokwana to stop, which he did. He was accused of having disobeyed a red traffic light. Mokwana denied the accusation. Mokwana and Mr Ledwaba were removed from the truck and placed in the Corolla motor vehicle. They were taken to a squatter camp situated behind the Boksburg Prison. The truck drove away with two of the assailants. At the house Mokwana and Ledwaba were guarded by another suspect who was armed with a firearm. Mokwana was relieved of his possessions including his cellphone. Mokwana and Ledwaba were ordered not to leave the house for some time and were

left alone.

- [8] During the same afternoon, and as soon as he could do so, Mokwana contacted his employer telephonically and reported the incident. The truck was later recovered as stated below. At the trial, Mokwana identified the appellant as one of the robbers of the Corolla motor vehicle. He said that it was the appellant who demanded his cellphone. When the truck was robbed, Mokwana resisted to be transferred to the Corolla motor vehicle and there was some argument between him and the robbers and he observed the appellant for about 10 minutes, and the argument delayed the robbery slightly. He was pointed with firearms by the robbers and accused of being too talkative. Between the time of the incident and the trial, Mokwana had not seen the appellant again. It was common cause that Ledwaba, the assistant, was not called to testify, and for which the State was eventually severely criticised. The State prosecutor informed the court that this witness could not identify any of the perpetrators.

- [9] The evidence of Mokwana was corroborated by police officer B M Semenya (“Semenya”), who testified that he was stationed at the Dawn Park, Benoni, Police Station. On the same day of the robbery, Semenya and a colleague Sgt Maisela, were on duty patrolling when they noticed Mokwana’s truck. It was about 18h00. The truck was ordered to stop. The driver complied. It had two occupants. It was common cause that the appellant was one i.e. the passenger. The driver escaped. The appellant attempted also to escape but was deterred by a warning shot fired by Semenya. The appellant was arrested. The appellant could not provide a reasonable explanation for his presence in the truck. In cross-examination the version of the appellant that he had in fact told the police that he had obtained a lift from the occupants of the truck since his own motor vehicle had broken down, was denied by Semenya. According to the latter, the appellant said that he had been in the company of three other persons, two of whom were left at a nearby petrol station.
- [10] In regard to Count 5, both Mr and Mrs Coombs, the complainants, testified. On Saturday 27 July 2006 at about 20h00, Mr Coombs arrived back at his home. He parked his motor vehicle in front of the gate whilst Mrs Coombs alighted to open the gate. In the motor vehicle were also his two grandchildren aged 3 years and 6 years, respectively. Mr Coombs observed two men. One of the assailants, who was armed with a pistol, approached him, whilst the other accosted Mrs Coombs at the gate. Mr Coombs identified the appellant as the assailant who ran in front of his motor vehicle and cut Mrs Coombs on the arm when she tried to open the gate. The appellant wielded a pistol.
- [11] Mr Coombs was ordered out of his motor vehicle. The appellant entered the front passenger side of the vehicle, whilst the other suspect drove the vehicle away. This, in spite of the fact that the grandchildren were still in the vehicle. In desperation, Mr Coombs flung himself in front of the moving vehicle. The robbers stopped. Mr Coombs managed to retrieve his grandchildren. The place of the robbery was well-lit with electrical lights and the lights of the motor vehicle were also switched on.
- [12] The evidence of Mr Coombs was corroborated substantially by his wife, Mrs Coombs, when she testified, in particular about the identity of the appellant as one of the robbers who had accosted her at the gate. Whilst Mr Coombs testified that he identified the appellant through general face appearance, the shape of the face, and that he could never forget the face of the assailant, his wife, said more. She testified that the appellant’s ears were very small and somewhat pressed flat against his head. In this regard, in the course of his judgment, the regional magistrate observed:

“Now it is so when you look at the accused from the front you actually do not see his ears. This can also be seen on the photograph that was handed in.”

The photograph referred to is what Mr and Mrs Coombs testified they had seen about a month after the incident published in newspapers. In the publications, the appellant’s face was shown as a wanted suspect who had escaped from the Boksburg Police Station holding cells on 18 August 2006. Both Mr and Mrs Coombs identified the appellant as one of the robbers.

THE APPELLANT'S VERSION AT THE TRIAL

[13] The appellant testified as the only witness in his defence. His version in regard to Count 1 came to this. On 18 July 2005 his motor vehicle broke down. He waved to Mokwana's truck to stop as he wanted a lift. The truck stopped. The driver of the truck agreed to offer him a lift and he charged the appellant R300,00 in order to take him to his house. The reason for this was that the appellant did not have in his possession the fee charged but would first fetch his bank card from his house. Unfortunately, on the way to the house, they were arrested by the police as testified by Semenya. The driver of the truck who had offered the appellant a lift ran away. In regard to Count 5, involving Mr and Mrs Coombs, the version of the appellant was simply a bare denial. He alleged that the State witnesses were mistaken about his identity as one of the perpetrators.

THE REGIONAL MAGISTRATE'S FINDINGS

[14] In a well-reasoned and motivated judgment, the regional magistrate, and with reference to some applicable case law, such as *S v Van der Meyden* 1999 (1) SACR 447 (W), and *S v Mthethwa* 1972 (3) SA 766 (A), concluded that Mr and Mrs Coombs were trustworthy witnesses despite some discrepancies between their versions. They had sufficient

opportunity to observe the appellant, and their identification of him as one of the robbers was reliable. The same applied to the evidence of Mokwana in regard to Count 1. In addition, the regional magistrate found that Mokwana even had a better opportunity than Mr and Mrs Coombs to observe the appellant as robbery occurred during daylight. The appellant was in Mokwana's truck approximately three hours after the robbery.

[15] On the other hand, the regional magistrate found that the version of the appellant was not reasonably possibly true. In particular, that the version of the appellant in regard to count 1, the robbery of Mokwana, did not make sense at all. There was plainly no conceivable reason why the State witnesses would falsely implicate the appellant in the commission of the crimes. For these reasons the regional magistrate was satisfied that the State had succeeded in proving the guilt of the appellant beyond reasonable doubt.

[16] It is indeed an established legal principle that since a trial court has certain advantages which a court of appeal does not have, appeal courts will be slow to disturb factual findings made by courts of first instance. Such interference can be justified only in the face of a clear misdirection or irregularity. See *Nomandela and Others v S* [2007] 1 All SA 506 (E) at 514h-I, and *S v Monyane and Others* 2008 (1) SACR 543 (SCA) at para [15]. In the present matter, there is no indication that the regional magistrate committed any misdirection in convicting the appellant.

[17] I now turn to the question of sentence when the petition was considered. We held the view that the regional magistrate took into account all the relevant circumstances in imposing the sentences. He, despite the fact that the offences were committed one a year apart, ordered the substantial period of imprisonment in Count 1 to be served concurrently with the

sentence in Count 5. In any event, as will appear below, the appellant in the present application does not seek to appeal against the sentences imposed. Moreover, it is trite law that the imposition of sentence is a question falling pre-eminently within the discretion of the trial court, and the test for interference by an appeal court is clear. See, inter alia, Khoza and Others 2010 (2) SACR 207 (SCA), at para [86]. In the present matter, there was no justification at all to interfere with the imposed sentences.

[18] I conclude that for all the above reasons, there are no reasonable prospects of success on appeal against the refusal of the petition.

THE PRESENT APPLICATION FOR LEAVE TO APPEAL TO THE SUPREME COURT OF APPEAL

[19] I now turn to the instant application. To restate, it is an application for leave to appeal to the Supreme Court of Appeal against the dismissal of his petition as dealt with above. It is noteworthy that the appellant now seeks leave to appeal against the convictions in respect of Counts 1 and 5 only and not the sentences imposed in respect thereof. He also does not seek leave to appeal against the conviction and sentence imposed in regard to Count 3, i.e. escaping from lawful custody.

THE CONDONATION APPLICATION

[20] The starting point is the consideration of the application for condonation for the late filing of the present application for leave to appeal. As stated earlier in this judgment, the appellant's petition for leave to appeal against the convictions and sentences was refused by this Court as far back as 11 June 2009. The present application is dated 17 September 2013, and filed with the registrar the following day. This was more than four years after the petition was declined.

[21] The question of condonation in cases of this nature, is closely connected with the pertinent issue whether there are reasonable prospects of success on appeal. See for example *S v Brink* 1973 (2) SA 571 (A) at 576F; *Immelman v Loubser* 1974 (3) SA 816 (A) at 824B-C; and *S v Tseli* 1984

(1) SA 565 (A) at 570D-F. In *S v Mantsha* 2006 (2) SACR 4 (CPD), at 6f-h, the Court said:

"However, there is a limit to the lengths to which a Court of Appeal can go in relaxing the Rules and granting condonation to those who flagrantly fail to comply with them. It is not, and has never been, the position in our law that whilst the relevant Rules apply to appellants who are represented, they do not apply to others who are not. That would be a quite untenable and unjustifiable stance to adopt ... The Rules are for all litigants. They must be adhered to by all litigants. That is the basic principle which applies."

See also *S v Mantsha* 2009 (1) SACR 414 (SCA) at 419.

[22] In the instant matter, the appellant has advanced several reasons why he should be granted condonation, including that he has been in custody since his conviction and sentence in March 2007. The appellant also alleges that he lost confidence in the legal representative who assisted him during the trial and in the petition proceedings in the High Court. The

appellant also advances as a further reason his lack of funds. His friends and relatives eventually managed to raise the necessary funds during December 2012, which enabled him to instruct his current attorneys of record, S Shapiro Attorneys, who in turn briefed Mr P Shapiro. The appellant, however, omits to explain fully and satisfactorily what steps he took to prosecute the instant application since the petition for leave to appeal was dismissed by this Court during June 2009. In addition, there was a further unexplained delay from the time the necessary funds were allegedly accumulated to the time of the filing of the present application, i.e. 18 September

2013. There is also no intimation regarding any steps taken by the appellant to seek legal representation from institutions such as the Legal Aid SA, which do not charge fees. For all these reasons I conclude that the appellant has not made out a case for condonation to be granted.

THE APPELLANT'S SPECIAL ENTRY AND CONDONATION THEREOF

- [23] Finally, I deal with the appellant's application for condonation and the special entry to be settled and to grant leave to appeal thereon in terms of the provisions of section 317 of the Criminal Code. Section 317 of the Criminal Code provides as follows:

"(1) If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his/her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made bona fide or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court.

- (2) Save as hereinafter provided, an application for condonation or for a special entry shall be made to the judge who presided at the trial or, if he is not available, or if in the case of a conviction before a circuit court the said court is not sitting, to any other judge of the provincial or local division of which that judge was a member when he so presided.
- (3) ...
- (4) The terms of a special entry shall be settled by the court which or the judge who grants the application for a special entry.
- (5)..." (underlining added)

- [24] In his rather helpful heads of argument, Mr Van Wyk for the State, argues that the provisions of section 317 quoted above, are not applicable in respect of a lower court trial. Further that the correct procedure to address an alleged irregularity in the lower court, would be of review, whether in the form of an independent process or combined with an

appeal as provided for in section 309(3) of the Criminal Code. In my view, there is merit in the submission. In *S v Felthun* 1999 (1) SACR 481 (SCA), the Supreme Court of Appeal dealt with a special entry in terms of sections 317 and 318 of the Criminal Code. In ultimately dismissing the appeal, the Court at 485f-g said:

“Section 317(1) of the Act provides that if an accused person considers that any of the proceedings in connection with or during his trial before a superior Court are irregular or not according to law, he may apply for a special entry to be made on the record. Section 318(1) provides that if a special entry is made on the record, the person convicted may appeal to this Court against his conviction on the ground of the irregularity or illegality stated in the special entry. In considering the appeal regard must be had to the proviso to s 322(1) of the Act, in terms of which the accused’s conviction and sentence are not to be set aside by reason of any irregularity, or defect in the record of proceedings, unless it appears to this Court that a failure of justice has in fact resulted from such irregularity or defect.”

See also *S v Mabasa and Others* [2005] ZANCHC 3; 2005 (2) SACR 250 (NC) at 253. The clear and unambiguous wording of section 317 of the Criminal Code makes it plain that special entries only apply to criminal trials before a High Court. This, in my view, should put to rest the appellant’s application for a special entry to be made in the present matter. It also becomes unnecessary to detail the alleged irregularity. The mere allegation of an irregularity in the regional court clearly does not present the appellant with any automatic entitlement to an appeal (without leave thereto from the lower court or by way of petition) or of a review. No failure of justice has resulted from what the appellant contends to be the irregularities.

SUMMATION

[25] To sum up. The appellant’s petition against the refusal of the regional magistrate to grant leave to appeal against the convictions and sentences imposed, was refused by this High Court in June 2009. The reasons for such refusal, include the absence of reasonable prospects of success on appeal, and as set out earlier in the judgment. That finding stands. In regard to the present application, the appellant has not shown good cause for condonation of the late filing of the application for leave to appeal. The same applies to the condonation application for a special entry to be made on the record of the proceedings, as well as the merits of the special entry itself. In addition, it is rather significant that the grounds for leave to appeal to the Supreme Court of Appeal are not identical to the grounds for leave to appeal to this High Court. Furthermore, and most importantly, the present appeal, for reasons stated above, has no reasonable prospects of success on appeal. The application must fail.

ORDER

[26] In the result the following order is made:

1. The application for leave to appeal as set out in the notice of motion dated 17 September 2013 is refused.

D S S MOSHIDI

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

I concur:

P A MEYER

COUNSEL FOR THE APPELLANT ADV P SHAPIRO

INSTRUCTED BY S SHAPIRO ATTORNEYS

COUNSEL FOR THE RESPONDENT ADV D VAN WYK

INSTRUCTED BY DPP, JOHANNESBURG

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