

SOUTH AFRICA / JUDGMENT

Nontshinga and Others v S (23/2011) [2016] ZAECHGC 88 (15 September 2016) [2016] ZAECHGC 88

COURT

Eastern Cape High Court, Grahamstown

BEFORE

C. Plasket, J.D. Pickering

CASE / FILE NUMBER

CA&R 23/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no: CA&R 23/2011

Date delivered: 15/9/16

Not reportable

In the matter between

MFUNDO NONTSHINGA First

Accused

MZWEKHAYA ZAGANA Second

Accused

MANDLA MAZWI Third

Accused

DUMISANI SIKAKANA Fourth

Accused

and

THE STATE Respondent

JUDGMENT

PLASKET J

[1] This is a special review with a long and complicated history. The matter has been referred to this court by means of an agreement

between the State and the legal representatives of the accused.

[2] On 17 September 2008, the accused and one Vusumzi Bolo robbed a shop in Alexandria. They were captured within an hour and duly tried in the Regional Court, Port Elizabeth. They were convicted of robbery with aggravating circumstances, six counts of kidnapping, the unlawful possession of a semi-automatic firearm and the unlawful possession of ammunition. They were sentenced to lengthy periods of imprisonment.

[3] All of the accused and Bolo applied for leave to appeal. They were unsuccessful. The four accused petitioned this court for leave. Their petition was refused. Bolo petitioned this court separately. He was granted leave to appeal against the convictions of unlawful possession of a semi-automatic firearm and ammunition – counts 8 and 9. That firearm and the eight rounds of ammunition in its magazine were found on the back seat of the car in which the robbers had fled the scene of their crimes.

[4] Bolo's appeal was argued on 5 November 2014 before Brooks AJ and me. We found, on the authority of *S v Mbuli* 2003 (1) SA 97 (SCA), that the State had not proved that Bolo was in joint possession with the accused of the firearm and ammunition. We accordingly set aside Bolo's convictions of counts 8 and 9. See *S v Bolo* ECG 6 November 2014 (Case no CA&R352/13) unreported.

[5] As we were not aware that the accused had even applied for leave to appeal, we requested the Grahamstown Justice Centre, which had represented Bolo, to inform the accused of our judgment. We did so because it was clear to us that they were, in relation to the firearm and the ammunition, in exactly the same position as Bolo.

[6] The Grahamstown Justice Centre applied to the Supreme Court of Appeal, in terms of the Superior Courts Act 10 of 2013, for special leave to appeal against the convictions in respect of counts 8 and 9.

[7] The matter was struck from the roll because the Superior Courts Act and the procedure provided for by it was not applicable: as the matter arose before that Act came into force, the matter had to have

been determined in terms of the applicable provisions of the Supreme Court Act 59 of 1959. See *S v Nontshinga & others*

[2016] ZASCA 76 (27 May 2016).

- [8] That would mean that an application for leave to appeal against the refusal of the petition would have to be brought before the judges who refused it; if that was granted, the appeal against that refusal would have to be heard by the Supreme Court of Appeal; and if that was successful, an appeal on the merits would have to be heard in this court. That could take a year an a half or more.
- [9] Given that the outcome in respect of counts 8 and 9 is a foregone conclusion, in the light of the authorities and my judgment in Bolo, and that these cases all establish that the magistrate misdirected himself, it is in the interests of justice that the misdirection be cured by way of review.
- [10] In the result, the convictions and sentences imposed on the accused in respect of counts 8 and 9 are set aside.

C. PLASKET

JUDGE OF THE HIGH COURT

I agree.

J.D. PICKERING

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