

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appeal case number: A55/2023

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED. ✓
26/07/2023
DATE

Mabesele
SIGNATURE

In the matter between:

MCEBO THANDO VILAKAZI

Appellant

And

THE STATE

Respondent

Mabesele J; Mahalelo J et Dosio J:

J U D G M E N T

MABESELE, J:

[1] This is an appeal against conviction of the appellant. He was convicted on fifteen counts which include unlawful possession of firearms and ammunition, robbery, attempted murder and murder. Leave to appeal was granted in respect of five counts only, before sentence was imposed upon the appellant. Subsequent to leave being granted the proceedings were adjourned until 15 August 2023 for sentencing, pending the outcome of this appeal.

[2] The events that led to this appeal are as follows: The appellant was convicted by Monama J (as he then was). Sadly, Monama passed on before the conclusion of the sentencing proceedings. As a result, the matter was allocated to our brother , Moosa J, to impose sentence upon the appellant in terms of section 275(2) (a) of the Criminal Procedure Act¹. This section provides as follows.

“(2) Whenever-

(a) a judge is required to sentence an accused convicted by him or her of any offence and that judge is for any reason not available, any other judge of the provincial or local division concerned may, after consideration of the evidence recorded and in the presence of the accused, sentence the accused or, as the case may be, take such other steps as the former judge could lawfully have taken in the proceedings in question if he or she had been available”

¹ 51 of 1977

[3] After the judge has obtained the record of the proceedings and considered the evidence recorded, he directed the parties to file heads of arguments and address him on conviction prior to the commencement of the pre-sentence proceedings. Due to the invitation by the Court the state counsel pointed out to the Court that the conviction on certain counts are questionable in that the state had failed to prove its case against the appellant beyond reasonable doubt on those counts. Accordingly, state counsel submitted that the Court may proceed to amend the judgement of the trial Court, as provided for by section 176 of the Criminal Procedure Act. This section provides:

“When by mistake a wrong judgement is delivered the court may, before or immediately after it is recorded, amend the judgement”

[4] The judge, having relied on section 176 of the CPA was of the view that the trial judge delivered a wrong judgement. The judge said the following:

‘In terms of section 176 of CPA, this Court proceeds to find that a wrong judgement has been delivered and to amend the judgement. To this end, to set aside and/ or not confirm the conviction on counts one, two (to a limited degree), three, five, six and twelve, and to sentence the applicant on the remaining counts.’

[5] The judge was of the view that his role as the sentencing Court is to satisfy himself regarding the veracity and soundness of the convictions, prior to him imposing sentence and finalising the matter. Accordingly, he was of the view that section 316 of the CPA entitles the appellant to bring an application for leave to appeal after conviction to any judge, if the trial judge is not available. His view was that the appellant does not have to wait for the sentencing proceedings to be finalised. Accordingly, the judge made the following order:

- (a) Leave to appeal to the Full Court of the Gauteng Division, Johannesburg, against the conviction on counts one, two, three, five, six and twelve is granted.
- (b) Leave to appeal to the Full Court of the Gauteng Division, Johannesburg, against the conviction on counts four, seven, eight, nine, ten, eleven, thirteen, fourteen and fifteen is refused.
- (c) The parties are directed to forthwith communicate with the Office of the Deputy Judge President, Johannesburg, with a view to obtaining a preferential date for the hearing of the appeal in Term 3, 2023.
- (d) The matter is postponed to Tuesday, 15 August 2023 before this Court for pre-sentencing proceedings, pending the outcome of the appeal.

[6] The judge correctly stated in his judgement that section 275(2)(a) of the CPA requires the Court to consider the recorded evidence and the section does not specify that the Court must be satisfied that the judgement of the trial Court is indeed sound. In my view, the section does not require the parties to

scrutinise or deliberate on the judgement delivered by the trial judge before another judge proceed with the sentencing proceedings.

[7] The judge was alive to the fact that it would be incorrect for him to proceed to set aside and/ or amend the judgement of the trial Court in terms of section 176 of the CPA as he will then be acting as a Court of review or appeal. This, notwithstanding, his view was that it would be a travesty of justice to proceed to finalise the sentencing of the appellant on all counts in terms of section 275(2)(a) of the CPA, having due regard to the fact that the state has failed to prove its case against the appellant on certain counts on the basis that evidence² was not led on those counts. For this reason, he granted the appellant leave to appeal against conviction on those counts, thus incorrectly amending the findings of the trial Court. Section 176 which our brother relied on, refers to a wrong judgement delivered by mistake³ and to be amended prior or immediately⁴ after it was recorded. There is no evidence on record that the judgement of the trial judge was delivered by mistake and was considered to be wrong by the trial judge. If that was the case, the trial judge would have amended the judgement immediately after it was recorded. Section 176 was relied on, incorrectly. For these reasons it cannot be said to be a travesty of justice not to grant the appellant leave to appeal against conviction on the aforementioned counts.

² evidence on record does not refer to viva voce evidence only, but both viva voce and the statements made by the accused.

³ emphasis added

⁴ emphasis added

[7] Section 316 of the CPA allows an aggrieved person to make an application for leave to appeal against his conviction or against sentence or order and within 14 days after the passing of sentence or order⁵ following on the conviction. The section clearly does not allow the aggrieved person to apply for leave to appeal against conviction before sentence is passed. Therefore, this Court cannot entertain the merits of this appeal. For all these reasons, I am of the view that the matter should be referred back to the Court below to sentence the appellant in terms of section 275(2)(a) of the Criminal Procedure Act.

⁵ Emphasis added. The word 'order' should not be understood to mean 'conviction'

[8] For all these reasons, the following order is made:

8.1 The matter is referred back to the Court below to sentence the appellant in terms of section 275(2)(a) of the Criminal Procedure Act in respect of all 15 counts of which the appellant was convicted.



M.M. MABESELE

(Judge of the High Court Gauteng Local Division)

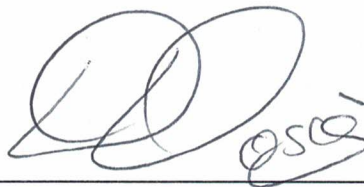
I concur



B. MAHALELO

(Judge of the High Court Gauteng Local Division)

I concur



D.DOSIO

(Judge of the High Court Gauteng Local Division)

Date of Hearing : 17 July 2023

Date of Judgment : 26 July 2023

Appearances

On behalf of Appellant : Mr A Steenkamp

Instructed by : Andre Steenkamp Attorneys

On behalf of the Respondent : Adv Le Roux

Instructed by : Director of Public Prosecutions