

10/12/2010
NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO.: A1010/2008

DATE:

In the matter between:

PETER MAKUNYE KHAULI

1ST APPELLANT

PHILLIP MOEKETSI KHAULI

2ND APPELLANT

And

THE STATE

RESPONDENT

CORAM: WEBSTER J, RANCHOD J et PAKATI AJ

JUDGMENT

PAKATI AJ

1. This appeal served before a full bench of this court. The appellant was represented by Adv Monyakane on the instructions of the Legal Aid Board. The appellant and another accused were convicted on 30 August, 2002, of robbery with aggravating circumstances on count 1 and were each sentenced to fifteen (15) years' imprisonment. On count 2 they were convicted of murder and were each sentenced to life imprisonment. On count 5 they were convicted of theft and were each sentenced to six (6) months' imprisonment. All the sentences were ordered to run concurrently.
2. The record shows that immediately after the accused were sentenced on 30 August, 2002, Mr Pienaar, for the appellant, moved an application for leave to appeal against both conviction

and sentence. The application was dismissed by Van der Bijl AJ, the trial Judge.

1. On 5 February, 2007, the appellant brought another application for leave to appeal before Shongwe DJP (as he then was). Leave to appeal was only granted on sentence.

4. The question is whether Shongwe DJP was competent to entertain the appellant's second application after leave had been refused by the trial court against both conviction and sentence.

5. Section 316(8)(a)(ii) of the Criminal Procedure Act 51 of 1977, provides:

"(8)(a) If any application-...

(i)

(ii) *referred to in subsection (1)(b)(i) (hereinafter in this section referred to as an application for leave to appeal)... is refused by a High Court, the accused may by petition apply to the President of the Supreme Court of Appeal to grant any one or more of the application in question".*

The application for leave to appeal entertained by Shongwe AJA was clearly contrary to the express provisions of the section quoted above. It was improperly before him as he had no power, with respect, to entertain it. The decision of Van der Bijl AJ could not serve before a judge of this Court.

6. It is clear that Shongwe DJP was not made aware that the appellant had already exhausted his appeal remedies in the High Court. The application was not supposed to have been entertained because the High Court was *functus officio*. The appellant's remedy was to seek leave to appeal from the President of the Supreme Court of Appeal by way of petition. This Court, sitting as a Court of

appeal, may therefore not entertain the appeal. In *S v Fourie* 2001(2) SACR 118 (SCA) at 121 para 13, Mthiyane JA held:

"The power to regulate its procedure does not include the power to hear a matter which is not the proper subject of an appeal. This is simply because this Court's appellate jurisdiction is not an inherent jurisdiction (S v Mamkeli 1992(2) SACR 5 (A))".

7. No application for leave to appeal was brought on behalf of the second appellant. Leave to appeal against sentence was also extended to him by Shongwe DJP when his former co-accused was granted leave by Shongwe DJP. He never, of his own accord, made any attempt to seek leave to appeal or to prosecute the leave to appeal he received gratuitously. No order regarding his right to appeal can be made.
8. In my view there is no appeal before us to uphold or dismiss. In my view the proper order is to strike the matter from the roll.
9. In the circumstances I make the following order:

The appeal is struck from the roll.



BM PAKATI

ACTING JUDGE IN THE HIGH COURT

I agree.



JUDGE IN THE HIGH COURT

I agree and it is so ordered.



G WEBSTER

JUDGE IN THE HIGH COURT

On behalf of the Appellant	:	Adv C van Veenendal
Instructed by	:	Pretoria Justice Centre
On behalf of the Respondent	:	Adv S Scheepers
Instructed by	:	Director of Public Prosecutions