

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. : A256/14

In the case between:

KHETANI MBUYISE NKABINDE
ORAPELENG LAWRENCE MOGOJE
UBREY MMUSHI DIKOBÉ
JABULANE ELLIOT PAPIE MAKHENE

1st Appellant
2nd Appellant
3rd Appellant
4th Appellant

and

THE STATE

CORAM: CJ MUSI et NAIDOO, JJ et REINDERS, AJ

JUDGMENT: CJ MUSI, J

HEARD ON: 5 AUGUST 2015

DELIVERED ON: 5 NOVEMBER 2015

[1] This matter came before us as an appeal against a judgment of a single judge (now retired) of this division. I will refer to the appellants as the accused.

[2] The N8 road between Bloemfontein and Kimberley is very tedious. The tedium is to some extent interrupted when one reaches Petrusburg, a small and tranquil town, which is situated equidistant between the aforementioned cities.

- [3] On the morning of 8 August 2008 the tedium and tranquillity was terribly disturbed by a daring and bloody robbery that occurred on the N8 near Petrusburg.
- [4] During the robbery a Mercedes Benz motor vehicle deliberately collided with an armoured vehicle of Fidelity Security, which was transporting approximately R2.5 million from Bloemfontein to Kimberley, as a result of which the armoured vehicle overturned. Although the robbers could not get access to the R2.5 million, which was in a safe at the back of the armoured vehicle, they robbed some of the security guards, who were transporting the money, of their firearms and personal goods.
- [5] The armoured vehicle came to a halt in the road and obstructed traffic. Some motorists who were forced to stop at the scene were robbed, at gun point, and Mr De La Rey, a white farmer from Potgietersrus, was fatally shot by one of the robbers.
- [6] The four accused were later arrested, after a high speed chase with a helicopter, in a stolen Audi Q7, a few kilometres from the robbery scene. Some of the items that were robbed from the security guards were allegedly found in the Audi Q7.
- [7] They were arraigned in the Free State High Court, Bloemfontein and charged with 28 counts ranging from murder and robbery with aggravating circumstances, to

unlawful possession of firearms, ammunition and explosives. Accused 1 was sentenced to 151 years imprisonment and life imprisonment, while accused 2 to 4 were sentenced to life imprisonment and 146 years imprisonment. The sentences were ordered to run concurrently with the sentence of life imprisonment.

[8] During the trial the accused were represented by Mr Potgieter; thereafter, during the application for leave to appeal, and before us, by Mr Shapiro.

[9] During the application for leave to appeal Mr Shapiro requested the trial judge to make special entries. The proposed special entries were dated 22 April 2014. They were, in essence, to the following effect:

- 9.1 Did the fact that the deceased was a white Afrikaans speaking farmer, like the trial judge, make him bias against the accused, who are black persons. Should the judge not have recused himself?
- 9.2 Given that the judge would fall asleep during presentation of evidence, did the accused have a fair trial?
- 9.3 Whether the judge pre-judged the matter.
- 9.4 Whether the judge manifested bias against the accused in unfairly denying an application to postpone the trial in order to obtain expert technical assistance.

[10] On 22 July 2014 Mr Shapiro filed another notice proposing additional special entries. There were approximately eighteen additional special entries proposed. I do not deem it

necessary to repeat all the purported special entries but will highlight a few to illustrate that most of them did not qualify as special entries. They are briefly:

- 10.1 Whether Advocate Pretorius (the State Advocate) wrongly misstated the position, thereby misleading the Court regarding the relevance of video evidence.
 - 10.2 The court misdirected itself by ignoring crucial and highly material evidence of the defence case.
 - 10.3 The court misdirected itself regarding the improbability of Col. Joubert's evidence.
 - 10.4 The court misdirected itself by not applying *S v Mbuli* 2003 (1) SACR 97 (SCA) regarding the possession of firearms and ammunition charges.
 - 10.5 The court overlooked the fact that the accused were probably pointed out by Mr. Danie van Jaarsveld, a farmer, for blatantly racist reasons.
 - 10.6 The court unfairly allowed blatantly leading questions.
- Most of the other purported special entries referred to evidence which was overlooked or accepted.

[11] On 24 July 2014 the trial judge made the following order:

- "1. Condonation for the late filing of the notice of appeal is granted.
- 2. The requested special entries as set out in the proposed draft special entries dated the 2nd April 2014 and the proposed draft additional special entries dated 22 July 2014 are entered as special entries in terms of section 317 of Act 51 of 1977.
- 3. Leave to appeal to a full bench of this court against the convictions and sentences imposed is granted to all 4 the accused."

- [12] After the matter was argued before us, I requested the parties to furnish us with supplementary heads of argument focussing on whether paragraph 3 of the trial judge's order was competent.
- [13] Mr Shapiro contended that the accused should not be penalised for the trial judge's error and that we should consider the merits of the appeal with the special entries. He contended that it would only be fair if the appeal is decided by us. He further submitted that the accused's constitutional right to appeal would be interfered with should we decide not to determine the merits of the appeal. Mrs Giorgi, on behalf of the State, either misunderstood the problem I had with paragraph 3 of the court a quo's order or she did not have regard to the relevant sections of the Criminal Procedure Act 51 of 1977 (the Act). She submitted that the trial judge exercised his discretion properly, in terms of s 315(2) of the Act, and that we should not interfere therewith. Section 315(2) (a) and (b) reads as follows:

“(2) (a) If an application for leave to appeal in a criminal case heard by a single judge of a High Court (irrespective of whether he or she sat with or without assessors) is granted under section 316, the court or judge or judges granting the application shall, if it, he or she or, in the case of the judges referred to in subsections (12) and (13) of that section, they or the majority of them, is or are satisfied that the questions of law and of fact and the other considerations involved in the appeal are of such a nature that the appeal does not require the attention of the Supreme Court of Appeal, direct that the appeal be heard by a full court.

(b) Any such direction by the court or a judge of a High Court may be set aside by the Supreme Court of Appeal on application made to it by the accused or the Director of Public Prosecutions or other prosecutor within 21 days, or such longer period as may on application to the Supreme Court of Appeal on good cause shown, be allowed, after the direction was given.”

[14] The recording of a special entry and the procedure to be followed thereafter are regulated by sections 317, 318 and 320 of the Act. They read as follows:

“317 Special entry of irregularity or illegality

(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 or 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 a 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.

[Sub-s. (1) substituted by s. 6 (a) of Act 42 of 2003.]

(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)

[Sub-s. (3) deleted by s. 13 of Act 62 of 2000.]

(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) If an application for condonation or for a special entry is refused, the accused may, within a period of 21 days of such refusal or within such extended period as may on good cause shown, be allowed, by petition addressed to the President of the Supreme Court of Appeal, apply to the Supreme Court of Appeal for condonation or for a special entry to be made on the record stating in what respect the proceedings are alleged to be irregular or not according to law, as the case may be, and thereupon the provisions of subsections (11), (12), (13), (14) and (15) of section 316 shall mutatis mutandis apply."

318 Appeal on special entry under section 317

(1) If a special entry is made on the record, the person convicted may appeal to the Appellate Division against his conviction on the ground of the irregularity or illegality stated in the special entry if, within a period of twenty-one days after entry is so made or within such extended period as may on good cause be allowed, notice of appeal has been given to the registrar of the Appellate Division and to the registrar of the provincial or local division, other than a circuit court, within whose area of jurisdiction the trial took place, and of which the judge who presided at the trial was a member when he so presided.

[Sub-s. (1) amended by s. 23 of Act 105 of 1982.]

(2) The registrar of such provincial or local division shall forthwith after receiving such notice give notice thereof to the attorney-general and shall transmit to the registrar of the Appellate Division a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the

trial and of the special entry: Provided that with the consent of the accused and the attorney-general, the registrar concerned may, instead of transmitting the whole record, transmit copies, one of which shall be certified, of such parts of the record as may be agreed upon by the attorney-general and the accused to be sufficient, in which event the Appellate Division may nevertheless call for the production of the whole record.

...

320 Report of trial judge to be furnished on appeal

The judge or judges, as the case may be, of any court before whom a person is convicted shall, in the case of an appeal under section 316 or 316B or of an application for a special entry under section 317 or the reservation of a question of law under section 319 or an application to the court of appeal for leave to appeal or for a special entry under this Act, furnish to the registrar a report giving his, her or their opinion upon the case or upon any point arising in the case, and such report, which shall form part of the record, shall without delay be forwarded by the registrar to the registrar of the court of appeal.”

- [15] The trial judge is not bound to make a special entry because there is an application for him/her to make such special entry. The trial judge has discretion not to make such entry if he/she 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. In *S v Khoza* 2010 (2) SACR 207 (SCA) at par [44] it was said that a further ground to refuse an application for a special entry is when the irregularity appears from the record itself, because in such a case the special entry procedure may be unnecessary because of the wide powers enjoyed by the

SCA in terms of section 316 of the Act. In terms of section 317(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. What this entails is that the judge must apply his/her mind to the alleged irregularity or the alleged manner in which the proceedings are not in accordance with the law and determine whether there is merit in the application. In doing so the trial judge must decide the issue by having regard to the factors mentioned in section 317(1) and *S v Khoza*. The applicant must therefore in his/her application show that the factors mentioned in section 317(1) and *S v Khoza* are absent. If the trial court is of the opinion that the application is *bona fide* and not frivolous or absurd and that granting it would not be an abuse of the process of court, it must then settle the special entry.

[16] On settling the special entry the trial judge must set out the allegation/s made and the question that falls to be decided by the court of appeal when it deals with the special entry. The mere incorporation of issues or allegations that are characterised by unbecoming levity and which are undeserving of any serious consideration, as special entries, does not meet the requirement.

[19] Some of 'special entries' proposed by Mr Shapiro and incorporated by the trial judge are, *prima facie*, absurd, frivolous and an abuse of the process. The trial court should have considered each and every one of the proposed special

entries in order to discern whether it meets the requirements set out in the Act. The grounds of appeal, which were disguised as special entries, that could be considered on appeal in the ordinary course without a special entry being made should also not have been granted as special entries.

[20] After a special entry has been made the accused may appeal to the Supreme Court of Appeal, not a full bench of the high court, on the ground of the irregularity or illegality which forms the subject matter of the special entry. The making of a special entry *per se* gives the accused the right to appeal to the Supreme Court of Appeal based on that special entry. Where there is a request that the judge should make more than one special entry, each proposed special entry must be considered based on the factors mentioned in paragraph 15 above.

[21] In **S v Felthun** 1999 (1) SACR 481 (SCA) at 485 the Supreme Court of Appeal summarised sections 317(1) and 318(1) as follows:

“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 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.” (My underlining.)

- [22] Kriegler and Kruger in Hiemstra: Suid Afrikaanse Strafproues Butterworths, 6th ed at p891 states that it is clear from the wording of sections 315(2) and (5) and 318(1) that appeals based on special entries may not be referred to the full bench of a provincial division. I agree.
- [25] Mr Shapiro submitted that we have inherent jurisdiction and can therefore, for the sake of fairness and expedience, consider the merits of the appeal. This court has no jurisdiction to override an express provision of the Act. See **Sefatsa and Others v Attorney General Transvaal & Another** 1989 (1) SA 821 (A) at 839 where it was said that “It hardly needs saying that a court cannot have an inherent jurisdiction which would entitle it to act contrary to an express provision of an Act of Parliament.” Even in our current constitutional dispensation this Court does not have the power to act contrary to a provision of the Act, where such provision is constitutional.
- [26] The accused’s right to appeal would not be taken away if this matter is not decided by us. In fact they have already attained the right to appeal to a higher court. Should the appeal be heard by us and the accused are not satisfied with the outcome they would then have to approach the Supreme Court of Appeal which would be another costly exercise. If the appeal is heard where it is supposed to be heard this unnecessary extra layer or level would be avoided. Fairness is not a consideration in this matter; this is a matter of law. The Act pertinently regulates the issue and we must act in accordance therewith.

[27] In my judgment the trial judge's directive that this matter should be heard by a full bench of the Free State High Court Bloemfontein was incompetent. We have no jurisdiction to hear the appeal.

[28] This matter ought to be removed from the roll so that the accused can prosecute their appeal in accordance with the law. No travesty of justice would result if this matter is removed from the roll because the accused's right to appeal would still be intact.

[29] I accordingly make the following order:

(a) The appeal is removed from the roll.

C.J. MUSI, J

I concur.

S. NAIDOO,

I concur.

C. REINDERS, AJ

On behalf of the appellants: Adv. P. I. Shapiro
Instructed by:
Shapiro Attorneys
JOHANNESBURG

On behalf of the respondent: Adv. Giorgi
Instructed by:
The Director: Public Prosecutions
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