

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case Nr: APPEAL NO: 1 / 2009
CASE NO: RC 37/04
Case Heard: 04/05/2009
Date delivered: 08/05/2009

In the matter between:

D A Stellenberg

APPELLANT

and

The State

RESPONDENT

Coram: Majiedt J et Henriques AJ

JUDGMENT

Henriques AJ:

1. The Appellant was convicted in the Kuruman Regional Court on 31 October 2005 of assault with intent to cause grievous bodily harm and possession of an explosive device. He was sentenced to 5 years imprisonment of which two years were suspended for a further period of five years.
2. He subsequently sought leave to appeal against such conviction and sentence which application was refused. He then petitioned this Court. The petition was drafted by the Appellant without the benefit of legal representation and dealt with the conviction only. I may add that letters addressed by the Appellant to the Clerk of

Court Kuruman referred to an intention to petition both on conviction and sentence. On 23 October 2008, after having considered the petition and the record of the proceedings, Majiedt J and Williams J granted the Appellant leave to appeal against sentence only.

3. Prior to hearing argument on the appeal and on receipt of the heads of argument it became clear that the Appellant intended arguing the appeal on both conviction and sentence. In view of the fact that we were of the view that we could only deal with the appeal in respect of sentence, Majiedt J addressed a letter to the Appellant's attorneys of record, in which the Appellant was requested to show cause why this Court was not *de jure functus officio* in respect of the conviction.
4. In her heads of argument, and at the hearing of the matter, Advocate Mabaso who appeared on behalf of the State, argued that having granted leave to appeal only against sentence this court had no jurisdiction to deal with the appeal. She further submitted that there were no reasons to interfere with the sentence imposed.
5. Advocate Strydom, who appeared for the Appellant, sought to persuade us that we could in fact consider the appeal against conviction as well as sentence. In this regard he referred us to the judgment of the Supreme Court of Appeal in **Bongani Phillip Vilakazi v The State**, delivered on 2 September 2008. Such case dealt with an appeal against a sentence on a charge of rape in terms of the Criminal Law Amendment Act, 105 of 1997. Leave to appeal had been granted only in respect of sentence.

6. In addition he argued that this Court now had the benefit of submissions by a legal representative which were not available at the time of the petition being considered. In his heads of argument he submitted that as the Appellant had already served his sentence, no purpose would be served to hear the appeal only on the question of sentence.
7. We were specifically referred to paragraph 8 of the Vilakazi judgment as the basis for us to consider the current appeal on conviction, which reads as follows:

"Although leave to appeal was granted only against sentence Mr de Meillon properly accepted that the appeal might be broadened to include the conviction if upon reflection on the evidence we were to be of the view that the appellant should not have to been convicted."

8. What is of importance is the footnote to the paragraph which reveals that the record of the trial was not before court when the petition was considered. It is this factor which makes Vilakazi's case distinguishable from the present one. It is apparent that when the petition was considered by this Court, the entire record of the trial together with the Magistrate's judgment was available and considered.
9. Section 309C of the Criminal Procedure Act, 51 of 1977 deals with the petition procedure where leave to appeal has been refused by a lower court. The section provides for a petition to be considered by a Judge of a division designated by the Judge President.
10. Following the decision in **Shinga v The State and Another (Society of Advocates(Pietermaritzburg Bar) Intervening**

as Amicus Curiae);S v O'Connell and Others 2007 (2) SACR 26 (CC) two Judges of a Division consider a petition.

11. In the event of the petition being unsuccessful a party has recourse to the provisions of section 21 of the Supreme Court Act and can petition the President of the Supreme Court of Appeal.
12. There does not appear to be any statutory provision which allows this Court to deal with the question of conviction where leave to appeal was only granted against sentence. This view is reinforced having regard to Du Toit, Commentary on the Criminal Procedure Act, and having considered the judgment in **Van der Merwe v The State** [2008] JOL 22155.
13. Steyn AJ, as she then was, and Moosa J had to consider the very same issue-in that matter leave to appeal had been granted against sentence only. I am in agreement with such decision and it would appear that this court does not have any review powers or inherent jurisdiction to deal with a conviction where leave to appeal had not been granted in respect thereof.
14. It would thus appear that this Court is *functus officio* in regard to the appeal against the conviction.
15. We were also referred to a number of other decisions by Advocate Strydom which after having considered same, I am of the view do not apply in this instance as in as much as a Court can amend, supplement or alter its judgment the substance thereof must remain the same.

16. Advocate Strydom conceded during argument that the decision in **Van der Merwe v The State** was of application but urged us not to rely on it, but to rather rely on **Vilakazi**.
17. I cannot agree with this submission. As I already indicated Vilakazi's decision is distinguishable. In addition two judges of this division after having considered the full record and judgment granted the Appellant leave to appeal only against sentence.
18. I am therefore of the view that this Court is *functus officio* in relation to the conviction as leave to appeal was not granted.
19. The Appellant is not without remedy and he can petition the Supreme Court of Appeal. He may very well be successful in doing so in light of the submissions which Advocate Strydom has raised in his heads of argument.
20. In light of that fact that the Appellant has already served his sentence (he in fact attended the hearing of this matter) and in light of the fact that Advocate Strydom did not pursue the appeal against sentence, it is not necessary to consider the appeal against sentence save to say that the sentence may have been harsh given the circumstances.
21. Accordingly, I make the following order:

The appeal is struck from the roll as this Court is functus officio in relation to the appeal against conviction.

**J I HENRIQUES
ACTING JUDGE
NORTHERN CAPE DIVISION**

I agree:

**S A MAJIEDT
JUDGE
NORTHERN CAPE DIVISION**

For the Plaintiff:	Adv K Strydom
Instructed by:	Engelsman Magabane Inc, KIMBERLEY
For the Respondent:	Adv J Mabaso
On behalf of:	Director of Public Prosecutions, KIMBERLEY