

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: AR707/2017P

In the matter between:

THULANI MCHUNU

1ST APPELLANT

SANDILE NGUBANE

2ND APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Regional Court, Richards Bay (Ms Moodley, sitting as a court of first instance):

The appeal by the second appellant against his sentence is removed from the roll.

JUDGMENT

Sibiya J (Chithi J concurring):

[1] It is necessary to explain that this appeal first served before Mngadi J and I as a full bench on 28 February 2025. Mngadi J was the scribe and submitted his judgment to me in March 2025, for my consideration.¹ It became apparent that we

¹ That judgment is set out below as the dissenting judgment.

could not reach agreement, as we differed on the most elemental aspect, namely, the nature of the appeal that we had to determine.

[2] Consequently, s 14(3) of the Superior Courts Act 10 of 2013, was invoked and following written communication to the parties' representatives, they indicated their view that it was not necessary for the matter to be re-argued before the third judge, and that the matter could be decided on the papers. Nkosi DJP then allocated Chithi J as the third member of the court.

[3] Briefly the background to this appeal is that the first appellant was convicted of two counts of robbery with aggravating circumstances each, and one count of theft of a motor vehicle. He was sentenced to ten years' imprisonment for each of the robbery counts which were to run concurrently, and six years' imprisonment for theft of a vehicle. The effective sentence was 16 years' imprisonment. His appeal was against his sentence as the petition to appeal against the convictions had been refused by this court, and no further leave had been sought from the Supreme Court of Appeal in relation to the said convictions.

[4] The second appellant was convicted of two counts of robbery with aggravating circumstances, a count of theft of motor vehicle, a count of unlawful possession of a firearm and unlawful possession of ammunition. He was sentenced to ten years' imprisonment running concurrently for each of the robbery counts, and respectively five years' imprisonment, eight years' imprisonment and three years' imprisonment for the possession counts. It was further ordered that the sentences relating to the possession counts would run concurrently, and cryptically, that the second robbery count would run concurrently with the theft count. The effective sentence was 18 years' imprisonment.

[5] Similar to the first appellant, the second appellant was only appealing against his sentences, the leave to appeal against his conviction having been refused by a full bench of this division on 13 December 2017. The second appellant had not sought or been granted leave to appeal against his conviction by the Supreme Court of Appeal. Hence, this court is only seized with an appeal against sentence.

[6] When we were first allocated the appeal there were two separate appeals before us, prosecuted by two legal representatives. There was an appeal by the first appellant and another by the second appellant, to be heard at the same time. Both appeals related only to the sentence imposed by the trial court.

[7] At the commencement of the hearing of the appeal, the first appellant withdrew his appeal against the sentence, as he had been released and was on parole. The notice of withdrawal was filed on 25 February 2025. There was thus no appeal for us to determine in relation to the first appellant.

[8] I have read the judgment of my brother Mngadi J and I disagree with the judgment in its entirety and the order proposed as a result. The main issue that I have with Mngadi J's judgment is that it considers numerous issues that have a direct impact on the conviction of the two appellants. The problem with this is that the appeal matter before this court is on sentence only, as, the order granted by Bezuidenhout J and Mahabeer AJ is as follows:

- '1. Leave to appeal against conviction by applicant 1 and 2 is refused.
2. *Leave to appeal against sentence by applicant 1 and 2 is granted.*' (My emphasis.)

[9] The Supreme Court of Appeal² as well as the divisions of the high court³ have noted that once leave to appeal has been granted on a specific ground, the court hearing the appeal cannot extend the ground of appeal before it, only the Supreme Court of Appeal can. Put differently, if the appellants were unhappy with the decision of Bezuidenhout J and Mahabeer AJ, a petition to extend the leave to appeal to conviction should have been sent to the Supreme Court of Appeal requesting that leave also be granted against conviction. No such petition was filed.

² *Minister of Safety and Security and Others v Mohamed and another* [2011] ZASCA 134; 2012 (1) SACR 321 (SCA) para 18.

³ *Hendricks v S* [2011] ZAWCHC 374 para 7.

[10] It is my view, contrary to that expressed in the judgment of Mngadi J, that as a full bench, we are not empowered to set aside or ignore or go around an order granted by the full bench of this division refusing leave to appeal. Neither, in my view, would the full court of the same division have such power. This is worse when there is not even an application by the appellant to this court to reconsider that order.⁴

[11] The same is not true where the decision of the full bench was patently incorrect, in that it constitutes a glaring irregularity where the court exercised a jurisdiction it did not have. This distinction is significant.⁵

[12] It is apparent from the record that the second appellant never sought leave to appeal against his sentence from the trial court, and accordingly this court made an error when it granted him leave to appeal against the sentence on petition, instead of remitting that application to the trial court. It would be improper for this court to consider the appeal against sentence in the prevailing circumstances.

[13] As a result of the above facts, this court did not have any appeal that it could properly determine on the 28 February 2025. I have already indicated my disagreement with the judgment of Mngadi J. I do not agree that s 304 of the CPA can be interpreted as conferring on this court the power to interfere with an order of the same provincial division refusing leave to appeal. I agree with the reasoning and the judgment in *Van der Merwe*.⁶

[14] There was no appeal by the first appellant before us, and if there had been, it would have been related only to the sentences imposed. The first appellant withdrew his appeal, and it was not for this court to reinstate it without any application from the first appellant. Similarly, the appeal by the second appellant was only in relation to sentence, but such leave was improperly granted by the full bench of this division.

[15] I therefore disagree with the judgment of Mngadi J in its entirety as well as the order he proposes as a result.

⁴ This distinguishes the present case from *S v Moyo* 2015 (1) :SACR 555 (GJ) (*Moyo*) where it was the appellant who raised the issue of the procedural irregularity.

⁵ *Moyo supra*.

⁶ *S v Van der Merwe* 2009 (1) SACR 673 (C).

[16] The order I therefore grant is the following:

The appeal by the second appellant against his sentence is removed from the roll.

Sibiya J

I agree

Chithi J

Mngadi J (dissenting)

[17] The matter is before us as an appeal against sentence.

[18] The appellants, on 31 March 2015, were charged with two counts of robbery with aggravating circumstances, one count of theft of a motor vehicle, and one count of attempted murder. In addition, the second appellant faced charges of unlawful possession of a firearm and unlawful possession of ammunition. The appellants, who were legally represented throughout the trial by separate counsel, pleaded not guilty to all the charges. The regional magistrate, after hearing all the evidence, convicted the appellants on the two counts of robbery with aggravating circumstances and on the count of theft of a motor vehicle. In addition, the second appellant was convicted of the unlawful possession of a firearm and of the unlawful possession of ammunition. The appellants were acquitted on the count of attempted murder. Each appellant, on the count of robbery with aggravating circumstances, was sentenced to ten years' imprisonment and on the charge of theft of a motor vehicle, to six- and five-years' imprisonment, respectively. On the counts of the unlawful possession of a firearm and the unlawful possession of ammunition, sentences of eight years' imprisonment

and three years' imprisonment, respectively, were imposed on the second appellant. An order to serve the sentences concurrently was made, which resulted in an effective sentence of 16 years' imprisonment on the first appellant and on the second appellant, 18 years' imprisonment.

[19] The incident from which the charges arose is captured in the summary of the evidence of Ms Doreen Sibongile Nsele. She testified that on 9 July 2013, at about 18h00, at her home at Kwa Mthethwa, she and her family were accosted by three robbers. One robber was armed with a firearm and another with a bush knife. They were beaten up and tied up and the robbers searched their home for money and firearms. When her husband arrived in his Toyota Hilux bakkie (the bakkie), he was also held and beaten up. His bakkie keys were taken as well as two cell phones. The robbers got into the bakkie and drove away with the items they had taken, as well as the items that were in the bakkie. The bakkie was valued between R300 000 and R400 000, and it had the registration number N[...]. The robbers wore balaclavas and nobody in her family was able to identify any of the robbers.

[20] The evidence on the basis of which the appellants were convicted is that of Constable Biyela and Constable Ntsibande, the two police officers. Constable Biyela's evidence is to the effect that on 31 July 2013, he and other police officers proceeded to Nhlabosini to the homestead of the Sokhela family. They arrived at about 3h00. They proceeded to a rondavel. He knocked, and a male person asked who they were. They introduced themselves as police officers from KwaMbonambi Police Station. A male opened the door for them - it was the second appellant. He asked for permission to conduct a search in the house and the second appellant gave him permission. There was no light in the house, and they had to use torches. Only the second appellant was in the house. He found a firearm which was in a plastic bag next to a sponge on the floor. It had been dismantled and there was a magazine with four live rounds of ammunition.

[21] Constable Ntsibande testified that on 30 July 2013 during the night, he, together with other police officers, proceeded to a particular homestead. They went to one of the structures. He knocked and introduced themselves. The first appellant opened for them and they entered the house. He explained to the first appellant the

purpose of their visit. He asked for permission to search, which the first appellant gave. It was a one-roomed house. Only the first appellant was in the house. He switched on an electric light. He searched the back area of the house and lifted a mattress. He found a set of car keys with a key holder under the mattress. He took the first appellant to the home of the second appellant. They had earlier found the bakkie which had been stolen during the robbery on 9 July 2013, stripped in a forest at Shayamoya. In the second appellant's home, after a firearm was found by Biyela, he searched a cabinet and found two registration number plates in a drawer in a steel cabinet, which had no doors, and one could see what was in the shelves.

[22] The other evidence by the State showed that the car keys found in the house were for the bakkie which had been taken from the Nsele's homestead on 9 July 2013 and that the two recovered registration number plates were the number plates of the bakkie. The State further led evidence that showed that the dismantled firearm, after it was reassembled, worked normally.

[23] The appellants, after the State closed its case, applied for a discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the CPA). The regional magistrate, without giving any reasons, held that in evaluating the evidence holistically, there was a *prima facie* case made by the State for the appellants to meet and she refused the application.

[24] The first and second appellants thereafter testified. It is not necessary for purposes of this judgment to summarise their evidence. They denied that any items as alleged by the police were found when the police found them, and they stated that they had no knowledge of those items. They denied that they were involved in the robbery on 9 July 2013 at the Nsele's homestead.

[25] The learned regional magistrate in her judgment stated that:

'There is no direct evidence implicating the accused insofar as robberies are concerned, the theft of the motor vehicle as well as the attempted murder and the Court is aware if the State is relying on inferences that the Court should draw as well as circumstantial evidence then the only inference that the Court

must draw on the facts that have been proven is that both accused 1 and 2 were indeed the persons that committed the offences as reflected in the charge.'

[26] The regional magistrate then stated that on the counts of the unlawful possession of a firearm and ammunition relating to the second appellant, the State relied on direct evidence to implicate the second appellant. It is also clear that on the question of the car keys and the number plates, the regional magistrate reasoned that there was direct evidence of possession. The regional magistrate, in my view, overlooked the fact that the dismantled firearm and the ammunition were allegedly found in a plastic bag in a house at the time occupied by the second appellant. Therefore, it was not in physical possession by the second appellant. There was no evidence of when the second appellant got into the house, who had occupied the house when the plastic bag with the dismantled firearm and the ammunition was placed in the house, or whether the second appellant was aware of the presence of the plastic bag, and that it had a dismantled firearm and the ammunition in it. Therefore, the regional magistrate's conclusion that the second appellant exercised control over the plastic bag with the firearm and ammunition is not based on any evidence. The charge refers to s 117 of the Firearms Control Act 60 of 2000 but the regional magistrate in the judgment made no reference to those provisions. It is therefore not necessary to consider whether the State could rely on the said provisions.

[27] The regional magistrate found it proved that the car keys of the bakkie were found by the police in the homestead and in a room occupied by the first appellant at the time. Furthermore, the regional magistrate found it proved that the registration plates of the bakkie were found by the police in a structure occupied by the second appellant at the time. She then concluded that these items were recovered from the appellants. There was no evidence of when and by whom the car keys and the number plates were placed where the police found them. There was no evidence of who had accessed the structures wherein the items were found. There was no evidence of whether the appellants were aware of the presence of the items before they were found and, if aware, knew that they belonged to the bakkie stolen during the robbery. Therefore, the conclusion by the regional magistrate that the appellants

possessed the items is not a conclusion arrived at after the application of the legal principles to the facts.

[28] The learned regional magistrate misdirected herself in failing to appreciate that the State was seeking to rely on circumstantial evidence to prove possession. In *Rex v Blom*⁷ it was said that in reasoning by inference in a criminal case, there are two cardinal rules of logic which cannot be ignored. The first rule is that '[t]he inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn'. The second rule is that '[t]he proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn'. If these proved facts do not exclude all other reasonable inferences, then there must be 'doubt whether the inference sought to be drawn is correct'. Therefore, there were no proved facts justifying an inference, as the only reasonable inference, that the second appellant was in possession of the firearm and ammunition and the registration plates of the bakkie. In respect of the first appellant, there were no proved facts justifying an inference, as the only reasonable inference, that he possessed the car keys of the bakkie. Possession having not been proved; the appellants had no case to answer.

[29] The first and second appellants were arrested on 31 July 2013 and remained in custody awaiting trial. The court convicted and sentenced them on 1 June 2016. On 12 August 2016, they applied for leave to appeal against conviction, which was refused. On 19 September 2016, the first appellant lodged a petition for leave to appeal against conviction. On 19 September 2016, the second appellant also lodged a petition for leave to appeal, stating that he was seeking leave to appeal against conviction and sentence. It is trite that the second appellant could not have petitioned for leave to appeal against sentence, as he had not applied for leave to appeal against sentence from the trial court. The court considering a petition has jurisdiction to consider a petition for leave to appeal only after the trial court has refused an application for leave to appeal.

⁷ *Rex v Blom* 1939 AD 188 at 202-203.

[30] On 13 December 2017, Bezuidenhout J and Mahabeer AJ, having considered the petition, ordered as follows:

'1. Leave to appeal against conviction by applicant 1 and 2 is refused.

2. Leave to appeal against sentence by applicant 1 and 2 is granted.'

The purported granting of leave to appeal against sentence to the first appellant is a nullity. The first appellant did not apply for leave to appeal against sentence from the trial court. Furthermore, even on petition, the first appellant did not petition for leave to appeal against conviction. On petition for leave to appeal, leave to appeal that has not been applied for cannot be granted. The purported granting of leave to appeal that has not been applied for is a nullity. It follows that the first and second appellants cannot appeal against their sentences as the granting of leave to appeal against sentence is a nullity.

[31] On 29 November 2019, the matter came before Kruger and Lopes JJ. The court adjourned the appeal to 17 April 2020 and ordered the reconstruction of the appeal record. On 6 July 2020, Chetty and Hadebe JJ ordered that the appeal be postponed pending compliance with the order dated 27 November 2019. On 27 November 2020, Balton and D Pillay JJ adjourned the appeal to 12 March 2021 and ordered the reconstruction of the appeal record. On 12 March 2021, Nkosi J and Law AJ adjourned the appeal sine die. On 10 September 2021, Steyn and M E Nkosi JJ ordered that the appeal be adjourned sine die and both parties were directed to jointly reconstruct the record. The appeal records show that the required reconstruction was done on 25 July 2017, and the reconstructed appeal record bears the registrar's stamp bearing the date 30 November 2017.

[32] There is clearly, as stated above, no proper appeal against the sentence. The first appellant conveyed to us just before the hearing that he wished to withdraw his appeal against sentence, because, on 15 August 2024, he was released from prison on parole. As explained above, he had nothing to withdraw. In any case, the matter is not resolved because the conviction and sentence stand. It is only that he is

serving the rest of the sentence on parole. In any case, he was tried with the second appellant and the issues in both cases are more or less the same.

[33] If there were no reservations relating to the propriety of the convictions, as stated above, it would have been the end of the matter. The said reservations in the normal scheme of things would have resulted in advising the appellants if they wished, to pursue the matter for leave to appeal against conviction by petitioning the Supreme Court of Appeal. However, the appellants have been in custody since 2013 it is necessary as far as possible to avoid any further delays.

[34] This court was allocated the matter as an appeal against sentence. It then perused the record of the proceedings, resulting in it having reservations whether the convictions were correct. Section 304(4) of the CPA provides:

'If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section:' Section 304 regulates the review of criminal proceedings of lower courts. Criminal proceedings which appear not to be in accordance with justice are liable to be reviewed. The review relates to the propriety of both the procedure and the merits. Section 304(2) provides that the court conducting a review has the same power as a court of appeal. It follows that this court, after the jurisdictional requirements of s 304 have been met, has the same power as a court of appeal. See *Walhaus and Others v Additional Magistrate, Johannesburg and Another*,⁸ *S v Karolus*;⁹ *Du Toit: Commentary on the Criminal Procedure Act*.¹⁰

⁸ *Walhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A).

⁹ *S v Karolus* 2018 (2) SACR 398 (WCC).

¹⁰ S Terblanche (general ed) *Du Toit: Commentary on the Criminal Procedure Act* (RS 73, 2024) at

[35] In *S v Moyo*¹¹ the court was of the view that it depends on the ground on which the conviction was assailed. The attack founded on the trial court's evaluation of the evidence or the admissibility of certain evidence once leave to appeal against conviction has been refused, the conviction cannot be reconsidered under s 304 of the CPA in that the refusal of leave to appeal on petition is a judicial decision subject to reconsideration by a court of higher hierarchy, as provided for ins 16(1)(b) of the Superior Courts Act 10 of 2013. The court considering the petition considers whether there are reasonable prospects of success on appeal or not, whereas s 304 is directed at the issue of whether the proceedings are in accordance with justice. A conviction founded on the misapplication of the law regulating the making of factual findings based on inferences shows that the conviction is not in accordance with justice. If the conviction in those proceedings is not in accordance with justice, s 304(4) can be invoked. See, however, *S v Van der Merwe*¹² and *Pieterse v S*¹³ where the court came to a different conclusion. The court in *Van der Merwe* regarded the appeal court in s 304(4) as reviewing the decision on petition to refuse leave to appeal against conviction. This is not the position, ass 304(4) deals with reviewing the proceedings of the lower court. The court in *Pieterse* merely followed the decision in *Van der Merwe*. In *Van der Merwe*, the emphasis was that refusal of leave to appeal on petition is a binding judicial decision by a court on the same level as the provincial appeal court. It is binding until reversed on a further appeal by a court higher in the hierarchy. However, provincial appeal courts always refuse to entertain appeals where leave to appeal was not properly granted in that such leave to appeal is a nullity. Therefore, it is absurd that if leave to appeal is refused, it becomes a binding judicial decision, excluding any other remedy at the provincial level.

[36] The power given to this court by s 304 of the CPA is regulated by the provisions of s 304. There is no provision that where leave to appeal was refused, either by the trial court or on petition, the power given to this court by s 304 is excluded or restricted. A court considering an application for leave to appeal is carrying out a duty that is different from that of an appeal court. Except to show that

¹¹ *S v Moyo* 2018 (1) SACR 658 (GJ) para 38.

¹² *S v Van der Merwe* 2009 (1) SACR 673 (C) (*Van der Merwe*).

¹³ *Pieterse v S* [2017] ZAGPJHC 103 (*Pieterse*).

the appeal is properly before the appeal court, the views of the judicial officer who dealt with the application for leave to appeal are irrelevant. Therefore, this court is obliged to exercise the power given to it by s 304 if the circumstances justify the exercise of that power. It is a non-issue that on petition, leave to appeal against conviction was refused.

[37] The conclusion, in my view, is inescapable that the regional magistrate erred in concluding that the State proved the guilt of the first and second appellants beyond reasonable doubt. The evidence created a suspicion against them, but it fell short to prove their guilt beyond reasonable doubt.

[38] It is thus proposed that the order is as follows:

The convictions and sentences of the first and second appellants are set aside.

Mngadi J

APPEARANCES

Date of Hearing : 28 February 2025

Date of Judgment : 23 January 2026

Counsel for Second Appellant : Mr Garasi

Instructed by : Chris G Attorneys

Counsel for Respondent : Mr Sishi

Instructed by : The Director of Public Prosecutions