

9/6/2008
NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	YES
(3) REVISED:	
9/6/2008	[Signature]
DATE	SIGNATURE

Case No: A2666/03
Date heard: 09/06/2008
Date of judgment: 09/06/2008

In the matter between:

John Msani
Sipho Ngubane

1st Appellant
2nd Appellant

and

The State

Respondent

JUDGMENT

DU PLESSIS J:

The regional court convicted the applicant on two counts of robbery with aggravating circumstances (Counts 1 and 2), on one count of kidnapping (count 3) and on two counts of the illegal possession of a firearm (counts 4 and 5). On each of counts 1 and 2 he was sentenced to 20 years imprisonment. On count 3 the applicant was sentenced to three years imprisonment and on each of counts 4 and 5 to three years imprisonment. The trial court ordered the sentence on count 3 to be served concurrently with that on count 1, thus rendering the effective term of imprisonment 46 years.

The applicant lodged an appeal against all the convictions and sentences to this court. On 12 November 2004 the appeal came before Du Plessis AJ and Van Zyl AJ. The record of the proceedings on appeal is not before us, but from the judgment of the learned judges it appears that heads of argument on behalf of the appellant were filed out of time. There was no application to condone the later filing of the heads and the appeal was struck from the roll.

The learned judges nevertheless exercised the court power to review the proceedings of the regional court (See section 304(4) of the **Criminal Procedure Act, 51 of 1977**). Having done so, the court made an order to the following effect:

- The applicant's sentences on counts 1 and 2 were set aside and replaced with a sentence of 18 years imprisonment on each count.
- The applicant's conviction and sentence on count 3 (three years imprisonment for kidnapping) were set aside.
- The applicant's conviction and sentence on count 5 (three years imprisonment for illegal possession of a firearm) were set aside.
- Seven years of the sentence on count 2 was ordered to be served concurrently with that on count 1.
- In the result the applicant's sentence was changed to one of 32 years effective imprisonment.

The applicant filed an application for leave to appeal against the abovementioned order of this court. As neither of the learned judges who made the order is available (they no longer hold acting appointments), the acting deputy judge-president referred the matter to me to deal with.

When the relevant file was first placed before me in chambers, there was no record of the proceedings in the trial court available. What was before me was the applicant's application for leave to appeal with certain annexures. One of these annexures is a letter from the registrar of this court addressed to the applicant. In it the registrar advised the applicant that he (the applicant) had exhausted all his remedies in this court, and that his only remedy was to approach the President of the Supreme Court of Appeal by way of a petition. I referred the matter to the chief registrar who informed me that he has no record other than the papers that have been placed before me. In particular, the office of the registrar has no record of proceedings other than the appeal itself and the application for leave to appeal. Accordingly, I arranged for the application to be set down before the court as presently constituted.

As we sit today, we still have no more than the application for leave to appeal with annexures. Those annexures include the judgment of Du Plessis AJ with which Van Zyl AJ concurred and the court's order. We still do not have a copy of the record of the proceedings in the regional court. The

situation if highly unsatisfactory but, for the reasons I shall state, we deem it in the interests of justice to deal with the application on the papers before us.

There was, as I have said, no application to condone the late filing of heads of argument before the court in 12 November 2004. Accordingly, the court did not refuse to condone the later filing of the heads of argument. It struck the appeal from the roll, however. In the case of a criminal appeal, such an order does not put an end to the appeal. It remains pending and can be re-enrolled and dealt with if the necessary condonation is granted. What the learned judges did in this case, therefore, is to exercise the court's power of review while there was still an appeal pending.

As a general proposition, it is undesirable for the High Court to exercise its review power before an appeal to that same court has been dealt with. There are, of course, exceptions. If the High Court determines to grant on review the exact relief that the appellant seeks on appeal, the matter can be disposed of on review. Similarly, the matter might be dealt with on review if the High Court determines to grant more relief than the relief the appellant seeks on review. The present case is a good example of such undesirability: The effect of the order of 12 November 2004 is that this court has already made changes to the regional court's order while an appeal, also to this court, is still pending.

To summarise the applicant's position: His appeal to this court against his convictions by the regional court on five counts is still pending. The same applies to his appeal against the sentence on each count. This court has set aside the conviction and sentence on counts 3 and 5 and the appeal concerning those counts is academic. The convictions on counts 1, 2 and 4 still stand as do the sentences albeit that those on counts 1 and 2 and the effective sentence have been changed.

As this court has not yet dealt with the appellant's appeal, leave to appeal to the Supreme Court of Appeal cannot be granted.

The appellant's appeal to this court has now been pending since before November 2004. It is desirable and certainly in the interests of justice that the appeal is dealt with expeditiously. To achieve that, the following order must be made:

1. The appellant's appeal against his convictions and sentences on counts 1, 2 and 4 is re-enrolled and postponed *sine die*.
2. The registrar of this court is requested to locate the record of the proceedings in the regional court and to deal with it in accordance therewith that the appeal has been re-enrolled, has been postponed *sine die* and is still pending.
3. The Director of Public Prosecutions is requested as expeditiously as possible, to allocate a date for the hearing of the appeal.

4. A copy of this judgment and of the judgment of Du Plessis AJ and Van Zyl AJ must be placed in the relevant court file and must be placed before the court hearing the appeal.



B.R. DU PLESSIS

JUDGE OF THE HIGH COURT

I AGREE



E. JORDAAN

JUDGE OF THE HIGH COURT