



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable
Case No: 607/2017

In the matter between:

OUPA STANLEY MAPHANGA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Maphanga v The State* (607/2017) [2018] ZASCA 120 (20 September 2018)

Coram: Ponnann, Tshiqi and Mbha JJA

Heard: 15 August 2018

Delivered: 20 September 2018

Summary: Reconsideration of application for special leave to appeal – section 17(2)(f) of the Superior Courts Act 10 of 2013 – exceptional circumstances not shown.

ORDER

The application in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 is dismissed.

JUDGMENT

Tshiqi JA (Ponnan and Mbha JJA concurring):

[1] This is an application for the reconsideration of an application for special leave to appeal brought in terms of 17(2)(f) of the Superior Courts Act 10 of 2013 (the Act).

[2] The applicant, Mr Maphanga, and his co-accused, Mr Mkhonza, were charged in the regional court, Benoni, with four counts. On count 1, which is the only one relevant to this application, they were charged with robbery with aggravating circumstances.¹ The charge sheet alleged that upon or about 12 March 2011 they robbed the complainant, Mr Kassen of his motor vehicle, a silver Jetta with registration number 555 RAM GP.

[3] Mr Kassen testified that on the evening of the robbery he had just arrived at his home, parked his motor vehicle on his driveway and was about to get out of the motor

¹ Robbery as contemplated in s 1 of the Criminal Procedure Act 51 of 1977, read with s 51(2) of the Criminal Law Amendment Act 105 of 1997.

vehicle in order to unlock his garage door when he noticed two men next to his motor vehicle. One was on the left hand side whilst the other was on the right hand side. The one on the right hand side had a firearm. He approached Mr Kassen, pointed him with the fire-arm and demanded his car keys. He took the car keys, got into the motor vehicle, reversed it and drove away. He stated that he could see this assailant because a fluorescent light, which was at the top of the wall of his garage, about three to four metre from the ground was on. He did not pay much attention to the other man on the left hand side. He could not sleep well that night as he kept remembering the face of the man on the right hand side. Subsequently, on 1 March 2011, he attended an identification parade where he identified accused 2 as the perpetrator.

[4] The magistrate convicted the applicant on two of the four counts and sentenced him to 15 years imprisonment in respect of count 1. After taking into account the sentence on count 2 and the cumulative effect of the sentences, the magistrate imposed an effective sentence of 25 years imprisonment. The applicant applied for leave to appeal against both the convictions and sentences, relying mainly on mistaken identity concerning his conviction on count 1. The application was dismissed by the trial court. The applicant thereupon petitioned the Gauteng Division of the High Court, Pretoria for leave to appeal in terms of s 309C of the Criminal Procedure Act 51 of 1977. That application was dismissed by the high court.

[5] The applicant then applied to this court in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 for special leave to appeal the high court's dismissal of his

petition. The two judges of this court, who considered the petition in chambers, dismissed it on the grounds that there were no special circumstances meriting a further appeal. The applicant then applied to the President of this court in terms of s 17(2)(f). Section 17(2)(f) provides:

'The decision of the majority of the judges considering an application referred to in paragraph 9(b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'

We are thus required to consider whether there are exceptional circumstances which warrant the reconsideration or variation of the earlier order of this court dismissing the application for special leave to appeal.

[6] In prayer 3 of the Notice of Motion the applicant asked this court for an order allowing him to adduce further evidence regarding count 1. According to him, the evidence would show that on 12 March 2011, which is the date appearing on the charge sheet as the date on which it is alleged he committed the robbery, he was an inmate at the Modderbee Correctional Centre, Benoni, thereby providing him with an alibi defence. In support of this allegation the applicant attached an affidavit by Mr Ramoroka, a correctional supervision official from the correctional centre.

[7] In attempting to explain why he had not raised the alibi defence during the trial the applicant submitted that after his arrest he was confronted by approximately seven cases of robbery of motor vehicles over a period of two years. He was confused by

these allegations since he had no knowledge thereof. When the other charges were withdrawn and he was only charged with two counts of robbery, he together with his counsel, focused on the issue of mistaken identification, as he knew that he was not present at the scene of the crimes. The unfortunate consequence of this focused approach, so he continued, led to no thought on his part or his counsel of an alibi defence. He continued to state that he is not an educated man and cannot easily recollect specific times and places, especially when confronted with seven crimes over a period of time.

[8] The applicant's allegation that he has an alibi defence has no merit and can easily be disposed of through a closer look at the complainant's evidence tendered during his cross-examination by the applicant's legal representative. He clarified the dates as follows:

'Mr Nkuna: I just want to make sure, when did the incident take place. Happen? – 1 March 2010.

[Mr Nkuna:] 2010 and when did you attend the ID parade? It is not in dispute, if you do not remember it was put to you the 1 March 2011. This is roughly. – It was roughly a year later.

Roughly a year. – Yes

[Mr Nkuna:] Yes sir but look, it was your first time to see this person on 12 March 2010; So you saw this person for only 20 seconds. – Yes.

....

[Mr Nkuna:] Then you took a year without seeing him but still pointed him at the ID parade? – Exactly.'

[9] Thus although the charge sheet alleged that the offence had been committed on 12 March 2011, the evidence came to be undisputed during the course of the trial that the offence had indeed been committed in March 2010. It was also common cause that the identity parade had been held on 1 March 2011. That could not have occurred had the offence been committed, as alleged in the charge sheet, on 12 March 2011. It is clear therefore that the offence took place on 1 March 2010 and not on 12 March 2011 as stated in the charge sheet and as referred to earlier by the prosecutor during the examination in chief of Mr Kassim. Had the prosecutor and the magistrate been more vigilant, the variance between the evidence adduced and the charge sheet could have been addressed in terms of ss 86 or 88 of the Act. It is generally accepted that a charge sheet may be amended on appeal. (See *S v Nedzamba* 2013 (2) SACR 333 (SCA) para 19-20).

[10] It follows that the applicant has failed to show that there are exceptional circumstances that warrant reconsideration or variation of this court's earlier order dismissing the application for special leave to appeal. The application must therefore fail.

[11] I make the following order:

The application in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 is dismissed.

Z L L Tshiqi

Judge of Appeal

APPEARANCES:

For Appellant:

A H Van der Bilt

Instructed by:

Van der Bilt Attorneys, Pretoria

c/o Lovius Block Attorneys, Bloemfontein

For First Respondent:

MR Molatudi (With him, MJ Makgwatha)

Instructed by:

Director of Public Prosecutions, Pretoria