

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

**CASE NO CC16/2013
Date Heard: 31 July 2014
Date delivered: 14 August 2014
NOT REPORTABLE**

In the matter between

THE STATE

Applicant

And

MADODA NUBE

Respondent

Application by prosecution for conditional leave to appeal against acquittal of respondent on conspiracy charge – leave having been granted to respondent to appeal conviction and sentence imposed in respect of charges arising from execution of conspiracy – trial court finding that conspiracy proved – respondent convicted on basis of common purpose of crimes committed in execution of conspiracy – not charged with conspiracy in alternative – acquitted on basis that conviction would amount to duplication of charges – question of law raised – interests of justice favour determination on appeal – leave to appeal granted.

JUDGMENT

GOOSEN, J.

- [1] This is an application in which the applicant (namely the prosecution) seeks conditional leave to appeal against the acquittal of the respondent on a charge of conspiracy.
- [2] The respondent was granted leave to appeal to the Supreme Court of Appeal in relation to his conviction on charges of robbery with aggravating circumstances and murder. The respondent was not charged in the alternative with the crime of

conspiracy and those offences which arose from the execution of the conspiracy. At the conclusion of the case the prosecution sought a conviction against the respondent for those offences committed in the execution of the conspiracy.

- [3] The applicant seeks leave to appeal on the basis that the respondent's acquittal on a charge of conspiracy was founded in law, on the basis that a conviction on the charge of conspiracy would constitute a duplication of charges. It is also submitted that this court found it necessary to consider the legal principles applicable in respect of a charge of conspiracy in relation to those principles applicable to establishing a basis for common purpose, as the basis upon which the respondent was convicted of the principal offences. On this basis it is contended that the acquittal raises a question of law.
- [4] It was found that the prosecution had proved all of the elements of the charge of conspiracy in terms of section 18(2) of the Riotous Assemblies Act, Act 17 of 1956. That finding was relevant to determining whether the prosecution had also established the basis for a finding of common purpose to commit the offences which were executed in furtherance of the conspiracy on the basis of the existence of a prior agreement. The basis upon which the respondent was acquitted on the charge of conspiracy was the fact that a conviction would amount to a duplication of charges.
- [5] It was not submitted that this court had erred or misdirected itself in relation to that aspect. On the contrary, the prosecution had itself asked for an acquittal on the count of conspiracy, on the basis that a conviction would amount to duplication of charges. Nevertheless, in this application it was submitted that a question of law arises in relation to the acquittal of the respondent on the charge of conspiracy, in the event that the respondent's appeal succeeds in respect of the main charge.
- [6] The state's right to appeal is constrained to an appeal either against sentence pursuant to section 316A of the Criminal Procedure Act, 51 of 1977 or, in the

event of an acquittal, upon a point of law reserved for determination by the Court of Appeal.

- [7] In this instance there has been no application to reserve a specific question of law. The point of law upon which the applicant now relies concerns the question whether, in the event that the respondent's appeal against his conviction on the offences committed in the execution of the conspiracy is upheld, the appeal court ought to enter a conviction on the charge of conspiracy based on the trial court's findings of fact regarding proof of the conspiracy.
- [8] In *S v Pillay and others* 2004 (2) SA 419 (SCA) the trial court had returned verdicts of not guilty against an accused in respect of certain charges because a conviction "would amount to an unjustified duplication of charges" (*Pillay* supra at par 112). It was however argued on appeal that the court was entitled to substitute for the convictions set aside on appeal a conviction for those charges for which the accused had been acquitted by reason of duplication. The Court (at par 113) referred with approval to the dictum in *R v Kaseke and another* 1968 (2) SA 805 (RA) where Beadle CJ said that:

This submission amounts to an appeal by the Crown against the acquittals on these counts and the substitution of a verdict of guilty in the place of that of not guilty. In the absence of clear statutory authority empowering the Court to adopt such a course, I cannot see how it can be followed as it cuts across all the fundamental principles related to the doctrine of *autrefois acquit*.

- [9] The court in *Pillay* went on to consider s 22 of the Supreme Court Act 59 of 1959 (now s19 of the Superior Courts Act 10 of 2013) and said the following (at par 114 – 115):

It is clear from this section that the power to confirm, amend or set aside a judgment or order can be exercised only in respect of a judgment or order which is the subject of an appeal. In the instant case the order acquitting accused 14 on counts 2, 3 and 14 is not the subject of an appeal before us. Compare *R v Motala* 1927 AD 118.

Section 322(1) of the Criminal Procedure Act is in the following terms:

'In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may –

- (a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or
- (b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or
- (c) make such other order as justice may require.

The subsection clearly deals with the powers of a Court of appeal may exercise in the instance of an appeal against a conviction or where a question of law has been reserved for its consideration. It does not give a Court of appeal the power to alter an acquittal order or to substitute it with a finding of guilty.

(emphasis added)

[10] It is clear from the passage cited from the *Pillay* judgment that in the absence of an appeal the issue cannot be determined on appeal by a court of appeal.

[11] In this matter there is no controversy between the parties regarding the principle of law, namely that a conviction on the conspiracy and on the charges arising from the execution of the conspiracy would amount to a duplication of charges. What is however in issue is the effect of the application of that principle in circumstances where the trial court is found to have erred in finding the respondent guilty of the principal offences. It is for this reason that the state seeks conditional leave to appeal thereby rendering the order of acquittal the subject of appeal.

[12] In my view it is appropriate that the ambit of the state's right of appeal in circumstances such as the present be clarified. It is also in the interest of justice that all of the issues, including those related to the acquittal of the accused on the basis of duplication of charges be ventilated in the appeal to be prosecuted by the respondent. In the result the application must succeed.

[13] I make the following order:

The applicant is granted conditional leave to appeal against the order acquitting the respondent on the charge of conspiracy.

G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances: For the Applicant
 Mr. M. Le Roux
 National Director of Public Prosecutions

 For the Respondent
 Mr. T. N Price
 Instructed by Brendan Weldrick Attorneys