IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: A1249/2006

DATE: 16/5/2008

REPORTABLE

IN THE MATTER BETWEEN:

PATRICK KHUMALO APPELLANT

AND

THE STATE RESPONDENT

JUDGMENT

PRELLER J:

The appellant was convicted in the regional court on counts of rape and abduction. Three men who pretended to be police officers assaulted the complainant's husband and abducted her from their home at night under the

pretext that she was to point out a certain Vusi to them. She was driven to a sports stadium where the men raped her in turn. Only the present appellant appeared in court, the other two having escaped arrest.

Because the complainant had been raped three times the proceedings in the regional court were stopped after the conviction and the appellant was referred to the high court for sentence in terms of the provisions of the Criminal Law Amendment Act 105 of 1997.

The matter came before Hussain J on 3 May 2002 and the convictions on both counts were confirmed. After finding that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence the appellant was sentenced to imprisonment for life on the count of rape and to a sentence of five years on the count of abduction. An application for leave to appeal against both the sentence and the conviction was dismissed on the same day.

Included in the record is a court order by Hussain J dated 4 April 2006 according to which he granted an application for leave to appeal to the

full court against sentence only. I later obtained a copy of the relevant judgment in which HUSSAIN J mentioned that when he had dealt with the case he had reference to the case of *S v Malgas* 2001 (1) SACR 469 (SCA). He remarked that it did not appear that at the time the judgment of *S v Mahomotsa* 2002 (2) SACR435 (SCA) was available to him. On the strength of that judgment he found that there was a reasonable prospect that another court might come to a different conclusion and granted leave to appeal to this court against the sentence imposed by him approximately four years earlier. There is no indication in the judgment that he was aware at the time of the fact that he had previously dismissed a similar application. I managed to obtain the original court file and noticed that the initial refusal of the application for leave to appeal is not recorded in its customary place on the file cover. The submission made in his heads by Mr Viviers on behalf of the appellant that Hussain J "reconsidered" his previous decision is wrong and it is clear that he granted leave, unaware of his previous refusal.

I accordingly requested counsel to file further heads on this aspect which they promptly did.

The first question for decision before us is therefore whether Hussain J was *functus officio* after his initial dismissal of the application for leave to appeal and what the status was of his subsequent order granting such leave. From that follows the question whether we have jurisdiction to consider the present appeal without valid leave having been granted.

Du Toit et al. *: Commentary on the Criminal Procedure Act* 31-14/15 state :

'Once an application for leave to appeal had been refused, a subsequent new application for leave to appeal, leave to lead further evidence and to enter a special entry on the record could not be entertained by the court that had refused the original application for leave to appeal. An application for leave to appeal against sentence might constitute an exception to this principle.'

The authority quoted for the exception is *Matjila v Director of Public Prosecutions, TPD* 2002 (1) SACR 507 (T) 517c-d. The reason for the apparent exception was that the first application for leave to appeal was directed against the conviction only and Jordaan AJ (as he then was) was prepared to entertain the subsequent application only because he had not considered an application in respect of sentence before. There is

accordingly no principle elevating an application for leave to appeal against sentence to any special status. See also *S v Ebrahim* 1972 (2) SALR 61 (C) at 64H-65A.

As early as 1934 the appellate division, after considering the common law position, confirmed the principle that subject to certain exceptions a judge, having uttered a definite judgment, is *functus officio* and cannot thereafter alter, supplement, amend or correct the judgment. See *Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499 at 502. That principle has since been confirmed on several occasions. See: *R v Sibande* 1958 3 SA (1) (A); *R v Maharaj* 1958 (4) SA 246 (A); *S v Vontsteen* 1972 (4) SA 1 (T).

A full court of the Cape provincial division in *S v Gentle and Another* 2003 (1) SACR 395 (C) considered the question whether it could hear an appeal without the required leave for such appeal having been granted and came to the conclusion that it had no such jurisdiction. The court relied *inter alia* on the judgment in *Sefatsa and Others v Attorney-General Transvaal and Another* 1989 (1) 821 (A) and in particular on the *dictum* at

839B-C where Rabie ACJ (as he then was) observed that:

> '…..it hardly needs saying that a court cannot have an inherent jurisdiction which would entitle it to act contrary to an express provision of an Act of Parliament.'

The Act of Parliament in question was section 315(4) of the Criminal Procedure Act which allows appeals from superior court convictions only in accordance with the provisions of sections 316 to 319 of the Act.

The full court also relied on *S v Fourie* 2001 (2) SACR 118 (SCA) and in particular on the passage at 121a-c. The appellant had been convicted of kidnapping, attempted rape and culpable homicide and sentenced to 16 years' imprisonment. Leave was granted to appeal against the conviction on one of the charges and against the sentences in respect of all the charges. A petition for leave to appeal against the convictions on the other charges had been dismissed. At the hearing it was submitted that the appellant should be allowed to attack the convictions on the other charges as well in terms of the Court's inherent reservoir of power to regulate procedure in the interests of justice. At the passage referred to the Court held with reference to inter alia *Sefatsa* that 'The power to regulate its procedure does not include the power to hear a

matter which is not the proper subject of an appeal This is imply because this Court's appellate jurisdiction is not an inherent jurisdiction. . . . . Section 168 of the Constitution did not change the position.'

I respectfully find myself in full agreement with the views expressed by the full court.

Another judgment that had been delivered in the same division was also considered by the full court: in *Hansen v The Regional Magistrate Cape Town and Another* 1999 (2) SACR 430 (C) the court found that the judgment in the *Safatsa* case has to be reconsidered in the light of the provisions of section 173 of the Constitution. The full court expressly refrained from expressing a view on the correctness or otherwise of that judgment, but came to the conclusion that section 173 of the Constitution does not permit the court to assume jurisdiction to hear an appeal in circumstances where such assumption would be tantamount to ignoring an express statutory provision contained in the Criminal Procedure Act.

In the *Matjila* case Jordaan AJ also considered the effect of the *Hansen* judgment but distinguished it on the facts and did not follow it.

I find the reasoning of Jordaan AJ inherently convincing in his following of the *Safatsa* judgment to the effect that the court has no inherent jurisdiction which would entitle it to act contrary to an express provision of an Act of Parliament.

A similar problem arose in *S. v Sawman* 2001 (1) SACR 649 (E). The fact were briefly that after a Regional Court Magistrate had granted leave to appeal against the sentence imposed by him, he sent the case on special review because his sentence was not a competent one. The sentence was set aside on review and another sentence substituted for it. The fact that leave had been granted to appeal was not brought to the attention of the reviewing judges. The problem in this case would have been avoided if the incompetent order had merely been set aside on review and the matter referred back to the court *a quo* for sentence to be imposed afresh. .

When the matter came on appeal the court considered whether it had jurisdiction to hear the matter after it had already been dealt with on review. The court reasoned that section 304(2)(a) of the Criminal Procedure Act provides that when a case together with the magistrate's reasons comes

before a judge on review, the high court with jurisdiction considers that case "as a court of appeal". Accordingly, so it was held, when a court interferes with a sentence, that interference amounts to a judgment by a court on appeal and the court will thereafter have no further jurisdiction to deal with the same case on appeal. The court accordingly held that it had no jurisdiction to reconsider the decision already given by two other judges on review.

As far as I could establish the meaning of the words “as a court of appeal” in sec 304(2)(a) nor the effect of the wording of its predecessor, sec 96 of the Magistrates Court Act 32 of 1944, has never been judicially considered. It could, however, hardly have been the intention of the legislature to abolish the right of a convicted person to be heard on appeal in such an off-hand manner.

If the reasoning in *Sawman’s* case is correct, the result would be that once a judgment or sentence has been interfered with on review, that would be the end of the right of appeal that the convicted person had. Review and appeal are two very distinct procedures and whatever may have happened in

a case on review (except perhaps if there had been an acquittal) does not affect the accused's right of appeal. That must be so because, save for the right in terms of section 303 of the Criminal Procedure Act to have his representations forwarded to the registrar together with the record of the proceedings, the accused is normally not heard during the review process. The result of the reasoning in the *Sawman* case is that the accused's right of appeal simply disappears. This same concern seems to have been the reason behind the decisions in *R v Mokoena* 1953 (4) SA 133 (T) and *S v Scout* 1969 (1) SA 545 (E). Keeping in mind the clear distinction between the two procedures there is no "skynbare teenstelling" (*Sawman* at 653h-i) between the latter two judgments and the judgment by Centlivres CJ in *R v D and Another* 1953 (4) SA 384 (A). The principle considered and confirmed in the first two cases was that a judgment given on review does not affect the accused's right of appeal whereas in the latter the question was whether the accused can have a second bite at the cherry by way of a further appeal after the first one had been disposed of.

At p657 in the *Sawman* case the court went on to consider whether it should in terms of section 173 of the Constitution expand the inherent

powers of a court in terms of the common law to overturn a conviction on the grounds of a *iustus error* or *iusta causa*. It was argued that that principle had already been approved as far as the civil law is concerned in the matter of *De Wet and Others v Western Bank* 1979 (2) SA 1033 (W). (Sic. The reference should be either 1977 (4) SA 770 (W) or 1979 (2) SA 1030 (A).) Both the full court of the WLD and the SCA considered *inter alia* the common law power of a court, beyond that contained in Rules 31 and 42, to rescind judgments and found it to be unimpaired. It seems to me that as far as the criminal law is concerned, the question has been disposed of in the judgment of *Safatsa* referred to above.

In the result I regretfully find myself unable to agree with the reasoning in the *Sawman* judgment.

I may add that the Constitutional Court has in respect of both the interim and the present Constitution considered the limitation on the right of appeal contained in the Criminal Procedure Act and found those limitations to be constitutional. See: *S v Rens* 1996(1) SACR 105 (CC) and *S v Twala (SA Human Rights Commission Intervening*) 1999(2) SACR 622 (CC).

In the *Matjila*-case Jordaan AJ held that there was 'nothing in the Constitution that confers the right on the High Court or the Supreme Court of Appeal to grant leave to appeal without having regard to the provisions and the structures created by the statutes and the Rules of Court'

And further:

'To hold otherwise would endanger the very core of the purpose of the intention of the legislature and the makers of the rules of the high court and the constitutional court to ensure a system where swift justice is meted out to accused without the system being clogged with appeals with no prospect of success.'

I find myself in respectful agreement with the sentiments there expressed.

In conclusion I therefore find that the granting of leave to appeal in the face of his previous refusal of such leave by Hussain J was a nullity and that the case is not properly before us.

In the result the appeal must be struck from the roll.

F G PRELLER
JUDGE OF THE HIGH COURT

I AGREE

A P LEDWABA
JUDGE OF THE HIGH COURT

I AGREE

T J VILAKAZI
ACTING JUDGE OF THE HIGH COURT

A1249-2006

HEARD ON: 13/02/2008
FOR THE APPELLANT: ADV A M VIVIERS
INSTRUCTED BY: LEGAL AID BOARD, PRETORIA
FOR THE RESPONDENT: ADV M N C MENIGO
INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA