IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION JOHANNESBURG)

CASE NO: A136/2012

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

20 February 2014 **S JULY**

In the matter between:-

MNISI NICHOLAAS **Appellant**

And

THE STATE **Respondent**

JUDGMENT

JULY AJ

1. This is an appeal against the conviction and sentence of the applicant, by the Regional Court sitting at Randfontein, which came through a petition and was

subsequently heard by this court on 17 February 2014. On petition the applicant was granted leave to appeal against sentence only

2. The appellant seeks two remedies:
   a. The setting aside of the convictions on two counts of robbery with aggravating circumstances;
   b. alternatively, the reduction of the 15 year prison sentence to 10 years as there are allegedly substantial and compelling factors justifying the reduction of the said sentence.

CONVICTIONS

3. The question that needs to be answered is whether this court has any power to deal with the conviction when the leave to appeal was only granted in respect of the sentence. This court derives its powers from various sources, namely, the legislation, constitution and its inherent powers, to interfere if there is if there is irregularity or misdirection which results in injustice.
4. It is common cause that the appellant has only been granted leave on petition to appeal against the sentence only and not against the actual conviction. Notwithstanding that the leave to appeal is in respect of the sentence, the appellant seeks this court to interfere with the conviction by the trial court.
5. The appellant in his heads of argument relies on section 304 (4) of the Criminal Procedure Act 51 of 1977 as the basis upon which this court must set aside the convictions on the two counts of robbery with aggravating circumstances.
6. For completeness' sake, section 304 (4) provides that:

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.

7. The appellant's interpretation of this section is misplaced. The section specifically deals with reviews and thus does not apply to appeals that have been considered for leave to appeal by this court. Section 309 specifically deals with appeals.
8. Although section 309 does refer to section 304, this is only in relation to cases that are appealed directly from the magistrate's court and not those that come before this court by way of petition. Cases that come to this court by means of a petition are dealt with in section 309C. Therefore, there is no statutory power granted to this court to make such a finding in terms of section 309C.
9. This court, however, has inherent powers to set aside any convictions and sentences which come before it, if it finds that such a conviction is not in accordance with justice. Nevertheless, this court will not have the jurisdiction to exercise its powers if the decision taken by the two judges in dealing with the petition is considered to be judicial in nature.

10. In the case of *S v Van der Merwe*[1], E Jssteyn AJ concluded that the high court did

> *" not have jurisdiction to exercise its review powers if the decision taken by the two judges in dealing with the petition is considered judicial in nature*"

and further stated that,

> " *in S v Khoasasa*[2]*, the court ruled that a decision in terms of section 309C of the Act is a ruling or judgment of a Provincial Division as intended in ss 20 (1) or 21 (1) of the Supreme Court Act 59 of 1959, meaning that the decision is judicial in nature."*

11. Accordingly, this court is bound by the decision of *Potland Cement Co Ltd an Another v Competition Commission and Other*[3]*,* where the court held that only proceedings of inferior courts could be reviewed and that proceedings of the High Court are not reviewable. In paragraph 3 , Schutz JA states that:

> *"And throughout it has been the High Court, and only the High Court, acting through its judges, that has enjoyed the general, inherent jurisdiction to entertain reviews. It is not itself the subject of review…"*

In paragraph 42 , he emphasises that :

[1] 2009 (1) SACR 673 (C)
[2] 2003 (1) SACR 123 (SCA).
[3] 2003 (2) SA 385 (SCA).

"What I have said about the non-reviewability of a judge does not, of course, apply to a magistrate. A magistrate is subject to review..."

12. Further, for purposes of certainty and uniformity, which are fundamental principles in our law, it is trite that appeal judges not arbitrarily surpass the scope of the leave granted to appellants by petition. Petitions are decided on by honourable judges, who apply their minds as such and make findings as to the matters on which they will grant a petition. It would therefore cause unnecessary confusion and uncertainty should appeal judges make their own findings as to the matters upon which such a petition should have been granted and decide accordingly.
13. Accordingly, the appeal against the convictions on the two counts of robbery must fail for the reasons set out above.
14. However a perusal of the record and the version put to some of the witnesses indicates that he was involved in the robbery. The gist of the appellant's argument was that he was not part of the robbery that took place and that he was there looking for a car for his niece. He alleges that he was coerced to tie up the victims of the crime by the so called robbers. However, when asked by the police who responded to the alarm, about the whereabouts of the owners, he responded and told the police that the owners had left with their *mercedes benz.* This was a lie. It begs the question why he had to lie when he was not one of the robbers.

SENTENCE

15. It is trite law that sentencing is pre-eminently with the trial court and that this court may only interfere with the sentence imposed by the trial court when there has been demonstrable and material misdirection by such a trial court in imposing such a sentence, or that court's discretion has not been exercised properly or judicially. In the absence of such proof, the appeal court has no right to interfere with the exercise of such discretion.

16. The power of the court to interfere with the findings of the trial court is limited. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.[4]

17. The appellant raises the fact that he had already been incarcerated for a period of 10 months before he was convicted and thus the sentence imposed on him is unfair

18. In the *S v Vilakazi*[5] case, Nugent JA stated that;

> *"…it would be most unjust if the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed. I intend ordering that the sentence- which for purposes of considering parole is a sentence of 15 years imprisonment commencing on the date that the appellant was sentenced- is to expire two years earlier than would ordinarily have been the case."*

[4] S v Monyane and Others 2008 (1) SACR 543 (SCA).
[5] 2009 (1) SACR 552 (SCA).

19. Therefore in determining the sentence, following this reasoning, the 15 year sentence against the appellant would expire 10 months earlier than would ordinarily have been the case.

20. However, in the case of *S v Radebe*[6] the court stated that in determining whether the period in detention pre-sentencing is relevant in establishing the period of imprisonment to be imposed, such a period should be taken into account and the sentence must be proportionate to the crime committed. Lewis JA emphasises that;

> *"In determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all circumstances, including the period spent in detention prior to conviction and sentencing is a just one."*

21. It follows that the fact that the appellant had been incarcerated for a period of 10 months, is not in itself a substantial and compelling factor but merely a factor to be considered in determining whether the sentence is proportionate to the crime and whether the sentence is a just one.

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[6] 2013 (2) SACR 165 (SCA).

22. However, it is noted that the trial court did not take the fact that the appellant had already been incarcerated for a period of 10 months into account when determining the sentence. This factor ought to have been taken into account in determining whether the sentence in all circumstances, including the period spent in detention prior to conviction and sentencing is a just one.

23. Accordingly, I am of the view that the sentence of 15 years' imprisonment from the date that he was sentenced, taking into account the period in detention pre-sentencing, is to expire 10 months earlier than would ordinarily have been the case.

24. The appeal against the sentence is upheld. The sentence imposed upon the appellant is set aside and is substituted with the following:

> The accused is sentenced to 15 years imprisonment. The 10 months are to be deducted when calculating the date upon which the sentence is to expire.

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JULY AJ

JUDGE OF THE HIGH COURT

I agree

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FRANCIS J

JUDGE OF THE HIGH COURT

FOR APPELLANT	:	M MILLER
FOR RESPONDENT	:	M RAMPYAPEDI
DATE OF HEARING	:	17 FEBRUARY 2014
DATE OF JUDGMENT	:	20 FEBRUARY 2014