

IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE, CAPE TOWN)

CASE NO:

A484/01

DATE:

30 JUNE 2010

5 In the matter between:

**MANDLA XABENDLINI**

Appellant

and

**THE STATE**

Respondent

10

**JUDGMENT**

(Application for Leave to Appeal)

**THRING, J**

15 This is a very belated application by the second appellant for  
 leave to appeal to the Supreme Court of Appeal against the  
 judgment delivered in this Court on the 2<sup>nd</sup> September, 2003,  
 confirming his conviction on certain charges. The application  
 is brought under s 20(4) of the Supreme Court Act, No. 59 of  
 20 1959. There is also an application for condonation of the  
 lengthy delay which has occurred in bringing the application  
 for leave to appeal. We grant the condonation sought.

The second appellant was convicted in the magistrate's court  
 25 on five charges, namely:

/ds

/...

A484/01

- 1) robbery with aggravating circumstances;
- 2) theft of a motor vehicle;
- 3) the unlawful possession of a firearm;
- 4) the unlawful possession of ammunition, and
- 5) unlawfully pointing a firearm in contravention of s. 39(1)(i) of the Arms and Ammunition Act, No. 75 of 1969.

On charge 1 he was sentenced to fifteen years' imprisonment; on charge 2 he was sentenced to three years' imprisonment; on charges 3 and 4 he was sentenced to two years' imprisonment; and on charge 5 he was sentenced to six months' imprisonment, which was ordered to run concurrently with the sentences on charges 3 and 4.

15

On appeal before us the convictions and sentences of the second appellant on charges 1, 2 and 5 were confirmed, but the convictions and sentences on charges 3 and 4 were set aside. It is against the order of this Court in regard to charges 1, 2 and 5 that the second appellant now seeks leave to appeal further.

20

I am of the view that no reasonable prospect of success exists in an appeal against the convictions or sentences on charges 1 and 2, and leave will consequently not be granted in respect

/ds /...

25

A484/01

thereof. However, as regards charge 5, the pointing of the firearm, there is a conflict of authority on what constitutes the pointing of a firearm for the purposes of the relevant subsection. In S v Van Zyl, 1993(1) SACR 338 (C) Williamson, J said in this Division at 340(g), Van Deventer, J. concurring:

“I thus find myself in respectful disagreement with the views expressed in the Humphries case. In my opinion, on a proper construction of s. 39(1)(i) the offence in question is only committed when the firearm is pointed directly at the person concerned so that if discharged the bullet would hit the victim.”

However, in S v Hans, 1998(2) SACR 406 (E) Erasmus, J., with Ludorf, J. concurring, disagreed with the decision in the Van Zyl case, and declined to follow it.

In the instant matter we preferred the approach adopted in Hans' case, and we respectfully disagreed with the views expressed by the learned judges in Van Zyl's case. However, another Court might reach a different conclusion.

Consequently LEAVE IS GRANTED TO THE SECOND APPELLANT TO APPEAL TO THE SUPREME COURT OF



A484/01

APPEAL ONLY AGAINST THAT PART OF THE ORDER OF  
THIS COURT IN WHICH THE CONVICTION AND SENTENCE  
OF THE SECOND APPELLANT ON CHARGE 5 WERE  
CONFIRMED. The appeal is limited to the grounds set out in

5 paragraphs 1.2, 6 and 7 of the second appellant's application  
for leave to appeal dated July 2008, only insofar as they relate  
to the conviction and sentence of the second appellant on  
charge 5.

10 Save as aforesaid, the application for leave to appeal is  
refused.



15

---

  
THRING, J

I agree,

20

---

  
McDOUGALL, AJ