Republic of South Africa

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

REPORTABLE

Case no: A 74/12
Division: 5

In the matter between:

ANDRE PRETORIUS Appellant

v

THE STATE Respondent

Coram: HLOPHE, J.P. et CLOETE, A.J.

Heard: 7 SEPTEMBER 2012

Delivered: 7 SEPTEMBER 2012

JUDGMENT

CLOETE AJ:

[1] The appellant, who was legally represented throughout the trial, was convicted on 24 February 2011 in the Wynberg Magistrates' Court on 1 count of contravening

s 8(3) as read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter referred to as *"the Act"*). He was sentenced on the same date. With the leave of the trial court, he appeals against his conviction only.

[2] The appellant seeks to amplify the grounds of appeal contained in the notice of appeal in the court *a quo.* While it is noted that he specifically reserved his right therein to amplify such grounds upon receipt of the typed record, it is common cause that, first, such grounds were not in fact amplified prior to or after the hearing of the application for leave to appeal in that court (in accordance with s 309 as read with section 309B of the Criminal Procedure Act 51 of 1977 and as further read with rule 67(7) of the Magistrates' Court rules); and second, that the appellant has failed to bring a substantive application to this Court for leave to amplify such grounds.

[3] A similar situation arose in *S v Khoza* 1979(4) SA 757 (N). A full bench in that matter dismissed the appellant's application from the bar for leave to introduce a new ground of appeal for the very reasons that he had failed to comply with both the relevant statutory provisions and rule of court, and had further failed to bring a substantive application before that court; and in *Willemse v S* [2001] 3 All SA 6 (C) a full bench of this division refused an application from the bar on the same grounds, finding that the appellant's failure to comply constituted *"an insurmountable difficulty"* for him to overcome.

[4] In my view the position is no different in the present case, and on that basis alone the appellant's application should be refused. In any event, the new ground

which the appellant seeks to introduce is in reality nothing other than a variation on the same theme as the first of his grounds of appeal contained in the notice of appeal and which was referred to therein as a point *in limine*. That ground - although inelegantly drafted - clearly relates, when regard is had to the record, to an allegedly defectively formulated charge; and the "new" ground which the appellant now seeks to introduce is that he could not have received a fair trial since he was not informed of the charge that he faced with sufficient detail so as to enable him to answer it (as stipulated in s 35(3)(a) of the Constitution of the Republic of South Africa). Accordingly - and if the ground of appeal in respect of the allegedly defective charge is properly before us - this Court will also be considering whether the appellant received a fair trial as a result.

[5] The question that now arises is whether the ground of appeal relating to the allegedly defective charge is properly before this Court. The answer to this is to be found at p 210 of the record, where the appellant's legal representative, in addressing the magistrate in argument in the application for leave to appeal, said the following:

> *"Ten opsigte van die eerste punt in limine, Edelagbare, wil ek graag op rekord plaas dat die applikant daardie punt abandoneer op grond van die feit dat die korrekte inligting van die klagstaat wel tot sy aandag gekom het. Ek beweeg dan aan na die meriete toe."*

[6] S 309B(3)(a) of Act 51 of 1977 provides that every application for leave to appeal must clearly set forth the grounds upon which the convicted person wishes to appeal. Rule 67(5) of the Magistrates' Court rules, which deals with reasons to be furnished by a magistrate when granting an application for leave to appeal, stipulates that in such reasons the magistrate is obliged to set out (a) the facts that he or she

found proved; (b) his or her reasons for any finding of fact specified in the appellant's statement of grounds of appeal; and (c) his or her reasons for any ruling on any question of law or the admission or rejection of evidence so specified as appealed against (my emphasis).

[7] To my mind these provisions make it clear that a magistrate, when dealing with an application for leave to appeal, need only consider and provide reasons in respect of the specific grounds of appeal advanced.

[8] In the present matter, the ground of appeal advanced in respect of the allegedly defective charge was abandoned before the magistrate considered the application for leave to appeal. It was thus not a ground which she was obliged to consider in deciding whether or not to grant leave to appeal.

[9] There is a line of Supreme Court of Appeal authority to the effect that the latter court will not necessarily consider itself bound by the grounds upon which leave to appeal has been granted by the trial court: see *inter alia* *S v Safatsa and Others* 1988 (1) SA 868 (A) at 877 A-D; *Legal Aid Board v The State and Others* 2011 (1) SACR 166 SCA at 176 a-b.

[10] In *Queenstown Girls High School v MEC, Department of Education, Eastern Cape, and Others* 2009 (5) SA 183 (Ck) at 186 H – 187 A, Leach J found that the authority of the Supreme Court of Appeal to do so "*appears to be based upon its power to adjudicate upon a petition for leave to appeal where such leave was refused by a lower court, a power which a full court of a provincial division does not have.*

Accordingly, it has been held that a full court does not have the power to allow argument on appeal to be advanced on grounds wider than those in respect of which leave to appeal was granted". The court referred to *Harlech-Jones Treasure Architects CC and Others v University of Fort Hare* 2002 (5) SA 32 (E) where Kroon J said the following at 51 I – 52 A:

> *"In our judgment, it is clear that the power of the Supreme Court of Appeal, when hearing an appeal, to permit argument on grounds of appeal, on which leave to appeal was refused, is derived, not from the fact that it is the forum hearing the appeal, but from the fact that it is the forum that, in terms of the Act, is empowered to adjudicate upon a petition for leave to appeal refused by the Court of a Provincial or Local Division. A Full Court of a Provincial Division is not so empowered and the fact that it is the forum hearing the appeal does not give it the power to entertain grounds of appeal in respect of which leave to appeal was refused".*

[11] It should immediately be noted that the findings in the *Queenstown Girl High School* and *Harlech-Tech Jones* cases were made in the context of civil and not criminal appeals. In criminal appeals where leave has been refused by a Magistrates' Court, the High Court indeed has the power to adjudicate upon a petition for leave to appeal in accordance with s 309C of Act 51 of 1977.

[12] However, that section applies where leave to appeal has been refused, and not where leave has been granted as is the case in the present matter. The appellant was granted leave to appeal on specific grounds. One of the grounds that he now seeks to advance in argument is the same ground that he chose to abandon prior to the hearing of his application for leave to appeal. To allow the appellant to now revive that ground

in argument – without any substantive application for leave to do so (as was the case in the *Legal Aid Board* matter to which I have referred) would be wholly inappropriate. It follows that the principles set out in the *Khoza* and *Willemse* cases apply equally to this ground.

[13] I thus turn to the remaining ground of appeal, namely the attack on the merits. The magistrate comprehensively summarised the evidence of the various witnesses in her judgment on conviction and I accordingly do not intend to repeat it here, save to highlight certain pertinent aspects.

[14] In essence, the charge faced by the appellant - in accordance with s 8(3) of the Act - was that he unlawfully and intentionally compelled or caused the complainant to witness his act of self-masturbation.

[15] The state has conceded that the evidence does not show that the appellant compelled the complainant to witness his act. Accordingly the sole issue to be determined is whether the state had proved beyond a reasonable doubt that the appellant caused the complainant to witness that act without her consent.

[16] "*Cause*" is not defined in the Act. As to the ordinary meaning of the word, the Chambers Twentieth Century Dictionary defines the word *"cause"* to mean, *inter alia*, to "*bring about*".

[17] Although he admits that the complainant witnessed his act of self-masturbation, the appellant seeks to persuade us that because - on her own version - the opportunity

presented itself not to witness it – she must have effectively consented thereto.

[18] The charge sheet reflects that the appellant was charged in terms of s 8(3) of the Act as read *inter alia* with s 1 thereof. S 1(2) provides that for purposes of s 8(3) *"consent"* means *"voluntary or uncoerced agreement"*. S 1(3) provides that the circumstances in which a complainant does not voluntarily or without coercion agree to an act as contemplated in s 8(3) include, but are not limited to, where there is an abuse of power or authority by the offender to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance.

[19] The complainant's unchallenged testimony, as well as that of her employer, was that she was an employee of an agency with whom the appellant had contracted for domestic services. She was performing domestic work for the appellant on the day in question. She was required to render her services unsupervised by her employer. Accordingly during the hours that she had performed her domestic duties on that day she would have been under the authority of the appellant.

[20] It was not disputed by the appellant that he sat in the lounge, completely naked, performing an act of self-masturbation while the complainant was cleaning the same room. He then asked her – a stranger whom he had met for the first time that day – whether she would like to help him to masturbate, and she replied that she would not. Undeterred, he continued to masturbate in front of her, finally moving to the bathroom but leaving the door open in full view of the complainant. Although he claimed that she was free to leave at any time (and it was common cause that she had in fact left the flat momentarily on a few occasions earlier) he was forced to concede that she might have

been unwilling to leave the flat permanently because she was dependent on the income that she would receive for that day's work. The complainant testified that she had left the flat earlier that day as previously described due to the appellant's aberrant behaviour preceding his act of self-masturbation.

[21] When the complainant was cross-examined on why she did not simply leave the flat and not return, she replied

> *"As ek straight geloop het, net die werk gelos het, meneer, dan hoe sal ek my kinders brood kan gegee het?"*

[22] In my view, it is clear from the evidence that the appellant abused his position of power or authority in self-masturbating in the complainant's presence and in attempting to exploit the complainant into participating in his act of self-masturbation. The complainant, as a result of the fact that she needed the income to support her children, did not expressly indicate her objection to the appellant's conduct because she was inhibited. It is thus fallacious to contend that her failure to expressly object or indicate her unwillingness or resistance amounted to voluntary or uncoerced consent. The state indeed proved its case against the appellant beyond reasonable doubt and he was correctly convicted by the magistrate.

[23] I accordingly propose the following order:

1. **The appellant's application to introduce a new ground of appeal is refused.**
2. **The appellant's appeal against his conviction is refused.**
3. **The conviction and sentence are confirmed.**

CLOETE, A J

I agree and it is so ordered.

HLOPHE, J P

17/09/2012