



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 30 April 2021

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*Director of Public Prosecutions: Gauteng Division, Pretoria v Pooe* (348/2019) [2021] ZASCA 55 (30 April 2021).

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The Supreme Court of Appeal (SCA) today dismissed an application for leave to appeal brought by the Director of Public Prosecutions, Gauteng (the State). No order was made as to costs. The State sought leave to appeal against the refusal of leave by the Gauteng Division of the High Court, Pretoria (the trial court) to reserve questions of law for decision by the SCA, in terms of s 319 of the Criminal Procedure Act 51 of 1977 (the CPA), following the acquittal of the respondent, Mr Rethabile Amogelang Pooe (Mr Pooe), at the conclusion of the trial.

On 10 September 2018, the trial court found Mr Pooe not guilty on all five counts, namely murder, robbery with aggravating circumstances, kidnapping, unlawful possession of a firearm and the unlawful possession of ammunition. Dissatisfied with the outcome of the trial, the State then requested the trial court to reserve four questions of law in terms of s 319 of the CPA for consideration by the SCA. The trial court refused the application. The State then challenged the decision by applying to the SCA for an order granting it leave to appeal. The SCA heard argument from both parties on the application for leave to appeal and on the merits.

The majority judgment, written by Mabindla-Boqwana AJA (Mbha JA and Ledwaba AJA concurring) dismissed the application for leave to appeal not on the grounds of non-compliance with s 319(1) of the CPA, but on the basis of the merits of the application. It found that precedent suggested that failure by the State to set out facts fully in its s 319 application was condonable. Further, what was important was whether the question of law sought to be reserved and the facts upon which the findings hinged can be ascertained from the trial court's judgment and the record. It found that this case was not one of those where the appeal court needed to trawl through the record to learn what the factual findings of the court were, inadequate as they may have been. Accordingly, it held that non-compliance with the requirements should be condoned.

With regard to the merits, the majority found that while the trial court had misdirected itself by focusing solely on prior agreement, which need not be shown to prove common purpose, the trial court proceeded to make a factual finding that Mr Pooe had acted out of necessity, which was the reason the trial court attributed to Mr Pooe's failure to disassociate himself from the

commission of the crime. Further, that while one may have been critical of the trial court's clear failure to assess the evidence of Mr Pooe as against the requirements of necessity, that issue remained a question of fact, which the SCA was not at liberty to interfere with, as it was an enquiry that involves judicial process of evaluating evidence. Thus, the fact that the trial court erred by confining itself to the question of prior agreement was academic.

A minority concurring judgment was written by Saldulker JA (Dlodlo JA concurring) and found that the State's application in terms of s 319 of the CPA fell short of what was required, and therefore must be dismissed. This was on the grounds that the State did not set out the factual findings on which the reserved questions of law ought to have been considered. Thus, the facts upon which the point hinged were not clear, nor were they fully set out by the State. Accordingly, the application for condonation by the State for non-compliance with s 319(1) of the CPA ought to have been refused.

Nevertheless, the minority considered it necessary to deal further with the issues raised. It found that the SCA was precluded from entertaining an appeal from the State on the facts. As an appellate court, it was not sitting in judgment on the factual circumstances of this case, but adjudicating on whether the questions raised by the State were questions of law. It found that all of the questions raised by the State were questions of facts and not of law.

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