



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 987/2024

In the matter between:

ZOLISA NCITHA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Ncitha v The State* (987/2024) [2026] ZASCA 53 (15 April 2026)

Coram: MBATHA, HUGHES and UNTERHALTER JJA and MABESELE and BASSON AJJA

Heard: 13 March 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 15 April 2026 at 11h00.

Summary: Criminal Law and Procedure – Criminal Procedure Act 51 of 1977 (CPA) – whether the High Court correctly dealt with the appeal in terms of the provisions of s 309(1)(a) of the CPA.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Majiki J and Tilana-Mabece AJ sitting as a full court):

- 1 The appeal succeeds.
 - 2 The order of the high court is set aside.
 - 3 The matter is remitted to the high court to deal with both conviction and sentence before a newly constituted bench.
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JUDGMENT

Hughes JA (Mbatha and Unterhalter JJA and Mabesele and Basson AJJA concurring)

[1] This appeal concerns the rape of a nine-year-old girl in Msizazwe location in the Eastern Cape. The appellant, Zolisa Ncitha, who was legally represented, tendered a plea of guilty to the charge of rape.

[2] This case served before the regional court for the Regional Division of the Eastern Cape, Bizana (the regional court), which convicted the appellant of rape and sentenced him to life imprisonment. His appeal to the Eastern Cape Division of the High Court, Mthatha (the high court) was dismissed. This Court granted special leave to the appellant, specifically as follows: ‘. . . to address the court on the merits, and on whether the High Court followed the provisions of Section 309(1)(a) of the Criminal Procedure Act 51 of 1977 in dealing with the matter on appeal’.

Background

[3] On 18 July 2022, the appellant appeared before the regional court. The following charge was put to the appellant. He pleaded guilty to:

‘. . . [C]ontravening the provisions of Section 3 read with Sections 1, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007. Also read with sections 256 and 261 of the Criminal Procedure Act 51 of

1977 . . . [and further] read with the provisions of Sections 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended.’

[4] Before pleading to the charge, the appellant was warned by the regional magistrate that a conviction could attract a sentence of life imprisonment by virtue of the fact that s 51(1) Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1977 (CLAA), as amended, was invoked. The charge read thus:

‘. . . IN THAT on or about the February 2017 and at or near Msizazwa Location, Bizana in the District/Regional Division of Eastern Cape the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant [S] (9 year old girl) by inserting his penis into her vagina without the consent of the said complainant.’

[5] Conversely, the appellant’s plea statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (CPA), which was accepted by the prosecutor, however, reflected that he pleaded guilty to inserting his ‘finger on her vagina without her consent, thereby raping her’. The regional magistrate pointed out that the plea was different to the facts stated in the indictment. This prompted the prosecution to seek an amendment to the indictment, which the magistrate duly granted. The record reflects that the prosecutor placed the following on record: ‘The charge sheet is amended Your Worship it now reads that he inserted his finger into her vagina’. The regional magistrate sought confirmation from the appellant that he understood the amendment to the charge sheet, which he confirmed. The regional magistrate then proceeded to enquire whether the statement that had been ‘read into the record earlier on’ was confirmed, and the appellant stated: ‘I confirm the contents of the statement Your Worship’.

[6] I deem it prudent that I set out the pertinent portion of the actual s 112(2) statement made by the appellant:

‘. . . I am [the] accused person in the matter, also aware of the charges preferred against me. I plead guilty to rape, I also plead guilty out of my own free will. I wish to state as follows: on or about February 2017, I was at home doing my house chores. I sent [S] my cousin sister to get me a cigarette from [the] shop. Indeed she came back with it. On her return I became tempted and lifted her panty and inserted [my] finger on her vagina without her consent, thereby raping her. I admit what I did was against the law. I am also remorseful for what I did.’

[7] The following interaction occurred on the pronouncement of the appellant's guilt: 'COURT: The Court is satisfied that the plea is an [indistinct] admission of guilt and there is no possible defence and you are consequently found GUILTY of rape as read with Section 51(1), Part 1, Schedule 2 of the Criminal Law Amendment Act as amended.

PROSECUTOR: As the Court pleases.

DEFENCE ATTORNEY: As the Court pleases.

COURT: The statement shall be accepted. Mr Zobeka I was a step ahead. The statement is now accepted and marked as EXHIBIT A in the proceedings. You may take a seat sir.'

[8] The appellant was duly convicted. During sentencing and after submissions by counsel, the regional magistrate realised that the J88 medical certificate had not been handed in by the prosecution. The prosecutor then commenced to read into the record the findings on the J88. It recorded that there was a whitish discharge, the hymen was not intact and sexual assault could not be excluded. Further, the J88 recorded the history of the sexual assault as having occurred several times between 2017 and August 2019. The child's birth certificate was also handed up to the regional magistrate. Critically, before marking them as exhibits, the regional magistrate sought confirmation from the appellant's attorney that the aforesaid documents could be entered into the record. The vital response was as follows: '. . . I have had sight of the said documents Your Worship. I do not have an objection that it be handed in'.

[9] On appeal before the high court, the appellant raised the point that his plea statement did not admit all the elements of the offence for which he was charged and convicted. This was premised on the basis that, in his plea, there were no admissions of penetration and intention was not established. In addition, the plea was silent on whether he was in his sound and sober senses when he deposed to the plea statement and that he had disavowed the right to remain silent. The high court found no misdirection by the regional magistrate in the reasoning and findings and confirmed the conviction. It did not deal with sentence.

[10] Before this Court, the grounds of appeal articulated by the appellant are as follows: whether the high court applied s 309(1)(a) of the CPA when dealing with the appeal from the regional court; whether the elements of penetration and intention of the offence of rape had been admitted by the appellant or established in his s 112(2)

plea statement; and whether the appellant was correctly convicted in terms of s 51(1) of the CLAA.

Section 309(1)(a) of the CPA

[11] The history and meaning of s 309(1)(a) have evolved over time. The relevant portion of the amended section as of 1 April 2010 reads:

‘(1)(a) Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51 (1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302 (1) (b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302 (1) (a).’

[12] By virtue of this amendment, a convicted offender sentenced to life imprisonment by a regional court lost their automatic right of appeal. The provision prior to the amendment read thus:

‘Any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that –

(i) if that person was, at the time of the commission of the offence –

(aa) below the age of 16 years; or

(bb) at least 16 years of age but below the age of 18 years and was not assisted by a legal representative at the time of conviction in a regional court; and

(cc) sentenced to any form of imprisonment as contemplated in section 276 (1) that was not wholly suspended; or

(ii) if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997(Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the

provisions of section 302(1) (b)¹ shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302 (1) (a).’

[13] Prior to that amendment, a convicted offender had an automatic right of appeal. It is worth noting that s 309B applies to the general applications for leave to appeal from a lower court by a convicted offender. Having failed to obtain leave to appeal under s 309B, a convicted offender can then invoke s 309C, which involves petitioning a higher court for leave to appeal.

[14] In *S v Alam (Alam)*,² the high court held that an accused person sentenced to life imprisonment by a regional court ought to seek leave to appeal from that court in terms of s 309B and did not enjoy the right to an automatic appeal. In 2013, this Court in *S v Chake (Chake)*³ confirmed the decision in *Alam* as correct, as it was determined before the amendment incorporating s 84 of the Child Justice Act 75 of 2008 (the Child Justice Act) took effect.

[15] *Chake* also considered the impact of enacting the Child Justice Act on s 309(1)(a). It found that as of 1 April 2010, as a consequence of the amendment, a convicted person sentenced to life imprisonment by a regional court in terms of s 51 of

¹ Sections 302(1)(a) and (b) provide as follows:

‘Sentences subject to review in the ordinary course

(1)(a) Any sentence imposed by a magistrate’s court-

- (i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191 (2) (j) of the Children’s Act, 2005 (Act 38 of 2005), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;
- (ii) which, in the case of a fine, exceeds the amount determined by the Minister from time to time by notice in the *Gazette* for the respective judicial officers referred to in subparagraph (i),
- (iii) . . .

shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.

(b) The provisions of paragraph (a) shall-

- (i) be suspended in respect of an accused referred to in the first proviso to section 309 (1) (a) who has duly noted an appeal in terms of section 309 (2) against a conviction or sentence and has not abandoned the appeal;
 - (ii) be suspended in respect of an accused who has duly noted an appeal in terms of section 309.
- (2) against a conviction or sentence, after being granted leave to appeal in terms of section 309B or 309C, and has not abandoned the appeal; and
- (iii) cease to apply in respect of an accused when judgment in the appeal is given.’

² *S v Alam* [2011] ZAWCHC 226; 2011 (2) SACR 553 (WCC) para 7.

³ *S v Chake* [2013] ZASCA 141; 2014 (1) SACR 177 (SCA) (*Chake*) para 15.

the CLAA must apply for leave to appeal. This Court concluded that the amendments to s 309(1)(a) of the CPA by the Child Justice Act effectively removed the automatic right of appeal to a high court for persons sentenced in such cases. In *S v Radebe* this Court, though it was considering a refusal by the high court of leave to appeal against the judgment of the trial court, held that s 309(1)(a) made provision from the trial court for leave to appeal to a higher court of that division and not directly to the Supreme Court of Appeal.⁴

[16] The impact of the amendment by the Child Justice Act was that, except for children referred to in s 85 of the Child Justice Act, persons sentenced to life imprisonment by a regional court did not need leave to appeal. Subsection (1)(a) was then amended again, effective from 1 April 2010, by removing the first proviso and making it subject to s 84 of the Child Justice Act. This retrospective amendment re-established the automatic right of appeal for individuals sentenced to life imprisonment by a regional court, with effect from 1 April 2010. The retrospective effect was made operative from 1 April 2010 in accordance with s 43(2) of the Judicial Matters Amendment Act 42 of 2013 (JMA Act),⁵ enacted on 22 January 2014. From 1 April 2010 to 22 January 2014, persons sentenced to life imprisonment did not have an automatic right of appeal. This was corrected by the enactment of the JMA Act, which applied retrospectively from 1 April 2010. As a result, from 1 April 2010, a person sentenced to life imprisonment by a regional court has an automatic right of appeal to the high court and does not require leave to appeal.

[17] Thus, an automatic right of appeal is provided for in terms of s 309(1)(a) of the CPA in cases where the convicted person was sentenced to life imprisonment. According to the section, a person convicted by a lower court or regional court to life imprisonment may note an appeal without seeking leave to appeal in terms of s 309B of the CPA.⁶ On interpreting the provision, in context, its wording and syntax, it's

⁴ *S v Radebe* [2016] ZASCA 172; 2017 (1) SACR 619 (SCA).

⁵ Section 43(2) of the Judicial Matters Amendment Act 42 of 2013 provides for the retrospective commencement of the following provisions: s 10 amending s 309(1)(a) and s 11 amending s 309B(1)(a) of the CPA are deemed to have commenced on 1 April 2010; while s 42 is deemed to have commenced on 20 September 2010.

⁶ Section 309B of the CPA provides:

'(1)(a) Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any accused, other than a person referred to in the first proviso to section 309 (1) (a), who wishes to note an appeal against any

abundantly clear that the automatic right of appeal is in respect of both conviction and the resultant sentence or order.

Discussion

[18] When this Court granted special leave, it directed that the issue of compliance by the high court with s 309(1)(a) of the CPA needed to be addressed by the appellant and state counsel. Disappointingly, both parties failed to address the issue properly. This is totally unsatisfactory and inadequate, as both conviction and sentence ought to be dealt with at the same time.

[19] In *Director of Public Prosecutions, Free State v Mokati*,⁷ this Court identified a specific ground on which the case ought to have been determined on appeal. The Court said the following:

'The well-established principle is that when a high court grants leave to appeal to this Court it may limit the grounds of appeal to be addressed or it may grant leave generally so that all the relevant issues might be canvassed. *Where the high court has limited the grounds of appeal this Court has no jurisdiction to expand the grounds of appeal.* If an appellant is dissatisfied with a high court's decision to limit the grounds of appeal his or her remedy is to petition this Court to expand the grounds of appeal, not to appeal directly to this Court.'⁸ (Emphasis added.)

[20] The aforesaid principle is applicable to this matter as well: once this Court sets out the parameters within which the appeal ought to be addressed, the parties are obliged to comply therewith. However, it appears that s 309(1)(a) of the CPA has been the subject of much confusion by the courts and needs to be addressed. Thus, the crisp determination in this matter is whether the high court, in dealing with the prescripts of s 309(1)(a), misconstrued the nature of the provision by dealing only with the conviction, instead of both the conviction and sentence.

[21] The following portion of a passage in *Chake* is apposite:

conviction or against any resultant sentence or order of a lower court, must apply to that court for leave to appeal against that conviction, sentence or order.'

⁷ *Director of Public Prosecutions, Free State v Mokati* [2022] ZASCA 31; [2022] 2 All SA 646 (SCA); 2022 (2) SACR 1 (SCA) (*Mokati*).

⁸ *Ibid* para 28 with reference to *S v Delpport and Others* [2014] ZASCA 197; [2015] 1 All SA 286 (SCA); 2015 (1) SACR 620 (SCA) (*Delpport*) para 41.

‘ . . . Judges must be careful not to submit to the temptation of substituting what they regard would have been reasonable and sensible for what was in fact done by the legislature, and to thereby “cross the divide between interpretation and legislation”. Instead, a court must determine the appropriate meaning of the words used in the statutory provision in question by adopting their plain meaning unless it would lead to a glaring absurdity.’⁹

[22] Applying the above to the case before us, an appeal was noted after the conviction and sentence of life imprisonment was meted out by the regional court. The high court was tasked in terms of s 309(1)(a) of the CPA to deal with an appeal, on both conviction and sentence. Unfortunately, the high court dealt only with the conviction. This was a procedural misdirection by the high court, as a grave injustice was committed by failing to address the sentence at all.

[23] As a result, this Court is not empowered to decide the merits of the conviction only. The high court must de novo consider both the conviction and the sentence and examine the findings of the regional court, before this Court becomes involved. This would prevent the appeal from being heard by this Court on a piecemeal basis. This Court’s parameters cannot be extended on its own accord.¹⁰

[24] As a result, the following order is granted:

- 1 The appeal succeeds.
- 2 The order of the high court is set aside.
- 3 The matter is remitted to the high court to deal with both conviction and sentence before a newly constituted bench.

W HUGHES
JUDGE OF APPEAL

⁹ *Chake* fn 3 above para 13; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

¹⁰ *Mokati* fn 7 above para 28 and *Delport* fn 8 above para 41.

Appearances:

For the Appellant:

X Babane

Instructed by:

Legal Aid South Africa, Mthatha

Legal Aid South Africa, Bloemfontein

For the Respondent:

A Bikitsha

Instructed by:

Director of Public Prosecutions, Mthatha

Director of Public Prosecutions, Bloemfontein.