



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Not Reportable**

Case No: 117/2019

In the matter between:

**JOSEPH BONGANI GWIBA**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Gwiba v State* (117/2019) [2019] ZASCA 155 (27 November 2019)

**Coram:** Petse DP, Mbha and Mocumie JJA, Koen and Gorven AJJA

**Heard:** 13 November 2019

**Delivered:** 27 November 2019

**Summary:** Criminal Procedure – appeal – special leave granted against refusal of high court to grant leave to appeal from the regional court – appeal relates to whether the high court should have granted leave to appeal – not the merits of the appeal – reasonable prospects of success exist – leave to appeal granted to the high court.

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## ORDER

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**On appeal from:** Free State Division of the High Court (Kruger J and Boonzaaier AJ on petition to them):

- 1 The appeal against the refusal of the petition to the High Court is upheld.
  - 2 The order of that court is set aside and substituted with the following order:  
‘The applicant is granted leave to appeal to the Free State Division of the High Court against his convictions and sentence.’
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## JUDGMENT

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**Gorven AJA (Petse DP, Mbha and Mocumie JJA and Koen AJA concurring)**

[1] The appellant was tried in the Regional Court, Bothaville on three counts of robbery with aggravating circumstances. Despite pleading not guilty to all three counts, he was convicted as charged. The counts were taken together for purposes of sentence. He was sentenced to a period of imprisonment of 15 years. Two other persons were charged and convicted with him but their fate does not arise here.

[2] The appellant applied for leave to appeal against his convictions and sentences in terms of s 309B of the Criminal Procedure Act (the CPA).<sup>1</sup> The regional magistrate refused the application. As a result, the appellant petitioned the High Court of South Africa, Free State Division for leave to appeal in terms of s 309C of the CPA. This was likewise refused. He then approached this court

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<sup>1</sup> Criminal Procedure Act 51 of 1977.

for special leave to appeal. On 13 December 2018 this court granted the following order:

- ‘1. The application for condonation is granted.
2. Special leave to appeal . . . is granted to the Supreme Court of Appeal.  
. . . .’

It is this order which has resulted in the matter being set down before us.

[3] The appeal of an accused convicted in a regional court lies to the high court under s 309(1)(a) of the CPA.<sup>2</sup> There are various procedures when leave to appeal is desired. The first step is an application to the regional magistrate under s 309B(1)(a) of the CPA. In its relevant parts, this provides:

‘. . . any accused . . . who wishes to note an appeal against any 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.’

The next step is provided by s 309C(2)(a) of the CPA:

‘If any application—

- (i) for condonation;
- (ii) for further evidence; or
- (iii) for leave to appeal,

is refused by a lower court, the accused may by petition apply to the Judge President of the High Court having jurisdiction to grant any one or more of the applications in question.’

[4] In order to understand the next step to be taken, it is necessary to recognise that if such a petition is refused, that refusal is an order granted on appeal to it by a high court.<sup>3</sup> Under the Supreme Court Act,<sup>4</sup> if the petition was refused, the next step was to appeal to this court with leave of the High Court.<sup>5</sup> This is no longer

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<sup>2</sup> This provides, in its relevant parts:

‘[A]ny person convicted of any offence by any lower court . . . 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’.

<sup>3</sup> *S v Khoasasa* 2003 (1) SACR 123 (SCA); [2002] 4 All SA 635 paras 14 & 19-22.

<sup>4</sup> Supreme Court Act 59 of 1959.

<sup>5</sup> Section 20(4)(b) of the Supreme Court Act.

the case. The Superior Courts Act<sup>6</sup> repealed the Supreme Court Act. A high court no longer has the power to grant leave to appeal to this court against the refusal of a petition.

[5] Section 1 of the Superior Courts Act excludes from the definition of ‘appeal’ one which is regulated by the CPA. The CPA does not provide for a right of appeal to this court from a decision of the high court taken on appeal to it from a magistrates’ court.<sup>7</sup> Because the appeal in question is not regulated by the CPA, such an appeal falls within the definition of ‘appeal’ in the Superior Courts Act. It is accordingly governed by the provisions of Chapter 5 of the Superior Courts Act.

[6] Because the refusal of the petition is a ‘decision of a Division on appeal to it’, special leave must be sought from this court as provided for by s 16(1)(b) of the Superior Courts Act:<sup>8</sup>

‘(1) Subject to section 15(1), the Constitution and any other law —

...

(b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal’.

This is then the next step to take. The procedure to obtain special leave is set out in s 17(3) of the Superior Courts Act:

‘An application for special leave to appeal under section 16 (1) (b) may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after the decision sought to be appealed against, or such longer period as may on good cause be allowed . . .’.

The special leave granted is to appeal to this court ‘against any decision of a Division on appeal to it’. The special leave granted is thus to appeal the decision of the high court. The next step is to prosecute that appeal in this court.

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<sup>6</sup> Superior Courts Act 10 of 2013.

<sup>7</sup> *S v Van Wyk & another* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) para 18.

<sup>8</sup> *Van Wyk* para 20.

[7] The high court refused to grant leave to appeal. So the appeal to be considered by this court is an appeal against the refusal of the high court to grant leave to appeal. The issue for consideration is whether the high court correctly refused leave to appeal.<sup>9</sup> If the appeal succeeds, the appropriate order is that which the high court ought to have granted on petition, viz. to grant leave to appeal to the high court. The resultant appeal in the high court deals with the merits of the appeal. This court does not deal with the merits of the appeal.<sup>10</sup>

[8] This court has granted special leave to appeal. It must have held that special circumstances exist which satisfy the higher threshold for special leave to appeal against the refusal of the petition by the high court.<sup>11</sup> We are thus to decide an appeal against the refusal of the high court to grant leave to appeal.<sup>12</sup> It is clear that this court cannot decide the merits of the appeal, which must, if leave is given, be decided by the high court.<sup>13</sup>

[9] The matter must accordingly be dealt with on the basis of whether the magistrate, and subsequently the high court, should have found that there are grounds for leave to appeal. The test for this is whether the appellant has reasonable prospects of success on appeal.<sup>14</sup>

[10] It is clear from both sets of heads of argument that a pointing out was held. This pointing out may have amounted to a confession but no finding to that effect is appropriate at this point. This was contested evidence. No trial within a trial was held. For the rest, eyewitnesses did not testify that the appellant was at the scene of the crime. He was not identified at an identification parade. One witness

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<sup>9</sup> *S v Matshona* [2008] ZASCA 58; 2013 (2) SACR 126 (SCA) para 4.

<sup>10</sup> Section 309(1)(a) of the CPA. See also *S v Tonkin* 2014 (1) SACR 583 (SCA) para 4.

<sup>11</sup> *Van Wyk* para 21.

<sup>12</sup> *Matshona* para 7.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Matshona* para 8.

testified that items were found in the boot of the vehicle of the appellant. Two other witnesses testified that they searched the vehicle and did not find any such items.

[11] From this, it is clear that the learned magistrate, and later the high court on petition, should have come to the conclusion that the appellant has reasonable prospects of success on appeal. It must be made clear that the factors set out above are not definitive findings which in any way affect the findings to be made by the court hearing the appeal. They are simply weighed in the mix in considering the issue before us.

[12] Counsel for the respondent identified correctly the manner in which the appeal should be dealt with. He also, with respect, correctly conceded that there are reasonable prospects of success on appeal. After the appeal was heard, an order was made and it was indicated that reasons would follow. These are those reasons.

[13] The following order was made:

- 1 The appeal against the refusal of the petition to the High Court is upheld.
- 2 The order of that court is set aside and substituted with the following order:  
‘The applicant is granted leave to appeal to the Free State Division of the High Court against his convictions and sentence.’

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T R Gorven  
Acting Judge of Appeal

## Appearances

For the Appellant: DC Hattingh  
Instructed by: Julian Knight & Associates Inc,  
Brooklyn  
Rossouws Attorneys, Bloemfontein

For the Respondent S Chalale  
Instructed by:  
The Director of Public Prosecutions, Bloemfontein