THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 1380/2018

In the matter between:

MZOMISI HLONGWA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Hlongwa v The State* (1380/2018) ZASCA 156 (27 November 2019)

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

Heard: 13 November 2019

Delivered: 27 November 2019

Summary: Criminal Procedure – Special leave granted against refusal of high court to grant leave to appeal from Regional Court – whether the high court should have granted leave to appeal – not on the merits of the appeal – reasonable prospects of success exist – leave to appeal granted to the high court.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Masipa and Maluleke JJ dismissing an application for leave to appeal on petition to it.):

1 The appeal is upheld.

2 The order of the high court is set aside and substituted with the following:

'Leave to appeal against sentences is granted to the Gauteng Division of the High Court.'

JUDGMENT

Mocumie JA (Petse DP and Mbha JA and Koen and Gorven AJJA concurring):

[1] The Regional Court, Westonaria (the regional court) convicted the appellant on four counts of robbery with aggravating circumstances, one count of attempted murder; one count of possession of an unlicensed firearm; and one count of possession of live ammunition without a licence, the latter two in contravention of the Arms and Ammunition Act 75 of 1969.[1] He was sentenced as follows: 20 years' imprisonment on each of the four counts of robbery with aggravating circumstances all of which were ordered to run concurrently; 10 years' imprisonment on the count of attempted murder; and 3 years' imprisonment for the possession of a firearm and the possession of live ammunition, which latter two offences were taken together for the purposes of sentence. In effect, he

[1] This was the Act that governed the offences at the time of their commission. It has since been repealed by the Firearms Control Act 60 of 2000 which came into operation in 2004.

was sentenced to an effective term of 33 years' imprisonment. The regional court refused leave to appeal against his convictions and sentences. The appellant petitioned the Gauteng Division of the High Court, Johannesburg (the high court) where, likewise, leave was refused. This court was then petitioned for special leave to appeal. Despite the indication in the petition that it was for special leave, ordinary leave to appeal was granted by this court in respect of the sentences only. It is clear that the order was made *per incuriam* and can be corrected without any formal application.[2] The appropriate order should have been to grant special leave to appeal to this court.

[2] In their heads of argument, both parties dealt with the matter as if this court was to hear an appeal against the sentences. In order to arrest this misconception that continues despite the numerous judgments of this court, it is apt to quote from the judgment of *Dipholo v The State*[3] where this court stated in the most clear language:

'It is correct that in terms of our current law appeals from the magistrates' court must be heard by the high court. Section 309(1)(*a*) of the Criminal Procedure Act 51 of 1997 (CPA). There is no provision in the law for this court to hear appeals on the merits directly from the magistrates' courts. However, confusion has reigned in the various divisions of the high court in recent times regarding the proper procedure to be followed by an accused in instances where a high court has refused leave to appeal a judgment from the magistrates' court. One would have hoped that the position was settled in *S v Khoasasa* (supra) paras 19-22. However, as this confusion persisted, this Court once again restated the correct approach in *S v Tonkin* 2014 (1) SACR 583 (SCA) in para 6 as follows:

"In response to our invitation, counsel for the appellant submitted a well prepared argument urging us to entertain the merits of the appeal. But on reflection it appears to me that, unfortunate as it may be, we have no authority to do so. The reason why it is so have been stated in *Khoasasa*

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[2] *Jacobs & others v S* [2019] ZACC 4; 2019 (5) BCLR 562 (CC); 2019 (1) SACR 623 (CC) para 97.
[3] *Dipholo v The State* [2015] ZASCA 120 para 5.

and elaborated upon in the decisions following upon it to which I have referred. On reflection, these reasons cannot, in my view, be faulted. In broad outline they are as follows:

(a) Although this Court has inherent jurisdiction to regulate its own procedure, it has no inherent or original jurisdiction to hear appeals from other courts. In the present context, its jurisdiction is confined to that which is bestowed upon it by sections 20 and 21 of the Supreme Court Act. In terms of these sections the jurisdiction of this Court is limited to appeals against decisions of the high court.

(b) When leave to appeal has been refused by the high court, that court rather obviously, did not decide the merits of the appeal. If this court were therefore to entertain an appeal on the merits in those circumstances, it would in effect be hearing an appeal directly from the magistrates' court. That would be in direct conflict with s 309 of the Criminal Procedure Act, which provides that appeals from lower courts lie to a high court. The "order on appeal" by the high court – in the language of s 20(4) – that is appealed against is the refusal of the petition for leave to appeal and nothing else".'

One would have thought that by now these cases would be common knowledge amongst practitioners.

[3] Following the line of the cases referred to in the preceding paragraph, including *S v Khoasasa*[4] and *Van Wyk v S, Galela v S*,[5] it is clear that the leave that has been granted is special leave to appeal to this court against the refusal of the high court to grant leave to appeal on petition. If successful, this court would then grant leave to appeal to the high court since it is that court that must hear such appeal in terms of s 309(1)*(a)* of the Criminal Procedure Act 51 of 1977 (the CPA). This means that the merits of the appeal

[4] *S v Khoasasa* [2002] ZASCA 113; 2003 (1) SACR 123 (SCA); [2002] 4 All SA 635 (SCA).
[5] *Van Wyk v S, Galela v S* [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA). See also *Tonkin v S* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA); *Matshona v S* [2008] ZASCA 58; [2008] 4 All SA 68 (SCA); 2013 (2) SACR 126 (SCA); *Radebe v S* [2016] ZASCA 172; 2017 (1) SACR 619 (SCA); *Lubisi v S* [2015] ZASCA 179.

itself are not before us, only the question whether the high court ought to have granted leave to appeal on petition to it against the refusal by the regional court to do so.

[4] I revert to the crux of the appeal, whether the appellant should be granted leave to appeal to the high court against the sentences only. The test is whether there are reasonable prospects that another court may impose a different sentence. In *Smith v S*[6] this court stated:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[5] Coming to the facts of this case, there is no doubt that the offences of which the appellant was convicted are very serious and prevalent in our society. However, it is also trite that where there are multiple convictions, as happened in this case, the court has to consider the cumulative effect of the sentences that it intends to impose. In *S v Young*[7] this court stated:

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[6] *Smith v S* [2011] ZASCA 15; 2012 (1) SA SACR 567 (SCA) para 7.
[7] *S v Young* [1977] 1 All SA 654 (A); 1977 (1) SA 602 (A) at 610E-H. See also *S v Rantlai* 2018 (1) SACR 1 (SCA). Take note of the warning meted out by this court in *S v Kruger* [2011] ZASCA 219; 2012 (1) SACR 369 (SCA) para 10.

'Where multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise, [a court must ensure] that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused.'

[6] On the face of it, the effective sentence of 33 years' imprisonment, which was imposed on the appellant, in the circumstances of this matter, seems excessive. In addition, despite the regional magistrate stating so, it seems that he did not place sufficient weight or emphasis on the personal circumstances of the appellant namely, the time he spent in custody awaiting trial, the fact that none of the complainants sustained physical injury, the blending of the sentences with some measure of mercy, as the regional magistrate himself correctly observed was required, and the provisions of s 280(2) of the CPA, which confer a discretion on the court to order sentences to run concurrently in circumstances such as the present, where the commission of the offences formed part of a single *tableau* of events at the scene of the offences that gave rise to this case. This list is not exhaustive of the appropriate factors that should have been taken into consideration in sentencing.

[7] In the light of the factors outlined above, it is unnecessary to deal with the other points that counsel for the appellant raised during argument before us including the applicability or otherwise of the Criminal Law Amendment Act 105 of 1997, specifically, whether the state was entitled to rely on the minimum sentencing provisions of this Act for one offence and not the other offences and, if not, whether the regional magistrate was, nonetheless, obliged to apply those provisions; and whether it was incumbent upon

the regional magistrate to have forewarned the appellant of the severe sentences it intended to impose. These points are best left for the high court to decide.

[8] I am of the view that there are reasonable prospects that another court may impose a different sentence to that imposed by the regional magistrate. In the result, the appeal ought to succeed and the following order is granted:

1 The appeal is upheld.

2 The order of the high court is set aside and substituted with the following:

‘Leave to appeal against sentences is granted to the Gauteng Division of the High Court.’

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B C Mocumie

Judge of Appeal

APPEARANCES:

For Appellant:	W A Karam
Instructed by:	Legal Aid SA, Johannesburg
	Bloemfontein Justice Centre, Bloemfontein
For Respondent:	P J Schutte
Instructed by:	DPP Gauteng Division of the High Court, Johannesburg
	DPP, Free State Division of the High Court, Bloemfontein