THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 20565/2014

In the matter between:

SAMSON GIVEN MASIKE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Masike v The State* (20565/2014) [2015] ZASCA 189 (30 November 2015)

Coram: Ponnan, Bosielo, Leach, Petse and Zondi JJA

Heard: 11 November 2015

Delivered: 30 November 2015

Summary: Criminal Procedure ─ Appeal against order of the High Court refusing leave to appeal in terms of s 309(7)*(c)* of the Criminal Procedure Act 51 of 1977 ─ refusal of condonation by lower court when there are no reasonable prospects of success of appeal may be appealed against to the high court if leave to appeal is granted by the high court. Necessity for judges considering petition to have at their disposal documents listed in s 309C(4) of the CPA for a proper adjudication of petition explained.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Makgoba and Louw JJ sitting as court of appeal):
The matter is struck from the roll.

JUDGMENT

Petse JA (Ponnan, Bosielo, Leach and Zondi JJA concurring):

Introduction

[1] On 20 June 2008 an armed robbery took place at the Blue Ribbon Bakery in Vereeniging. In a bid to evade arrest, the robbers' getaway motor vehicle drove against a red traffic-signal into an intersection and collided with another motor vehicle and in consequence two passengers travelling in the getaway motor vehicle were fatally injured.

[2] Subsequently the appellant, who was the owner and driver of the getaway motor vehicle was charged, together with two other persons who do not feature in this appeal, in the Vereeniging Regional Court on six charges, to which he pleaded not guilty namely: (a) robbery with aggravated circumstances ; (b) two counts of possession of an unlicensed firearm in contravention of s 3 read with ss 1, 103, 117, 120(1)*(a)* and 121 of the Firearms Control Act 60 of 2000; (c) possession of unlicensed ammunition in contravention s 3 read with of ss 1, 103, 117, 120(1)*(a)* and 121 of the Firearms Control Act; and (d) two counts of culpable homicide.

[3] The appellant was convicted on the robbery and culpable homicide charges but acquitted on the remaining charges. He was sentenced to 15 years' imprisonment on the robbery charge ─ this being the prescribed minimum sentence in terms of s 51(2) read with Part II of Schedule 2 of the Criminal Law Amendment

Act 105 of 1997 (the Act) ─ and five years' imprisonment on each of the two counts of culpable homicide. The latter sentences were ordered to run concurrently with the 15 year term of imprisonment.

Delays and consequent applications for condonation

[4] The appellant subsequently applied for leave to appeal against both his conviction and sentence. As this application was out of time, it was supported by an application for condonation. Both applications served before the trial court on 17 January 2011. The only reason proffered by the appellant for the delay is contained in a single sentence being that 'due to financial difficulties [he] was unable to give [his] current attorneys proper instructions to file leave to appeal within the 14 days' period prescribed in terms of s 309B(1)*(b)*(ii) of the Criminal Procedure Act 51 of 1977 (the CPA).

[5] At the outset the magistrate called into question the truthfulness of this explanation. It would appear that he held this view because the attorney who represented the appellant at the trial had previously approached him on 10 December 2010 intimating that he had come to move an application for leave to appeal. However this application did not proceed as the appellant was not brought to court from gaol. In the event, the magistrate refused the application for condonation. He did so without considering the application for leave to appeal on its merits, after he had remarked that he could not 'grant leave on a perjurious affidavit'.

[6] Aggrieved at this result the appellant, by way of a petition, applied to the Judge President of the Gauteng Division of the High Court, Pretoria for leave to appeal, not against the refusal of his condonation application, but what he chose to call the dismissal of his application for leave to appeal against his conviction and sentence. That petition was similarly out of time and consequently the appellant also applied for condonation for its late filing. The petition served before Makgoba and Louw JJ who, having found that there were 'no prospects of success on appeal in

respect of both conviction and sentence', dismissed the application on 22 September 2011.

[7] The appellant, almost nine months later, applied to the high court in terms of s 316 of the CPA for leave to appeal against the order refusing him leave to appeal to this court. This application was similarly accompanied by an application seeking condonation in respect of its late filing. Again, the reason proffered for the inordinate delay by the appellant was that he lacked funds to enable him to instruct an attorney and counsel and was 'recently being financially supported by [his] family'. In a terse judgment (per Louw J in which Makgoba J concurred) the court a quo was somehow persuaded that there was indeed 'a reasonable possibility that another court could come to a different conclusion' in regard to the prospects of success on appeal. Consequently it granted leave to appeal to this court. What motivated its change of mind in regard to the reasonable prospects of success was not articulated.

[8] Against that backdrop, the registrar of this court was directed to address a note, at our behest, to counsel for the parties inviting them to file supplementary heads of argument addressing the following:

(a) what precisely served before the high court when it:

(i) first refused the application for leave to appeal;

(ii) subsequently granted leave to appeal to this court.

(b) precisely what serves before this court on appeal.

(c) on what basis is it contended that:

(i) the high court had jurisdiction to entertain the matter;

(ii) this court has jurisdiction to hear the matter.

(d) in the event of this court having jurisdiction and the appeal succeeding, what order, is it envisaged, will be sought of this court?

[9] Both counsel filed supplementary heads of argument in response to our invitation. The thrust of the submission was that we should determine whether or not the appellant's application for leave to appeal against his conviction and sentence was correctly refused in the high court.

[10] It is convenient at this stage to set out the dates and events relevant to the determination of this appeal.

1. On 6 December 2010 the appellant was convicted and sentenced by the regional court on three charges.

2. On 10 December 2010 an application for leave to appeal against both conviction and sentence was scheduled to be heard by the regional court but was not dealt with because the appellant was not in attendance in court.

3. On 17 January 2011 an application for leave to appeal served before the regional court brought outside the 14 day period prescribed by s 309B(1)*(b)*(i) of the CPA and for this reason it was supported by an application for condonation. On the same day condonation was refused. No order was made on the application for leave to appeal.

4. On 30 August 2011 the appellant applied for leave to appeal against his conviction and sentence to the court a quo.

5. On 22 September 2011 the court a quo refused leave to appeal.

6. On 20 June 2012 the appellant brought an application for leave to appeal to this court against the refusal of his petition in terms of s 316 of the CPA.

7. On 10 August 2012 the court a quo granted leave to appeal to this court.

Legal framework

[11] The key statutory provisions are ss 309B and 309C of the CPA. The material parts of s 309B read thus:

'**309B Application for leave to appeal**

(1)*(a)* Subject to section 84 of the Child Justice 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 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.

(b) An application referred to in paragraph *(a)* must be made ─

(i) within 14 days after the passing of the sentence or order following on the conviction; or

(ii) within such extended period as the court may on application and for good cause shown, allow.

(2)*(a)* Any application in terms of subsection (1) must be heard by the magistrate whose conviction, sentence or order is the subject of the prospective appeal (hereinafter referred to as the trial magistrate) . . .

(4)*(a)* If an application for leave to appeal under subsection (1) is granted, the clerk of the court must, in accordance with the rules of the court, transmit copies of the record and of all relevant documents to the registrar of the High Court concerned: Provided that instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be transmitted of such parts of the record as may be agreed upon by the Director of Public Prosecutions and the accused to be sufficient, in which event the High Court concerned may nevertheless call for the production of the whole record.

(b) If any application referred to in this section is refused, the magistrate must immediately record his or her reasons for such refusal.'

[12] The relevant portions of s 309C provide as follows:

'**309C Petition procedure**

(1) In this section─

(a) **"application for condonation"** means an application referred to in the proviso to section 309(2), or referred to in section 309B (1)*(b)*(ii);

(b) **"application for leave to appeal"** means an application referred to in section 309B(1)*(a)*;

. . .

(d) **"petition"**, unless the context otherwise indicates, includes an application referred to in subsection (2)*(b)*(ii).

(2)*(a)* If any application─

(i) for condonation;

(ii) . . .

(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.

(b) Any petition referred to in paragraph *(a)* must be made-

(i) within 21 days after the application in question was refused; or

(ii) within such extended period as may on an application accompanying that petition, for good cause shown, be allowed.

(3)*(a)* If more than one application referred to in subsection (1) relate to the same matter, they should, as far as is possible, be dealt with in the same petition.

(b) An accused who submits a petition in terms of subsection (2) must at the same time give notice thereof to the clerk of the lower court referred to in subsection (2)*(a)*.

(4) When receiving the notice referred to in subsection (3), the clerk of the court must without delay submit to the registrar of the High Court concerned copies of-

(a) the application that was refused;

(b) the magistrate's reasons for refusal of the application; and

(c) the record of the proceedings in the magistrate's court in respect of which the application was refused. . . .'

Nature of the application by court a quo

[13] As I have already stated, the trial court did not deal with the application for leave to appeal against conviction and sentence. It focussed its attention on the application for condonation, which it refused. But the appellant misconceived the nature of his remedy following the dismissal of the condonation application. Instead, he petitioned the court a quo for leave to appeal against his conviction and sentence. This course would have been competent only if the trial court had considered and determined his application for leave to appeal against his conviction and sentence which it clearly did not. The appellant ought to have petitioned the high court under s 309C(2)(*a*)(i) which he did not do. The court a quo similarly misconstrued the nature of the remedy available to the appellant. It seemed to believe that it was considering an application properly before it under s 309C(2)(*a*)(iii). Consequently it determined the application for leave to appeal against conviction and sentence, which it subsequently dismissed, but which had never been properly before it. In reaching this conclusion it, in essence, held that the envisaged appeal was bereft of any reasonable prospect of success, although, subsequently it changed its view in granting leave to appeal to this court against its earlier refusal of leave.

Discussion

[14] Counsel for the State submitted that the interests of justice dictated that we consider the question whether the court a quo had erred in refusing the appellant leave to appeal. And if so, that we grant leave to the appellant to appeal to the Gauteng Division of the High Court.

[15] In *S v Khoasasa* 2003 (1) SACR 123 (SCA) para 12, this court held that a refusal by a high court of a petition for leave to appeal against the refusal of leave to appeal by a magistrate's court does not vest this court with power to decide the envisaged appeal itself. If it finds that the petition should have succeeded it must grant leave to appeal to the relevant Division of the High Court. *Khoasasa* has since been followed in subsequent decisions of this court.[1]

[16] But different considerations apply in this case. There was no substantive order refusing leave to appeal against conviction or sentence that could have been the subject of a petition for leave to appeal to the court a quo under s 309C(2)(*a*)(iii) of the CPA. The judges in the court below considered the application as if condonation had been granted and the application for leave to appeal had been refused on its merits, when it had not.

[17] But what seems clear from the provisions of s 309C(2)*(a)*(i) of the CPA is that when a lower court refuses an application for condonation, as it happened in this case, it is open to an accused to apply, by way of a petition, to the Judge President of the Division of the High Court having jurisdiction, for leave to appeal against such refusal. This, the appellant did not do.

[18] In the light of what has been said above, it is plain that the court a quo misconceived the position. It lost sight of the fact that all that the trial had done was to refuse condonation. An appeal against the refusal of condonation is to be dealt with in terms of s 309C(2)(*a*)(i) of the CPA. It follows that the order of the court a quo granting leave to appeal to this court amounts to a nullity[2] and that in consequence

[1] See for example, *S v Smith* 2012 (1) SACR 567 (SCA) paras 2-3.
[2] See for example *Sefatsa & others v Attorney-General, Transvaal, & another* 1989 (1) SA 821 (A) at 834E; *S v Absalom* 1989 (3) SA 154 (A) at 163C-164E-G; *Todt v Ipser* 1993 (3) SA 577 (A) at 589C-D.

this court suffers a want of jurisdiction. It was submitted that in the interests of justice we should nonetheless exercise our discretion in favour of the appellant by entering into the merits of the matter. In a situation such as this, where we lack jurisdiction, we are not possessed of any discretion that can be exercised in the appellant's favour. But even were we to have a discretion, a careful perusal of the record leaves me in doubt that such discretion ought, in the circumstances of this case, to be exercised in favour of the appellant.

Order

[19] The matter is struck from the roll.

_____

X M PETSE
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	AB Burger Instructed by: David Mey & Partners, Vereeniging Van Pletzen Lambrechts Attorneys, Bloemfontein
For Respondent:	P Vorster Instructed by: The Director of Public Prosecutions, Pretoria The Director of Public Prosecutions, Bloemfontein