IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case no.: 483/10

In the matter between:

PETRUS JACOBUS KRIEL Appellant

and

THE STATE Respondent

Neutral citation: ***Kriel v The State*** **(483/10) [2011] ZASCA 113 (01 June 2011)**

Coram: Cloete, Cachalia JJA and Meer AJA

Heard: **26 May 2011**

Delivered: **01 June 2011**

Summary: Criminal Procedure − Leave to appeal − Appeal against refusal of − Where an accused obtains leave to appeal against the refusal in a high court of a petition seeking leave to appeal against a conviction or sentence in the regional court, the issue is whether leave to appeal should have been granted by the high court and not the merits of the appeal itself − The test is whether there is a reasonable prospect of success in the envisaged appeal against sentence, rather than whether the appeal ought to succeed or not.

ORDER

On appeal from: KwaZulu-Natal High Court (Durban) Nicholson and Swain JJ sitting as court of first instance:

1 The appeal succeeds.

2 The order refusing appellant leave to appeal is set aside and is replaced with an order granting the appellant leave to appeal to the KwaZulu-Natal High Court against the sentence imposed on him in the regional court.

JUDGMENT

MEER AJA (Cloete and Cachalia JJA concurring)

[1] This matter comes before us on appeal with leave of the KwaZulu-Natal High Court. It is an appeal against a sentence imposed in a regional court. For the reasons set out in this judgment the issue before us is not the appeal itself on the merits, but whether the petition for leave to appeal to the KwaZulu-Natal High Court against the sentence imposed in the Vryheid Regional Court, should have been granted by the KwaZulu-Natal High Court.

[2] The relevant facts are as follows. On 11 December 2004 a collision occurred on a public road between Vryheid and Dundee, KwaZulu-Natal between a Toyota Landcruiser driven by the appellant in the direction of Dundee and a Nissan double cab driving in the opposite direction towards Vryheid. The impact caused the death of two of the occupants of the Nissan. Other passengers were injured.

[3] On 18 January 2008 the appellant was convicted in the Vryheid Regional Court following a plea of guilty on a charge of driving under the influence of liquor in contravention of s 65 (1) (a) of the National Road Traffic Act 93 of 1996 (count one), and two charges of culpable homicide (counts 2 and 3). On the same day he was sentenced on count one to six years' imprisonment. On counts two and three, which were taken together for the purpose of sentence, the appellant was sentenced to eight years' imprisonment of which two years were suspended for five years on condition that he was not again convicted of culpable homicide involving a motor collision. The appellant's drivers' license was suspended for a period of two years and he was declared unfit to possess a firearm licence in terms of s 103(1) of the Firearms Control Act 60 of 2000. Leave to appeal against sentence was refused by the regional magistrate.

[4] In his plea of guilty in terms of s 112 of the Criminal Procedure Act 57 of 1977 and his statement setting out the facts upon which the plea was based, the correctness of which was accepted by the State, the appellant admitted that he had caused the collision and the deaths of two deceased, women aged 70 and 57. He said he had consumed several beers until about 01h00 during the night before the collision but said that he had sobered up. At approximately 10h00 the next morning he had about two brandies before setting out from Vryheid for Dundee. He felt fatigued and believed that he could continue driving. But he nodded off to sleep briefly, lost control of the vehicle, crossed the double barrier line in the middle of the road and collided with the oncoming vehicle. He admitted that alcohol had a part to play in causing the collision. His statement concluded with his offering his deepest sympathy to the family of the bereaved and praying that God might grant them patience and willingness to forgive him. Equally, he expressed his sincere and utter remorse for his actions.

[5] Anita Groenewald, the daughter of one of the deceased women, testified for the State on sentence. The two deceased and the child who was seriously injured were all members of the same family that was preparing for a wedding to be held that very day. The witness was summonsed to the scene of the accident where she discovered that the

two elder women were dead. The child, Germaine, who had sustained brain injuries, had to be taken by helicopter to hospital in Pietermaritzburg. In all some R200 000 was paid to cover the costs of medical services. There were also burial costs of R15 000

[6] After the accident Germaine, who was six at the time, could not maintain proper posture and fell over when trying to sit upright. She crawled for some time before re-learning to walk, had to be potty trained, fed and was helpless. Although nearly ten at the time of the trial, she had a mental age of a six year old and had failed both Grade one and Grade two. Germaine had lost all the sparkle in her life and showed little emotion. The two deceased women had been energetic and healthy at the time of the collision. Mrs Groenewald also described the considerable trauma occasioned to the rest of the family as a result of the collision. She was being treated for depression.

[7] The appellant did not testify in mitigation of sentence. His attorney, addressing the court in mitigation, provided the following information, which was not put in issue by the State. The appellant was a first offender. At the time of the trial he was 46 years of age and had three children aged 21, 19 and 12. His wife was unemployed. The appellant, who has a diploma in agriculture, had been a wealthy farmer but had lost

everything early in 2000. As a consequence he had sought solace in alcohol, becoming an alcoholic. Since the collision appellant had been working with a priest towards his personal rehabilitation. At the time of his trial he had not stopped drinking but his drinking habits were under control. His only asset was his farm which was heavily bonded. The appellant was working as a consultant on contract, teaching fire fighting skills and earned between R10 000 and R12 000 per month.

[8] Three days after he had been sentenced, on 21 January 2008, during an application for bail pending a petition for leave to appeal against his sentence to the KwaZulu-Natal High Court, the magistrate who had sentenced the appellant stated that due to an oversight he had neglected to order that the sentences imposed on each count were to run concurrently. The magistrate thereafter amended the sentence as follows:

'(1) It is also directed in terms of section 280 of Act 51 of 1977 THAT THE SENTENCES ON COUNTS 1 AND 2 TO RUN CONCURRENTLY. In other words you will serve an effective six (6) years' imprisonment and not the previous incorrect twelve (12) years.

(2) In terms of section 276 (b) of Act 51 of 1977 it is directed that the accused serves half of his sentence before he qualifies for parole.

(3) In terms of section 35 THE DRIVER'S LICENCE IS SUSPENDED FOR TWO (2) YEARS.

(4) In terms of section 103 (1) of Act 60 of 2000 YOU ARE EX LEGE DECLARED UNFIT TO OBTAIN A FIREARM LICENCE.'

[9] The magistrate expressed concern about his competency to rectify the sentences as it could be argued that he was *functus officio* at the time he corrected the sentences. He accordingly directed that the proceedings be sent on urgent special review to the KwaZulu-Natal High Court. The appellant was granted bail in the sum of R2 000 pending petition. On 19 February 2008 the conviction and sentences were confirmed on review by the high court and it was ordered that the sentences should run concurrently.

[10] A petition to the KwaZulu-Natal High Court, Pietermaritzburg for leave to appeal against sentence was refused on 14 August 2009. The appellant then applied to the high court for leave to appeal to this court against the refusal by the high court of his petition for leave to appeal. Nicholson and Swain JJ, sitting as a full bench in granting leave to appeal, cited *S v Khoasasa*[1] and then proceeded to grant leave to appeal directly to this court against the sentence imposed by the regional court. They were wrong in so doing, as, in *S v Khoasasa*[2] it was held that a sentence imposed in the regional court can only be appealed against in

[1] S v *Khoasasa* 2003 (1) SACR 123 SCA
[2] *S vKhoasasa* at para 12

this court when an appeal against such sentence has failed in the high court.

[11] In *Matshona v S*[3], a case similar to the present, this court was asked to consider an appeal against a sentence imposed in the Pretoria Regional Court. A petition for leave to appeal had been refused in the high court and leave to appeal was granted to this court. Leach AJA at paragraphs 4 to 6 set out why the appeal on its merits could not be entertained. These paragraphs are repeated:

'4 In my view, the reasoning in *Khoasasa* is unassailable. The appeal of an accused convicted in a regional court lies to the High Court under section 309(1)(a), although leave to appeal is required either from the trial court under section 309B or, if such leave is refused, from the High Court pursuant to an application made by way of a petition addressed to the Judge-President under Section 309C(2) and dealt with in chambers. In the event of this petition succeeding, the accused may prosecute the appeal to the High Court. But, if it is refused, the refusal constitutes a " judgment or order " or a "ruling" of a High Court as envisaged in section 20(1) and section 21(1) of the Supreme Court Act 59 of 1959, against which an appeal lies to this court on leave obtained either from the High Court which refused the petition or, should such leave be refused, from this court by way of petition.

5 It is clear from this that where, as is here the case, an accused obtains leave to appeal to this Court against the refusal in a High Court of a petition seeking leave to appeal against a conviction or sentence in the regional court, the issue before this court is whether leave to appeal should have been granted by the High Court and not the appeal itself which has been left in limbo, so to speak, since the accused first sought leave to appeal to the high court. After all, in the present case, the appellant's appeal against his sentence has never been heard in the high court and, as was held in

[3] S v*Matshona* [2008] 4 All SA 68 (SCA) paras 4 - 6

S v N 1991 (2) SACR 10 (A) at 16, the power of this Court to hear appeals of this nature is limited to its statutory power. Section 309(1) prescribes that an appeal from a Magistrates' Court lies to the High Court, and an appeal against the sentence imposed on the appellant in the regional court is clearly not before this Court at this stage. As was observed by Streicher JA in *Khoasasa*:

"Geen jurisdiksie word aan hierdie Hof verleen om 'n appél aan te hoor teen 'n skuldigbevinding en vonnis in 'n laer hof nie. Dit is eers nadat 'n appél vanaf 'n laer hof na 'n Provinsiale of 'n Plaaslike Afdeling misluk het dat 'n beskuldigde met die nodige verlof na hierdie Hof appél kan aanteken"….

[6] Not only does this Court lack the authority to determine the merits of the appellant's appeal against his sentence at this stage, but there are sound reasons of policy why this Court should refuse to do so even if it could. It would be anomalous and fly in the face of the hierarchy of appeals for this Court to hear an appeal directly from a Magistrates Court without that appeal being adjudicated in the High Court, thereby serving, in effect, as the court of both first and last appeal. In addition, all persons are equal under the law and deserve to be treated the same way. This would not be the case if some offenders first had to have their appeals determined in the High Court before they could seek leave to approach this Court if still dissatisfied while others enjoyed the benefit of their appeals being determined firstly in this Court. And most importantly, this Court should be reserved for complex matters truly deserving its attention, and its rolls should not be clogged with cases which could and should be easily finalised in the High Court.

Consequently this Court cannot determine the merits of the appeal but must confine itself to the issue before it, namely whether leave to appeal to the high court should have been granted….'

[12] Like the Court in *Matshoma* we, too, cannot determine the merits of the appeal. The issue before us is whether leave to appeal to the high court should have been granted and not the appeal itself. The test in that regard is simply whether there is a reasonable prospect of success on appeal against sentence.

[13] The following factors have a bearing on the reasonable prospects of success against the sentence of six years' direct imprisonment imposed on appellant for driving under the influence of liquor. The fact that two people died must be ignored in considering the appropriate sentence for this offence, to avoid duplication of punishment. First offenders who are convicted for driving under the influence of liquor are generally not sentenced to direct imprisonment but to a fine, alternatively imprisonment of which a portion is suspended. This is apparent from a review of sentences imposed for the offence in *S v Mtshobane*.[4] The appellant's sentence of six years is the maximum period of imprisonment for reckless and negligent driving under the Road Traffic Act 93 of 1996. Evidence was not presented about appellant's blood alcohol level or state of intoxication. The State accepted that he had sobered up before drinking the brandies. Yet the magistrate found that appellant was 'heavily under the influence of liquor'. Bearing these factors in mind, there exists a reasonable prospect that a court of appeal might consider the sentence imposed to be disproportionately harsh.

[14] In comparing the sentence of six years' imprisonment on the counts of culpable homicide with the lesser sentences generally imposed for

[4]S v M*tshobane*1999 (1) SACR 25

culpable homicide involving motor vehicles, as appears from the comparison done in *S v Nyathi*,[5] a court of appeal might similarly consider the sentence to be too severe, even should it take the view that direct imprisonment (whether or not in terms of s 276 (1)(i) of the Criminal Procedure Act) is warranted. In *Nyathi* a sentence of five years' imprisonment of which two were suspended, was confirmed on appeal. The appellant in *Nyathi* took a conscious decision to overtake on a double barrier line and a blind rise, causing the death of six people. It was found that the appellant's culpability was seriously aggravated by his conscious assumption of risk. The appellant before us assumed no such conscious risk, (and for that reason does not fall into the most extreme category mentioned in paragraph 12 of *Nyathi*), nor were the consequences as serious as those in *Nyathi* as less people were killed, yet his period of effective imprisonment is double that imposed in *Nyathi*.

[15] The Magistrate took the decision to suspend the appellant's driver's licence for two years in terms of s 35 of the National Road Traffic Act 93 of 1996 without affording the appellant an opportunity of addressing him in this regard. A court of appeal might also decide that he misdirected himself in doing so.

[5] S v *Nyathi* 2005 (2) SACR 273 (SCA) paras 16 to 21

[16] In the result I am satisfied that leave to appeal should be granted and the following order is made:

1 The appeal succeeds.

2 The order refusing the appellant leave to appeal is set aside and is replaced with an order granting the appellant leave to appeal to the KwaZulu-Natal High Court against the sentence imposed on him in the regional court.

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Y S Meer
Acting Judge of Appeal

APPEARANCES:

For Appellant: Adv P C Bezuidenhout SC (with him L Barnard)

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