THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**:** 891/2012
Not Reportable

In the matter between:

MORNÈ BARNARD Appellant

and

THE STATE Respondent

Neutral citation: *Barnard v The State* (891/2012) [2013] ZASCA 75 (29 May 2013)

Coram: MPATI P, THERON and PILLAY JJA and WILLIS and ERASMUS AJJA

Heard: 02 May 2013

Delivered 29 May 2013

Summary: Criminal Procedure – Leave to appeal – Where an accused obtains leave to appeal against the refusal in a high court of a petition seeking leave to appeal against a conviction and sentence in the regional court, the issue is whether leave to appeal should have been granted by the high court and not the appeal itself – the test is whether there is a reasonable prospect of success on appeal.

ORDER

On appeal from: Free State High Court, Bloemfontein (A Kruger and KJ Moloi JJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

THERON JA (MPATI P, PILLAY JA and WILLIS and ERASMUS AJJA concurring):

[1] The appellant stood trial on three charges, namely rape, common assault and unlawfully pointing a firearm in the regional court, Welkom. On 23 March 2010, he was convicted of rape and sentenced to 15 years' imprisonment.

[2] It is necessary to consider the nature and ambit of this appeal. This court, in *S v Khoasasa* 2003 (1) SACR 123 (SCA) held that the refusal of leave to appeal to a high court by judges of that court, constitutes a final order of a provincial division against which an appellant, either with the leave of the high court or this court, could appeal.

[3] Where a person 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, as is the case here, the issue before the court is whether leave to appeal should have been granted by the high court and not the

merits of the appeal.[1] This is the position as this court does not have authority to entertain an appeal directly from the regional court.[2]

[4] It is trite that the test in regard whether leave to appeal should have been granted by the high court is whether there are reasonable prospects of success on appeal – whether a court of appeal could reach a different conclusion to that of the trial court.

[5] In order to determine whether the appellant has prospects of success on appeal, it is necessary to briefly examine the merits. It is neither necessary nor desirable to deal with the merits in great detail.[3] The facts giving rise to the prosecution and conviction of the appellant are largely common cause. During the early hours of 28 June 2008, the appellant was driving his motor vehicle in the town of Virginia, in the Free State, when he picked up the complainant, who had signalled that she was looking for a lift. They travelled to the appellant's home where they had sexual intercourse. The question before the trial court was whether the intercourse was consensual or not. The appellant's version was that the intercourse was consensual and he believed that the complainant was a prostitute.

[6] On appeal, it was contended, on behalf of the appellant, that the high court ought to have found that there is a reasonable possibility that another court might find that the trial court erred in two respects. First, in rejecting the appellant's version as not being reasonably possibly true. Secondly, in not approaching the evidence of the complainant with the necessary caution and merely paying lip service to the cautionary rule. The reasons stipulated by the magistrate for rejecting the version of the appellant, were (1) the evidence did

[1] *Matshona v S* [2008] 4 All SA 68 (SCA) para 5.
[2] *S v N* 1991 (2) SACR 10 (A) at 16a-e; *S v Khoasasa* 2003 (1) SACR 123 (SCA) para 12; *Matshona v S* [2008] 4 All SA 68 (SCA) para 3.
[3] *De Sousa v S* [2012] JOL 29000 (SCA) para 9.

not support the alleged belief held by the appellant that the complainant was a prostitute; (2) neither the nature of the services to be rendered nor the price to be paid was discussed; and (3) crucial aspects of the appellant's version were not put to the complainant, such as that the complainant had placed her hand on his thigh shortly after entering the motor vehicle, that she had enjoyed the sexual intercourse and that the sex had been rough ('rowwe seks'). In accepting the evidence of the complainant, the trial court found that she was an impressive witness, that her evidence was corroborated in material respects and in particular by the medical evidence. I am not persuaded that the magistrate was wrong in the assessment of the evidence and accordingly am not satisfied that there exists a reasonable possibility that an appeal court can reach a different conclusion in respect of the conviction.

[7] The following factors have a bearing on whether there are reasonable prospects of success in respect of sentence. The appellant was 34 at time of his trial, with a previous conviction for assault. He was employed by the South African Police Service as a police officer. He had suffered financially since the charges were brought against him as he had been suspended for a period. He would probably, and in consequence of his conviction, be dismissed from his employment. There are a number of aggravating factors in this matter namely (a) although he was off-duty at the time, the appellant was a police officer who was supposed to protect and serve the community; (b) the complainant trusted him and he abused this trust; (c) a firearm was used to threaten the complainant; (d) the complainant sustained physical injuries as well as psychological trauma in consequence of the rape; and (e) rape is a serious and extremely prevalent offence. Having regard to the nature and circumstances of the offence, the personal circumstances of the appellant as well as the interests of the community, I am not persuaded that another court might find that the sentence of 15 years' imprisonment is unduly excessive or shockingly inappropriate.

[8] In the result, the appeal is dismissed.

_____

L V THERON

JUDGE OF APPEAL

APPEARANCES

For Appellant:	J Nel SC Instructed by: Pie-Ér Huggett Incorporated, Bloemfontein
For Respondent:	S Goirgi Instructed by: The Director of Public Prosecution, Bloemfontein