THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 705/2019

In the matter between

ANDRE PRETORIUS Appellant

and

THE STATE Respondent

Neutral citation: Pretorius v The State (705/2019) [2020] ZASCA 47 (4 May 2020)

Coram: Ponnan, Saldulker, Van der Merwe, Mokgohloa JJA and Matojane AJA

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 4 May 2020.

Summary: Appeal to Supreme Court of Appeal against the refusal in a high court of a petition seeking leave to appeal against a sentence imposed in a regional court – leave to appeal to the high court should have been granted – merits of the appeal against sentence to be determined by the high court.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Louw and Baqwa JJ, sitting as court of first instance):

(a) The appeal succeeds.

(b) 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 High Court (Pretoria) against his conviction on three counts of rape by the regional court.

JUDGMENT

Ponnan JA (Saldulker, Van der Merwe and Mokgohloa JJA and Matojane AJA concurring)

[1] On 13 September 2012 the appellant, Mr Andre Pretorius, was convicted by the Regional Court, Pretoria of three counts of rape of his then step daughter. On 17 January 2013 the appellant was sentenced to an effective term of 18 years' imprisonment. On 13 October 2013 the appellant sought leave from the regional magistrate to appeal to the High Court against

his conviction in each instance, which was refused. The appellant then petitioned the Judge President of the Gauteng Division of the High Court, Pretoria in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA) for leave to appeal. On 2 February 2016 the appellant's application was dismissed by Louw and Baqwa JJ. The appellant thereupon petitioned this court for special leave to appeal in terms of s 16(1)(*b*) of the Superior Courts Act 10 of 2013 (the SCA), which succeeded on 10 June 2019 before the two judges of this court who considered the application.

[2] It is necessary at the outset, to say something about the scope and ambit of the present appeal. In *S v Khoasasa*,[1] after a detailed analysis of the relevant provisions relating to appeals, this court concluded that a refusal of leave to appeal by two judges of the high court constitutes a 'judgment or order' of that court on appeal to it. Thus, where leave to appeal has been refused by the high court circumstances such as these, the only order appealed against is the refusal of leave and not the appeal on the merits, with the result that this court cannot, upon the granting of special leave, decide the merits of an appeal that has not yet been considered by the High Court.[2]

[3] It follows, that the issue to be decided presently is whether leave should have been granted by Louw and Baqwa JJ, to the appellant, to appeal to the high court and not the appeal itself. The test in this regard is this simply whether there is a reasonable prospect of success in the envisaged appeal.[3]

[1] *S v Khoasasa* 2003 (1) SACR 123 (SCA); [2002] 4 All SA 635 (SCA).
[2] *S v Matshona* [2008] 4 All SA 68 (SCA); 2013 (2) SACR 126 (SCA).
[3] *S v Kriel* 2012 (1) SACR (1) (SCA) para 12.

[4] In heads of argument filed with this court, it was contended on behalf of the appellant that two key witnesses for the prosecution, the complainant and her friend, both of whom were minors, had not been properly placed under oath or admonished to speak the truth in terms of ss 162, 163 and 164 of the CPA. Accordingly, so it was contended, the testimony of both witnesses lacked the status and character of evidence and was thus inadmissible.[4] Moreover, and in addition to the aforesaid point *in limine*, various misdirections on the part of the regional magistrate were alluded, culminating in the submission that the court had erred in concluding that the appellant was indeed guilty beyond a reasonable doubt.

[5] That was met in the heads of argument filed by counsel for the State, as follows:

'. . . There is a sound, rational basis for the conclusion that there are prospects of success on appeal in respect of both the point *in limine* and whether on equal inspectors of the evidence as a whole the state has proven its case beyond reasonable doubt.

. . .

It is therefore respectfully submitted that the appellant has made out a compelling case that he has reasonable prospect of success on appeal.'

In my view, those concessions by counsel for the State were fairly and properly made.

[6] It remains to record that both counsel were agreed that this appeal could be disposed of without the hearing of oral argument in terms of s 19(*a*) of the SCA.[5]

[4] *S v Matshivha* 2014 (1) SACR 29 (SCA) paras 10 and 11.
[5] Section 19(*a*) provides: 'The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any law - dispose of an appeal without the hearing of oral argument.

[7] In the result:

(a) The appeal succeeds.

(b) 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 High Court (Pretoria) against his conviction on three counts of rape by the regional court.

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PONNAN JA

JUDGE OF APPEAL

Appearances

For appellant:	F van As
Instructed by:	Justice Centre Local Office, Pretoria Justice Centre Local Office, Bloemfontein
For respondent:	AP Wilsenach
Instructed by:	Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein.