THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 203/2022

In the matter between:

CHICCO MASANGO **FIRST APPELLANT**

HENDRIQUE MUAINGA **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Masango and Another v The State* (203/2022) [2024] ZASCA 98 (14 June 2024)

Coram: MOKGOHLOA and KGOELE JJA and TOLMAY AJA

Heard: This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

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 of the judgment is deemed to be 11h00 on 14 June 2024.

Summary: Criminal Procedure – first appellant appeal against conviction and sentence – second appellant appeal against conviction – leave to appeal refused by regional court – petition in terms of s 309 C – refused by the high court – special leave to appeal against dismissal of the petition granted by this Court – test whether appellants have shown reasonable prospects of success on appeal.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Molahlehi J and Thobane AJ sitting as court of appeal):

1 The appellants' application for leave to appeal against the refusal of the petition on their convictions is dismissed.

2 The first appellant's application for leave to appeal against the refusal of the petition on his sentence is refused.

JUDGMENT

Tolmay AJA (Mokgohloa and Kgoele JJA concurring):

[1] The two appellants in this matter were convicted of robbery with aggravated circumstances read with s 51(2) of the Criminal Law Amendment Act 105 of 1997 in the Regional Court for the District of Soweto held at Protea (the regional court). The first appellant was sentenced to twenty years imprisonment and the second to fifteen years imprisonment on 24 January 2017. On 16 October 2017, leave to appeal was refused against both conviction and sentence in relation to both appellants by the regional court. The appellants then petitioned the Gauteng Division of the High Court, Johannesburg (the high court) for leave to appeal against both conviction and sentence in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA). On 25 February 2019, leave to appeal was refused by the high court.

[2] The appellants approached this Court for special leave to appeal, in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013 (the Superior Courts Act). On 18

December 2019, special leave to appeal the dismissal of the petition was granted by this Court to the first appellant. The second appellant also approached this Court and sought special leave to appeal against conviction only, leave was granted by this Court on 15 February 2022. Despite this, the notice of appeal states, obviously incorrectly, that both appellants seek leave to appeal against both sentence and conviction. In the heads of argument, however, this error was not repeated. It was directed, for obvious reasons, that the two appeals should be heard together.

[3] On the eve before the hearing, counsel requested that the appeal be dealt with in terms of s 19*(a)* of the Superior Courts Act, and that the appeal accordingly be disposed of without the hearing of oral argument. The request was granted, but counsel was referred to relevant authorities to consider, as only leave to appeal against the dismissal of the petition by the high court was requested and granted. This is of importance as, in the heads of argument, counsel for the appellants and the respondent dealt only with the merits of the case. Despite this, no further heads of argument were filed.

[4] It is by now trite that appeals from the lower court under s 309C must be heard by the high court in terms of s 309(1)*(a)* of the CPA.[1] This Court has, in a long list of cases, consistently found that it lacks the jurisdiction to entertain an appeal on the

[1] Section 309(1)*(a)* of the CPA reads as follows:
'309 Appeal from lower court by person convicted
(1)*(a)* Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302 (1)*(b)* shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)*(a)*.'

merits in the absence of leave to appeal being granted.[2] Accordingly, the issue to be determined is not the merits of appeal, but whether the high court should have granted leave to appeal. From as far back as *S v Khoasasa*;[3] *S v Matshona*;[4] *Tonkin v S*;[5] *Dipholo v S*;[6] *Mthimkhulu v S*[7] to the latest *De Almedia v S*,[8] it has been reiterated that 'the issue to be determined is not whether the appeal against conviction and sentence should succeed but whether the high court should have granted leave, which in turn depends upon whether the appellant could be said to have reasonable prospects of success on appeal'.[9]

[5] What would constitute reasonable prospects of success was set out in *Nong and Masingi v The State*, with reference to *S v Smith*,[10] as follows:

'As regards what constitutes "reasonable prospects of success" Plasket AJA in *S v Smith* describes it concisely:

"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

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[2] *S v Khoasasa* [2002] ZASCA 113; 2003 (1) SACR 123 (SCA); [2002] 4 All SA 635 (SCA); *Dipholo v The State* [2015] ZASCA 120; *Lubisi v The State* [2015] ZASCA 179; *S v Van Wyk v S, Galela v S* [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA); *Mthimkulu v The State* [2016] ZASCA 180; *De Almeida v S* [2019] ZASCA 84; *Nong and Masingi v The State* [2024] ZASCA 25.
[3] *S v Khoasasa* 2003 (1) SACR 123 SCA; ([2002] 4 All SA 635).
[4] *S v Matshona* ZASCA 58; [2008] 4 All SA 68 (SCA); 2013 (2) SACR 126 (SCA) (*S v Matshona*).
[5] *Tonkin v S* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA).
[6] *Dipholo v The State* [2015] ZASCA 120.
[7] *Mthimkhulu v S* [2016] ZASCA 180.
[8] *De Almeida v S* [2019] ZASCA 84.
[9] *Tonkin v S* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA) para 3 quoting *S v Matshona* para 4; *Ntuli v The State* [2018] ZASCA 164 para 4; *S v Kriel* [2011] ZASCA 113; 2012 (1) SACR 1 (SCA) paras 11-12; *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) paras 2-3.
[10] *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 3.

hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal".'[11]

[6] The appellants' main argument on conviction was that Ms Wendy Ndlovu (Ms Ndlovu) was a single witness. The second was that her identification of the appellants was a dock identification and does not carry enough evidential value to allow for a conviction.

[7] Ms Ndlovu testified that on 1 December 2015, she was working at house number 3 in Blackie Swart Street, Randfontein, where she was employed as a housekeeper. Between 09h30 and 10h00, as she was taking out the dustbin, a Ford Bantam vehicle approached the gate, she closed the gate behind her. The men in the vehicle asked her whether the premises she was on, was Mr Jacques Porter's (Mr Porter) house. She confirmed that it was, and they indicated that they were there to take measurements for purposes of installing air-conditioning. She told them that she wanted to go and fetch her phone to call and confirm with Mr Porter if she could let them in. One of them pretended to call Mr Porter and during the conversation told the person to whom he was speaking that he would leave the invoice with Ms Ndlovu, who after hearing that, opened the gate for them.

[8] The men asked her to take them upstairs to the main bedroom. She also pointed out the other rooms as she assumed that they were going to take measurements of all the rooms. One of them went to the study and when he returned, they told her that they were not there for her but for Mr Porter's things and she needs to shut up. They took her phone and when she screamed, she was slapped. They tied

[11] *Nong and Masingi v The State* [2024] ZASCA 25 para 7.

up her hands and legs with cable ties and blindfolded her. She eventually managed to cut the cable ties and escaped through the kitchen door that was open as the perpetrators had locked the front door. She went to the neighbours and phoned Mr Porter and the police.

[9] The men took laptops, TV screens, a sound system, her cell phone and a car, a red BMW 3 series, which was in the garage. She testified that she was informed by the police officers who were investigating the robbery that the car was found between 12h00 and 13h00 on the same day.

[10] She testified that she had never seen the appellants prior to the incident. She then identified the first appellant in court as the person who took her phone and slapped her. She said that she was able to identify him in court, as he was the one who talked to her all the way to the house and she remarked that he treated her kindly. She pointed the second appellant out as the person who carried a notebook and a measuring tape. She did not attend an identification parade as she was not available on the day that it was held. She was willing to attend on another day, but was never informed of another date. Under cross-examination, she testified that Mr Porter showed her a photograph that was sent to him and asked her whether the man in the photograph was one of the culprits. She said the photograph was of the first appellant. This turned out to be incorrect.

[11] Constable Njobo testified that on 1 December 2015, he and five colleagues were driving to report for duty. On their way, they were stopped by community members and informed that two male persons were stripping a motor vehicle. They went with the community to the place and found the appellants stripping a red BMW

motor vehicle. They took the appellants to the police station to open a case as they suspected that it was a stolen motor vehicle. Constable Njobo described the motor vehicle as a red BMW 3 series. They took the appellants to the police station with the said vehicle and arrived at the police station at the same time as police officers from Randfontein, who informed them that the BMW was stolen during a robbery, which they were investigating.

[12] Mr Porter testified and identified the vehicle at the Protea police station as his own, and that it was stolen during a robbery at his house, together with the items identified by Ms Ndlovu. He said that the first appellant was not in the photographs that he showed to Ms Ndlovu.

[13] Another police officer, Mr Mthethwa, testified that he was present when they found the two appellants dismantling the BMW. He confirmed the evidence of Constable Njobo in all material respects. Although there were some contradictions between the evidence of the police officers, they were not material as the fact was that the appellants were found in possession of Mr Porter's vehicle merely two hours after it was taken during the robbery at his house. The police were, at that time, unaware of the robbery and were not looking for suspects.

[14] The appellants' evidence was a bare denial. Their version was that on the day in question, they were merely walking towards the taxi rank and, as they walked past the red BMW, they were confronted by the police. They denied any knowledge of the vehicle. The magistrate did not accept their version as reasonably possibly true.

[15] The law regarding dock identification is trite and the dangers inherent in it have been restated repeatedly.[12] In this matter however, the BMW was found in the possession of the appellants within a very short period of time after the robbery, so the doctrine of recent possession finds application.[13] Ms Ndlovu's evidence was corroborated by the fact that the vehicle was found in the appellants' possession. It is also important to note that Ms Ndlovu initially did not suspect anything and her powers of observation were not initially tainted by fear. In my view, the high court was correct in refusing leave to appeal the convictions.

[16] Regarding the sentence of the first appellant, it is trite that sentencing falls within the discretion of the trial court. In *casu*, there is nothing to indicate that the regional court misdirected itself or did not exercise its discretion properly and judicially. The first appellant was convicted of robbery on 15 November 1999 and sentenced to 14 years imprisonment. On 15 December 2011, he was found guilty of being in possession of stolen goods and was sentenced to three years imprisonment or a R7 000.00 fine. The first appellant's previous convictions indicate a propensity to commit crime and also indicate that the possibility of rehabilitation seems remote. Although the previous conviction for robbery was more than ten years ago, he was convicted of another crime during 2011. The regional court did not err in not regarding him as a first offender.

[17] In the circumstances, the high court was correct in refusing leave to appeal. The appellants did not succeed in convincing this Court that they have reasonable prospects of success on appeal.

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[12] *S v Charzen and Another* [2006] ZASCA 147; [2006] 2 All SA 371 (SCA); 2006 (2) SACR 143 (SCA) para 11; *S v Ngcina* [2006] ZASCA 155; 2007 (1) SACR 19 (SCA) para 16.
[13] *Mothwa v The State* [2015] ZASCA 143; 2016 (92) SACR 489 para 8.

[18] The following order is made:

1 The appellants' application for leave to appeal against the refusal of the petition on their convictions is dismissed.

2 The first appellant's application for leave to appeal against the refusal of the petition on his sentence is refused.

R G TOLMAY

ACTING JUDGE OF APPEAL

Written submissions

For the appellants:	J M Mojuto
Instructed by:	Legal Aid South Africa, Johannesburg
	Legal Aid South Africa, Bloemfontein
For the respondent:	V T Mushwana
Instructed by:	Director of Public Prosecutions, Johannesburg
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