THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No.1163/2015

In the matter between:

MZUVIKILE RADEBE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Radebe v S* (1163/15) [2016] ZASCA 172 (24 November 2016)

Coram: Bosielo, Pillay and Petse JJA

Heard: 11 November 2016

Delivered: 24 November 2016

Summary: Criminal Law and Procedure – appeal against the refusal of application for leave to appeal by high court following a refusal to grant leave to appeal against both the conviction and sentence by the trial court – Section 16(1)(*b*) of the Superior Courts Act 10 of 2013.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Goosen J and Brooks AJ sitting as a court of first instance).

1. The appeal is upheld.
2. Leave is granted to the appellant to appeal against both his conviction and sentence by the trial court to the Eastern Cape Division of the High Court (Grahamstown).

JUDGMENT

Bosielo JA (Pillay and Petse JJA concurring):

[1] On 11 November 2016, this court granted an order as set out above, without reasons and intimidated that judgment would be delivered in due course. This is the judgment containing reasons for the order made.

[2] The background facts to this appeal can be summarised as follows. The appellant was convicted on 3 June 2014 of stock theft of two bulls in the Magistrates' Court, Ugie in the Eastern Cape. He was subsequently sentenced to 18 months' imprisonment. His application for leave to appeal against both his conviction and sentence was refused by the trial court. This was followed by a petition to the Eastern Cape Division of the High Court Grahamstown, which suffered the same fate. However, this Court granted special leave to appeal against the refusal of his petition for leave to appeal.

[3] I pause to observe that this appeal is not against the merits of the conviction and sentence, but is only against the refusal by the high court of leave to appeal against the judgment of the trial court. This is so because this Court does not have the authority to hear appeals directly from the magistrate courts. In terms of the system of the hierarchy of our courts, appeals from magistrates' courts lie to the high court having jurisdiction. See s 309(1)(*a*) of the Criminal Procedure Act 51 of 1977 (CPA). Such appeals require leave being granted by the trial court in terms of s 309B of the CPA. If leave to appeal is refused by the trial court, the accused can direct a petition to the Judge-President of the specific high court having jurisdiction over that trial court in terms of s 309C(2) of the CPA, for leave to appeal against the decision of the trial court. Upon leave being granted, the accused is free to prosecute the appeal in the high court having jurisdiction. *S v Khoasasa* [2002] ZASCA 113; 2003 (1) SACR 123 (SCA), *S v Matshona* [2008] ZASCA 58; 2013 (2) SACR 126 (SCA) paras 4-6, *S v Van Wyk* & another [2014] ZASCA 152; 2015 (1) SACR 584 (SCA).

[4] However, if leave to appeal is refused by the high court, that refusal is a judgment or order of the high court as contemplated by s 20(1) and 21(1) of the old Supreme Court Act 59 of 1959. It is therefore appealable to the high court having jurisdiction. However, for the accused to appeal against it, leave should be granted by the high court, which refused leave to appeal against the judgment of the trial court. Where the high court refuses leave to appeal, such an accused may appeal to this Court but only with the special leave of this Court. Such leave to appeal will not be against the conviction or sentence by the trial court, but against the refusal of leave to appeal by the high court. What this means is that the envisaged appeal will be suspended, pending the application for leave to appeal against the high court's refusal to grant leave. I am constrained to comment that, notwithstanding a veritable body of judgments from this Court,

there is still some misunderstanding from various divisions of the high courts about the correct approach in such instances. See *Potgieter v S* (20109/2014) [2015] ZASCA 15 (17 March 2015); *Maringa & another v S* [2015] ZASCA 28; 2015 (2) SACR 629 (SCA) paras 4-5 and *Hattingh v S* (20099/2014) [2015] ZASCA 84 (28 May 2015) para 7. Section 309 (1)(*a*) of the CPA makes it abundantly clear that no appeal shall lie directly from a lower court to this Court. Such appeals must be heard in the specific high court having jurisdiction. See *S v Khoasasa* (supra).

[5] It follows that what we are called upon to decide in this appeal, is simply whether leave to appeal by the high court should have been granted or not, see *S v Matshona* (supra) para 5. This could only be done if the high court was satisfied that there were reasonable prospects of success. See *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7 where this Court enunciated the correct approach as follows:

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

See also *Molema v S* (555/10) [2011] ZASCA 62 (1 April 2011) para 8. As already alluded to earlier, the crisp question that we are called upon to decide in this appeal is whether the high court was correct in refusing leave to appeal against the trial court's judgment refusing leave to appeal. In other words, whether the high court erred in finding that the envisaged appeal has no reasonable prospects of success.

[6] In answering this question, we turn to the facts of the case. The appellant was charged with stock theft of two bulls. These bulls were described by various state witnesses as 'Ntsundu' and the other one being red with a white face. Interestingly, this accords with the appellant's description of the two bulls. Although he admitted having fetched the two bulls from Mr Matshata, the appellant denies that he stole them. He explained that he kept them at Mr Ndakana's kraal after he had discovered that the pound was closed by the time he had wanted to deliver them to it. During February 2012, he fetched them from Ndakana's kraal and delivered them to the pound which was managed by Mr Ndabambi.

[7] Mr Ndakana corroborated the appellant's version that he brought two bulls to his kraal for safekeeping. He confirmed that the appellant explained to him that the pound was already closed. The appellant subsequently fetched these two bulls from Mr Ndakana and took them to the pound which was managed by Mr Ndabambi. Mr Ndakana testified that he subsequently saw the bulls at the pound after the appellant had fetched them from his kraal.

[8] Mr Ndabambi who was in charge of the pound confirmed that the appellant brought the two bulls to them which they registered in their register as required by the law. Mr Sibotsha, his assistant, confirmed this.

[9] Importantly, both Ndabambi and Sibotsha confirmed that the two bulls which had been brought to the pound by the appellant were fetched on 4 May 2012 by one Mr Mazanzi who claimed to be their lawful owner. They confirmed that Mr Mazanzi produced satisfactory proof that he was the lawful owner. Significantly, they both confirmed that these were the same two bulls which had been brought to the pound by the appellant. There is undisputed evidence that these two bulls were never found in the appellant's possession.

[10] The only evidence adduced by the state, which incriminates the appellant, is that of Mr Nxenye from whose farm the appellant fetched the two bulls. However, he is not their owner. Essentially, his evidence is to the effect that after the appellant fetched the two stray bulls from his farm instead of taking them to the pound, he swapped them and took the wrong ones to the pound.

[11] In convicting him, the trial court reasoned that, because he delayed for two hours before he took the two bulls to the pound after he had fetched them from Mr Mxenge, and secondly that when he ultimately took them to Ndakane's kraal, he was using a different vehicle, he was therefore guilty. This finding begs two legal questions: is this evidence sufficient to pass the legal test of proof of theft of the two bulls by the appellant beyond reasonable doubt? Put differently, do these findings mean that the appellant's version is not reasonably possibly true?

[12] Based on the above exposition, I am of the view that reasonable prospects exist that another court might find that the state did not prove its case beyond reasonable doubt against the appellant. It follows that the appeal must succeed and the appellant must be granted leave to appeal to the high court having jurisdiction against both his conviction and sentence by the trial court. Hence the order which we made on 11 November 2016.

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L O Bosielo
Judge of Appeal

APPEARANCES:

For Appellant:	JE Howse
	Instructed by: Cloete and Company, Grahamstown Honey Attorneys, Bloemfontein
For Respondent:	D Els
	Instructed by: Director of Public Prosecutions, Grahamstown Director of Public Prosecutions, Bloemfontein