THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1101/2015

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS,
GAUTENG DIVISION, PRETORIA **APPELLANT**

and

KINGSLEY JAFTA MOLOI **RESPONDENT**

Neutral Citation:	*DPP v Moloi* (1101/2015) [2017] ZASCA 78 (2 June 2017).
Coram:	Maya AP, Theron and Dambuza JJA and Molemela and Gorven AJJA
Heard:	**15 February 2017**
Delivered:	**2 June 2017**

Summary: Appeal in terms of s 311 of the Criminal Procedure Act 51 of 1977: Section 311 provides for an appeal as of right, without leave: failure to have regard to *all* the evidence in determining the guilt or otherwise of an accused constitutes an error of law: question of law upheld: order of the high court set aside: conviction and sentence imposed by the regional court reinstated and matter remitted to the high court for the appeal to proceed on the merits.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Louw J and Avvakoumides AJ sitting as a court of appeal):

1 The appeal is upheld in respect of the first question of law.

2 The order of the court a quo is set aside.

3 The conviction and sentence imposed by the regional court are reinstated.

4 The matter is remitted to the high court for the appeal to proceed on the merits.

JUDGMENT

Dambuza JA (Molemela AJA concurring):

[1] On 12 February 2014 the respondent was convicted by the Nelspruit Regional Court on a charge of the rape of a 13 year old girl. He was sentenced to life imprisonment. The Regional Magistrate ordered that he not be considered for parole and that his name be entered in the register of sex offenders.

[2] On appeal the Gauteng High Court, Pretoria, (per Avvakoumides AJ with Louw J concurring) (high court), set aside the conviction and the sentence. Consequently, the respondent was released from imprisonment. The Director of Public Prosecutions, Gauteng Division, Pretoria (DPP) then brought an application, in this court, for special leave to appeal against the order of the court a quo. The appeal was to be founded on two questions of law, as provided in s 311(1) of the Criminal Procedure Act 51 of 1977 (CPA). This court ordered that the application for special leave to appeal be argued in open court and that the parties be prepared to make submissions on the merits of the appeal if invited to do so.

[3] In this judgment I set out the background facts. I then consider whether the intended grounds of appeal fall within the ambit of s 311 of the CPA, whether such an appeal requires special leave or is an appeal as of right, whether a proper case has been made for special leave to appeal and whether the appeal should be upheld.

[4] The respondent was charged in the Regional Court, Nelspruit, with the rape of his 13 year old niece, who was his sister's daughter (the complainant). At the time of the incident, which took place on 9 September 2005, the complainant shared her home in Phola Trust, Nelspruit with her older sister G. Their mother lived in Johannesburg where she worked. Although this is not clear from the record, it would appear that their father lived elsewhere as well. The respondent lived with his mother (the children's grandmother).

[5] The State led the evidence of the complainant, G who was 16 years old at the time of giving evidence; Dr Megan Windvogel who examined the complainant after the incident; Nurse Lucy Themba who drew a blood sample from the respondent and several police officers who were involved in the safekeeping and transmission of the forensic samples. The respondent was the sole defence witness.

[6] The complainant's evidence was as follows. On the afternoon preceding the night of the incident her uncle the respondent, and his girlfriend who lived in their locality, requested that she sleep at the girlfriend's home that night, to keep the latter's 14 year old daughter, K, company as the couple were going out for the evening. For this reason the couple fetched the complainant from her home during the day and left her at the girlfriend's home. In the early hours of the following morning, whilst the complainant was still at the girlfriend's home, the couple returned home. They were drunk and it appeared that they had been fighting. The respondent continued to assault the girlfriend until she ran away. He then ordered the complainant to go to her home with him to see if G was home. They found her at home. The respondent told the complainant that he was taking her back to his girlfriend's home. On the way he told her that they should stop at his home to close a window. At his home they went into the respondent's bedroom. The respondent closed the window and the bedroom door and instructed the complainant to undress

and get into the bed. By this time he had a firearm in his hand. He promised not to hurt the complainant. When the complainant did as she was instructed the respondent proceeded to have sexual intercourse with her without her consent. Thereafter he gave her R50 and warned her not to tell anyone about the incident. The complainant went home where she immediately told G what had happened.

[7] G testified that at about 06h00 on the morning of 10 September 2005 she was at home when the complainant arrived home crying, reporting that the respondent had sexual intercourse with her at their grandmother's house and then gave her R50. G took the money and went to her grandmother's home where she reported the matter. She used the money to telephone her parents from a nearby public phone, to report the incident. While she was phoning her parents she observed the respondent fleeing from her grandmother's home. Thereafter she, together with her grandmother and her aunt, went back home to the complainant. She gave what was left of the money to her grandmother to take the complainant to the clinic. Prior to that morning, she had last seen the complainant the previous evening when the respondent's girlfriend came to fetch her to keep her daughter, K, company.

[8] Dr Megan Windvogel's evidence related to the contents of the medico-legal report she had prepared pursuant to the medical examination of the complainant following the allegation of rape. In essence, her evidence was to the effect that the complainant's private parts presented with redness and she had observed a white discharge thereon. She took vaginal swabs from the complainant and placed them in a crime kit which, after sealing, she handed, together with the medico-legal report, to Inspector Nkosi.

[9] Evidence relating to the collection and transmission of forensic evidence was also led, together with the evidence of a nurse who drew a blood sample from the respondent. It was common cause at the trial that blood samples were obtained from him on two occasions. Two forensic reports set out in two affidavits deposed to by Lieutenant Colonel Catharina Botha, in terms of ss 212(4)(*a*) and 8(*a*) of the CPA, form part of the record. Lieutenant Colonel Botha performed the forensic analysis on the specimens obtained from the complainant and the respondent.

[10] In the first affidavit, dated 16 July 2008, she stated amongst other things, that:
'The partial STR profile of the DNA obtained from the vaginal vault swab is the same as the STR-profile of the DNA obtained from the control blood sample'.
It was common cause that the blood sample referred to in this report was the one allegedly drawn from the respondent on the first occasion. In the second affidavit, dated 17 July 2012, she said that:
'The STR-profile of the DNA obtained from the control blood sample is the same as the STR-profile of the DNA obtained from the control blood sample "KJ MOLOI".'

[11] In summary, the State case was that the DNA results were obtained on an analysis done on the first blood sample drawn from the respondent in 2007. The second blood sample was used to confirm that the first and the second blood samples belonged to the same person, the respondent.

[12] The respondent denied having had sexual intercourse with the complainant. He insisted that his DNA could never have been found on the complainant. According to him, on his arrival at his girlfriend's home, after the evening out, he saw two boys leaving the girlfriend's house. The suggestion was that the two boys must have been in the company of the complainant and K and that is how the complainant had engaged in sexual intercourse. According to him the false charge of rape and the fabricated evidence against him was motivated by a 'vendetta' on the part of his sister, the complainant's mother, and her children. They did not want him to discipline them. He denied that he had requested the complainant to sleep at his girlfriend's home and that he had a firearm in his possession on the night in question.

[13] In convicting the respondent the magistrate found that the chain evidence relating to the DNA was never seriously disputed during cross-examination. He acknowledged, however, that the respondent had denied that the first blood specimen was drawn from him and suggested that the second blood specimen could have been contaminated. The magistrate was of the view that the fact that the person who drew the first blood sample from the respondent did not testify at the trial, did not undermine the rest of the evidence relating thereto. It was sufficient, in the view of the magistrate, that Nurse Themba who drew the second blood sample, and Constable Simba in whose presence the second blood sample was drawn, gave

evidence. What was paramount, according to the magistrate, was that both blood samples were proved to be from the respondent, and that the DNA from the first blood specimen matched the partial STR profile of the DNA found in the vaginal smear obtained from the complainant. The magistrate concluded that forensic evidence proved that the respondent had engaged in sexual intercourse with the complainant.

[14] As to the different versions given by the respondent and the complainant, the magistrate found that the complainant's evidence was credible. He found that the complainant did not contradict herself and that, although she was a single witness, G's evidence as to the complainant's condition when she returned home, the report she made to G immediately upon her arrival, together with the R50 she had in her possession, all supported her version. On the other hand the fact that the respondent fled from his home after the arrival of G to report the incident, was found to be supportive of the State case. The magistrate found the respondent to be a liar and that his version, including his allegation of conspiracy against him by his sister and her children, was false.

[15] On appeal, the high court set the conviction aside based on the denial of sexual intercourse, the failure of the State to 'sustain the chain and link of the blood samples taken from the Appellant' and 'the failure to lead evidence to "corroborate the samples and the authenticity of the tests conducted and to link such samples to the Appelant".'

[16] It is pursuant to the order of the high court that the DPP brought the application in this court, seeking special leave to appeal against the decision of the high court. The application is based on two questions of law, advanced by the DPP as follows:

'1. May a court of appeal set aside a conviction and sentence in circumstances where an appellant is implicated by direct eye witness evidence without evaluating, referring (to) or rejecting such evidence in the judgment?

2. Is there a duty on the prosecution to tender viva voce evidence of an analyst who deposed to an affidavit in terms of section 212(4) of Act 51 of 1977 in circumstances where

an accused does not lay a basis for his mere denial that it was his DNA found in the specimen obtained from the complainant?'

[17] Section 311 provides that:

'Where the provincial or local division on appeal, whether brought by the attorney-general or other prosecutor or the person convicted, gives a decision in favour of the person convicted on a question of law, the attorney-general or other prosecutor against whom the decision is given may appeal to the Appellate Division of the Supreme Court, which shall, if it decides the matter in issue in favour of the appellant, set aside or vary the decision appealed from and, if the matter was brought before the provincial division in terms of-

(a) section 309(1), re-instate the conviction, sentence or order of the lower court appealed from, either in its original form or in such a modified form as the Appellate Division may consider desirable; or

(b) section 310(2), give such decision or take such action as the provincial or local division ought, in the opinion of the Appellate Division, to have taken (including any action under section 310(5), and thereupon the provisions of section 310(4) shall *mutatis mutandis* apply.

(2) If an appeal brought by the attorney – general or other prosecutor under this section or section 310 is dismissed, the court dismissing the appeal may order that the appellant pay the respondent the costs to which the respondent may have been put in opposing the appeal, taxed according to the scale in civil cases of that court: Provided that where the attorney – general is the appellant, the costs which he is so ordered to pay shall be paid by the State.'

[18] It is trite that the term 'question of law' relates to the application of a legal principle to an established set of facts and determination of whether or not a crime has been committed. Recently this court, in *Director of Public Prosecutions, Gauteng v Pistorius*[1] considered, comprehensively, the disregarding, by a court, of relevant evidence in considering whether the commission of a crime has been proved. This court found that the failure by the trial court to take into account all the relevant evidence as to the presence or otherwise of *dolus eventualis* constituted an error of law. Leach JA reasoned that:

[1] *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (2) SA 317 (SCA).

'[34] It is thus trite that a trial court must consider the totality of the evidence led to determine whether the essential elements of a crime have been proved. As Nugent J stated in *Van der Meyden*, a passage oft cited with approval in this court:

"The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

. . .

[36] There seems to me to be no difference in principle between the exclusion of relevant evidence by ruling it inadmissible and excluding such evidence, once admitted, by not taking it into account to decide the issues in dispute. In either event the judicial process becomes flawed by regard not being had to material which might affect the outcome. As much as excluding evidence on the basis of admissibility is a legal issue, it seems to me to also be a legal issue should account not be taken of any evidence placed before court which ought to be weighed in the scales.'

As contended by the DPP, failure by any court to take into account relevant evidence is an error of law. Since the high court did not consider anything other than the DNA evidence, it failed to take into account relevant and admissible evidence. This means that the first question of law is in fact one which was decided in favour of the respondent and that s 311 applies. That being the case it is not necessary to deal with the second question of law.

[19] The question of law, having been decided in favour of the convicted person (the respondent), as envisaged in s 311(1)*(a)* of the CPA, the next issue for consideration is whether the applicable test in relation to prospects of success was met. The contentious issue of whether leave of court is required to prosecute an appeal under this section, was introduced, rather obliquely, in the parties' heads of argument. Notably, although the section provides for the right of appeal by the DPP

under s 311, nowhere does the CPA prescribe a procedure for prosecuting such appeal. Furthermore, s 1 of the Superior Courts Act provides that:

'"appeal" in Chapter 5, does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 (Act 51 of 1977), or in terms of any other criminal procedural law.'

The contention was that in terms of this definition appeals under s 311 of the CPA are excluded from the procedure set under ss 16(1)*(b)* and 17(3) of the Superior Courts Act. More specifically, s 311(1)*(a)* of the CPA provides for an automatic right of appeal to this court from a decision of the high court given on appeal to that court.

[20] In *Attorney General, Transvaal v Nokwe & others,*[2] Trollip J considered, comprehensively, the question whether leave of the court was required for the Attorney-General (the predecessor-in-title of the DPP) to prosecute appeals on a question of law. The right to appeal on a question of law was, at that time, provided for under s 105 of the Magistrates Courts Act, 32 of 1944. The learned Judge held:

'Sec 105(1) enables the Attorney-General to appeal to the Appellate Division from a decision given on appeal from a magistrate's court by a Provincial Court in favour of an accused on a matter of law. No mention is made therein that such an appeal is subject to leave being first granted. Section 114(3) of that Act, however, provides that nothing in the Act must be construed as affecting the provisions of sec. 105 of the South Africa Act, 1909, relating to appeals to the Appellate Division. That latter section, as amended, made special provision to the effect that an appeal to the Appellate Division from a judgment on appeal by a Provincial Division, only lay if leave was first granted by the latter Division.'[3]

[21] The learned Judge considered the provisions of s 21(2)*(a)* of the Supreme Court Act of 1959 (the predecessor to the Superior Courts Act in its earlier form – prior to the 1982 amendment) and concluded that under that Act leave to appeal was necessary to enable the Attorney-General to prosecute an appeal on a question of law. That section provided that:

'there shall be no appeal to the appellate division against … any decision given by a division on appeal to it except with the leave of the court against whose decision the appeal is to be made'.

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[2] *Attorney-General, Transvaal v Nokwe & Others* 1962 (3) 803 (T).
[3] Ibid at 804.

[22] In 1982 certain provisions relating to appeals under both the CPA and Supreme Court Act were amended.[4] In its amended form s 20 of the Supreme Court Act read in the relevant part:

'(4) No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except-

(a) in the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in terms of subsection (3), with the special leave of the appellate division;

(b) *in any other case*, with the leave of the court against whose judgment or order the appeal is to be made, or where such leave has been refused, with the leave of the appellate division.'[5] (My emphasis.)

[23] The purpose of these amendments was to ensure that appeals based purely on fact should not unnecessarily take up the time of this court, which is more profitably devoted to issues of law. Matters of pure fact, or of fact and law, where the law is not really controversial, must be heard by a full court of the provincial division concerned. Thus, the legislature demonstrated an intention to maintain the qualitative limitation on appeals coming to this court. This principle and the concomitant requirement for leave to appeal endured after the Superior Courts Act 10 of 2013 came into effect in respect of both civil and criminal appeals. Section 16(1)*(b)* of the Superior Courts Act provides that:

'… [a]n appeal against *any* decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon *special leave having been granted by the Supreme Court of Appeal*.'

(My emphasis.)

As the court remarked in *Nokwe*, the conclusion that leave of the court is necessary to prosecute an appeal on a point of law is consistent with the general principle to limit appeals to this court from superior courts.[6] The wording in s 16(1)*(b)* conveys an intention, on the part of the legislature, to intensify the qualitative control over appeals to this court from appeal decisions of the superior courts.

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[4] Appeals Amendment Act 105 of 1982.

[5] The Supreme Court Act 59 of 1959 has since been repealed and replaced by the Superior Courts Act 10 of 2013.

[6] *R v Bhana* 1954 (1) SA 45 (A).

[24] Section 311 of the CPA and ss 1 and 16(1)*(b)* of the Superior Courts Act are not inconsistent. The former only creates the right of appeal to this court and the latter sets the procedure and benchmark for all appeals to be heard in this court. Section 1 of the Superior Courts Act becomes applicable where a criminal law provision, such as s 309 of the CPA regulates both the jurisdictional requirements and the benchmark for prosecuting appeals in this court. It seems to me that against the entrenched qualitative control principle set out above, if the Legislature had intended to effect the suggested fundamental change in procedure it would have expressed such intention explicitly. Direct access by the State to this court is inconsistent with the intention denoted in the more stringent test set under the Superior Courts Act. It also seems that such right of direct access unfairly tilts the balance of power in criminal proceedings in favour of the State against ordinary persons in whose favour superior courts find on appeal.

[25] I am, therefore, of the view that this appeal is not excluded from Chapter 5 of the Superior Courts Act and that s 311(1)*(a)* of the CPA does not provide an automatic right of appeal to this court. Put otherwise, the provisions of ss 16(1)*(b)* and 17(3) apply and special leave of this court is therefore required.

[26] As to whether special leave should be granted in this instance I am satisfied that there are special circumstances which merit an appeal to this court. In regard to the first point of law the record shows that the high court simply ignored relevant evidence, including the evidence of the complainant and her sister. It also disregarded the findings of the magistrate. This is impermissible.

[27] If allowed to stand the incorrect approach by the high court would uproot the long established legal principles in our law in relation to evaluation of evidence. The high court is a precedent setting court. The incorrect approach would result in extensive miscarriage of justice to members of the public. Therefore the matter is of importance, not only to the parties in this case, but to the members of the general public. These factors constitute special circumstances and I would therefore grant leave to appeal.

[28] Further, having found that the high court disregarded relevant evidence and ignored the findings of the trial court, the appeal on the first question of law must succeed. That being the case, it is unneccessary to deal with the second question of law.

[29] Counsel for both parties urged us to consider the merits of the appeal in the event that the application for leave to appeal was granted. However this court does not have the benefit of properly considered views of the full court on the submissions made to it on the merits. The respondent has not had the benefit of consideration of the merits of his appeal by the high court. This court would, in essence, be considering the merits of the findings made by the magistrate. It is appropriate therefore that the matter revert to the high court for a proper determination of the issues on the merits.

[30] I would therefore grant the State special leave to appeal on a question of law, uphold the appeal, reinstate the conviction and sentence and remit the appeal to the high court for consideration on the merits.

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N DAMBUZA

JUDGE OF APPEAL

Gorven AJA (Maya AP and Theron JA concurring):

[31] I have read the judgment of my colleague Dambuza JA. The high court simply failed to consider admissible evidence by confining itself to the DNA evidence. The failure to do so was accordingly a question of law decided in favour of the respondent as is explained in the minority judgment. The provisions of s 311 of the CPA are therefore triggered. The first question of law must be decided in favour of the appellant. It is unnecessary to decide the second question. The appeal must be

allowed. The error of law committed by the high court, in the exercise of its appeal jurisdiction, was fundamental and of so gross a nature as to vitiate the proceedings in that court.[7] The result is that the respondent's appeal has not been heard on the merits. The conviction and sentence of the respondent must be re-instated in their original form as imposed by the trial court. It follows that the matter must be remitted to the high court for it to properly exercise its appeal jurisdiction.[8] I thus concur in the order granted in this matter.

[32] I write because it is my view that special leave to appeal is not required in a matter arising from s 311 of the CPA. This section provides for an appeal as of right, without leave. An appeal under s 311 of the CPA is also an appeal 'regulated in terms of the Criminal Procedure Act'.[9] It is therefore one to which the provisions of Chapter 5 of the Superior Courts Act,[10] and in particular s 16(1)*(b)* thereof, do not apply.

[33] Paragraph 24 of the minority judgment holds that s 311 of the CPA 'only creates the right of appeal to this court' whereas s 16(1)*(b)* of the Superior Courts Act 'sets the procedure and benchmark for all appeals to be heard in this court'. It goes on to hold in paragraph 25 that:

'[T]his appeal is not excluded from Chapter 5 of the Superior Courts Act and that s 311(1)*(a)* of the CPA does not provide an automatic right of appeal to this court. Put otherwise, the provisions of ss 16(1)*(b)* and 17(3) [of the Superior Courts Act] apply and special leave of this court is therefore required.'

I respectfully differ from this approach.

[34] The introduction of the definition of an appeal in s 1 of the Superior Courts Act has given rise to a new situation. This must prompt fresh enquiries on matters settled under the previous legislation. Certain appeals are now excluded from the operation of Chapter 5 of the Superior Courts Act. This was not the position under the

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[7] *S v Naidoo* 1962 (4) SA 348 (A) at 353D-E; *S v Le Grange and Others* (040/2008) [2008] ZASCA 102; 2009 (1) SACR 125 (SCA) 2009 (2) SA 434 (SCA); [2010] 1 All SA 238 (SCA); 2010 (6) BCLR 547 (SCA) para 30.

[8] *S v Meje* (248/11) [2011] ZASCA 127 (13 September 2011) para 12.

[9] From s 1 of the Superior Courts Act 10 of 2013 – this section will be dealt with more fully below.

[10] Superior Courts Act 10 of 2013.

Supreme Court Act.[11] The enquiry which must be made prior to concluding that s 16(1)*(b)*, which requires special leave to appeal, applies, is whether the appeal in question is subject to the provisions of Chapter 5. I now turn to that enquiry.

[35] Section 1 of the Superior Courts Act provides that an appeal in Chapter 5 'does not include an appeal in a matter regulated in terms of the Criminal Procedure Act . . . or in terms of any other criminal procedural law'. Chapter 5 of the Superior Courts Act comprises ss 15-20. This means that, if an appeal is 'regulated in terms of' the CPA, the provisions of s 16(1)*(b)* requiring special leave to appeal do not apply. The crisp issue in this regard is whether an appeal under s 311 is one 'regulated in terms of the Criminal Procedure Act'.[12]

[36] Section 311 of the CPA reads:

'(1) Where the provincial or local division on appeal, whether brought by the attorney-general or other prosecutor or the person convicted, gives a decision in favour of the person convicted on a question of law, the attorney-general or other prosecutor against whom the decision is given may appeal to the Appellate Division of the Supreme Court, which shall, if it decides the matter in issue in favour of the appellant, set aside or vary the decision appealed from and, if the matter was brought before the provincial or local division in terms of-

(a) section 309(1), re-instate the conviction, sentence or order of the lower court appealed from, either in its original form or in such a modified form as the said Appellate Division may consider desirable; or

(b) section 310(2), give such decision or take such action as the provincial or local division ought, in the opinion of the said Appellate Division, to have given or taken (including any action under section 310(5)), and thereupon the provisions of section 310(4) shall *mutatis mutandis* apply.

(2) If an appeal brought by the attorney-general or other prosecutor under this section or section 310 is dismissed, the court dismissing the appeal may order that the appellant pay the respondent the costs to which the respondent may have been put in opposing the appeal, taxed according to the scale in civil cases of that court: Provided that where the attorney-general is the appellant, the costs which he is so ordered to pay shall be paid by the State.'

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[11] The Supreme Court Act 59 of 1959 was repealed by the Superior Courts Act.

[12] It has not been contended that such an appeal is regulated by any other criminal procedural law.

[37] It can be seen that s 311 gives jurisdiction to this court when a high court 'on appeal . . . gives a decision in favour of the person convicted on a question of law'. Jurisdiction is founded on s 311 itself and is clear and express. The present matter was brought before the high court by way of an appeal in terms of s 309(1) of the CPA. We have found that, on appeal, the high court decided the first question of law in favour of the respondent. Accordingly, the provisions of s 311(1)*(a)* find application. In those circumstances, this court's jurisdiction is established under s 311.

[38] As mentioned, the introduction of the definition of appeal in s 1 of the Superior Courts Act has brought about a new situation requiring the consideration of whether an appeal is regulated by the CPA. In *S v Van Wyk & another*,[13] in the context of an appeal by an accused person, this court held that '[t]he CPA does not contain any provision dealing with a right of appeal to this court from a decision of the high court taken on appeal to it from a magistrates' court.'[14] Accordingly, it was held, such an appeal is not regulated by the CPA and is not excluded from the operation of Chapter 5 of the Superior Courts Act. As a result, the provisions of s 16(1)*(b)* govern such an appeal.[15] This requires the grant of special leave to appeal by this court. In contrast to the position dealt with in *Van Wyk*, s 311 of the CPA clearly does 'contain [a] provision dealing with a right of appeal to this court from a decision of the high court taken on appeal to it from a magistrates' court.'[16] This distinguishes the position under s 311 from that dealt with in *Van Wyk*. Applying the dictum in *Van Wyk*, because s 311 of the CPA gives a right of appeal, such an appeal is excluded from the operation of Chapter 5 of the Superior Courts Act.

[39] In *DPP Western Cape v Kock*,[17] this court held that, where the state seeks to appeal against sentence under the provisions of s 316B(1) of the CPA, that right of appeal 'is specifically regulated by the CPA, therefore the provisions of s 16(1*)(b)* do not find application.'[18] And in *Director of Prosecutions v Olivier*,[19] this court held that

[13] *S v Van Wyk & another* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA).
[14] *Van Wyk* para 18.
[15] *Van Wyk* para 20.
[16] *Van Wyk* para 18.
[17] *DPP Western Cape v Kock* [2015] ZASCA 197; 2016 (1) SACR 539 (SCA).
[18] Para 18.

it only has jurisdiction to deal with an appeal against sentence brought by the state under s 316B of the CPA where the high court acted as a court of first instance and not as an appeal court.[20] These both dealt with attempts to appeal against sentence in this court where that sentence had been imposed by the high court sitting as a court of appeal. In both of those matters this court held that it had no jurisdiction to entertain such an appeal. In each of those cases the appeal was struck from the roll, which is the appropriate order when there is a lack of jurisdiction to adjudicate an appeal. Neither of those matters dealt with an appeal brought under s 311 of the CPA.

[40] The context of s 311 must be considered. Most other sections of the CPA which allow for an appeal require applications for leave to appeal. These include s 309(1*)(a)*, s 309B(1)*(a)*, s 310A(1), s 316(1)*(a)* and s 316B(1) of the CPA. It is clear that these are appeals 'regulated in terms of' the CPA. They give the right of appeal and deal with the procedure for the exercise of that right. In all cases, the procedure requires an application for leave to appeal.

[41] Leaving aside s 311 for the moment, the exceptions to the requirement of leave to appeal in the CPA are twofold. The first is the proviso to s 309(1)*(a)*:

'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'.

There is therefore an explicit provision that an accused person in the circumstances set out in the proviso to s 309(1)*(a)* 'may note such an appeal without having to apply for leave'. The reason for specifying this is clear. It is stated as an exception to the general provision in that section requiring leave to appeal. In this section, the right to appeal is given, it is expressly stated that no leave to appeal is required and the person is directed to exercise that right by simply noting an appeal.

[42] The second is s 310, the relevant parts of which provide:

'(1) When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law . . . the attorney-general . . . may require the judicial officer

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[19] *Director of Public Prosecutions v Olivier* 2006 (1) SACR 380 (SCA) approved in *S v Nabolisa* [2013] ZACC 17; 2013 (2) SACR 221 (CC).

[20] *Olivier* para 81.

concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law.
(2) When such case has been stated, the attorney-general or other prosecutor, as the case may be, may appeal from the decision to the provincial or local division having jurisdiction.
(3) The provisions of section 309(2) shall apply with reference to an appeal under this section.'

Section 309(2) provides that such an appeal must be noted and prosecuted according to the rules of court. Section 310 thus gives a right of appeal. Unlike s 309(1)*(a)*, it does not provide in terms that no leave to appeal is required. It does specify that the right to appeal must be exercised by noting and prosecuting the appeal according to the rules of court. It is clear that leave to appeal is not first required and that it is also an appeal as of right.

[43] The wording of s 311 is similar to that of s 310(2). Section 311 says that 'the attorney-general or other prosecutor against whom the decision is given may appeal'. Both sections allow this when a decision in favour of the accused on any question of law has been made. The right to appeal is given. As is the case with s 310(2), the section does not state in terms that no leave to appeal is required. Sections 310 and 311 differ in two respects. Section 310(3) imports the provisions of s 309(2), which specifies that the noting and prosecution of the appeal must take place as 'prescribed by the rules of court'. There is no equivalent provision in the CPA concerning an appeal under s 311 and an appeal under s 310(2) does not lie to this court.

[44] Dealing with the second of these first, an objection has been raised that appeals without leave do not lie to this court. This is not so. In the context of an appeal by an accused against a refusal by the high court of condonation for the late noting of an appeal, this court has consistently recognised appeals as of right without leave in certain circumstances.[21] Until the coming into effect of the Superior Courts Act, this was also the case for appeals against the refusal of bail or the imposition of

[21] *S v Swiegers* 1969 (1) PH H110 (A); *S v Tsedi* 1984 (1) SA 565 (A) at 570A-C; *S v Absalom* 1989 (3) SA 154 (A) at 162D-E; *S v Botha en 'n ander* 2002 (1) SACR 222 (SCA) para 13.

a condition of bail by a high court sitting as a court of first instance.[22] The Superior Courts Act also brought about a change of approach in this regard.[23]

[45] Section 315(4) of the CPA is of some significance:

'An appeal in terms of this Chapter shall lie only as provided in sections 316 to 319 inclusive, and not as of right.'

This section is part of Chapter 31 of the CPA, comprising ss 315 to 324, and deals with appeals in cases of criminal proceedings in superior courts. Chapter 30, comprising ss 302 to 314, must thus be taken to allow for appeals as of right. This chapter deals with reviews and appeals in cases of criminal proceedings in lower courts. We have seen that both the proviso to s 309(1)*(a)* and s 310(2) fall into the category of appeals as of right. Section 311 is part of this chapter.

[46] Section 311(2) ties ss 310 and 311 together. It provides that, if an appeal arising from these two sections is dismissed, 'the court dismissing the appeal may order that the appellant pay the respondent the costs to which the respondent may have been put in opposing the appeal'. This provides a check against abusive appeals which might otherwise arise from such a provision.

[47] Similar provisions are found in ss 310A(6) and 316B(3). These allow the State to apply for leave to appeal against a sentence and, if given leave, to appeal against sentence. What is significant is that, in addition to providing for an 'order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing' the appeal, they also provide for an 'order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing' the application for leave to appeal. The absence of a similar provision in s 311(2) for costs of an application for leave to appeal fortifies an interpretation that no such application is necessary.

[48] As mentioned, s 310(3) specifies that the appeal must be noted and prosecuted in terms of the rules of court. This provision does not find echo in s 311.

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[22] *S v Botha en 'n ander* [2001] ZASCA 146; 2002 (2) SA 680 (SCA); 2002 (1) SACR 222; [2002] All SA 577.

[23] *S v Banger* 2016 (1) SACR 115 (SCA).

As such, no procedure for the prosecution of the appeal is set out in the CPA. The question is whether the absence of a provision setting out the procedure to exercise the right of appeal means that it is not one 'regulated in terms of' the CPA.

[49] The minority judgment holds that s 311 of the CPA 'creates the right of appeal' but that s 16(1)*(b)* of the Superior Courts Act 'sets the procedure and benchmark for all appeals to be held in this court.' However, s 16(1)*(b)* provides that:

'an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal'.

What this means is that, until granted by this court, there is no right to appeal. The right to appeal can be withheld or granted by this court. But s 311 of the CPA already gives that right if the circumstances specified in it are met. In addition, it also specifies that such an appeal lies to this court. What the minority judgment does not explain is why, if a right of appeal is given by s 311, leave is required in order to obtain that right.

[50] It is, of course, instructive that, unlike other sections in the CPA, s 311 does not in terms specify that any form of leave to appeal must be obtained. All of the sections requiring leave specify this requirement. In my view there is no need to specify the procedure to exercise the right because rule 7(1)*(a)* of the rules of this court does so:[24]

'(1) An appellant shall lodge a notice of appeal with the registrar and the registrar of the court a quo within one month after the date of—

(a) the granting of the judgment or order appealed against where leave to appeal is not required'.

Rule 7(1)*(a)* thus deals in terms with a situation where leave to appeal is not required. Holding that s 311 deals with an appeal as of right accordingly does not give rise to a procedural lacuna.

[51] It is my view that, because a right to appeal is given in s 311 of the CPA, such an appeal is one 'regulated' by the CPA. It is not necessary, in addition, for the CPA to specify the procedure by which to exercise that right. The Director of Public Prosecutions, or other prosecutor, has an appeal as of right. That being the case, an

[24] Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa.

appeal under s 311 is excluded from the operation of Chapter 5 of the Superior Courts Act. As such, the provisions of s 16(1)*(b)* of the Superior Courts Act do not apply. An appeal under s 311 accordingly does not require special leave to appeal.

[52] Arising from this conclusion, accordingly, no application for special leave to appeal was necessary in this matter. It follows that an order granting special leave to appeal is neither necessary nor competent.

[53] In the result, the following order is made:

1 The appeal is upheld in respect of the first question of law.

2 The order of the court a quo is set aside.

3 The conviction and sentence imposed by the regional court are reinstated.

4 The matter is remitted to the high court for the appeal to proceed on the merits.

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T R Gorven
Acting Judge of Appeal

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