THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 620/2018

In the matter between:

ISHMAEL BLESSING SEGWATI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Segwati v The State* (620/2018) [2019] ZASCA 35 (29 March 2019)

Coram: Ponnan and Leach JJA and Mokgohloa AJA

Delivered: 29 March 2019

Summary: Criminal Procedure – sentence – appellant's previous convictions impermissibly taken into account despite s 271A of the Criminal Procedure Act 51 of 1977 – parties agreed sentence imposed at first instance cannot stand.

ORDER

On appeal from: Guateng Division of the High Court, Johannesburg (Borchers and Bam JJ concurring, sitting as a court of appeal):

1 The appeal is upheld.

2 The order of the court *a quo* is set aside and replaced with the following:

'The applicant is granted leave to appeal to the Gauteng Division of the High Court, Johannesburg solely against the sentence imposed upon him for his convictions of theft or attempted theft.'

JUDGMENT

Leach JA (Ponnan JA and Mokgohloa AJA concurring):

[1] The appellant was convicted in the regional court on a charge of theft and a further charge of attempted theft. The complainant on each count was the Emperor's Palace Casino in Kempton Park, by whom he was employed at the time. The amounts involved were considerable: he stole R800 000 and attempted to steal a further R200 000, both offences having been committed on the same day. The appellant had a number of petty convictions for theft and fraud committed more than 14 years previously. In consequence, the trial court regarded the appellant as being a third offender as envisaged by s 51(2)*(a)*(iii)

Act 105 of 1997 which attract a prescribed minimum sentence of 25 years' imprisonment, and imposed that sentence upon the appellant. An application under s 309B of the Criminal Procedure Act 51 of 1977 (the CPA) for leave to appeal against both conviction and sentence was refused. The appellant then petitioned the Gauteng Division of the High Court for leave to appeal under s 309C of the CPA. This application was dismissed by the court *a quo* (Borchers and Bam JJ) on 21 October 2014.

[2] The refusal of an application for leave to appeal against a high court's refusal of a s 309C application is appealable with a special leave of this Court – *Van Wyk v The State; Galela v The State* 2015 (1) SACR 584 (SCA); [2014] ZASCA 152. As a last resort, the appellant therefore petitioned this Court, and special leave to appeal was granted, albeit in respect of sentence only. At the same time the parties were requested to file written argument and to indicate whether they had any objection to this Court dealing with the appeal under s 19*(a)* of the Superior Courts Act 10 of 2013. Both sides were amendable to such a procedure. In this way the matter came before this Court and will now be finalised.

[3] It is necessary to remember that what is before this Court is the refusal of the appellant's application for leave to appeal by the high court. The appeal itself is not before this Court, and it cannot make an order relating to the appellant's sentence even if, as in this case, interference is obviously justified. The merits of the appeal are therefore relevant only in so far as reasonable prospects of success are concerned.

[4] I make this remark as the respondent has conceded that the appeal must succeed. As already mentioned, the trial court regarded the appellant as a third offender who therefore faced a prescribed minimum sentence of 25 years' imprisonment. In doing so, it overlooked that the appellant's last previous conviction had taken place more than 14 years before he committed the present offences. All his previous convictions related to offences as envisaged in s 271A of the CPA, and in these circumstances such previous convictions 'shall fall away as a previous conviction' in terms of that section. Presumably both the magistrate and the high court overlooked this, but the parties are therefore agreed that the magistrate erred in imposing what he viewed was a prescribed minimum sentence and that a lesser sentence would be appropriate.

[5] Accordingly the high court clearly erred in dismissing the appellant's petition for leave to appeal. Although the convictions were indisputable, it ought to have granted leave to appeal against the sentence. To this extent, its order cannot stand.

[6] The parties in a written argument attempted to persuade this Court to impose what it viewed would be the appropriate sentence. However, as I have said, and is apparent from various judgments in this Court, including eg *S v Matshona* 2013 (2) SACR 126 (SCA) para 4 and *S v Tonkin* 2014 (1) SACR 583 (SCA), this Court can do no more than interfere with the order of the court *a quo* refusing the application for leave to appeal. It cannot determine the merits of the appeal itself. That appeal will have to be determined in the high court which ought to have granted leave to appeal to it.

[7] It is therefore ordered:

1 The appeal is upheld.

2 The order of the court *a quo* is set aside and replaced with the following:

'The applicant is granted leave to appeal to the Gauteng Division of the High Court, Johannesburg solely against the sentence imposed upon him for his convictions of theft or attempted theft.'

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L E Leach

Judge of Appeal

Appearances:

For the Appellants:	J L Hattingh
Instructed by:	Wentzel & Partners Attorneys, Kempton Park
	Symington & De Kok Attorneys, Bloemfontein
For the Respondent:	K T Ngubane
Instructed by:	Director of Public Prosecutions, Johannesburg
	Director of Public Prosecutions, Bloemfontein