



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 1173/2016

In the matter between:

NCEBA TYHULU

Appellant

and

THE STATE

Respondent

Neutral citation: *Nceba Tyhulu v The State* (1173) [2019] ZASCA 51 (1 April 2019)

Coram: Cachalia, Mbha, Mocumie, Dlodlo JJA and Matojane AJA

Heard: 11 March 2019

Delivered: 1 April 2019

Summary: Criminal Procedure – Appeal against a refusal to grant leave to appeal on petition – issue to be decided is whether the appellant has a reasonable prospect of success on appeal and not the merits of the appeal.

ORDER

On appeal from Western Cape High Court, Cape Town.

1 The appeal against the dismissal of the application for leave to appeal in respect of counts 1 and 2 is dismissed

2 The appeal against the dismissal of the application for leave to appeal in respect of count 3 and count 4 is upheld.

3 The appeal against dismissal of the appeal against the sentence imposed on counts 3 and 4 as well as the effective sentence of 13 years' imprisonment is upheld.

4 The order of the court below is replaced with the following order:

'The application for leave to appeal against counts 1 and 2 is dismissed. The appellant is granted leave to appeal to the Western Cape High Court, Cape Town, against the conviction and sentence imposed upon him in respect of counts 3 and 4 as well as the effective sentence of 13 years' imprisonment.'

JUDGMENT

Matojane AJA (Cachalia, Mbha and Mocumie JJA and Dlodlo AJA concurring):

[1] This is an application for special leave against dismissal by the high court of the application for leave to appeal against the convictions and sentences imposed in the magistrate's court.

[2] The appellant, Mr Tyhulu was convicted in the Regional Court Paarl on two counts of contravening the provisions of the Prevention and Combating Corrupt Activities Act of 2004 ("POCCA") and two counts of contravening the provisions of section 5(a) of the Drugs and Drugs Trafficking Act 40 of 1992. He was sentenced

on 13 July 2015 to 10 years' imprisonment on the first two counts taken together, and three years' direct imprisonment on the second two counts which were also taken together for purposes of sentence.

[3] He applied to the trial magistrate for leave to appeal against both conviction and sentence. Leave to appeal was refused. He then applied, by way of petition in terms of s 309B of the Criminal Procedure Act 51 of 1977 to the Judge President of the Western Cape High Court, Cape Town for leave to appeal against his conviction. His petition was dismissed.

[4] The refusal of an application for leave to appeal on petition to two judges of the High Court is appealable with special leave of this court. *S v Khoasana*¹, *Van Wyk v The State; Galela v The State* 2015 (1) SACR 584 (SCA). The appellant petitioned this court and special leave to appeal was granted.

[5] The issue to be determined at this stage is whether the appeal should have been granted by the High Court and not the appeal itself. As a result, the test to be applied is whether there is a reasonable prospect of success in the envisaged appeal rather than whether the appeal ought to succeed.² 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.

[6] The appellant argues that there is a reasonable prospect of success on appeal because the magistrate misdirected herself in, among other things, rejecting his evidence that he was pressured and threatened by the undercover police agent, that he has been offered a financial inducement to commit these offences.

[7] Having heard the argument on the merits and considered the judgment of the magistrate I am of the view that there are no reasonable prospects of success that another court may come to a different conclusion regarding the convictions on the two counts of corruption. However, with regard to counts 3 and 4 it is doubtful

¹ *S v Khoasana* 2003 (1) SACR 123 (SCA) paras 14 and 19-22.

² *S v Matshona* [2008] ZASCA 58; [2008] 4 All SA 68 (SCA) para 4.

whether the state has proved beyond reasonable doubt that the appellant dealt in drugs. There are therefore reasonable prospects that another court may conclude that the appellant ought to have been convicted of possession of tik instead of dealing in the substance. If the court comes to this conclusion, it may consider interfering with the sentence imposed in respect of the said two counts and of the effective sentence of 13 years' imprisonment that was imposed on the four counts. In the result, the appeal against the dismissal of the application for leave to appeal in respect of counts 3 and 4 and the sentence imposed on these counts succeeds.

[8] The following order is issued:

1 The appeal against the dismissal of the application for leave to appeal in respect of counts 1 and 2 is dismissed

2 The appeal against the dismissal of the application for leave to appeal in respect of count 3 and count 4 is upheld.

3 The appeal against dismissal of the appeal against the sentence imposed on counts 3 and 4 as well as the effective sentence of 13 years' imprisonment is upheld.

4 The order of the court below is replaced with the following order:

'The application for leave to appeal against counts 1 and 2 is dismissed. The appellant is granted leave to appeal to the Western Cape High Court, Cape Town, against the conviction and sentence imposed upon him in respect of counts 3 and 4 as well as the effective sentence of 13 years' imprisonment.'

KE Matojane

Acting Judge of Appeal

Appearances:

For the Appellant:

M Calitz

Instructed by:

Legal Aid South Africa

Bloemfontein Justice Centre

For the Respondent:

M V Orban

Instructed by:

Office of the Director of Public Prosecutions,

Western Cape