THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Non-Reportable

Case no: 728/2018

In the matter between:

DANIëL DA SILVA MARQUES DE ALMEIDA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *De Almeida v S* (728/2018) [2019] ZASCA 84 (31 May 2019)

Coram: Leach, Saldulker, Zondi and Mocumie JJA and Eksteen AJA

Heard: 20 May 2019

Delivered: 31 May 2019

Summary: Criminal Procedure – appeal against sentence of 8 years' imprisonment – leave to appeal refused by regional court – petition refused by the high court – special leave granted by this court – the test is whether the appellant has shown reasonable prospect of success on appeal against the sentence.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Msimeki, J and Dosio, AJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the high court refusing the appellant leave to appeal against his sentence in terms of s 309C of the Criminal Procedure Act 51 of 1977, is set aside and replaced with the following:

'The applicant is granted leave to appeal against his sentence.'

JUDGMENT

Mocumie JA (Leach, Saldulker and Zondi JJA and Eksteen AJA concurring):

[1] This is an appeal against the refusal of a petition for leave to appeal by the Gauteng Local Division, Johannesburg (Msimeki, J and Dosio, AJ). The appellant, Mr Daniel Marques De Almeida, appeared in the regional court, Johannesburg on one count of attempted murder. Despite his plea of not guilty, he was convicted as charged and sentenced to 8 years' imprisonment. The appellant, aggrieved by this, sought leave to appeal against his sentence. The regional court refused leave to appeal. An application to the high court for leave to appeal against sentence in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA) was also refused. Subsequently, this court granted special leave to appeal to this court against the refusal of leave by the high court.

[2] Both counsel for the appellant and the State laboured under the impression that this matter was to be heard on the merits of the appeal against the appellant's sentence that was imposed by the regional court. In consequence thereof, in this court, counsel for the appellant argued that the regional court misdirected itself when it imposed the sentence of

eight years' imprisonment. This indicates that despite several judgments of this court since *S v Khoasasa*[1] on the current law on appeals from the magistrate courts under s 309 of the CPA, the confusion on where the appeal lies in circumstances such as those before us, still persists. Therefore, it makes it imperative once more to highlight the ambit of this appeal. It is more apt to quote from this court in *Dipholo v The State*[2] which dealt with the issue of where the appeal lies in such circumstances:

'It is correct that in terms of our current law appeals from the magistrates' court must be heard by the high court. Section 309(1)*(a)* of the Criminal Procedure Act 51 of 1997 (CPA). There is no provision in the law for this court to hear appeals on the merits directly from the magistrates' courts. However, confusion has reigned in the various divisions of the high court in recent times regarding the proper procedure to be followed by an accused in instances where a high court has refused leave to appeal a judgment from the magistrates' court. One would have hoped that the position was settled in *S v Khoasasa* (supra) paras 19-22. However, as this confusion persisted, this Court once again restated the correct approach in *S v Tonkin* 2014 (1) SACR 583 (SCA) in para 6 as follows:

"In response to our invitation, counsel for the appellant submitted a well prepared argument urging us to entertain the merits of the appeal. But on reflection it appears to me that, unfortunate as it may be, we have no authority to do so. The reason why it is so have been stated in *Khoasasa* and elaborated upon in the decisions following upon it to which I have referred. On reflection, these reasons cannot, in my view, be faulted. In broad outline they are as follows:

(a) Although this Court has inherent jurisdiction to regulate its own procedure, it has no inherent or original jurisdiction to hear appeals from other courts. In the present context, its jurisdiction is confined to that which is bestowed upon it by sections 20 and 21 of the Supreme Court Act. In terms of these sections the jurisdiction of this Court is limited to appeals against decisions of the high court. (b) When leave to appeal has been refused by the high court, that court rather obviously, did not decide the merits of the appeal. If this court were therefore to entertain an appeal on the merits in those circumstances, it would in effect be hearing an appeal directly from the magistrates" court. That would be in direct conflict with s 309 of the Criminal Procedure Act, which provides that appeals from lower courts lie to a high court. The "order on appeal" by the high court – in the language of s 20(4) – that is appealed against is the refusal of the petition for leave to appeal and nothing else."'

[1] *S v Khoasasa* [2002] ZASCA 113; 2003 (1) SACR 123 (SCA); [2002] 4 All SA 635 (SCA).
[2] *Dipholo v The State* [2015] ZASCA 120 para 5.

[3] This legal position was also set out by this court in *Matshona v The State*[3] which, in the light of the confusion still reigning, bears repeating:

'[T]he reasoning in *Khoasasa* is unassailable. The appeal of an accused convicted in a regional court lies to the high court under section 309(1) *(a)*, although leave to appeal is required either from the trial court under s 309B or, if such leave is refused, from the high court pursuant to an application made by way of a petition addressed to the judge-president under s 309C (2) and dealt with in chambers. In the event of this petition succeeding, the accused may prosecute the appeal to the high court. But, if it is refused, the refusal constitutes a "judgment or order" or a "ruling" of a high court as envisaged in s 20(1) and s 21(1) of the Supreme Court Act 59 of 1959, against which an appeal lies to this court on leave obtained either from the high court which refused the petition or, should such leave be refused, from this court by way of petition.' (Footnotes omitted)

[4] Further in *Matshona*[4], this court went on to state as follows:

'Not only does this court lack the authority to determine the merits of the appellant's appeal against his sentence at this stage, but there are sound reasons of policy why this court should refuse to do so even if it could. It would be anomalous and fly in the face of the hierarchy of appeals for this court to hear an appeal directly from a magistrates court without that appeal being adjudicated in the high court, thereby serving, in effect, as the court of both first and last appeal. In addition, all persons are equal under the law and deserve to be treated the same way. This would not be the case if some offenders first had to have their appeals determined in the high court before they could seek leave to approach this court if still dissatisfied while others enjoyed the benefit of their appeals being determined firstly in this court. And most importantly, this court should be reserved for complex matters truly deserving its attention, and its rolls should not be clogged with cases which could and should be easily finalised in the high court.'

[5] I now turn to consider whether leave to appeal to the high court against the sentence imposed by the regional court should have been granted. The test in that regard is simply whether there is a reasonable prospect of success in the envisaged appeal against sentence, rather than whether or not the appeal ought to succeed.

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[3] *Matshona v The State* [2008] ZASCA 58 para 4. See also *Tonkin v The State* [2013] ZASCA 179 para 3 and *Van Wyk v S, Galela v S* [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA) para 14.

[4] *Matshona* para 6.

[6] The appellant was 55 years of age at the time of sentencing. He is divorced with three children, two of whom are staying with their biological mothers. Of the three children, two are minors: one, a 17 year-old son and the youngest, a six year-old son, whose biological mother has since passed on. At the time of the sentencing the appellant was the primary care giver of the youngest child. Further, he was employed and was a partner in a business of panel-beating luxury motor vehicles which employed over 18 employees. He had no previous convictions of similar offence or offences involving violence. As the magistrate correctly held, the charge in respect of which he was convicted is a serious one, attempted murder, which was committed inside a pub where members of the public were present and could have been injured. He had ample opportunity to walk away from the situation after he was assaulted and to even proceed to lay a charge of assault against the complainant. He did not. Instead, he took the law into his own hands and shot at the complainant in revenge for the earlier assault on him.

[7] Counsel for the appellant submitted that the sentence was excessively severe and disturbingly inappropriate considering the favourable personal circumstances of the appellant which submission the State did not challenge. Relying on the judgment of this court in S v *De Villiers*,[5] counsel for the appellant argued that the regional court committed a material misdirection when it ignored the three pre-sentence reports and the recommendations contained therein on the suitability of the appellant as a candidate for correctional supervision. In the circumstances of this case, so the argument went, the suitability of the appellant to correctional supervision arises from: his offer to compensate the complainant for the damage caused at his pub; the fact that the appellant himself was severely assaulted; and how best to cater for the best interests of the minor child in line with the guidelines as set out by the Constitutional Court in *S v M.*[6] Counsel for the appellant further argued, the regional court considered itself bound to impose only a custodial sentence instead of considering other options of sentence under s 276(1) including correctional supervision under ss 276(1)(h) and 276(1)(i).

[5] *S v De Villiers* [2015] ZASCA 119; 2016 (1) SACR 148 (SCA); [2015] 4 All SA 268 (SCA) para 31.
[6] *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) paras 18 and 30-39.

[8] Notably, although disagreeing on the appropriateness of correctional supervision in a serious offence as attempted murder, counsel for the State conceded that the regional court indeed committed a material misdirection by ignoring the three pre-sentence reports. These concessions are in my view, sufficient to justify the conclusion that there are reasonable prospects of success that another court would interfere with the sentence imposed by the regional magistrate.

[9] In the circumstances, I am satisfied that leave to appeal should be granted to the Gauteng Local Division, Johannesburg.

[10] In the result the following order is granted.

1 The appeal is upheld.

2 The order of the high court refusing the appellant leave to appeal against his sentence in terms of s 309C of the Criminal Procedure Act 51 of 1977, is set aside and replaced with the following:

‘The applicant is granted leave to appeal against his sentence.’

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B C Mocumie

Judge of Appeal

APPEARANCES:

For Appellant:	Adv F Ismail (with Adv F McAdam and Adv P Smith)
	Instructed by: Ulrich Roux & Associates, Parkhurst Symington & de Kok Attorneys, Bloemfontein
For Respondent:	Mr Mashego
	Instructed by: Director of Public Prosecutions, Johannesburg Director of Public Prosecutions, Bloemfontein