



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable/Not reportable

Case No: 848/18

In the matter between:

RENIO MOYO

APPELLANT

and

THE STATE

RESPONDENT

Neutral Citation: *Reno Moyo v The State* (848/18) [2018] ZASCA 157 (23 November 2018)

Coram: Cachalia, Wallis and Makgoka JJA and Carelse and Matojane AJJA

Heard: In chambers

Delivered: 23 November 2018

Summary: Appeal from decision of the High Court dismissing a petition in terms of s 309C of the Criminal Procedure Act 51 of 1977 – where the High Court refuses leave to appeal against an order of a Magistrate, appeal against such refusal lies to the Supreme Court of Appeal.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Moshidi J, Makhoba AJ concurring) sitting as a court of appeal.

1. The appeal is upheld and the order of the High Court refusing leave is set aside and replaced with the following order:

‘The application for leave to appeal against the effective sentence imposed upon the appellant is granted.’

JUDGMENT

[1] On 10 January 2012 the appellant was convicted in the Specialised Commercial Crimes Court, Johannesburg, on 14 counts of theft totalling R1 358 912.50. The provisions of section s 51(2)(a) Part II of schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended by Act 38 of 2007 (the Act) applied to count 13 because the amount involved exceeded R500 000.

[2] He was sentenced as follows, in respect of counts 1 to 10, which were taken together for purposes of sentencing, seven years’ imprisonment. In respect of counts 11, 12 and 14 taken together for sentencing, the appellant was sentenced to seven years’ imprisonment. Concerning count 13 to which s 51(1) of the Act applied, the appellant was sentenced to 15 years’ imprisonment with an order that he should not be released on parole until he had served two-thirds of his sentence. The court ordered that the sentences on counts 1 to 10, 11, 12 and 14 run concurrently with the sentence on count 13.

[3] On 11 December 2012 the appellant's application for leave to appeal against sentence was dismissed by the trial magistrate. The appellant then applied to the Gauteng Division of the High Court (the high court) in terms of section 309C of the Criminal Procedure Act 51 1977 (the Criminal Procedure Act) for such leave. The application was refused by two judges of the Gauteng Division of the High Court (Moshidi J and Makhoba AJ concurring).

[4] The appellant subsequently applied to this Court in terms of section 16(1)(b) of the Superior Court Act 10 of 2013 for special leave to appeal to this court against the refusal of the high court to grant leave against the sentence. The application was considered by two judges, who ordered that special leave be granted.

[5] This Court in *S v Khoasasa*¹ held that the refusal, by two judges of the Provincial Division, of leave to appeal was a 'judgment or order' or 'a ruling' of the Court of the Provincial Division as intended in s 20(1) or s 21(1) of the Supreme Court Act 59 of 1959, (the Supreme Court Act) given by the high court on appeal to it.

[6] The Court held that a petition for leave to appeal to a high court in terms of s 309C of the Criminal Procedure Act, was in effect an appeal against the refusal of leave to appeal by the magistrates' court in terms of s 309B of the Criminal Procedure Act.

[7] Accordingly, the refusal of leave to appeal by the high court, is appealable to this Court with special leave of this court. The order appealed against is the refusal of leave with the result that this Court cannot decide the merits of the appeal.

[8] It follows that the issue before us is whether leave to appeal to the high court should have been granted and not the appeal itself. If such an appeal is

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

successful, the appeal should be referred back to the High Court to be heard on the merits.

[9] I now proceed to consider the present application. An applicant for special leave to appeal must show, in addition to the requirement of reasonable prospect of success, that there are special circumstances which merit a further appeal to the SCA. See *Westinghouse Brake & Equip v Bilger Engineering*.²

[10] In *Van Wyk v S, Galela v S*³ this court set out the requirements for granting special leave as follows:

'An applicant for special leave to appeal must show, in addition to the ordinary requirement of reasonable prospects of success, that there are special circumstances which merit a further appeal to this court. This may arise when in the opinion of this court the appeal raises a substantial point of law, or where the matter is of very great importance to the parties or great public importance, or where the prospects of success are so strong that the refusal of leave to appeal would probably result in a manifest denial of justice'

[11] Adopting the above approach and as fairly conceded by the state, the failure of the trial court to allow the applicant an opportunity to address it before imposing the non-parole period in terms of s 276B(2) was a misdirection⁴. The court further misdirected itself by its failure to give reasons for fixing the non-parole period. This constituted the special circumstances required for special leave to be granted. In our view, an appeal will have a reasonable prospect of success on count 13.

[12] In addition, because the sentences on the other counts were ordered to run concurrently with count 13 it shall be necessary for the Full Court to reconsider the cumulative effect of the effective sentence imposed. This is provided for in the order set out below. For the sake of clarity the terms of that

² *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) 555 at 564H

³ *Van Wyk v S, Galela v S* [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA) para 21.

⁴ *S v Stander* 2012(1) SACR 537 (SCA), *S v Mthimkulu* 2013 JDR 0685 (SCA).

order do not grant the appellant leave to appeal against the sentences imposed upon him in terms of counts 1 to 10, 11, 12 and 14.

[12] For these reason the following order is made:

1. The order of the High Court refusing leave is set aside and replaced with the following order:

‘The application for leave to appeal against the effective sentence imposed upon the applicant is granted’

KE Matojane
Acting Judge of Appeal

APPEARANCES

For Appellants: B Jassat

Johannesburg Justice Centre
c/o Bloemfontein Justice Centre

For Respondent: P Tichner

Director of Public Prosecutions
c/o Director of Public Prosecutions
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