THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20450/2014

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG **APPELLANT**

and

MOLEFE JOSEPH MPHAPHAMA **RESPONDENT**

Neutral citation: *Director of Public Prosecutions, Gauteng v Mphaphama* (20454/14) [2016] ZASCA 8 (3 March 2016)

Coram: Majiedt and Willis JJA and Baartman AJA

Heard: **24 February 2016**

Delivered: **3 March 2016**

Summary: Criminal Law and Procedure – application for special leave to appeal under s 16(1)*(b)* read with s 17(3) of the Superior Courts Act 10 of 2013 – High Court having reduced sentence of the regional court from life imprisonment to 20 years – State has no right to appeal further to the SCA – appeal struck from the roll.

ORDER

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

The appeal is struck from the roll.

JUDGMENT

Willis JA (Majiedt JA and Baartman AJA concurring):

[1] This appeal is concerned with the question: whether the State represented by the Director of Public Prosecutions (DPP) has a right to appeal to this court against an order of the High Court on appeal to it from the regional court, reducing a sentence of imprisonment from that of life to one of 20 years.

[2] The respondent (the accused), who was 51 years of age at the time, was arraigned before the regional court in Springs on four counts of contravening s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act). The counts related to the rape of an 11-year old girl. The accused, who enjoyed the benefit of legal representation, pleaded not guilty. He denied having had any sexual relationship with the girl and professed to having no idea why she would falsely have implicated him. When he gave evidence in his defence, he claimed that he was the father of the girl.

[3] The first three counts related to incidents that occurred in 2009, the fourth in 2011. The accused had been a family friend. The complainant testified through an

intermediary, who was a registered social worker. On 11 February 2013 the accused was convicted on all four counts and sentenced to life imprisonment. The incident relating to count one took place at the home of the complainant and her mother, and those relating to counts two, three and four at the accused's home. The accused applied for leave to appeal the trial court's conviction and sentence. This was refused by the magistrate but leave was granted, in respect of both conviction and sentence, on petition to the relevant division of the High Court.

[4] The appeal before the Gauteng Division of the High Court, Pretoria was heard by Khumalo J and Mushasha AJ. On 25 July 2014 they dismissed the appeal on conviction but reduced the sentence to an effective term of 20 years' imprisonment. During the course of his judgment, Mushasha AJ, with whom Kumalo J concurred, said the following, inter alia:

(a) 'It was submitted on behalf of the appellant that…the complainant had consented to sexual intercourse.'

(b) 'Regard being had to the facts of this case I am persuaded to accept counsel's submissions in this regard.'

(c) 'The appellant obtained easy access into the house with the co-operation of the complainant…

(d) 'During all the sexual encounters with the appellant the complainant had always showed her unwillingness by merely closing her thighs.'

(e) 'There is no evidence that complainant experienced any psychological problems.'

(f) 'I have given a full consideration of the fact that the somewhat acquiescent conduct of the complainant was the result of the grooming effect.'

[5] The high court referred to the fact that, in terms of s 57(1) of the Act, a person under the age of 12 years is incapable of consenting to a sexual act but nevertheless found that the circumstances, which included those in para 4 above, constituted 'substantial and compelling circumstances, which justified a departure from the prescribed minimum sentence of life imprisonment' in terms of the Criminal Law Amendment Act 105 of 1997.

[6] The DPP, who is the appellant, then petitioned this court for special leave to appeal hereto against the reduced sentence of the high court in terms of s 16(1)*(b)*

read with s 17(3) of the Superior Courts Act 10 of 2013. The basis of the petition was that the high court had erred, as a matter of law, in having regard to the so-called consent of the complainant, when she was legally incapable of giving it. This court directed that the DPP should first argue whether this matter was appealable and only if such preliminary issue was decided affirmatively, could the appeal be heard on the merits. In parallel with her submissions relating to s 16(1)*(b)* read with s 17(3) of the Superior Courts Act, Ms Mahomed, counsel for the DPP, argued further, in response to this court's directive, that the question was, in any event, appealable in terms of s 311(1) of the CPA as 'a question of law'. The section reads as follows:

'(1) Where the provincial or local division on appeal, whether brought by the attorney-general[1] 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,[2] 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.' (Emphasis added.)

[7] The DPP applied for condonation for the late filing of its heads of argument. This was not opposed by the accused. That application has been granted. In the meantime, this court drew the attention of the parties to the recent unanimous judgment of five judges in this court in *Director of Public Prosecutions, Western Cape v Kock*,[3] inviting them to prepare argument accordingly.

[8] Section 316B of the Criminal Procedure Act 51 of 1977 (CPA) provides that:

'**316B Appeal by attorney-general against sentence of superior court**

---

[1] The DPP now takes the place of the former Attorney-General.
[2] Now the Supreme Court of Appeal.
[3] *Director of Public Prosecutions, Western Cape v Kock* [2015] ZASCA 197 (1 December 2015).

(1) Subject to subsection (2), the attorney-general[4] may appeal to the Appellate Division[5] against a sentence imposed upon an accused in a criminal case in a superior court.' (Own footnotes inserted.)

In *Director of Public Prosecutions v Olivier*,[6] Navsa JA, delivering the unanimous judgment of this court, said:

'This section provides for appeals to this court from a sentence imposed by a superior court. This does not mean a superior court sitting as a court of appeal. It clearly means a superior court sitting as a court of first instance.'[7]

Olivier was followed in *Kock* and referred to with approval by the Constitutional Court in *S v Nabolisa*.[8]

[9] Ms Mahomed argued in response to these clear statements in *Olivier* that what was sought was not an appeal against sentence per se but rather an appeal on a legal question, as formulated above. She relied on s 16(1)*(b)* of the Superior Courts Act which 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 to the Supreme Court of Appeal;'

As was noted in *S v Van Wyk & another* [9] and *Kock*, however, this general provision had to be read in conjunction with s 1 of the Superior Courts Act which specifically defines an appeal for the purposes of the Act as excluding 'an appeal in a matter regulated in terms of the Criminal Procedure Act . . . or in terms of any other criminal procedural law.'[10]

[10] Ms Mahomed also relied on ss 17(1)*(a)*(i) and (ii) of the Superior Courts Act which provide that:

'Leave to appeal may only be given where the judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration'.

---

[4] As mentioned in fn 1 above, the DPP now takes the place of the former Attorney-General.
[5] Now the Supreme Court of Appeal (SCA).
[6] *Director of Public Prosecutions v Olivier* [2006] ZASCA 121; 2006 (1) SACR 380 (SCA).
[7] Paragraph 15.
[8] *S v Nabolisa* [2013] ZACC 17; 2013 (2) SACR 221 (CC) para 81.
[9] *Van Wyk v S , Galela v S* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA).
[10] *Van Wyk* (above) para 18; *Kock* (above) para 14.

She submitted that the judgment of the high court brought the administration of justice into disrepute as it undermined the clear intention of the Legislature – endorsed by this court in *S v Malgas*[11] – to protect children from sexual offences through the deterrence, the extended removal from society and the display of social opprobrium that severe sentences entail. Accordingly, so the argument went, there was a compelling reason why the appeal should be heard and, correspondingly, a reasonable prospect of success of the appeal.

[11] In addition to *Kock*, Mr Alberts, for the accused, relied on *S v Mosterd,*[12] in which it was held that sentence can never be a question of law decided in favour of a convicted person.[13] Certainly, when it comes to the exercise of a judicial discretion in favour of a convicted person in regard to sentence, that cannot be a question of law decided in his or her favour. The definition of an appeal in the Superior Courts Act, however, overrides a consideration of s 311 of the CPA, in terms of the decision in *Kock*. This has to prevail, even if Ms Mahomed's argument that there is indeed a question of law were to be correct.

[12] While the approach of the high court in this matter is to be strongly deprecated, our hands are tied. This court's jurisdiction is circumscribed by the Constitution and legislation.[14] As was held in *Kock*, the definition of an appeal in the Superior Courts Act precludes our coming to the assistance of the DPP.[15] As was also pointed out in *Kock*, the facts in *Van Wyk* were distinguishable in so far as it dealt with the rights of a convicted person to appeal further to this court and the manner in which leave had to be sought from a division of the high court sitting as a court of appeal.[16] As was found in *Olivier*, the Criminal Procedure Act does not allow the DPP a right of appeal from the High Court, where that court has sat as a court of appeal.[17]

---

[11] *S v Malgas* [2001] ZASCA 30; 2001 (2) SA 1222 (SCA), especially paras 9 and 25.
[12] *S v Mosterd* 1991 (2) SACR 636 (T).
[13] At 640c-d.
[14] *S v Tonkin* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA) para 6. See also *Snyders v De Jager* [2015] ZASCA 137 para 8.
[15] Paragraph 20.
[16] Paragraphs 16 to 18.
[17] Paragraph 15.

[13] The court is much indebted to counsel for both the DPP and the accused for their fine, helpful and thoroughly prepared arguments.

[14] The following order is made:

The appeal is struck from the roll.

_____

N P WILLIS

JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	S Mahomed
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein
For the Respondent:	H L Alberts
Instructed by:	Justice Centre, Pretoria
	Justice Centre, Bloemfontein