THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 334/11

ALBERTO ABRAM de SOUSA **Appellant**

and

THE STATE **Respondent**

Neutral citation: *AD v The State* (334/2011) [2011] ZASCA 215 (29 November 2011)

Coram: Harms AP, Shongwe JA and Plasket AJA

Heard: 23 November 2011

Delivered: 29 November 2011

Summary: Criminal Procedure Act 51 of 1977 – s 309C – appeal against refusal of petition – issue to be determined is whether appellant enjoys reasonable prospects of success, not the merits of the appeal.

ORDER

On appeal from: Free State High Court, Bloemfontein (Hancke J and Claasen AJ sitting as court of appeal):

1 The appeal is upheld and the order of the court below is set aside.

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

'The appellant is granted leave to appeal against his convictions and sentences to the Free State High Court, Bloemfontein.'

JUDGMENT

PLASKET AJA (HARMS AP and SHONGWE JA concurring)

[1] The appellant was convicted, in the regional court sitting at Welkom, of two counts of indecent assault and one count of rape as defined by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He was sentenced to terms of imprisonment of five, ten and 15 years in respect of these offences. The sentences were ordered to run concurrently. He applied unsuccessfully to the trial court for leave to appeal against both the convictions and the sentences.

[2] He petitioned the Judge President of the Free State High Court, in terms of s 309C of the Criminal Procedure Act 51 of 1977, for leave to appeal. His petition was refused by Hancke J and Claasen AJ. He then applied for leave to appeal against the refusal of the petition. This application was heard by Hancke and Kruger JJ, Claasen AJ not being available. Having found reasonable prospects of success in respect of both the convictions and the sentences, the high court granted the appellant leave 'to appeal to the Supreme Court of Appeal against his convictions and sentences'. This course of events brought about the rather strange and illogical result that while the high court decided at first that the appellant had no reasonable prospects of succeeding on appeal to it, it then decided that the appellant had reasonable prospects of succeeding on appeal to this court.

[3] This court held in *S v Khoasasa*[1] that a refusal of leave to appeal on petition to two judges of a high court is a 'judgment or order' or a 'ruling' as contemplated by s 20(1) and s 21(1) of the Supreme Court Act 59 of 1959; that a petition for leave to appeal to a high court is, in effect, an appeal against the refusal of leave to appeal by the court of first instance; and that a refusal of leave to appeal by a high court is appealable to this court with the leave of the high court.

[4] In *Matshona v S*[2] this court endorsed the reasoning in *Khoasasa*. Leach AJA stated that the issue to be determined at this stage is 'whether leave to appeal should have been granted by the High Court and not the appeal itself'.[3] As a result, the test to be applied 'is simply whether there is a reasonable prospect of success in the envisaged appeal . . . rather than whether the appeal . . . ought to succeed or not'.[4]

[5] The reason why this is so is that this court's power to hear criminal appeals is a statutory power and does not derive from its inherent jurisdiction; ss 20 and 21(1) of the Supreme Court Act only grant jurisdiction to this court to hear appeals from high courts and s 309(1) of the Criminal Procedure Act provides that appeals from lower courts (including regional courts) lie to a high court.[5] The result is, in the words of Streicher JA in *Khoasasa*, the following:[6]

'Geen jurisdiksie word aan hierdie Hof verleen om 'n appél aan te hoor teen 'n skuldigbevinding en vonnis in 'n laer hof nie. Dit is eers nadat 'n appél vanaf 'n laer hof na 'n Provinsiale of Plaaslike Afdeling misluk het dat 'n beskuldigde met die nodige verlof na hierdie Hof appél kan aanteken.'

[6] There are good reasons why this is so. They were set out thus by Leach AJA in *Matshona*:[7]

'Not only does this Court lack the authority to determine the merits of the appellant's

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1 *S v Khoasasa* 2003 (1) SACR 123 (SCA) paras 14 and 19-22.
2 *Matshona v S* [2008] 4 All SA 68 (SCA) para 4.
3 Para 5.
4 Para 8.
5 *S v Khoasasa* (note 1) paras 11-12; *Matshona v S* (note 2) paras 4-5; *S v N* 1991 (2) SACR 10 (A) at 16a-d.
6 Para 12.
7 Para 6.

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 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.'

(I note in passing that in his petition, the appellant states that 'it would not be necessary to burden the Supreme Court of Appeal with the appeal. Leave may be granted to the High Court'.)

[7] It is clear that the high court's order was made in error: in the first paragraph of the judgment the correct position is set out, namely that the court was dealing with an application for leave to appeal against the dismissal of the appellant's petition; in the second paragraph the court, with reference to *Khoasasa*, stated that 'the applicant must ask this court for leave to appeal against the dismissal of his petition'; but then, contrary to what it had said initially, it granted leave to appeal against the convictions and sentences. On account of what I would term a patent error on the part of the court below, it is, in my view, open to this court to deal with the appeal on the basis that the court below intended to grant leave against the refusal of the petition and not in the terms in which it ultimately expressed itself.

[8] As the issue to be determined at this stage is whether the appellant has reasonable prospects of success on appeal, it is necessary to examine the merits. In *Smith v S*[8] this court said the following of the test for whether reasonable prospects of success exist:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably

8 *Smith v S* (475/10) [2011] ZASCA 15 (15 March 2011) para 7.

arrive at a conclusion different to that of the trial court. 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. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[9] I turn now to that enquiry. It is not necessary – and neither is it desirable – to deal with the merits in any detail. I shall do no more than make a limited number of points in respect of the appellant's convictions and the sentences imposed on him in order to determine whether it can be said that he has reasonable prospects of succeeding on appeal.

[10] As far as conviction is concerned, the complainant was a young single witness whose evidence had to be approached with caution. There was no corroboration for her version and the magistrate relied on her evidence being satisfactory in all material respects in order to satisfy the cautionary rules that applied. She also seems to have relied on the evidence of Ms Charmaine De Waal, a forensic social worker employed by the South African Police Service, who, having interviewed the complainant on a number of occasions, was of the opinion that she had told the truth.

[11] Whether the complainant was a satisfactory witness in all material respects – and consequently whether the cautionary rule was satisfied – was challenged by the appellant's counsel who pointed out a number of contradictions and other unsatisfactory aspects of the complainant's evidence. Whether the evidence of an expert to the effect that, in her opinion, the complainant told the truth is admissible, and can serve as 'corroboration', appears to me to be eminently arguable. What strikes one is that the magistrate rejected the version of the appellant as not being reasonably possibly true in the most perfunctory way and without any analysis of his evidence. Furthermore, the State has conceded that there is no evidence that count three was committed after 16 December 2007, the date on which the

new statutory offence of rape came into effect. That being so, the appellant has an unassailable prospect of this conviction being set aside on appeal, even if it is to be substituted with a conviction of indecent assault in terms of the common law. I conclude that the appellant enjoys reasonable prospects of succeeding on appeal against his convictions.

[12] The appellant was sentenced to 15 years' imprisonment in respect of count three. He was sentenced to five years' imprisonment in respect of count 1 (which was the least serious of the three counts) and ten years' imprisonment in respect of count 2, even though the *actus reus* in respect of counts 2 and 3 was identical. It would appear that the only reason why he was sentenced to 15 years' imprisonment in respect of count 3, and so much less severely in respect of count 2, was because he had been convicted of rape, even though, at common law, his acts amounted to indecent assault. In the light of the certainty that the rape conviction will be set aside, the sentence will also require re-assessment even if the conviction is substituted with a conviction of indecent assault. There is much to be said, in my view, for the argument that when the appellant's deeds, in respect of all three counts, are properly assessed within the triad of factors that informs sentencing, they may well be found to be 'disproportionate to the crime, the criminal and the needs of society'.[9] I am therefore of the view that, on sentence, the appellant has reasonable prospects of success on appeal.

[13] That being so, this appeal must succeed. Before making the order, however, it is necessary to say something of the procedure involved in cases such as this. That procedure is cumbersome and time consuming. It has involved a total of three high court judges and three judges of this court and the process is not completed. A further two judges of the high court still have to hear the appeal on its merits. It is perhaps time for thought to be given to legislative reform so that petitions can be finalised speedily at the high court level.

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9 *S v Malgas* 2001 (1) SACR 469 (SCA) para 25I. See too *S v Vilakazi* 2009 (1) SACR 552 (SCA) paras 18-20.

[14] The following order is made:

1 The appeal is upheld and the order of the court below is set aside.

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

'The appellant is granted leave to appeal against his convictions and sentences to the Free State High Court, Bloemfontein.'

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C PLASKET

ACTING JUDGE OF APPEAL

APPEARANCES

APPELLANT	J Nel

Instructed by
Muller Attorneys
Welkom
EG Cooper Majiedt Inc
Bloemfontein

RESPONDENT

WJ Harrington
Director of Public Prosecutions
Bloemfontein