THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No:
741/11
Not Reportable

In the matter between:

SIBUSISO JOHANNES MKHIZE **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Mkhize v The State* (741/11) ZASCA 74 (25 May 2012)

Coram: VAN HEERDEN, MAJIEDT JJA and PETSE AJA

Heard: 09 May 2012

Delivered: 25 May 2012

Summary: Criminal Procedure – Appeal against a refusal by a high court to grant leave to appeal on petition seeking leave to appeal against a sentence imposed by a regional court – the issue is whether leave to appeal should have been granted by the high court and not the merits of the appeal.

ORDER

On appeal from: North West High Court (Mafikeng) (Mpshe AJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the court below refusing the appellant leave to appeal is set aside and substituted with an order granting the appellant leave to appeal to the North West High Court (Mafikeng) against the sentence imposed on him in the regional court.

JUDGMENT

PETSE AJA (VAN HEERDEN, MAJIEDT JJA concuring):

[1] The appellant, Mr Sibusiso Johannes Mkhize, was arrested and arraigned before a regional magistrate in Mmabatho on a charge of theft of a motor vehicle. It was alleged that, on 29 September 2007 at Mafikeng, the appellant unlawfully and intentionally stole a navy-blue Opel Corsa, the property of or in the lawful possession of one Mr Kenneth Lobelo.

[2] Despite his plea of not guilty, the appellant was found guilty as charged and then sentenced to ten years' imprisonment. Disenchanted with his sentence, he applied for leave to appeal to the North West High Court in terms of s 309B of the Criminal Procedure Act 51 of 1977 (the Act). The trial magistrate refused this application. Subsequently he petitioned the North West High Court under s 309C of the Act but this petition suffered a similar fate. His subsequent application for leave to appeal to this court against the refusal of his petition under s 309C was successful (per Mpshe AJ).

[3] It is necessary to comment briefly on the terms of the order of the court below –

incorporated in a judgment by Mpshe AJ dated 12 August 2011 – granting leave to appeal to this court. It reads as follows:

'I therefore order that the application for leave to appeal for special leave to the Supreme Court of Appeal is granted.'

This order, on its terms, is obviously not elegantly crafted. This shortcoming is further compounded by the terms of the order issued by the Registrar of the North West High Court on 12 August 2011. It reads as follows:

'The application for leave to appeal to the Supreme Court of Appeal against sentence be and is hereby granted.'

[4] Because of the potential confusion if the orders mentioned in the preceding paragraph are taken at face value, I propose dealing first with the current state of the law concerning the ambit of this appeal. This is all the more important given that counsel in their heads of argument also addressed at length the merits of the appellant's 'appeal against sentence'.[1]

[5] In *S v Khoasasa* 2003 (1) SACR 123 (SCA) this court concluded, after a comprehensive analysis of the provisions of the Act relating to appeals, that an order of the high court refusing leave to appeal (be it against conviction or sentence or both) was an order of a provincial division against which an appellant, either with leave from the high court itself or, failing which, with leave of this court, could appeal. It went on to hold that a

sentence imposed in the regional court – which is what occurred in this appeal – can only be appealed against in this court after an appeal against such sentence has failed in the high court.

[6] This court subsequently described the reasoning in *Khoasasa* as unassailable.[2] Another pertinent decision is the unreported judgment of this court in *Smith v The State* [2011] ZASCA 15 (15 March 2011) in which the same question had arisen.

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1 I have put the words 'appeal against sentence' in parenthesis for reasons that will become apparent once I have considered this very point.

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

[7] In the light of the aforegoing it should be emphasised that what was before Mpshe AJ on 12 August 2011 was an application by the appellant in terms of which he sought leave to appeal against the refusal (per Kgoele J and Mpshe AJ) of his application for leave to appeal, to the North West High Court, against the sentence imposed on him in the regional court, Mmabatho. This appeal is consequently not before us on the merits. What we are called upon to decide at this stage is the question whether the court below was correct in refusing leave to appeal when it considered the appellant's petition under
s 309C of the Act.

[8] In order to answer that question we should in turn ask ourselves whether or not there is a reasonable prospect of success in the envisaged appeal to the high court against the sentence imposed on the appellant in the regional court.[3]

[9] It is to that question that I now turn. Before us, various grounds were relied upon by Mr Skibi, counsel for the appellant, in pursuit of the appellant's quest for leave to appeal against his sentence. I do not propose to mention all of them. Suffice to say that it was, *inter alia*, contended that the trial magistrate committed several misdirections and in particular (a) failed to have proper regard to appellant's personal circumstances and only did so, albeit in a perfunctory fashion, when dealing with the appellant's application for leave to appeal under s 309B of the Act; (b) found that the complainant had suffered psychological trauma as a consequence of both the theft of and damage to his motor vehicle, when there was not even a shred of evidence to sustain such a funding; (c) that, taking cognisance of the previous decisions[4] of this and other courts, the sentence imposed on the appellant was severe to a degree demonstrating that the trial court exercised its discretion unreasonably.[5]

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3 *R v Baloi* 1949 (1) SA 523 (A) at 524; *S v Sikosana* 1980 (4) SA 559 (A) at 562D-563A; *S v Mabena & another* 2007 (1) SACR 482 (SCA) para 22.
4 *S v Gerber* 2006 (1) SACR 618 (SCA) para 18; *Mthembu v S* 2008 (2) SACR 407 (SCA) para 38; *S v Naidoo* 2010 (1) SACR 499 (GSJ); *S v Nxopo* 2012 (1) SACR 13 (ECG).
5 *S v Giannoulis* 1975 (4) SA 867 (A) at 868G-H; *S v Kgosimore* 1999 (2) SACR 238 (SCA) para 10.

[10] Bearing, *inter alia*, the above factors in mind, we are persuaded that there is a reasonable prospect that a court of appeal might consider the sentence imposed to be excessive. This was conceded by counsel for the State. This appeal must therefore succeed.

[11] Before concluding there is one further aspect that requires mention. The appellant was sentenced on 17 March 2010 which means that he has already been incarcerated for over two years. Moreover the appellant was in custody for almost five months prior to his release on reduced bail. Bearing this in mind, it is hoped that the Director of Public Prosecutions, North West will consider placing the appeal on the roll for hearing at the earliest opportunity.

[12] In the result the following order is made:

1 The appeal is upheld.
2 The order of the court below refusing the appellant leave to appeal is set aside and substituted with an order granting the appellant leave to appeal to the North West High Court (Mafikeng) against the sentence imposed on him in the regional court.

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X M Petse

Acting Judge of Appeal

APPEARANCES

FOR APPELLANT:	N L Skibi Instructed by Legal Aid South Africa, Mafikeng Legal Aid South Africa, Bloemfontein
FOR RESPONDENT:	M G N Ndimande Instructed by the Director of Public Prosecutions, Mafikeng Director of Public Prosecutions, Bloemfontein