



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

**JUDGMENT**

**Not Reportable**

Case No:

807/2019

In the matter between:

**VINCENT CHAUKE**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Chauke v The State* (Case no 807/2019) [2020] ZASCA 68 (18 June 2020)

**Coram:** SALDULKER, MBHA, VAN DER MERWE AND SCHIPPERS  
JJA and MABINDLA-BOQWANA AJA

**Heard:** Disposed of without the hearing of oral argument in terms of s 19(a) of the Superior Courts Act 10 of 2013

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date for hand down is deemed to be 18 June 2020.

**Summary:** Criminal law and procedure – application for leave to appeal against the refusal of a petition by a high court against the sentence imposed by a regional court – test – whether there are reasonable prospects of success – leave granted to the high court.

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## **ORDER**

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**On appeal from:** Gauteng Division of the High Court, Johannesburg (Nicholls J and Manyathi AJ sitting as court of first instance):

1 The appeal succeeds.

2 The order refusing the appellant leave to appeal is set aside and is replaced with an order granting the appellant leave to appeal to the Gauteng Division of the High Court, Johannesburg, against the sentence imposed on him in the regional court.

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## **JUDGMENT**

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**Saldulker JA (Mbha, Van der Merwe and Schippers JJA and Mabindla-Boqwana AJA concurring):**

[1] The appellant was charged in the regional court, Johannesburg (regional court) with robbery with aggravating circumstances, read with the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997. He was convicted as charged, and after the court had found that there were no substantial and compelling circumstances in his case, he was sentenced to 15 years' imprisonment. An application for leave to appeal to the high court against the sentence was refused. The appellant then petitioned the Judge President of the Gauteng Division, Johannesburg (high court) in terms of s 309C of the Criminal Procedure Act 51 of 1977 for leave to appeal. On 5 May 2016, Nicholls J and Manyathi AJ dismissed the

petition. With the necessary leave of this Court, the appellant now appeals against the refusal of his petition in the high court.

[2] The issue to be decided is whether leave to appeal to the high court against the sentence imposed by the regional court should have been granted. In *S v Matshona*<sup>1</sup> Leach JA summarised the position as follows:

‘It is clear. . . that. . . where ...an accused obtains leave to appeal to this court against the refusal in a high court of a petition seeking leave to appeal against a conviction or sentence in the regional court, the issue before this court is whether leave to appeal should have been granted by the high court, and not the appeal itself. . . .’

The test is simply whether there is a reasonable prospect of success in the envisaged appeal against sentence.<sup>2</sup>

[3] It is not necessary to deal with the facts in any great detail, in the light of the outcome of the appeal. Suffice it to state that the appellant together with three others accosted a domestic helper in Mulbarton, Johannesburg, and ransacked the house where she was employed and stole goods valued at approximately R50 000. During the appellant’s arrest, goods belonging to the robbed home were found in his car.

[4] At the time of sentencing, the regional magistrate was informed by the appellant’s legal representative that the appellant was serving a sentence of 15 years’ imprisonment, imposed in the previous year, for a conviction of armed robbery. This was apart from what was reflected on the SAP 69, that he had a previous conviction for robbery committed in 2006, and for which he had been sentenced to seven years’ imprisonment. Despite this, the regional magistrate did not request or obtain confirmation of the existence of the appellant’s previous conviction and sentence (other than what was reflected on the SAP 69). The record before us confirmed this previous conviction and sentence.

[5] In passing sentence, the regional magistrate stated that as he had no documentation referring to the alleged sentence that the appellant was currently

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<sup>1</sup> [2008] ZASCA 58; 2013 (2) SACR 126 (SCA) para 5. See also *S v Khoasasa* 2003(1) SACR 123 (SCA); [2002] 4 All SA 635 (SCA).

<sup>2</sup> *S v Kriel*; 2012 (1) SACR 1 (SCA) para 12.

serving, he was not in a position to make an order regarding the concurrency of the sentence. In the result, the regional court did not consider the cumulative effect of the two sentences of 15 years' imprisonment each.

[6] The same applies to the decision of the high court. In dismissing the petition for leave to appeal, it stated: 'There is no evidence before court of the Accused serving the sentence with which he seeks this current sentence to run concurrently'. Accordingly, bearing the factors mentioned herein in mind, there exists a reasonable prospect that a court of appeal might consider that the regional magistrate ought to have obtained the requisite proof of the sentence that the appellant was serving and ought to have considered the cumulative effect of both sentences when imposing the sentence in the current matter. This appeal must therefore succeed.

[7] It remains to record that both counsel were agreed that this appeal could be disposed of without the hearing of oral argument in terms of s 19(a) of the Superior Courts Act 10 of 2013.<sup>3</sup>

[8] In the result, the following order is made:

1 The appeal succeeds.

2 The order refusing the appellant leave to appeal is set aside and is replaced with an order granting the appellant leave to appeal to the Gauteng Division of the High Court, Johannesburg against the sentence imposed on him in the regional court.

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**H K SALDULKER**  
**JUDGE OF APPEAL**

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<sup>3</sup> Section 19(a) provides: 'The Supreme Court of Appeal or Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any law. . . dispose of an appeal without the hearing of oral argument'.

## APPEARANCES

For appellant: W A Karam

Instructed by: Legal Aid SA, Johannesburg

Legal Aid SA, Bloemfontein

For respondent: M Mashego

Instructed by: Director of Public Prosecutions, Johannesburg

Director of Public Prosecutions, Bloemfontein