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[3] **THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

[4] **JUDGMENT**

[5] SCA Case No: 73/2012

[6] Not Reportable

[7]

[8] In the matter between:

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[10] ZAKHELE THEKISO

APPELLANT

[11]

[12] and

[13]

[14] THE STATE  
RESPONDENT

[15]

[16]

[17] Neutral citation: *Thekiso v S* (73/2012) [2012] ZASCA 129 (25  
September 2012)

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[19] Coram: Van Heerden and Shongwe JJA and Erasmus AJA

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[21] Heard: 12 September 2012

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[23] Delivered: 25 September 2012

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[25] Summary: *Criminal Procedure – leave to appeal – appeal against refusal of petition – issue to be determined is whether leave to appeal should have been granted by the High Court and not the appeal itself – the test is whether appellant enjoys reasonable prospects of success in the envisaged appeal, not the merits of the appeal.*

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[33] **ORDER**

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[35] **On appeal from:** Northern Gauteng High Court, Pretoria (Du Plessis & Legodi JJ sitting as court of appeal):

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[37] The following order is made:

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[39] (a) The appeal is upheld.

[40] (b) The order refusing the appellant leave to appeal is set aside and replaced with an order granting the appellant leave to appeal to the North Gauteng High Court, Pretoria, against the sentences imposed upon him in the regional court.

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[43] **JUDGMENT**

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[45] VAN HEERDEN JA (SHONGWE JA & ERASMUS AJA concurring):

[46] The appellant, Mr Zakhele Thekiso (accused 1 in the trial), was convicted in the then Southern Transvaal Regional Court held at Daveyton of five charges, namely murder, attempted murder, and three charges of kidnapping. He was sentenced to 20 years' imprisonment on the murder charge, 10 years' imprisonment on the attempted murder charge, and to 5 years' imprisonment on each of the three kidnapping charges. As none of the

sentences was ordered to run concurrently with any other sentence, his effective sentence was 45 years' imprisonment.

[47] The appellant's application to the Regional Court for leave to appeal against both conviction and sentence was refused. He then directed a petition for leave to appeal against both conviction and sentence to the North Gauteng High Court. This was dismissed by Du Plessis and Legodi JJ. Thereafter, the appellant directed a further petition to this court, which petition was referred to the Registrar of the North Gauteng High Court. In accordance with *S v Khoasasa* 2003 (1) SA 123 (SCA), the High Court dealt with this as an application for leave to appeal against its refusal of the first petition.

[48] Du Plessis and Van den Heever JJ, who heard this application for leave to appeal, concluded that, as regards the convictions, the application had no merit. Leave was accordingly refused. At the same time, however, the High Court granted leave to the appellant to appeal to this court against the High Court's refusal of his petition for leave to appeal against sentence. This latter refusal is the issue in the appeal that currently serves before us.

[49] It is clear from recent case law emanating from this court<sup>1</sup> that the ambit of the appeal before us is limited. We cannot determine the merits of the appeal, but are confined to the question whether leave to appeal to the High Court against sentence should have been granted, in other words, whether there is a reasonable prospect of success in the envisaged appeal against sentence, rather than whether the appeal against the sentence ought to succeed or not.

[50] According to the appellant, the trial court erred in not taking into account the cumulative effect of the sentences imposed upon him, resulting in an effective sentence that is manifestly inappropriate. Furthermore, he contended,

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<sup>1</sup>See in this regard *Matshona v S* [2008] 4 All SA 68 (SCA) paras 3-8, *Kriel v S* 2012 (1) SACR 1 (SCA) para 11, *AD v S* (334/2011) [2011] ZASCA 215 (29 November 2011) paras 3-8.

his sentence was disproportionately heavy when compared with the sentences imposed on his six co-accused.<sup>2</sup> This was conceded by counsel for the State.

[51] A sentence of 45 years' imprisonment is undoubtedly very severe. Bearing this in mind, and given the concession by counsel for the State, there exists in my view a reasonable prospect that a court of appeal might consider the sentence imposed to be too severe. This appeal must therefore succeed.

[52] In the circumstances, the following order is issued:

[53] (a) The appeal is upheld.

[54] (b) The order refusing the appellant leave to appeal is set aside and replaced with an order granting the appellant leave to appeal to the North Gauteng High Court, Pretoria, against the sentences imposed upon him in the regional court.

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**B J VAN HEERDEN**  
**JUDGE OF APPEAL**

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<sup>2</sup>In imposing sentence in respect of the other six accused (who were all convicted on the same five charges as the appellant), the regional magistrate had ordered that some of the sentences would run currently with the other sentences imposed, thus resulting in considerably lighter sentences.

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[67] APPEARANCES:

[68] APPELLANT: L AUGUSTYN

[69] Instructed by Pretoria Justice  
Centre, Pretoria

[70] Bloemfontein Justice Centre,  
Bloemfontein

[71]

[72] RESPONDENT: S R SIBARA

[73] Instructed by Director of Public Prosecutions,  
Pretoria

[74] Director of Public Prosecutions, Bloemfontein