THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 205/13
Reportable

In the matter between:

MATSHENG JACOB CHAKE **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Chake v State* (824/2012) [2013] ZASCA 141 (30 September 2013)

Coram: Navsa, Leach, Tshiqi and Saldulker JJA and Swain AJA

Heard: 10 September 2013

Delivered: 30 September 2013

Summary: Criminal Procedure ─ amendment of s 309(1)*(a)* of the Criminal Procedure Act 51 of 1977 by s 84 as read with s 99(1) and Schedule 4 of the Child Justice Act 75 of 2008 ─ effect thereof ─ amendment repealing automatic right of appeal of an offender sentenced to life imprisonment by a regional court under s 51(1) of the Criminal Law Amendment Act 105 of 1997 ─ decision in *S v Alam* 2011 (2) SACR 553 (WCC) approved.

O R D E R

On appeal from: North West High Court, Mafikeng (Leeuw JP and Landman J sitting as court of appeal):

1 The appeal succeeds to the limited extent set out in 2 below.

2 The order of the court a quo is set aside and is substituted with the following:

'The appeal is struck off the roll.'

J U D G M E N T

LEACH JA (NAVSA, TSHIQI and SALDULKER JJA and SWAIN AJA concurring)

[1] The appellant seeks to appeal to this court against a sentence of life imprisonment imposed upon him by a regional magistrate for raping two young girls. An appeal to the high court against his sentence was dismissed on 4 June 2012, as was a subsequent application to that court for leave to appeal further. An application to this court resulted in the appellant being granted the necessary leave.

[2] The two counts of rape on which the appellant was convicted arose out of an incident which occurred at his home near Matseng village on 9 October 2009. The State's case was that the appellant, who was in his mid-forties at the time, enticed the two complainants, girls who were both but 12 years of age, to enter his home by offering them money. Once they were inside his house, the appellant locked them in, switched off the light and proceeded to rape them in turn. In order to attempt to escape the consequences of this terrible deed, the appellant told the complainants that he would kill them if they reported what he had done.

[3] The appellant pleaded not guilty and denied that these events ever took place, but was convicted on the basis of what is set out above. Due to the age of the two complainants, each count of rape bore a prescribed minimum sentence of life

imprisonment under the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 ('the CLA') unless there were substantial and compelling circumstances justifying a more lenient sentence. The regional magistrate who heard the matter concluded that there were no such circumstances and, taking both counts together for the purposes of sentence, imposed life imprisonment.

[4] As already mentioned, the appellant proceeded to lodge an appeal to the high court solely against his sentence. This he did without obtaining the trial court's leave to do so. Consequently, when the matter came before the high court, his counsel most properly drew the court's attention to the decision in *S v Alam* 2011 (2) SACR 553 (WCC), in which it had been held that, since 1 April 2010, an accused sentenced to life imprisonment by a regional magistrate required leave to appeal.

[5] The court a quo concluded that the decision in *Alam* was wrong in that regard and held that despite the appellant having been convicted and sentenced after 1 April 2010, he enjoyed an automatic right of appeal. It proceeded to hear the appeal. After hearing argument and having concluded that there were no compelling and substantial circumstances justifying a sentence less than life imprisonment, the court a quo dismissed the appeal.

[6] Of course the first issue to decide is whether the court a quo was correct in concluding that the appeal was properly before it. The uncertainty in this regard arises out of various statutory enactments relating to the imposition of sentence by regional courts for offences referred to in the CLA, an enactment that has not been free from controversy and has given rise to various statutory amendments. For present purposes it suffices to record that immediately before the end of 2007 the position was as follows: the ordinary jurisdiction of a regional magistrate was limited to a maximum of 15 years' imprisonment; Part 1 of Schedule 2 to the CLA however prescribed a minimum sentence of life imprisonment for certain offences; and s 52 of the CLA therefore obliged a regional magistrate, on convicting an accused for an offence for which life imprisonment was prescribed, to stop the proceedings and to commit the accused for sentence in the high court.

[7] This position changed with effect from 31 December 2007 when s 52 of the CLA was repealed by s 2 of the Criminal Law (Sentencing) Amendment Act 38 of

2007 (the Sentencing Act) which, at the same time, amended s 51(1) of the CLA to allow a regional court to impose life imprisonment on a person convicted of an offence referred to in Part 1 of Schedule 2. In addition, s 6 of the Sentencing Act amended s 309(1)*(a)* of the Criminal Procedure Act 51 of 1977 so as to provide an offender sentenced to life imprisonment by a regional court an automatic right of appeal to a high court. This latter provision was presumably in order to provide a safety net for those who were thereafter to be sentenced to life imprisonment by regional courts exercising jurisdiction far beyond that they ordinarily enjoyed.

[8] After having been amended in this way, from 31 December 2007 s 309(1)(*a*) of the Criminal Procedure Act read as follows:

'(1)(*a*) Any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that ─

(i) if that person was, at the time of the commission of the offence ─

(*aa*) below the age of 16 years; or

(*bb*) at least 16 years of age but below the age of 18 years and was not assisted by a legal representative at the time of conviction in a regional court; and

(*cc*) sentenced to any form of imprisonment as contemplated in section 276(1) that was not wholly suspended; or

(ii) if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997),

he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(*b*) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)(*a*).'

(I should immediately mention that s 309B deals with applications for leave to appeal made to the lower court that convicted the offender, while s 309C provides a procedure whereby the convicted offender whose application for leave to appeal under s 309B has been unsuccessful, to seek leave of the high court by way of petition.)

[9] Thus from January 2008, persons in the position of the appellant sentenced to life imprisonment by a regional court under the CLA enjoyed an automatic right of

appeal to the high court without having to obtain leave under s 309B or 309C of the Criminal Procedure Act. This position endured until the Child Justice Act 75 of 2008 came into operation on 1 April 2010. Section 84 o33f that Act provides:

'(1) An appeal by a child against a conviction, sentence or order as provided for in this Act must be noted and dealt with in terms of the provisions of Chapters 30 and 31 of the Criminal Procedure Act: Provided that if that child was, at the time of the commission of the alleged offence –

(a) under the age of 16 years; or

(b) 16 years or older but under the age of 18 years and has been sentenced to any form of imprisonment that was not wholly suspended,

he or she may note the appeal without having to apply for leave in terms of section 309B of that Act in the case of an appeal from a lower court and in terms of section 316 of that Act in the case of an appeal from a High Court . . .'

[10] The automatic right of appeal provided to minors by this section is almost identical to that set out in part of the proviso to s 309(1)(*a*) as it read from 31 December 2007 (quoted in para 8 above). The only alteration is that s 84 is slightly broader in its operation in that it provides for a child below sixteen years of age to enjoy an automatic right of appeal without regard to whether imprisonment not wholly suspended is imposed. Be that as it may, s 99(1) of the Child Justice Act further amended or repealed the laws specified in Schedule 4 of that Act 'to the extent set out in the third column of that Schedule'.

[11] The laws so amended included s 309(1)(*a*) of the Criminal Procedure Act, which was altered to read as follows:

'(1)(*a*) Subject to section 84 of the Child Justice Act, 2008, any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction:'

Thus, at a stroke, by amending the proviso to s 309(1)(*a*) in this way, the legislature did away with the automatic right of appeal enjoyed by an offender sentenced to life imprisonment by a regional court, a right that had been in existence for only two years and three months.

[12] The court a quo concluded that the Child Justice Act had been intended to protect the interests of children and that its provisions, including s 99(1), were of no application to adult offenders; and that therefore the automatic right of appeal enjoyed by an adult offender, such as the appellant when sentenced to life imprisonment by a regional court, had not been repealed.

[13] This conclusion is clearly wrong. Judges must be careful not to submit to the temptation of substituting what they regard would have been reasonable and sensible for what was in fact done by the legislature, and to thereby 'cross the divide between interpretation and legislation'.[1] Instead, a court must determine the appropriate meaning of the words used in the statutory provision in question by adopting their plain meaning unless it would lead to a glaring absurdity. In the present case there is no absurdity. The effect of s 99(1) of the Child Justice Act, as read with the schedule thereto, was to replace s 309(1)(*a*) of the Criminal Procedure Act with a new section that no longer included an automatic right of appeal in cases of life imprisonment imposed by regional courts as had up until then been contained in part (ii) of the proviso to the section. Whether it would have been wiser or more sensible to have retained that provision is neither here nor there. The legislature removed it and, absent any legislative provision preserving it, it is not open for the courts to regard it as it still being in existence.

[14] I do not know why part (ii) of the proviso was removed from the statute books. It may be that it was done in error, possibly flowing from the fact that the Child Justice Act, in bill form, had initially been published in 2002, well before the automatic right of appeal in life imprisonment cases was introduced. On the other hand, it may have been felt that it was unnecessary and that the interests of justice were adequately protected by the leave to appeal provisions in ss 309B and 309C. It would be idle speculation to attempt to decide which is more likely, but the fact remains that the automatic right to appeal in life imprisonment cases was repealed.

[15] I stress that there was no attempt to impugn the provisions of the Child Justice Act that amended s 309(1)(*a*) by way of a constitutional challenge, nor were the parties who would have to be cited in such a case before court. An automatic

[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

right of appeal was assented simply on the basis that an interpretive excuse led inevitably to that conclusion. As demonstrated above, that is not so. For present purposes we must therefore accept that the amendment was validly made and, that being so, the court a quo wrongly concluded that the appellant still enjoyed an automatic right of appeal. The decision in *Alam* on this issue was correct.

[16] It is necessary to emphasise that the appellant is not without recourse, and that might explain the lack of a constitutional challenge. The appellant ought to have applied to the regional court for leave to appeal under s 309B of the Criminal Procedure Act and, in the event of that application failing, have petitioned a high court for such leave under s 309C. This he failed to do. His appeal was therefore not properly before the high court, which should have declined to entertain it, and its order dismissing the appellant's appeal must be set aside. To that limited extent the appeal to this court must succeed. This will leave the appellant at liberty to seek to pursue an appeal in the prescribed manner if he is so advised.

[17] It remains to comment on the State's handling of this matter. The issue whether a person sentenced to life imprisonment by a regional court has an automatic right of appeal is clearly a matter of national importance, and I have no doubt that this influenced the decision of this court to grant leave to appeal. Indeed we were informed by counsel for the parties that in certain divisions of the high court the approach in *Alam* is being followed, but that this is not the uniform approach throughout the country. Despite this, the State entrusted the presentation of its argument to junior counsel of but a few years' experience. He did his best I am sure, but it is unacceptable that it was left up to him to conduct the matter without supervision, particularly as he did not attempt to argue against the appellant's contention that *Alam* had been incorrectly decided. Both the courts and the public at large deserve better service from the Directorate. Even if the State for some reason was of the view that *Alam* might not be correct, we ought to have enjoyed argument on the matter to assist us in reaching a judgment which binds the country.

[18] It is ordered as follows:

1 The appeal succeeds to the limited extent set out in 2 below.

2 The order of the court a quo is set aside and is substituted with the following:

‘The appeal is struck off the roll.’

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L E Leach

Judge of Appeal

APPEARANCES:

For Appellant:	N L SKIBI Instructed by: Mafikeng Justice Centre, Mafikeng
For Respondent:	D P RANTSANE Instructed by: The Director of Public Prosecutions, North West Division, Mmabatho The Director of Public Prosecutions, Bloemfontein