REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 306/13

In the matter between:

WASHMAN SENGAMA Applicant

and

The State Respondent

Neutral citation: *Sengama v State* [2013] ZASCA 96 (23 August 2013)

Coram: BRAND, LEACH et WALLIS JJA.

Delivered: 23 August 2013

Summary: Criminal Procedure Amendment Act 8 of 2013 – amendment of s 316(10)*(c)* of the Criminal Procedure Act 51 of 1977 – effect.

ORDER

On petition: The application for leave to appeal is dismissed.

JUDGMENT

WALLIS JA (BRAND et LEACH JJA concurring)

[1] The Applicant was convicted of murder and various other offences by Willis J in the South Gauteng High Court. He was sentenced on the charge of murder to life imprisonment and on the other counts to varying periods of imprisonment that would run concurrently with the sentence of life imprisonment. An application for leave to appeal against conviction and sentence was dismissed and he now petitions this court for such leave. He was legally represented at the trial and is legally represented in pursuing this petition.

[2] The only issue at the trial was whether the applicant and his co-accused were two of three men who abducted a young woman, Posiswa Pungani, from the room in which she was sleeping with her boyfriend at the Sitoka Hostel, Tembisa, and then took her to a place near the hostel

and murdered her. The applicant's co-accused admitted that he was one of the perpetrators of this crime but denied that the applicant had participated or was present. This is the strongest point in favour of the petition but it is outweighed by the evidence of identification of the applicant by the deceased's boyfriend and another witness and the fact that the gun used to kill the deceased was found in the applicant's possession. The applicant's defence was an alibi in that he claimed at the time to have been in bed with his girlfriend. That young lady was not however called as a witness and no explanation was proffered for this failure. In addition the applicant was a poor witness whose evidence was rejected by the trial judge.

[3] In those circumstances we are satisfied that there is no merit in the petition. However, until the recent amendment of s 316(10) of the Criminal Procedure Act 51 of 1977 (the CPA) we could not have disposed of the petition until we had received the full record of the trial. This provision (introduced by way of an amendment in 2008) has resulted in considerable delays in this court dealing with petitions and the incurring of substantial costs in preparing and lodging records with this court. A substantial backlog of petitions has built up as members of this court awaited the provision of records. That did not delay the disposition of

meritorious petitions as these were granted on the basis of the material in the petition.

[4] There was and is no practical need for records to be lodged before disposing of petitions as applicants are obliged in terms of s 316(4)*(a)* of the CPA to set out clearly and specifically the grounds upon which leave to appeal is sought. That requirement is reinforced by the rules of this court, which require petitioners to set out the grounds upon which they submit that leave to appeal should be granted and to identify any relevant passages in the records that need consideration in the determination of the petition. In addition the judges are empowered if necessary to call for the whole or any part of the record to enable there to be a just determination of the petition. The requirement that records be filed with this court under s 316(10)*(c)* was also anomalous in that records were not always required in disposing of petitions in criminal cases even though the cases were similar. Thus, when a petition for leave to appeal against the dismissal of an appeal against a conviction in the magistrates' court is lodged in terms of s 20(4)*(b)* of the Supreme Court Act 59 of 1959, there is no requirement for the record of the trial to be lodged with this court and this court's rules frown upon it. Similarly an application for leave to appeal against the refusal of leave to appeal by two judges in the high court, in terms of the petition procedure under s 309C of the CPA, is dealt with

under ss 20 and 21 of the Supreme Court Act and there is no requirement that the record be filed with this court. However, where special leave is sought to appeal from a decision of a full court, given on appeal to it from a single judge sitting in the high court, s 316(3)*(c)* and *(d)*, read with s 316(10) of the CPA requires the record to accompany the petition.

[5] This situation was largely remedied by the passage of the Criminal Procedure Amendment Act 8 of 2013. It amends s 316(10)*(c)* of the CPA so that the registrar of a high court who receives notice of a petition is no longer automatically obliged to forward the record of the trial to this court. Registrars are now only obliged to do so if:

‘(i) the accused was not legally represented at the trial; or

(ii) the accused is not legally represented for the purposes of the petition; or

(iii) the prospective appeal is not against sentence only; or

(iv) the judges considering the petition, in the interest of justice, request the record or only a portion of the record.’

There is a corresponding amendment to s 316(12) authorising the judges considering an appeal to call for a copy of all or a portion of the record of the proceedings if it was not submitted in terms of s 316(10)*(c)*.

[6] The use of the word ‘or’ to separate each of these sub-sections may cause some confusion to arise in relation to the obligations of

registrars of the high court to furnish records to this court when they receive notice of a petition. If they are taken as reflecting four separate alternatives, that is, they are all read disjunctively, then the amendment would be self-defeating, because registrars will be obliged to furnish the record to this court in almost every case. The only exception will be where the applicant seeks to appeal against sentence alone and was legally represented at the trial and is similarly represented in lodging the petition. If that were indeed the effect of the amendment there would have been little or no purpose in inserting, in both s 316(10)*(c)* and s 310(12), a provision authorising the judges to call for all or part of the record. In an appeal against sentence alone the court must consider the appropriateness of the sentence in the light of the findings of fact made by the court when convicting the applicant. It will only be in rare cases that it is necessary or permissible to have regard to the record of the trial for the purposes of considering a petition seeking leave to appeal against sentence.

[7] Clearly the word ‘or’ is not intended to be read disjunctively in every case where it has been used in the amended s 316(10)*(c)*. It is accordingly permissible to read it conjunctively where that is necessary to give effect to the manifest purpose of the legislation, which was to

dispense with the need to file the record of proceedings in most cases.[1] As Innes CJ pointed out in *Barlin v Licencing Court for the Cape*:[2]

‘Now the words "and" and "or" are sometimes inaccurately used; and there are many cases in which one of them has been held to be the equivalent of the other.’

This is such a case. Accordingly where ‘or’ is used at the end of the new sub-section (ii) it is to be read conjunctively as if the word ‘and’ had appeared at that point. There will then be two circumstances in which the registrar of a high court will furnish the record of the proceedings to this court immediately on receiving notice of a petition. They will be in cases where leave is being sought to appeal against conviction, whether or not in conjunction with leave to appeal against sentence, and the applicant for leave was either not legally represented at the trial or is not legally represented for the purposes of the petition. Registrars will also be obliged to furnish all or portion of the record if the judges dealing with the petition call for it under s 316(1)*(c)*(iv).

[8] To summarise, a registrar must furnish the record of proceedings to this court on receiving notice of a petition in cases where:

(a) leave is being sought to appeal against conviction and the applicant was not legally represented at the trial;

[1] *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg* 1999 (2) SA 1057 (SCA) para 11.

[2] 1924 AD 472 at 478.

(b) leave is being sought to appeal against conviction and the applicant is not legally represented for the purposes of the petition.

Where the judges dealing with the petition after it has been filed, in circumstances where it was not necessary for the registrar to prepare and file the record of proceedings, request that all or a portion of the record be furnished the registrar shall comply with that request forthwith.

[9] It was accordingly not necessary for us to await the furnishing of the record of proceedings in the high court before disposing of this petition. The application for leave to appeal is accordingly dismissed.

M J D WALLIS

JUDGE OF APPEAL