THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 094/2015
Not reportable

In the matter between:

STEVEN OFENTSE DIPHOLO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Dipholo v The State* (094/15) [2015] ZASCA 120 (16 September 2015)

Coram: Bosielo, Petse JJA and Van der Merwe AJA

Heard: **02 September 2015**

Delivered: **16 September 2015**

Summary: Appeal against effective sentence of 40 years' imprisonment – leave to appeal refused by presiding magistrate – petition refused by full bench of the court below – leave to appeal to the Supreme Court of Appeal granted by the Supreme Court of Appeal – whether this Court has jurisdiction to hear appeals on the merits directly from the magistrates' court – Section 309 of the Criminal Procedure Act 51 of 1977.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Landman and Gura JJ sitting as court of appeal).

a) The appeal is upheld.
b) The order of the court below refusing the appellant leave to appeal is set aside and replaced with the following:
'The applicant is granted leave to appeal against the sentence imposed on him by the regional magistrate to the North West Division of the High Court, Mahikeng.'

JUDGMENT

Bosielo JA (Petse JA and Van der Merwe AJA concurring)

[1] The appellant was convicted in the regional court, Lichtenburg on 17 March 2009 of rape read with the provisions of s 51(2) and Part II Schedule 2 of the Criminal Law Amendment Act 105 of 1997, robbery with aggravating circumstances and sexual assault. He was sentenced as follows:
(a) Count 1 – rape: 15 years' imprisonment.
(b) Count 2 – robbery with aggravating circumstances: 15 years' imprisonment.
(c) Count 4 – sexual assault: 10 years' imprisonment.

[2] The regional magistrate did not order the sentences to run concurrently and as a result, the appellant was sentenced to 40 years of direct imprisonment. The appellant then applied for leave to appeal against his sentence only, to the regional court. The regional magistrate dismissed the application for leave to appeal on 1 May 2009. On 10 August 2012, the appellant's petition for leave to appeal against the judgment of the regional magistrate to the North West Division, Mahikeng (Landman and Gura JJ) was also dismissed.

[3] Aggrieved by this, the appellant filed an application for special leave to appeal to this Court. On 16 January 2015 this Court granted him leave to appeal against his sentence only to this Court. Hence this appeal before us.

[4] In their heads of argument and relying on *S v Tonkin* 2014 (1) SACR 583 (SCA), the appellant raised the question whether this Court had jurisdiction to hear this appeal against the sentences on the merits in terms of s 16(1)(*b*) of the Superior Court Act 10 of 2013. As a result, we raised this crisp issue with both counsel as a preliminary issue. After being referred to a long list of cases from this Court which included *S v Khoasasa* (515/2001) [2002] ZASCA 113 (20 September 2002); 2003 (1) SACR 123 (SCA), *S v Matshona* (509/2007) [2008] ZASCA 58; 2013 (2) SACR 126 (SCA), *S v Tonkin* (938/12) [2013] ZASCA 179; 2014 (1) SACR 583 (SCA) and *Van Wyk v S; Galela v S* (20273/2014, 20448/2014) [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA) (29 September 2014) both counsel conceded, correctly in my view, that this Court does not have jurisdiction to hear this appeal on the merits as it does not have the jurisdiction to hear appeals directly from the magistrates' court. In terms of the

law and the current jurisprudence of our courts such appeals must be heard first by the high court.

[5] It is correct that in terms of our current law appeals from the magistrates' court must be heard by the high court. Section 309(1)(*a*) of the Criminal Procedure Act 51 of 1997 (CPA). There is no provision in the law for this court to hear appeals on the merits directly from the magistrates' courts. However, confusion has reigned in the various divisions of the high court in recent times regarding the proper procedure to be followed by an accused in instances where a high court has refused leave to appeal a judgment from the magistrates' court. One would have hoped that the position was settled in *S v Khoasasa* (supra) paras 19-22. However, as this confusion persisted, this Court once again restated the correct approach in *S v Tonkin* 2014 (1) SACR 583 (SCA) in para 6 as follows:

'In response to our invitation, counsel for the appellant submitted a well prepared argument urging us to entertain the merits of the appeal. But on reflection it appears to me that, unfortunate as it may be, we have no authority to do so .The reason why it is so have been stated in Khoasasa and elaborated upon in the decisions following upon it to which I have referred. On reflection, these reasons cannot, in my view, be faulted. In broad outline they are as follows:

(*a*) Although this Court has inherent jurisdiction to regulate its own procedure, it has no inherent or original jurisdiction to hear appeals from other courts. In the present context, its jurisdiction is confined to that which is bestowed upon it by sections 20 and 21 of the Supreme Court Act. In terms of these sections the jurisdiction of this Court is limited to appeals against decisions of the high court.

(*b*) When leave to appeal has been refused by the high court, that court rather obviously, did not decide the merits of the appeal. If this court were therefore to entertain an appeal on the merits in those circumstances, it would in effect be hearing an appeal directly from the magistrates' court. That would be in direct conflict with s 309 of the Criminal Procedure Act, which provides that

appeals from lower courts lie to a high court. The "order on appeal" by the high court – in the language of s 20(4) – that is appealed against is the refusal of the petition for leave to appeal and nothing else'.

[6] It follows therefore that what is before us is not an appeal on the merits, as the high court has not heard the appeal on the merits, but an appeal against the refusal of leave to appeal by the high court. *S v Khoasasa* (supra) paras 14 and 19-22; *S v Matshona* [2008] ZASCA 58; [2008] 4 All SA 68 (SCA); 2013 (2) SACR 126 (SCA) para 4.In the circumstances, what this Court had to decide is simply whether the court below erred in finding that there were no reasonable prospects of success on appeal against the sentence imposed by the regional magistrate and thus refusing leave to the appellant to appeal against the judgement of the regional magistrate. *S v Tonkin* (supra) para 3.

[7] It is trite that leave to appeal can only be granted where there are reasonable prospects of success. *S v Smith* 2012 (1) SACR 567 (SCA) para 7. The appellant's counsel submitted that the regional magistrate erred in ordering the sentences imposed on the appellant to run consecutively and not concurrently. This, notwithstanding the fact that all the offences happened at the same time. As a result the appellant has had to serve a cumulative sentence of imprisonment for 40 years, which he submitted was disturbingly disproportionate or shocking. See *S v Muller & another* 2012 (2) SACR 545 (SCA) paras 8, 9 and 11; *S v Hendrick Van Wyk* (20273/2014) [2014] ZASCA 152; *Mudau v S* (547/13) [2014] ZASCA 43 (31 May 2014)

[8] Notably, the respondent's counsel conceded that the regional magistrate erred in failing to consider the cumulative effect of the sentences which he imposed on the appellant. He conceded further, correctly and fairly in my view, that the cumulative sentence in the circumstances of this case, induces a sense of shock. These concessions are, in my view, sufficient to justify the conclusion that there are reasonable prospects of success that another court might interfere with the sentences imposed by the regional magistrate.

[9] In the circumstances, I am satisfied that leave to appeal should be granted to the North West Division of the High Court, Mahikeng.

[10] In the result it is ordered that:

a) The appeal is upheld.

b) The order of the court below refusing the appellant leave to appeal is set aside and replaced with the following:

'The applicant is granted leave to appeal against the sentence imposed on him by the regional magistrate to the North West Division of the High Court, Mahikeng.'

L O Bosielo
Judge of Appeal

APPEARANCES:

For Appellant:	LN Skibi Instructed by: Legal Aid South Africa, Mahikeng Legal Aid South Africa, Bloemfontein
For Respondent:	Adv MG Ndimande Instructed by: Director Public Prosecutions, Mmabatho Director Public Prosecutions, Bloemfontein