



SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 230/2015

In the appeal between:

ELPHAS ELVIS LUBISI

First Appellant

and

THE STATE

Respondent

Neutral citation: *Lubisi v The State* (230/2015) [2015] ZASCA (179)
(27 November 2015).

Coram: Mhlantla, Shongwe, Theron, Dambuza, and Mathopo JJA

Heard: 5 November 2015

Delivered: 27 November 2015

Summary: Criminal Procedure – appeal against conviction – leave to appeal refused by regional magistrate – petition refused by the court a quo – special leave to appeal against conviction granted by the Supreme Court of Appeal – Section 309 of the Criminal Procedure Act – whether leave to appeal ought to have been granted – this court has no jurisdiction to hear appeals on the merits directly from the magistrates’ courts.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mngqibisa–Thusi J and Makhubela AJ sitting as court of appeal):

1 The appeal is upheld.

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

‘The applicant is granted leave to appeal to the Gauteng Division of the High Court against his conviction of murder in the Regional Court, Nelspruit, Mpumalanga.’

JUDGMENT

Mhlantla JA (Shongwe, Theron, Dambuza, and Mathopo JJA concurring):

[1] The appellant was arraigned in the Regional Court, Nelspruit, Mpumalanga on a charge of murder read with the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act). At the end of the trial he was convicted as charged and sentenced to ten years’ imprisonment. His application for leave to appeal against conviction was dismissed by the regional magistrate.

[2] Aggrieved by the outcome of his application, the appellant lodged a petition for leave to appeal against conviction and sentence in the

Gauteng Division of the High Court, Pretoria, in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA). The petition was dismissed by the full bench of that division (Mngqibisa–Thusi J and Makhubela AJ).

[3] The appellant thereafter lodged an application in this court for special leave to appeal against conviction and sentence in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013. In his affidavit, the appellant set out the history of his application and the fact that on 21 November 2014 the court a quo had dismissed his petition in terms of s 309C(2) of the CPA. In the following paragraph, he averred that he was approaching this court in terms of s 16(1)(b) read with s 17(2)(b) of Superior Courts Act for special leave to appeal the order refusing his petition in terms of s 309C(2). This court granted the appellant special leave to appeal against conviction.

[4] The respondent in its heads of argument raised a point *in limine* that this court lacked jurisdiction to adjudicate the appeal on the merits and that the appeal was in fact directed against the order of the court a quo refusing the appellant leave to appeal by way of petition. As this point was raised by the respondent after the appellant had already filed his written submissions, we granted the appellant an opportunity to file supplementary heads of argument and for the respondent to reply, if it so wished. Both parties filed written submissions on this point.

[5] Before us, counsel for the appellant submitted that this court was seized with the appeal against conviction by virtue of the order granted by it. He further argued that s 19 of the Superior Courts Act¹ conferred

¹It provides:

‘19 Powers of court on hearing of hearing of appeals

The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law-

jurisdiction on this court to consider the merits of the appeal. He therefore urged us to entertain the merits of the appeal notwithstanding the fact that the appeal had not been adjudicated by the court a quo.

[6] It is apposite at this stage to have regard to the relevant legislative framework. Section 309(1)(a) of the CPA provides:-

‘Appeal from lower court by person convicted

‘(1)(a) Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 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....’

[7] Section 16(1)(b) of the Superior Courts Act states:

‘Appeals generally

(1) Subject to section 15(1), the Constitution and any other law–

(b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal.’

[8] The question whether this court has jurisdiction to entertain the appeal on the merits under the circumstances of this case has been considered by this court in various decisions which include: *S v Khoasasa* [2002] ZASCA 113; 2003 (1) SACR 123 (SCA), *S v Matshona* [2008] ZASCA 58; 2013 (2) SACR 126 (SCA), *S v Tonkin* [2013] ZSACA 179; 2014 (1) SACR 583 (SCA), and *Van Wyk v S, Galela v S* [2014] ZASCA

(a) dispose of an appeal without the hearing of oral argument;

(b) receive further evidence;

(c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.’

152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA), and most recently, in *Dipholo v S* [2015] ZASCA 120.

[9] In *Dipholo*,² the appellant had also been granted special leave by this court after his application for leave to appeal by way of petition had been refused and no appeal on the merits had been adjudicated by the high court. Bosielo JA held:

‘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 judgment of the regional magistrate. *S v Tonkin* (supra) para 3.’

[10] It is evident that the circumstances of this appeal are on all fours with *Dipholo*. It follows then that the decision of the court a quo which is the subject of the present appeal is the refusal of the petition and that the question for determination is whether the court a quo was correct when it dismissed the petition in terms of s 309C of the CPA. If it was, that will be the end of the matter. However, if the court a quo erred, then leave to appeal to the full court will have to be granted for the appeal on the merits to be adjudicated by that court.

[11] The test in an application of this nature is whether there are reasonable prospects of success in the envisaged appeal. It is not desirable to deal with the merits in detail. I shall only refer to a limited number of

²*Dipholo v S* [2015] ZASCA 120 para 6.

points to determine whether there are reasonable prospects of success on appeal. The appellant's counsel challenged the evidence of the eye-witnesses. In this regard, he pointed out a number of contradictions and questioned their credibility and reliability due to their state of sobriety. Another aspect related to the chain evidence regarding the ballistic evidence and circumstances surrounding the discovery of the cartridge case.

[12] What is of concern is the manner in which the regional magistrate evaluated the evidence and in particular, the ballistic evidence. In this regard, he appears to have placed too much emphasis on the cartridge case that was found, yet dealt with that evidence in a perfunctory manner. In the end, one is left in the dark about what the trial court's opinion was with regards to that evidence. In my view and without wishing to comment on the merits in any detail, the alleged contradictions and other unsatisfactory aspects of the evidence of the eye-witnesses as well as the the basis upon which the trial court accepted and relied upon the ballistic evidence are not dealt with adequately in the judgment. This can be said to be sufficiently weighty to justify a conclusion that, if leave to appeal is granted, the appellant's prospects of success are reasonable. It follows that the appeal must succeed.

[13] In the result the following order is made:

1 The appeal is upheld.

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

'The applicant is granted leave to appeal to the Gauteng Division of the High Court against his conviction of murder in the Regional Court, Nelspruit, Mpumalanga.'

**N Z MHLANTLA
JUDGE OF APPEAL**

APPEARANCES:

For Appellant: P J de Necker

Instructed by: Coert Jordaan Attorneys Inc
Giorgi & Gerber Attorneys, Bloemfontein

For Respondent: P W Coetzer

Instructed by: Director of Public Prosecutions, Pretoria
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