**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Not Reportable**

Case no: 20075/14

In the matter between:

**COLIN ALLAN GREENWOOD** **APPELLANT**

and

**THE STATE** **RESPONDENT**

**Neutral citation:** *Greenwood v S* (20075/14) [2015] ZASCA 56 (30 March 2015)

**Coram:** Shongwe and Mbha JJA and Gorven AJA

**Heard:** **16 March 2015**

**Delivered:** **30 March 2015**

**Summary:** Criminal Procedure – appeal against refusal to grant leave to appeal on petition – question to be adjudicated is whether the appellant has reasonable prospects of success on appeal and whether there are any other reasons why an appeal should be heard.

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## ORDER

**On appeal from:** The Eastern Cape High Court, East London (Dambuza and Tshiki JJ concurring, sitting as court of appeal):

The appeal is dismissed.

## JUDGMENT

**Shongwe JA (Mbha JA and Gorven AJA concurring)**

[1] On 26 April 2006, the appellant was convicted on two counts of indecent assault in terms of s 94 of the Criminal Procedure Act 51 of 1977 ('the Act'), two counts of rape in contravention of s 3, read with ss 56(1), 57(1), 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the Sexual Offences Act') and three counts of sexual assault in contravention of s 5(1) read with ss 1, 56(1), 57(1), 58, 59 and 60 of the Sexual Offences Act, by the regional magistrate's court (East London). He was sentenced to 10 years' imprisonment (all counts taken together for purposes of sentence) of which 4 years' imprisonment was suspended for 5 years on certain conditions.

[2] His application for leave to appeal against conviction was refused, however leave to appeal against sentence was granted. His petition to the Judge President (Grahamstown High Court) against refusal of leave against conviction was unsuccessful, however leave to appeal against the dismissal of the petition was granted to this court (Dambuza J and Tshiki J concurring).

[3] The gravamen of what is before us is whether or not leave to appeal should have been granted by the high court (See *S v Khoasasa* 2003 (1) SACR 123 (SCA) para 14 and 19-22; *S v Smith* 2012 (1) SACR 567 (SCA) para 3; *S v Kruger* 2014 (1) SACR 647 (SCA). Therefore, the test to be applied is whether there is a reasonable prospect of success in the intended appeal and not the appeal itself – *Matshona v S* [2008] 4 All SA 68 (SCA) para 4. It was common cause during the hearing that the onus rested on the appellant to satisfy this court that there was a reasonable prospect of success on appeal – put differently whether there was a probability of the appellant succeeding on appeal.

[4] Plasket AJA in *S v Smith* (supra) succinctly observed that:

'[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[5] Counsel for the appellant contended that there are reasonable prospects of success on appeal on the grounds that the magistrate misdirected himself in the following respects. That because the complainants were minors, the trial court should have applied three cautionary rules, those relating to a single witness, young children and what he referred to as a residual cautionary rule. He pointed out certain contradictions between the evidence of the complainants and also contradictions based on what they said in their statements to the police. That the

magistrate erred in not finding that the appellant was a good witness despite his giving evidence which was clear and not full of contradictions. That the magistrate erred in accepting the evidence of Miss Karen Andrews, the clinical psychologist who dealt with the behaviour of the complainants after the alleged sexual assault and rape. That the magistrate erred in accepting the evidence of Doctor Bomkazi Majeke alternatively he failed to place enough weight on the fact that she (the Doctor) was inexperienced at the time she examined the two complainants. That the magistrate erred by finding that there was no conspiracy or collusion between the two complainants.

[6] Mr Price for the appellant referred to a whole host of criticisms, almost criticising each and every finding of the trial court. I shall not deal with all the contentions raised by him, it suffices to mention the few above.

[7] It was contended on behalf of the respondent that, it was naturally expected that there would be contradictions between the two young complainants. However, the trial court examined the evidence tendered by both the State and the defence holistically and not on a piece meal basis. Counsel for the respondent argued that, notwithstanding the concession of the existence of contradictions, same did not destroy the evidence of the complainants as supported by the medical evidence. Counsel further argued that there was no collusion between the two complainants as they independently and separately recollected what had happened and reported to their respective parents.

[8] I agree that the contradictions were expected, due to the passage of time and the fact that the complainants were young children who could not remember

dates and the sequence of events. Holmes JA in *S v Artman & another* 1968 (3) SA 339 (A) at 341 remarked that:

> 'I would add that, while there is always need for caution in such cases, … and courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense.'

He further referred to similar remarks of Macdonald AJP in the Rhodesian Appellate Division case of *R v J* 1966 (1) SA 88 (SR) at 90 – see also *S v Snyman* 1968 (2) SA 582 (AD) at 585.

[9] The trial court found that '[w]hat is important is that on the same Sunday in January 2009 the two boys at different and separate places in East London, reported to their respective fathers acts of indecent assault committed by the accused. As I have said, the versions coincided. This aspect, which is not disputed, clearly serves as corroboration for their respective claims. There was no possibility of any collusion between them. There is no bad blood'. The trial court went on to say that '[t]aking into account that these incidents happened over a lengthy period of time and repeatedly, such a confusion regarding the positions in which it happened, is possible'.

[10] Having heard both counsel, I am not satisfied that the alleged misdirections are sufficient to create a probability of the appellant succeeding on appeal, hence I conclude that the appellant failed to show that there is a reasonable prospect of success on appeal. Viewed holistically there are no other reasons why an appeal should be heard. In the result:

[11] The appeal is dismissed.

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J B Z SHONGWE
JUDGE OF APPEAL

Appearances

For the Appellant: T N Price SC
Instructed by:
Changfoot-Van Breda Attorneys, East London;
Symington & De Kok Attorneys, Bloemfontein.

For the Respondent: J P J Engelbrecht
Instructed by:
The Director of Public Prosecutions, Grahamstown;
The Director of Public Prosecutions, Bloemfontein.