THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 891/15

In the matter between:

MUZI GONYA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Gonya v S* (891/15) [2016] ZASCA 34 (24 March 2016)

Coram: Lewis, Leach, Pillay, Willis JJA and Victor AJA

Heard: **9 March 2016**

Delivered: **24 March 2016**

Summary: Criminal law and procedure **–** appeal for leave to appeal against refusal by high court to grant leave to appeal brought by way of petition from the regional court - Supreme Court of Appeal does not have jurisdiction to hear the appeal directly from the regional court – trial commenced prior to promulgation of the Superior Courts Act 10 of 2013 – appeal must be determined in terms of the Supreme Court Act 59 of 1959 – appellant granted leave to appeal against the non-parole period of the sentence – s 276B of the Criminal Procedure Act 51 of 1977.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mothle and Kubishi JJ sitting as court hearing application for leave to appeal).

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

2 Leave to appeal is granted to the Gauteng Division of the High Court, Pretoria, but is limited to determining only whether a non-parole period of imprisonment should have been imposed in terms of s 276B of the Criminal Procedure Act.

JUDGMENT

Victor AJA (Lewis, Leach, Pillay and Willis JJA concurring)

[1] On 23 August 2008 the appellant was convicted of rape in the Regional Court, Gauteng. He had raped a 15 year old girl more than once and was sentenced to 20 years' imprisonment. The regional court magistrate imposed a sentence that carried a non-parole period in terms of s 276B of the Criminal Procedure Act 51 of 1977. He was required to serve a minimum of two thirds of the sentence amounting to 13 years and four months before he would be eligible for parole. The appellant sought leave to appeal against the conviction and sentence of 20 years. The regional court refused leave to appeal.

[2] On 1 March 2013 the appellant's petition on conviction and sentence by the regional court magistrate to the Judge President of the North Gauteng High Court, Pretoria was refused by Mothle and Margardie JJ. At the time of his conviction and sentence the Superior Courts Act 10 of 2013 had not been promulgated. That Act was promulgated on 23 August 2013 during the course of the petition process. The appellant applied for leave to appeal against the refusal of the petition from the high court. That application failed and a petition to this court followed.

[3] The order granted by Mothle and Kubushi JJ on 3 December 2013 was worded as follows: 'That the application for leave to petition to the Supreme Court of Appeal on both conviction and sentence are granted.' This wording has led to some confusion as to whether the order was to be interpreted to mean that this court is to hear the actual appeal or whether it is an appeal against the refusal of the petition for leave to appeal.

[4] It is probable that certain errors crept into the order when it was typed as it is clear that the judges intended to grant leave to appeal against their refusal of the petition to this court. The order should have read as follows: 'That the application for leave to appeal against the refusal of the petition is granted to the Supreme Court of Appeal on both conviction and sentence. Counsel for the State agreed with this interpretation of the order.

[5] The Act provides for pending proceedings at the time of its promulgation: Section 52 of the Superior Courts Act provides:

‘(1) Subject to section 27, proceedings pending in any court at the commencement of this Act, must be continued and concluded as if this Act had not been passed.
(2) Proceedings must, for the purposes of this section, be deemed to be pending if, at the commencement of this Act, a summons had been issued but judgment had not been passed.

[6] The trial in this matter commenced on 21 November 2011. The Supreme Court Act was promulgated on 23 August 2013. On 1 March 2013 the petition was dismissed by the high court. The appellant thereafter sought leave to appeal against the refusal of the petition to this court. Leave was granted on 3 December 2013.

Plain meaning of s 52 of the Superior Courts Act

[7] The plain meaning of the words ‘proceedings pending in *any court’* as referred to in s 52 of the Act must include criminal proceedings. The question raised was whether the date of the petition proceedings post promulgation, had to be dealt with in terms of the Superior Courts Act or the Supreme Court Act 59 of 1959. This determination also affected the higher threshold required in terms of the Superior Courts Act which requires that special leave be granted when an application for leave to appeal is against a judgment of more than one judge. The pure meaning of the words *pending proceedings* must be interpreted to mean the date on which the appellant’s proceedings commenced on 21 November 2011. The proceedings were still pending as at date of promulgation of the Superior Courts Act. It follows that the matter must be dealt with in terms of the Supreme Court Act.

[8] Owing to the confusion in the wording of the order granted on 3 December 2013 it is necessary to reaffirm the appropriate procedure when a

petition is refused by the high court. Streicher JA in *S v Khoasasa* [2002] ZASCA 113*;* 2003 (1) SACR 123 (SCA) clarified the procedural steps as set out in the Supreme Court Act. The petition for leave to appeal to a high court is in terms of s 309C of the Criminal Procedure Act. It was in effect an appeal against the refusal of leave to appeal by the magistrates' court in terms of s 309B of that Act. Streicher JA concluded that such refusal of leave to appeal by the high court was a *judgment or order* of the high court as contemplated in ss 20(1) and 20(4) of the Supreme Court Act, given by the high court on appeal to it. Accordingly, in terms of s 20(4)(b), the refusal of leave to appeal by the high court was appealable to the Supreme Court of Appeal with the leave of the high court (being the court against whose order the appeal was to be made) or, where leave was refused, with the leave of this court. The order appealed against was the refusal of leave, with the result that this court could not decide the appeal itself.

[9] This principle was confirmed in *S v Matshona* [2008] ZASCA 58; 2013 (2) SACR 126 (SCA) where Leach AJA held (para 6):

‘It would be anomalous and fly in the face of the hierarchy of appeals for this court to hear an appeal directly from a magistrates' court without that appeal being adjudicated in the high court, thereby serving, in effect, as the court of both first and last appeal.’

[10] In view of the principles set out in *S v Khoasasa* and *S v Matshona* above this court cannot hear an appeal directly from a lower court and in this case, directly from the regional court.

The requisite test to be applied when granting leave to appeal in the court a quo

[11] Since the Supreme Court Act applies in this matter the appellant only has to show prospects of success and not the higher threshold as required in terms of the Superior Courts Act. In *S v Van Wyk and another* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) the court, dealing with the test in the Superior Courts Act, stated that an unsuccessful petitioner in a division of the High Court now faces a more stringent requirement in obtaining *special leave* from this court. The appellant must show in addition to the ordinary requirement of reasonable prospects of success, that there are special circumstances which merit a further appeal to this court. The appellant's trial was conducted when the Supreme Court Act applied. Leave to appeal was sought under the latter Act. This is an important feature when considering an application for leave to appeal. The lower threshold of reasonable prospects of success applies.

Prospects of success on appeal

[12] In order to assess the appellant's prospects of success it is necessary to examine the facts. On Sunday 24 July 2011 at approximately 6h00 the complainant aged 15 years, her sister and a friend were walking along a street in Chris Hani Township when a male person wearing a balaclava and wielding a knife accosted the complainant's sister by grabbing her from the back. During the struggle she managed to run away. He then turned his attention to the complainant whom he managed to subdue by stabbing her three times in the back and forcing her to walk to his room blindfolded. There he raped her and kept her captive from early Sunday morning till 17h00 the same day. The complainant described how he had raped her twice. Although the appellant's sister and his friend came to the room and spoke to him, the complainant did not seek help from them because she was too scared. During the course of the day he helped her clean her wounds by bringing her water. In his defence he claimed

to be her lover and indeed after the event did send the complainant messages asking her to marry him. He claimed that she arrived at his room at 4h30 on the Sunday morning in a terrible state asking to be let in. She apparently told him that she had been raped and he saw she was bleeding from her stab wounds.

[13] The appellant's version was correctly rejected as false by the regional court. It is inconceivable that, as her lover, he would have seen the condition she was in and not taken her to the police or doctor or back to her parental home. Instead he kept her in his room for the entire day and at 17h00 walked her back home only part of the way. Upon consideration of all the facts the appellant has no prospects of success on conviction.

[14] The regional court found that there were substantial and compelling circumstances entitling it not to impose a life sentence. In addition to the traditional factors such as the appellant's personal circumstances, the regional court also took into account the appellant's awaiting trial period of one year. It was noted that the awaiting trial conditions were far different from those after sentence.

[15] The appellant was sentenced to 20 years' imprisonment including a non-parole period in terms of s 276B of the Criminal Procedure Act. The appellant has a previous conviction for armed robbery and a 15 year sentence was imposed. He was still on parole when he committed this crime of rape. It is not clear quite why the regional magistrate did not impose life imprisonment as a sentence, but that is not, of course, before us as the State has not sought leave to appeal against sentence.

[16] The suitability of a non-parole period has been dealt with in several judgments of this court. In *S v Mhlakaza & Another* [1997] ZASCA 7; 1997 (1) SACR 515 (SCA) at 521 Harms JA dealt with the topic as follows:

'The function of a sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual period served or to be served . . . The lack of control of courts over the minimum sentence to be served can lead to tension between the Judiciary and the Executive because the executive action may be interpreted as an infringement of the independence of the Judiciary'. In particular Harms JA emphasised that where a non-parole sentence is imposed then it is the duty of the judicial officer to set out the reasons explicitly in the judgment.

[17] In *S v Stander* 2012 (1) SACR 537 (SCA) (paras 12 and 16) Snyders JA stated as follows:

'Despite the fact that s 276B grants courts the power to venture onto the terrain traditionally reserved for the executive, it remains generally desirable for a court not to exercise that power.

. . . An order in terms of s 276B should therefore only be made in exceptional circumstances, when there are facts before the sentencing court that would continue, after sentence, to result in a negative outcome for any future decision about parole.'

[18] In this matter the regional court referred to the effect of the crime on the complainant, the repugnance of society to this type of crime and the personal circumstances of the appellant, but did not mention why the serving of his sentence could not be left to the Department of Correctional Services. The exceptional circumstances as referred to in *S v Stander* above justifying a non-parole period were not referred to or dealt with by the regional court. In addition this aspect should have been raised prior to the judgment on sentence so as to afford the appellant and the State an opportunity to deal with it.

[19] In the result the regional court and the high court erred in this regard. The appellant should be granted leave to appeal against his sentence, but only in so far as the imposition of the non-parole period of his sentence is concerned.

[20] Accordingly,

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

2 Leave to appeal is granted to the Gauteng Division of the High Court, Pretoria, but is limited to determining only whether a non-parole period of imprisonment should have been imposed in terms of s 276B of the Criminal Procedure Act.

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M Victor
Acting Judge of Appeal

Appearances:

For the Appellant:	N L Skibi
	Instructed by:
	Justice Centre, Pretoria
	Justice Centre, Bloemfontein
For the Respondent:	E Leonard SC
	Instructed by:
	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein