



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 148/2017

In the matter between:

**FREDERICK UMUDE
DOMINIQUE NWAFOR
HENRY OHAERI**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT**

and

THE STATE

RESPONDENT

Neutral citation: *Umude & others v The State* (148/2017) [2017] ZASCA 150
(21 November 2017)

Coram: Ponnann, Petse, and Willis JJA and Lamont and
Schippers AJJA

Heard: 1 November 2017

Delivered: 21 November 2017

Summary: Criminal Procedure – appeal against conviction – leave to appeal refused by magistrate – petition refused by the courts 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.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Lowe J and Mgxaji AJ (14 May 2015 in respect of the second appellant) case no CA&R 264/2014 and Brooks J and May AJ (08 October 2014 in respect of the first and third appellants) case no CA&R 264/2014 sitting as court of appeal):

1 The appeal is upheld.

2 The orders of the Eastern Cape Division of the High Court, Grahamstown made respectively on 8 October 2014 under case number CA&R264/2014 and 14 May 2015 under case number CA&R264/2014 dismissing each appellant's petition against sentence are set aside and replaced with the following:

'The three applicants are granted leave to appeal to the Eastern Cape Division of the High Court, Grahamstown against the sentences imposed on them on 2 October 2013 by the Port Elizabeth Regional Court, Eastern Cape.'

JUDGMENT

Lamont AJA (Ponnan, Petse and Willis JJA and Schippers AJA concurring)

[1] On 1 October 2013 each of the appellants was convicted by the Port Elizabeth Regional Court, Eastern Cape (Specialised Commercial Crime Court) of three counts of fraud and sentenced the next day to 15 years' imprisonment. The appellants' application to that court in terms of s 309B of the Criminal Procedure Act 51 of 1977 (the CPA) for leave to appeal against

conviction and sentence was dismissed. In terms of s 309C(2) of the CPA, each then petitioned to the Eastern Cape Division, Grahamstown. Those applications likewise failed.

[2] The appellants thereupon petitioned this court in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 (the Act)¹ for special leave to appeal. This court issued the following order: 'Special leave to appeal against sentence is granted to the Supreme Court of Appeal'. That order conduces to confusion.

[3] The order by the court a quo dismissing the appellants' petition is an order of that court (see *S v Khoasasa*²), which stands until set aside on appeal by this court. In terms of the Supreme Court Act 9 of 1959, an application for leave to appeal the order had to be lodged with that court (the high court). If that court took the view that it was wrong in its earlier decision to dismiss the petition to it and that on further reflection there were indeed reasonable prospects of the contemplated appeal succeeding, then it granted leave to appeal to this court. However, all that served before this court on appeal was the correctness of the high court's dismissal of the appellant's petition to it. This court therefore did not enter into substantive merits of the envisaged appeal, save for the limited purposes of considering whether or not it had reasonable prospects of succeeding.

[4] In terms of the Act, the high court lacks jurisdiction, as it previously did to consider an application for leave to appeal against its dismissal of a petition to it. As a dismissal by the high court of a petition in terms of s 309C(2) is a decision on appeal to it, an application for special leave to appeal against that decision now lies to this court in terms of s 16(1)(b) of the Act.

[5] Thus what served before the two judges on petition to this court was whether the court a quo was correct in dismissing the appellants' petition to it.

¹ 'Section 16 (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....'

² *S v Khoasasa* [2002] ZASCA 113; 2003 (1) SACR 123 (SCA).

This court evidently took the view that there were reasonable prospects of success in the contemplated appeal against sentence. Accordingly, each appellant was granted leave to appeal against sentence. In truth, leave ought to have been granted against the order of the court a quo refusing the appellants leave to appeal against sentence.

[6] Accordingly, what this court has to decide is whether or not the high court was correct in dismissing the appellants' petitions to it. If that court erred, then this court will set aside the order of the high court; grant the appellants' leave to appeal and refer the matter back to the court a quo to hear the appeal on its merits.

[7] The appellants were convicted of three counts of fraud involving R109 649.87. The regional court found that the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 were applicable. It then held that there were no substantial and compelling circumstances and took the three counts together in imposing the prescribed minimum sentence. There is something to be said for the contention that the regional court should have, but failed to, adequately consider whether the prescribed sentence was a reasonable and appropriate punishment for each of the appellants having regard to the amount involved and their personal circumstances.³ It follows that there is a reasonable prospect of an appeal against sentence succeeding. Accordingly, the petitions to the Eastern Cape Division of the High Court, Grahamstown should have succeeded in respect of sentence.

[8] In the result:

1 The appeal is upheld.

2 The orders of the Eastern Cape Division of the High Court, Grahamstown made respectively on 8 October 2014 under case number CA&R264/2014 and 14 May 2015 under case number CA&R264/2014 dismissing each appellant's petition against sentence are set aside and replaced with the following:

³ *S v Vilakazi* [2008] ZASCA 87; 2012 (6) SA 353 (SCA) para 15.

‘The three applicants are granted leave to appeal to the Eastern Cape Division of the High Court, Grahamstown against the sentences imposed on them on 2 October 2013 by the Port Elizabeth Regional Court, Eastern Cape.’

C G LAMONT
ACTING JUDGE OF APPEAL

Appearances:

For the Appellant:

A Williams

Instructed by:

Legal Aid South Africa, Port Elizabeth

Legal Aid South Africa, Bloemfontein

For the Respondent:

U De Klerk

Instructed by:

The Director of Public Prosecutions, Grahamstown

The Director of Public Prosecutions, Bloemfontein