THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 634/2013
Not Reportable

In the matter between

JABULANI DLAMINI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Dlamini v The State* (634/2013) [2015] ZASCA 50 (27 March 2015)

Coram: Bosielo, Leach and Majiedt JJA

Heard: **13 March 2015**

Delivered: **27 March 2015**

Summary: Criminal Procedure – two judges refusing application for leave to appeal against conviction and sentence by a regional court –two other judges of the high court granting the appellant leave to appeal to the Supreme Court of Appeal – consequently the issue before us was whether leave to the high court ought to have been granted.

ORDER

On appeal from: Gauteng Division, Pretoria (Seriti J and Sapire AJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Bosielo JA (Leach and Majiedt JJA concurring):

[1] This matter has had a chequered history. The appellant was convicted by the regional magistrate (D Makhoba), sitting at the North Gauteng Regional Court, Pretoria on four counts of theft of motor vehicles, one count of robbery with aggravating circumstances as defined in s 1 of the Criminal Procedure Act 51 of 1977 (CPA), of a motor vehicle and one count of assault with intent to cause grievous bodily harm.

[2] He was sentenced to imprisonment for 7 years on each count of theft of a motor vehicle, 15 years for robbery and 1 year for assault with intent to cause grievous body harm. The regional magistrate ordered the sentence in respect of the assault with intent to cause grievous bodily harm to run concurrently with that for robbery, and ordered that ‘in total the accused is sentenced to 44 years’ imprisonment…. I have decided to order that you serve the maximum of 25 years’.

[3] His application for leave to appeal against both his convictions and sentence was dismissed by the regional magistrate. He then petitioned the North Gauteng High Court, Pretoria (Seriti J and Sapire AJ) for leave to appeal which was dismissed on the basis that there were no prospects of success in respect of both the conviction and sentence. Aggrieved by this decision, he applied for leave to appeal against this order to the high court. The application was granted by Mothle and Baqwa JJ as follows:

'Your application for condonation for the late filing of this application is granted as well as your application for special leave to appeal to the Supreme Court of Appeal in terms of s 20(4) of the Supreme Court Act 59 of 1959.'

[4] The reference to special leave in this order was wrong and misleading. The application for leave to appeal to this court was granted before the introduction of the Superior Courts Act 10 of 2013. The position in regard to the appeal procedure at that time (it has since changed) was explained by this court in *Matshona v S* [2008] 4 All SA 68 (SCA) 2013 (2) SACR 126 at paras 4-6 as follows:

In my view, the reasoning in *Khoasasa* is unassailable. The appeal of an accused convicted in a regional court lies to the high court under section 309(1)(*a*), although leave to appeal is required either from the trial court under s 309B or, if such leave is refused, from the high court pursuant to an application made by way of a petition addressed to the judge-president under s 309C(2) and dealt with in chambers. In the event of this petition succeeding, the accused may prosecute the appeal to the high court. But, if it is refused, the refusal constitutes a "judgment or order" or a "ruling" of a high court as envisaged in s 20(1) and s 21(1) of the Supreme Court Act 59 of 1959, against which an appeal lies to this court on leave obtained either from the high court which refused the petition or, should such leave be refused, from this court by way of petition. It is clear from this that where, as is here the case, an accused obtains leave to appeal to this court against the refusal in a high court of a petition seeking leave to appeal against a conviction or sentence in the regional court, the issue before this court is whether leave to appeal should have been granted by the high court and not

the appeal itself which has been left in limbo, so to speak, since the accused first sought leave to appeal to the high court. After all, in the present case, the appellant's appeal against his sentence has never been heard in the high court and, as was held in *S v N* 1991 (2) SACR 10 (A) at 16, the power of this court to hear appeals of this nature is limited to its statutory power. Section 309(1) prescribes that an appeal from a magistrates' court lies to the high court, and an appeal against the sentence imposed on the appellant in the regional court is clearly not before this court at this stage. As was observed by Streicher JA in *Khoasasa*:

"Geen jurisdiksie word aan hierdie Hof verleen om 'n appél aan te hoor teen 'n skuldigbevinding en vonnis in 'n laer hof nie. Dit is eers nadat 'n appél vanaf 'n laer of na 'n Provinsiale of 'n Plaaslike Afdeling misluk het dat 'n beskuldigde met die nodige verlof na hierdie Hof appél kan aanteken."

Not only does this court lack the authority to determine the merits of the appellant's appeal against his sentence at this stage, but there are sound reasons of policy why this court should refuse to do so even if it could. 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 *Khoasasa* at [14]. Section 20 (4)(*b*) as read with s 21(1) and (2) of the Supreme Court Act. Section 23 of the Supreme Court Act. See s 315(1) at [12]. Being adjudicated in the high court, thereby serving, in effect, as the court of both first and last appeal. In addition, all persons are equal under the law and deserve to be treated the same way. This would not be the case if some offenders first had to have their appeals determined in the high court before they could seek leave to approach this court if still dissatisfied while others enjoyed the benefit of their appeals being determined firstly in this court. And most importantly, this court should be reserved for complex matters truly deserving its attention, and its rolls should not be clogged with cases which could and should be easily finalised in the high court.'

[5] That this was the position was since confirmed in *S v Tonkin* 2014 (1) SACR 610 (SCA) para 6; *S v Van Wyk* and *S v Galela* [2014] ZASCA 152 paras 13-16. It follows that what is before us is not an appeal on the merits as this must be heard in the high court first. Hence the issue before this court is simply whether the high court should have granted leave to

appeal. This it could only do if it was satisfied that there were prospects of success. *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

[6] Turning to the facts, in respect of the four counts of theft of vehicles, the State relied on the evidence of the owners of the various vehicles who testified that their vehicles were stolen and recovered by the police; the purchasers who testified that the appellant sold the vehicles to them professing to be the owner with the right to sell them; that the vehicles were subsequently impounded from them by members of the South African Police Services (SAPS). Importantly, the appellant did not deny all this. His only defence was that he did not know that the vehicles were stolen and further that he sold them as an agent of a certain Mr Madisha, who has since died. What proved to be fatal to the appellant's version was the written agreement which he concluded with one of the witnesses-cum-purchasers, Jerwin Errol Eagen, 'Exh O' wherein he described himself as the seller. This statement was signed at Sunnyside Police Station. Based on this evidence, the regional magistrate rejected the appellant's version as not being reasonably possibly true.

[7] Regarding the counts of robbery of a motor vehicle and assault with intent to cause grievous bodily harm, both of which happened simultaneously, the respondent relied on the identification of the appellant by the two victims, Mr and Mrs Lombard. These were the eye-witnesses. Furthermore, the appellant's cellular phone records placed him at the scene where the offences took place and where Mr Lombard's wallet was subsequently recovered. These records were admitted as part of the evidence with his consent. This evidence proved overwhelming and fatal to the appellant's case.

[8] The appellant was sentenced to 7 years' imprisonment in respect of the four counts of theft of vehicles; 15 years in respect of robbery with aggravating circumstances and 1 year in respect of assault with intent to cause grievous bodily harm. The cumulative sentence was 44 years' imprisonment. However, as already mentioned, the regional magistrate made an order that the appellant was to serve 'a maximum of 25 years' imprisonment'.

[9] The appellant's main submission is that this sentence is so disturbingly disproportionate to the offences for which he was convicted that it induces a sense of shock. He contended that there are prospects that another court might find the sentence shocking and interfere with it.

[10] A sentence of 25 years' imprisonment is a severe one. However, sight should not be lost of the fact that the appellant was convicted of multiple, serious and prevalent offences. Furthermore, it is clear from his modus operandi that these offences were well-planned. In fact they constituted a consistent and lucrative business, albeit unlawful for the appellant. In the circumstances, a sentence of 7 years' imprisonment for each count of theft of a motor vehicle is not shocking to me.

[11] The same applies to the 15 years' imprisonment for robbery with aggravating circumstances. The evidence reveal that Mr Lombard was severely assaulted and his entire family traumatised. A firearm was used. This robbery occurred inside the Lombard's home where they thought they were safe. Inexplicably, their helper was subjected to the worst indignity when one of the robbers urinated on her.

[12] Crimes of this nature have over the years become endemic. However, my problem lies with the condition that the appellant shall serve a maximum of 25 years' imprisonment. I interpret this to mean that he intended to order that the sentences run concurrently to the extent that appellant should serve a sentence of 25 years' imprisonment. This makes the sentence unimpeachable. Given the nature, gravity, prevalence of these offences and their impact on society and the economy of this country, I am not persuaded that a sentence of 25 years is inappropriate. In the circumstances, I do not think that there are any reasonable prospects that the appeal against both the conviction and sentence might succeed.

[13] In the result, the appeal is dismissed.

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L O BOSIELO
JUDGE OF APPEAL

Appearances:

For Appellants	:	AB Booysen Instructed by: Mashamba Incorporated, Pretoria SMO Seobe Attorneys, Bloemfontein
For Respondent	:	P Vorster Instructed by: Director Public Prosecutions, Pretoria Director Public Prosecutions, Bloemfontein