THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 679/2020

In the matter between:

MICHAEL RAJU PADAYACHEE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Padayachee v The State* (679/2020) [2021] ZASCA 115 (16 September 2021)

Coram: PETSE AP and MATHOPO, MOCUMIE and MAKGOKA JJA and MOLEFE AJA

Heard: 24 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 16 September 2021.

Summary: Criminal procedure – leave to appeal against convictions and sentence refused by regional court and the high court – whether there are reasonable prospects of success on appeal against the conviction and sentence.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Vahed J and Bedderson AJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the court below, refusing the appellant leave to appeal against his convictions and resultant sentences, is set aside and substituted with the following:

'The applicant is granted leave to appeal against his convictions and resultant sentences to the KwaZulu-Natal Division of the High Court.

JUDGMENT

Mocumie JA (Petse AP, Mathopo and Makgoka JJA and Molefe AJA concurring):

[1] This is an appeal against the refusal of condonation and leave to appeal by the KwaZulu-Natal Division of the High Court, Pietermaritzburg (Vahed J and Bedderson AJ) (the Full Court). The appellant, Mr Michael Raju Padayachee, was indicted in the regional Court, Verulam on several charges. He was convicted of rape (count 2); two counts of assault with intent to do grievous bodily harm (counts 3 and 6); and attempted murder (count 7). He was sentenced as follows:(a) count 2 – rape, eight years' imprisonment; (b) count 3 – the first count of assault with intent to do grievous bodily harm, three years' imprisonment; (c) count 6 – the second count of assault with intent to do grievous bodily harm, 12 months' imprisonment; and (d) count 7 – attempted murder, 15 years' imprisonment, 3 years of which were suspended for five years, conditionally.

None of the aforementioned sentences was ordered to run concurrently with the result that the appellant was sentenced to an effective term of 24 years' imprisonment which he is presently serving.

[2] The appellant, aggrieved by this, sought leave to appeal against his convictions and effective sentence. He also sought condonation for the late filing of his application for leave to appeal. On 9 February 2018, the regional court refused the application for condonation and the leave to appeal. The applications to the Full Court for leave to appeal against the refusal of the condonation application, as well as against the convictions and effective sentence in terms of s 309C(2)*(a)* of the Criminal Procedure Act 51 of 1977 (the CPA) were also refused on 25 June 2019. Subsequently, on 31 July 2020, the appellant applied to this Court in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013 for special leave to appeal to this Court against the order of the Full Court. Two judges of this Court considered the application and granted special leave to appeal as sought. The application for condonation for the late filing of the application for special leave to appeal is not opposed by the State.

[3] In *S v Khoasasa,*[1] this Court held that the refusal, by two judges of a Division of the High Court, of leave to appeal is a 'judgment or order' or 'a ruling' as intended in ss 20(1) and 21(1) of the Supreme Court Act 59 of 1959, given by the Division concerned on appeal to it. If the appeal succeeds, this Court would then grant leave to appeal to the appropriate Division of the high court since it is that court that must hear such appeal in terms of s 309(1)*(a)* of the CPA.[2] This means that the merits of the appeal itself, are not before this Court, only the question whether the Full Court ought to have granted leave to appeal on petition to it, against the refusal by the regional court to grant leave.

[4] The test in this regard is simply whether there is a reasonable prospect of success in the envisaged appeal against the convictions and the resultant sentences, rather than whether the appeal against the convictions and resultant sentences ought to succeed. I now proceed to consider that question.

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[1] *S v Khoasasa* 2003 (1) SACR 123 (SCA) paras 14 and 19-22.

[2] See *S v Van Wyk and Another v The State and Galela v The State* [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA). See also *S v Tonkin* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA); *S v Radebe* [2016] ZASCA 172; 2017 (1) SACR 619 (SCA); *S v Moyo* [2018] ZASCA 157; 2019 (1) SACR 605 (SCA).

[5] Counsel for the appellant submitted that: (a) there were inconsistencies and contradictions in the evidence of the State witnesses; (b) the State failed to call relevant witnesses who would have clarified crucial aspects of its case; (c) the trial court failed to properly evaluate the evidence of the single witness in relation to the rape and second assault counts. For its part, the State conceded that there are indeed reasonable prospects of success in the envisaged appeal. Having had the benefit of reading the record, I am satisfied on balance that the envisaged appeal would have a reasonable prospect of success.

[6] As for the cumulative sentence, as stated earlier, the appellant was sentenced to an effective term of 24 years' imprisonment. None of the individual sentences was ordered to run concurrently. It is sufficient to say that, there is a reasonable prospect that another court might well consider this to be a misdirection on the part of the trial court. In light of the foregoing, leave to appeal ought to have been granted both in respect of the individual convictions and resultant sentences.

[7] In the result the following order is granted:

1 The appeal is upheld.

2 The order of the court below, refusing the appellant leave to appeal against the convictions and resultant sentences is set aside and substituted with the following:

'The applicant is granted leave to appeal against his convictions and resultant sentences to the KwaZulu-Natal Division of the High Court.'

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B C MOCUMIE

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	J E Howse SC
Instructed by:	RK Nathalal and Company
	C/o Webber Attorneys, Bloemfontein
For Respondent:	IP Cooke
Instructed by:	Director of Public Prosecutions, Pietermaritzburg
	C/o Director of Public Prosecutions, Bloemfontein