THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 959/2015

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS:
GAUTENG DIVISION, PRETORIA **APPLICANT**

and

DANIEL CHAKA MOABI **RESPONDENT**

Neutral Citation: *The Director of Public Prosecutions: Gauteng Division, Pretoria v Moabi* (959/15) [2017] ZASCA 85 (2 June 2017)

Coram: Maya AP, Theron, Dambuza JJA and Molemela and Gorven AJJA

Heard: 15 February 2017

Delivered: 2 June 2017

Summary: Appeal in terms of s 311 of the Criminal Procedure Act 51 of 1977: s 311 provides for an appeal as of right, without leave: question of law upheld: 'intent to do grievous bodily harm' not an element in a rape contemplated in Part I*(c)* of the Criminal Law Amendment Act 105 of 1997: conviction and sentence imposed by the regional court reinstated and matter remitted to the high court for appeal to proceed on sentence.

ORDER

On appeal from Gauteng Division of the High Court, Pretoria (Louw J and Kooverjie AJ sitting as court of appeal):

1 The appeal is upheld in respect of the question of law.
2 The order of the high court on sentence is set aside.
3 The sentence imposed by the regional court is reinstated.
4 The matter is remitted to the high court for the appeal to proceed on sentence.

JUDGMENT

Molemela AJA (Dambuza JA concurring):

[1] This is an application by the Director of Public Prosecutions, Gauteng Division, Pretoria (DPP) for special leave to appeal to this court on a question of law in terms of s 311(1) of the Criminal Procedure Act 51 of 1977 (CPA).

[2] The respondent was arraigned in the Regional Division of North West held at Klerksdorp (Magistrate Nzimande) (the regional court) on a charge of housebreaking with intent to rape and rape, read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA). On 16 May 2014 the regional court convicted the

respondent and sentenced him to life imprisonment as contemplated in s 51(1), read with Part I*(c)*[1] of the CLAA on the basis that the complainant had suffered grievous bodily harm during the course of the rape.

[3] The facts leading to the respondent's conviction and sentence are the following. On the night of 3 April 2012, the heavily pregnant complainant was asleep on her sofa in the dining room of her house in Jouberton, Klerksdorp, when she felt something touching her. She opened her eyes only to find an intruder standing near her feet. The intruder closed her mouth with his hand and pressed a sharp object against the side of her mouth. The complainant wrestled with her assailant and broke a window pane so as to alert her neighbour to her plight. At some point during the scuffle she switched on the light and recognized her assailant as the respondent – a man who had accompanied her boyfriend to her house earlier that day.

[4] During the scuffle that ensued, the respondent managed to overpower the complainant. He strangled her until she lost consciousness. When she regained consciousness, the respondent dragged her to her bedroom and ordered her to undress. She refused. He then pushed her onto the bed, undressed her, undressed himself and raped her. She pleaded with him to stop, impressing upon him that he was hurting her unborn twins. He ignored her pleas and hit her with fists on the buttocks. After the respondent's departure the complainant went to her neighbour's house and reported the rape to her. The neighbour arranged for a car to take her to the police station, after which the complainant was transported to the hospital, where she received medical attention for the injuries she had sustained.

---

[1] Part I provides
'Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007—
(a) . . . .
(b) . . . .
(c) involving the infliction of grievous bodily harm.'
'Section 51 provides Discretionary minimum sentences for certain serious offences
(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.'

[5] Pursuant to the sentence of life imprisonment being imposed by the regional court, the respondent lodged an appeal against his conviction and sentence by virtue of the automatic right of appeal granted in terms of s 309(1)*(a)* of the CPA. The appeal was heard by two Judges of the Gauteng Division of the high court, Pretoria (Louw, J and Kooverjie, AJ (high court). The high court confirmed the conviction but set aside the sentence on the basis that life imprisonment was not the applicable minimum sentence because the State had failed to prove that the respondent had the intent to inflict grievous bodily harm on the complainant. In making that conclusion, the high court reasoned as follows: '. . . . We are not satisfied that the element of "intent" exists. Hence there was assault but not intention to do grievous bodily harm.'

[6] The high court concluded that the failure of the State to prove the element of intent resulted in the rape not falling within the purview of s 51(1) read with Part I*(c)* of Schedule 2 of the CLAA, which attracted a minimum sentence of life imprisonment. It regarded the rape as falling within the purview of s 51(2) read with Part III of Schedule 2 of the CLAA,[2] which attracts a minimum sentence of 10 years' imprisonment. The high Court then found that, having regard to all the appropriate factors, the aggravating factors far outweighed the mitigating factors. It considered the appropriate sentence for the respondent to be 14 years' imprisonment.

[7] Aggrieved by the high court's finding, the DPP lodged an application for special leave to appeal to this court on a question of law in terms of s 311(1) of the CPA, read

---

[2] Part III provides
'Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in Part I.
Section 51 (2)*(b)* provides: '(2) Notwithstanding any other law but subject to subsection (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in –
(a) . . . .
(b) Part III of Schedule 2, in the case of–
(i) a first offender, to imprisonment for a period not less than 10 years;
(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years.
(c) …'

with the provisions of s 16(1)*(b)*[3] and s 17(3)[4] of the Superior Courts Act 10 of 2013 (Superior Courts Act). The applicant formulated the question of law as follows:

'That the Honourable Court *a quo* erred in law by holding that s 51(1) and Schedule 2 Part I of the Criminal Law Amendment Act 105 of 1997, providing for a minimum sentence of life imprisonment to be imposed in circumstances where an accused is convicted of rape involving the infliction of grievous bodily harm, requires also an intent on the part of the convicted person to cause such harm.'

[8] This court then referred the application for special leave to appeal for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act and issued a directive requiring the appellant to clarify on what basis it considered this court to have jurisdiction to hear the intended appeal.

[9] In argument before us it was contended on behalf of the DPP that this court's jurisdiction to hear the matter is derived from the provisions of s 311 of the CPA. The respondent disputed that the question raised on appeal was one of law within the meaning of s 311(1) of the CPA. He averred that there are no provisions in the CPA and the Superior Courts Act providing for the reservation of a question of law from appeal proceedings in relation to sentence. He argued that this appeal is misguided and is an impermissible appeal against sentence. The respondent further contended that s 16(1)*(b)* of the Superior Courts Act is not applicable to s 311 appeals because s 1 of the Superior

---

[3] Section 16 of the Superior Courts Act states:
'(1) Subject to section 15(1), the Constitution and any other law-
(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted-
(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17(6); or
(ii) if the court consisted of more than one judge, to the Supreme Court of Appeal.
(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; and
(c) an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of section 17 apply with the changes required by the context.'

[4] Section 17(3) states:
'(3) An application for special leave to appeal under section 16(1)(*b*) may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after the decision sought to be appealed against, or such longer period as may on good cause be allowed, and the provisions of subsection (2)*(c)* to *(f)* shall apply with the changes required by the context.'

Court Acts[5] provides that an appeal envisaged in Chapter 5 of that Act does not include an appeal in a matter regulated by the CPA, or in terms of any criminal procedural law.

[10] The issues for our determination were therefore whether: (a) this court has jurisdiction to hear an appeal brought by the State on a question of law against the decision made by the high court, on appeal, in favour of a convicted person as contemplated in s 311 of the CPA; and (b) the high court was correct in finding that the intention to do grievous bodily harm is one of the elements that the State must prove in a rape contemplated in the provisions of Part I*(c)* of Schedule 2 to the CLAA.

[11] Section 311 of the CPA reads:

'**311 Appeal to Appellate Division**

(1) Where the provincial or local division on appeal, whether brought by the attorney-general or other prosecutor or the person convicted, gives a decision in favour of the person convicted on a question of law, the attorney-general or other prosecutor against whom the decision is given may appeal to the Appellate Division of the Supreme Court, which shall, if it decides the matter in issue in favour of the appellant, set aside or vary the decision appealed from and, if the matter was brought before the provincial or local division in terms of-

(a) section 309 (1), re-instate the conviction, sentence or order of the lower court appealed from, either in its original form or in such a modified form as the said Appellate Division may consider desirable; or

(b) section 310 (2), give such decision or take such action as the provincial or local division ought, in the opinion of the said Appellate Division, to have given or taken (including any action under section 310 (5)), and thereupon the provisions of section 310 (4) shall *mutatis mutandis* apply.

(2) If an appeal brought by the attorney-general or other prosecutor under this section or section 310 is dismissed, the court dismissing the appeal may order that the appellant pay the respondent the costs to which the respondent may have been put in opposing the appeal, taxed according to the scale in civil cases of that court: Provided that where the attorney-general is the appellant, the costs which he is so ordered to pay shall be paid by the State.'

[12] It is evident from the wording of s 311 of the CPA that an appeal lies to this court under this section only if the basis for the appeal is a question of law decided by a high

[5] In terms of s 1 of the CPA 'appeal' in Chapter 5 does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or in terms of any other criminal procedural law.

court, sitting as a court of appeal, in favour of the convicted person. I turn now to consider whether this appeal is indeed based on a question of law. It was held in *Magmoed v Van Rensburg*[6] that the question whether the proven facts bring the conduct of an accused person within the ambit of the crime charged, is one of law.[7] The provisions of Part I and III of Schedule 2 of the CLAA do not create separate offences of rape.[8] They do, however, prescribe different penalties depending on the circumstances which warrant the categorisation of the rape as falling within the purview of either Part I or Part III of Schedule 2 of the CLAA. If the proven facts establish that the convicted person inflicted grievous bodily harm in the course of the rape, then that would bring the rape within the ambit of Part I of the CLAA, which prescribes a harsher minimum sentence than the one contemplated in Part III. Clearly, the question raised involves the interpretation of the CLAA in order to ascertain what must be proved to bring the rape within the ambit of either Part I or III of Schedule 2 of the CLAA. I am satisfied that the DPP has indeed raised a question of law.

[13] I now turn to determine whether the high court was correct in finding that the intention to do grievous bodily harm must be proven in a rape involving contemplated in Part I*(c)* of Schedule 2, read with s 51(1) of the CLAA. I deem it instructive to pay regard to the following remarks made by Hoexter JA in a concurring judgment in *R v Jacobs*[9] pertaining to the infliction of grievous bodily harm, albeit in the context of the offence of robbery with aggravating circumstances:

'The question whether grievous bodily harm has been inflicted depends entirely upon the nature, position and extent of the actual wounds or injuries, *and the intention of the accused is irrelevant in answering that question.*' (My emphasis.)

In the majority judgment Van Winsen AJA, in deciding whether or not grievous bodily harm was inflicted, said:

---

[6] *Magmoed v Van Rensburg* [1992] ZASCA 208; 1993 (1) SA 777 (A) at 807 i-j.
[7] See also *Director of Public Prosecutions Gauteng v Pistorius* [2015] ZASCA 204; [2016] 1 All SA 346 (SCA); 2016 (1) SACR 431 (SCA).
[8] *S v Kolea* [2012] ZASCA 199; 2013 (1) SACR 409 para 16.
[9] *R v Jacobs* 1961 (1) SA 475 (A) at 478A.

'In deciding whether the Crown has proved the infliction of grievous bodily harm by the accused, the jury would, in my opinion, be entitled to have regard to the whole complex of objective factors involved in the accused's assault upon the deceased. It could take into consideration the shock which would inevitably result to the deceased by reason of the fact that the accused directed two blows at his face with a knife. It could have regard to the wounds resulting from the stabs in the face, their number, nature and seriousness, as well as to the two blows directed to the accused's stomach, their severity and the results which flowed from their infliction.'[10]

I respectfully echo these sentiments.

[14] In the absence of any interpretative factors which would warrant a different approach in this matter, I am inclined to adopt the same reasoning in the interpretation of the same phrase in relation to the rape contemplated in Part I*(c)* of the CLAA. It is clear from this case that the test for ascertaining whether grievous bodily harm has been inflicted is factual and objective. The correct approach to that enquiry necessitates a holistic consideration of all objective factors pertaining to the incident, with a view to ascertaining whether bodily injuries were inflicted and whether they are of a serious nature.

[15] In my view, the high court's reliance on cases where the accused was charged with the offence of assault with intent to do grievous bodily harm was clearly wrong. By importing the intention of the respondent into the enquiry, the high court disregarded the principles laid down in *Jacobs.* It committed an error of law as 'intent' is irrelevant in the determination of whether grievous bodily harm was inflicted on a complainant in the rape envisaged in Part I*(c)* of the CLAA. Rather, the question to be answered is whether, as a matter of fact, the victim of such a rape sustained grievous bodily harm. It is evident from the high court's judgment that its erroneous conclusion that the DPP had failed to prove the element of intent resulted in it concluding that the rape committed by the respondent did not fall within the purview of s 51(1) read with Part I*(c)* of Schedule 2 of the CLAA and instead considered the applicable minimum sentence to be 10 years imprisonment as stipulated in Part III of the CLAA. This erroneous finding pertaining to the applicable

[10] Ibid, at 485B-D. See also *S v Maselani* 2013 (2) SACR 172 (SCA) at para 12-13.

minimum sentence was clearly made in favour of the respondent.[11] The applicant has thus shown a basis for invoking the provisions of s 311(1) of the CPA and this court has jurisdiction to hear the appeal.

[16] The respondent contended that the definition of appeal in s 1 of the Superior Courts Act precluded this court from entertaining appeals brought at the instance of the Director of Public Prosecutions in respect of decisions made by the high court on appeal. I disagree with that contention. Section 1 of the Superior Courts Act provides that 'appeal' in Chapter 5, does not include an appeal *in a matter regulated in terms of the CPA, or in terms of any other criminal procedural law.*' Section 311 of the CPA grants the State the right to appeal to this court against the judgment of the high court given on appeal, on a question of law decided in favour of the convicted person. However, it does not go as far as laying down a procedure pertaining to how this right must be exercised. None of the general provisions of the CPA regulating appeals and applications for leave to appeal specifically deal with how the right of appeal granted in s 311 must be exercised. Furthermore, no other criminal procedural law makes provision for this.

[17] In view of the fact that neither the CPA nor any other criminal procedural law regulates s 311 appeals, there is simply no basis for concluding that s 311 appeals are excluded from the application of the Superior Courts Act by virtue of s 1 of that Act. It stands to reason that an appeal envisaged in s 311 of the CPA does not fall within the category of those excluded from the application of the Superior Courts Act in terms of s 1 and falls to be regulated by s 16(1)*(b)* of the Superior Courts Act. This court does have jurisdiction to consider an appeal against a decision of the high court on appeal to it on a question of law as contemplated in s 311 of the CPA.

[18] I turn now to consider whether the DPP has an automatic right to appeal to this court or whether leave has to be sought. Sections 20(1), 20(4) and 21(1) of the Supreme

[11] In *S v Goabab* 2012 JD3 1063 (Nm) at para 8, the court found that alternative charges, viewed against maximum sentences constituted a lesser offence and therefore the decision of the court to acquit the accused on the main charge constituted a decision in favour of the accused.

Court Act 59 of 1959, which is the predecessor of the Superior Courts Act, conferred jurisdiction on this court to hear and determine appeals from any decision of provincial or local division. The question whether leave to appeal was required for the State to prosecute appeals on a question of law was considered in *Attorney-General, Transvaal v Nokwe & others.*[12] Having considered the provisions of s 21(2)*(a)* of the Supreme Court Act (in its earlier form, prior to its amendment in 1982), the court concluded that leave was indeed necessary.[13] After the 1982 amendment, s 20(4) of the Supreme Court Act made the granting of leave a pre-requisite to the hearing of an appeal by this court in the following terms:

'(4) No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except-

(a) in the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in terms of subsection (3), with the special leave of the appellate division;

(b) *in any other case*, *with the leave of* the court against whose judgment or order the appeal is to be made, or where such leave has been refused, *with the leave of* the appellate division.' (My emphasis).

[19] I have already concluded that s 1 of the Superior Courts Act does not serve as a bar to the adjudication of appeals envisaged in s 311 of the CPA. The general provisions applicable to appeals to this court are set out in s 16 of that Act. The granting of leave to appeal from the judgment of a high court, or court of similar status, to this court is a pre-requisite in terms of ss 16(1)*(a)(b)* and (c)[14] of the Superior Courts Act. This is not surprising, for the indisputable purpose of a party having to apply for leave to appeal is to limit appeals to those which have reasonable prospects of success.[15] In my view, it would be an anomaly for leave to appeal to this court to be required in respect of all appeals except for those that are at the instance of the State on a question of law. I see no basis for such a distinction.[16]

---

[12] *Attorney-General, Transvaal v Nokwe & others* 1962 (3) 803 at 804.
[13] Ibid at 806D.
[14] See footnote 3.
[15] *Cronshaw & another v Coin Security Group (Pty) Ltd* [1996] ZASCA 38; 1996 (3) SA 686 (SCA) at 689B; *Pharmaceutical Society of SA and Others v Minister of Health & Another; New Clicks SA (Pty) Ltd v Tshabalala Msimang NO & another* [2004] ZASCA 122; [2005] 1 All SA 326 (SCA) at para 20-23.
[16] *Attorney-General, Transvaal v Nokwe & others* supra, at p805D-806A.

[20] If the legislature intended to grant an automatic right of appeal, it would have done so expressly.[17] It is significant that s 16(1)*(b)* of the Superior Courts Act expressly states that an appeal against the decision of the high court *on appeal to it* lies to this court upon special leave having been granted. It is self-evident that an appeal envisaged in s 311 of the CPA relates to a decision made by the high court *on appeal,* which is the case in the matter at hand. The provisions of s 16(1)*(b)* have therefore been triggered. The respondent correctly conceded that 'apropos the application of s 311 in general, where an appeal is permissible, the respondent is in agreement with the appellant's submissions that special leave would be required from this honourable court in terms of s 16(1)*(b)* of the Superior Courts Act.' For all the reasons stated above, I conclude that the appellant's application for special leave to appeal on a question of law relating to the sentence imposed by the high court on appeal to it is therefore correctly before us.

[21] I now consider whether special leave ought to be granted in this matter. The factors relevant to the granting of special leave are well established. The general principle is that in addition to reasonable prospects of success, an applicant for special leave to appeal must show that there are special circumstances which merit a further appeal to this court. This court, in *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering*[18] held that the word 'special' denotes that some additional factor or criterion is to play a part in the granting of leave. It considered special circumstances as (i) where the appeal raises a substantial point of law; (ii) where the matter turns on factual issues but the prospects of success are so strong that the refusal of leave would result in a manifest denial of justice; (iii) where the matter is of very great importance to the parties or to the public.[19] This list is by no means exhaustive. The existence of the first two special circumstances is self-evident from the consideration of the facts of this matter in the preceding paragraphs and need not be repeated here.

---

[17] Section 309(1)*(a)* of the CPA grants automatic leave to appeal to a High Court where the regional court has imposed life imprisonment under s 51(1) of the CLAA.
[18] *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering* [1986] ZASCA 10; 1986 (2) SA 555 (A).
[19] At p 564 – 565.

[22] Turning now to consider whether this matter is of substantial importance to the parties or the public,[20] I have already found that the high court erred in considering intent to be a consideration in determining whether there was infliction of grievous bodily injury on the complainant. If this court does not intervene, the unfortunate result will be that the high court's erroneous decision will, on the basis of the doctrine of *stare decisis,* continue to be considered as a precedent, thus perpetuating the error of law it committed. I therefore conclude that this matter is indeed of substantial importance to the State and to the public and that there are compelling reasons which justify the hearing of the appeal. I am satisfied that all the requirements for the granting of special leave to appeal have been met.

[23] Having found that the decision made by the high court in favour of the respondent was based on an error of law and that the DPP has met the threshold for the granting of special leave to appeal, it stands to reason that the appeal is to be upheld. Section 311(1) of the CPA sets out the powers which an appeal court has after a successful appeal. These depend on whether it was the DPP or the accused person who originally appealed against the decision of the lower court. In terms of s 311(1)*(b)* of the CPA, if, pursuant to s 309(1), the accused had successfully appealed against the decision of a lower court, and the Director of Public Prosecutions in turn had succeeded with an appeal to the Supreme Court of Appeal in terms of s 311, the latter court may restore, in its original or amended form, the sentence or order of the lower court which the accused had originally appealed.

[24] Notably, there is no provision in s 311 of the CPA for remittal of the matter to the high court whose decision is the subject of this appeal. In *Attorney-General v Steenkamp,*[21] Van den Heever JA held that it could hardly have been the intention of the legislature that where the order of this court does not finally dispose of the issues raised in the first court of appeal, those issues must arbitrarily be deemed to have been decided or be left hanging in the air. In *The Director of Public Prosecutions KwaZulu- Natal v*

[20] *Director of Public Prosecutions v Nokwe* (supra).
[21]1954 (1) SA 351 (A) at 357F-G; Also see *S v Meje* (248/11); 2011 ZASCA 127 (13 September 2011).

Mekka[22] this court upheld the appeal on the question of law. Having found that the regional court had correctly convicted and sentenced the respondent, it set aside the order of the high court and re-instated the conviction and sentence imposed by the regional court. I am of the view that the circumstances of this matter warrant the remittal of the matter back to the high court for a de novo hearing on the respondent's appeal on sentence.

[25] In the result, I would grant special leave to appeal; uphold the appeal in respect of the question of law; set aside the order of the high court on sentence and remit the matter to the high court, Gauteng Division, for a de novo hearing on the respondent's appeal on sentence.

_____

M B Molemela

Acting Judge of Appeal

Gorven, AJA (Maya AP and Theron JA concurring)

[26] I have read the judgment of my colleague Molemela AJA. The high court held that intent must be proved when establishing whether grievous bodily harm was inflicted. This was clearly wrong as is pointed out in paragraph 15 of the minority judgment. This conclusion was accordingly a question of law wrongly decided in favour of the respondent. The provisions of s 311 of the CPA[23] are therefore triggered. This is so whether the question of law relates to conviction or sentence. The appeal must be allowed on the question of law. I agree, also, that, as a result of the error of law, the appeal court did not properly consider whether the offence fell within the ambit of Part I or Part III of Schedule 2 to the CLAA. This means that the merits of the appeal on sentence were not dealt with by the appeal court. The matter should therefore be remitted for this to take place.

---

[22] *The Director of Public Prosecutions KwaZulu-Natal v Mekka* 57/2002; [2003] ZASCA 17 (26 March 2003).
[23] Criminal Procedure Act 51 of 1977.

[27] I write because it is my view that special leave to appeal is not required in a matter arising from s 311 of the CPA. This section provides for an appeal as of right, without leave. An appeal under s 311 of the CPA is also an appeal 'regulated in terms of the Criminal Procedure Act'.[24] It is therefore one to which the provisions of Chapter 5 of the Superior Courts Act,[25] and in particular s 16(1)*(b)* thereof, do not apply.

[28] The minority judgment finds that, '[i]f the legislature intended to grant an automatic right of appeal, it would have done so expressly.' In para 17 of the judgment it is stated:

'In view of the fact that neither the CPA nor any other criminal procedural law regulates s 311 appeals, there is simply no basis for concluding that s 311 appeals are excluded from the application of the Superior Courts Act by virtue of s 1 of that Act. It stands to reason that an appeal envisaged in s 311 of the CPA does not fall within the category of those excluded from the application of the Superior Courts Act in terms of s 1 and falls to be regulated by s 16(1)*(b)* of the Superior Courts Act.'

The minority judgment goes on, in para 19, to say:

'The granting of leave to appeal from the judgment of a high court, or court of similar status, to this court is a pre-requisite in terms of ss 16(1)*(a)(b)* and *(c)* of the Superior Courts Act. This is not surprising, for the indisputable purpose of a party having to apply for leave to appeal is to limit appeals to those which have reasonable prospects of success. In my view, it would be an anomaly for leave to appeal to this court to be required in respect of all appeals except for those that are at the instance of the State on a question of law. I see no basis for such a distinction.'[26]

I respectfully differ from this approach.

[29] The introduction of the definition of an appeal in s 1 of the Superior Courts Act has given rise to a new situation. This must prompt fresh enquiries on matters settled under the previous legislation. Certain appeals are now excluded from the operation of Chapter 5 of the Superior Courts Act. This was not the position under the Supreme Court Act.[27] The enquiry which must be made prior to concluding that s 16(1)*(b)*, which requires

---

[24] From s 1 of the Superior Courts Act 10 of 2013 – this section will be dealt with more fully below.
[25] Superior Courts Act 10 of 2013.
[26] References omitted.
[27] The Supreme Court Act 59 of 1959 was repealed by the Superior Courts Act.

special leave to appeal, applies, is whether the appeal in question is subject to the provisions of Chapter 5. I now turn to that enquiry.

[30] Section 1 of the Superior Courts Act provides that an appeal in Chapter 5 'does not include an appeal in a matter regulated in terms of the Criminal Procedure Act . . . or in terms of any other criminal procedural law'. Chapter 5 of the Superior Courts Act comprises ss 15-20. This means that, if an appeal is 'regulated in terms of' the CPA, the provisions of s 16(1)*(b)* requiring special leave to appeal do not apply. The crisp issue in this regard is whether an appeal under s 311 is one 'regulated in terms of' the CPA.[28]

[31] Section 311 of the CPA reads:

'(1) Where the provincial or local division on appeal, whether brought by the attorney-general or other prosecutor or the person convicted, gives a decision in favour of the person convicted on a question of law, the attorney-general or other prosecutor against whom the decision is given may appeal to the Appellate Division of the Supreme Court, which shall, if it decides the matter in issue in favour of the appellant, set aside or vary the decision appealed from and, if the matter was brought before the provincial or local division in terms of–

(a) section 309(1), re-instate the conviction, sentence or order of the lower court appealed from, either in its original form or in such a modified form as the said Appellate Division may consider desirable; or

(b) section 310(2), give such decision or take such action as the provincial or local division ought, in the opinion of the said Appellate Division, to have given or taken (including any action under section 310(5)), and thereupon the provisions of section 310(4) shall *mutatis mutandis* apply.

(2) If an appeal brought by the attorney-general or other prosecutor under this section or section 310 is dismissed, the court dismissing the appeal may order that the appellant pay the respondent the costs to which the respondent may have been put in opposing the appeal, taxed according to the scale in civil cases of that court: Provided that where the attorney-general is the appellant, the costs which he is so ordered to pay shall be paid by the State.'

[32] It can be seen that s 311 gives jurisdiction to this court when a high court 'on appeal . . . gives a decision in favour of the person convicted on a question of law'. Jurisdiction

[28] It has not been contended that such an appeal is regulated by any other criminal procedural law.

is founded on s 311 itself and is clear and express. The present matter was brought before the high court by way of an appeal in terms of s 309(1) of the CPA. We have found that, in that appeal, the high court decided a question of law in favour of the respondent. Accordingly, the provisions of s 311(1)*(a)* find application. In those circumstances, this court's jurisdiction is established under s 311.

[33] As mentioned, the introduction of the definition of appeal in s 1 of the Superior Courts Act has brought about a new situation requiring the consideration of whether an appeal is regulated by the CPA. In *S v Van Wyk & another*,[29] in the context of an appeal by an accused person, this court held that '[t]he CPA does not contain any provision dealing with a right of appeal to this court from a decision of the high court taken on appeal to it from a magistrates' court.' Accordingly, it was held, such an appeal is not regulated by the CPA and is not excluded from the operation of Chapter 5 of the Superior Courts Act. As a result, the provisions of s 16(1)*(b)* govern such an appeal.[30] This requires the grant of special leave to appeal by this court. In contrast to the position dealt with in *Van Wyk*, s 311 of the CPA clearly does 'contain [a] provision dealing with a right of appeal to this court from a decision of the high court taken on appeal to it from a magistrates' court'.[31] This distinguishes the position under s 311 from that dealt with in *Van Wyk*. Applying the dictum in *Van Wyk*, because s 311 of the CPA gives a right of appeal, such an appeal is excluded from the operation of Chapter 5 of the Superior Courts Act.

[34] In *DPP Western Cape v Kock*,[32] this court held that, where the state seeks to appeal against sentence under the provisions of s 316B(1) of the CPA, that right of appeal 'is specifically regulated by the CPA, therefore the provisions of s 16(1*)(b)* do not find application.'[33] And in *Director of Prosecutions v Olivier*,[34] this court held that it only has jurisdiction to deal with an appeal against sentence brought by the state under s 316B of

---

[29] *S v Van Wyk & another* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) para 18.
[30] *Van Wyk* para 20.
[31] *Van Wyk* para 18.
[32] *DPP Western Cape v Kock* [2015] ZASCA 197; 2016 (1) SACR 539 (SCA).
[33] Para 18.
[34] *Director of Public Prosecutions v Olivier* 2006 (1) SACR 380 (SCA) approved in *S v Nabolisa* [2013] ZACC 17; 2013 (2) SACR 221 (CC).

the CPA where the high court acted as a court of first instance and not as an appeal court.[35] These both dealt with attempts to appeal against sentence in this court where that sentence had been imposed by the high court sitting as a court of appeal. In both of those matters this court held that it had no jurisdiction to entertain such an appeal. In each of those cases the appeal was struck from the roll, which is the appropriate order when there is a lack of jurisdiction to adjudicate an appeal. Neither of those matters dealt with an appeal brought under s 311 of the CPA.

[35] The context of s 311 of the CPA must be considered. Most other sections of the CPA which allow for an appeal require applications for leave to appeal. These include s 309(1*)(a)*, s 309B(1)*(a)*, s 310A(1), s 316(1)*(a)* and s 316B(1) of the CPA. It is clear that these are appeals 'regulated in terms of' the CPA. They give the right of appeal and deal with the procedure for the exercise of that right. In all cases, the procedure requires an application for leave to appeal.

[36] Leaving aside s 311 for the moment, the exceptions to the requirement of leave to appeal in the CPA are twofold. The first is the proviso to s 309(1)*(a)*:

'Provided that if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B'.

There is therefore an explicit provision that an accused person in the circumstances set out in the proviso to s 309(1)*(a)* 'may note such an appeal without having to apply for leave'. The reason for specifying this is clear. It is stated as an exception to the general provision in that section requiring leave to appeal. In this section, the right to appeal is given, it is expressly stated that no leave to appeal is required and the person is directed to exercise that right by simply noting an appeal.

[37] The second is s 310, the relevant parts of which provide:

'(1) When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law . . . the attorney-general . . . may require the judicial officer concerned to state

---

[35] *Olivier* para 81.

a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law.
(2) When such case has been stated, the attorney-general or other prosecutor, as the case may be, may appeal from the decision to the provincial or local division having jurisdiction.
(3) The provisions of section 309(2) shall apply with reference to an appeal under this section.'
Section 309(2) provides that such an appeal must be noted and prosecuted according to the rules of court. Section 310 thus gives a right of appeal. Unlike s 309(1)*(a)*, it does not provide in terms that no leave to appeal is required. It does specify that the right to appeal must be exercised by noting and prosecuting the appeal according to the rules of court. It is clear that leave to appeal is not first required and that it is also an appeal as of right.

[38] The wording of s 311 is similar to that of s 310(2). Section 311 says that 'the attorney-general or other prosecutor against whom the decision is given may appeal'. Both sections allow this when a decision in favour of the accused on any question of law has been made. The right to appeal is given. As is the case with s 310(2), the section does not state in terms that no leave to appeal is required. Sections 310 and 311 differ in two respects. First, s 310(3) imports the provisions of s 309(2), which specifies that the noting and prosecution of the appeal must take place as 'prescribed by the rules of court'. There is no equivalent provision in the CPA concerning an appeal under s 311. Secondly, an appeal under s 310(2) does not lie to this court.

[39] Dealing with the second of these first, an objection has been raised that appeals without leave do not lie to this court. This is not so. In the context of an appeal by an accused against a refusal by the high court of condonation for the late noting of an appeal, this court has consistently recognised appeals as of right without leave in certain circumstances.[36] Until the coming into effect of the Superior Courts Act, this was also the case for appeals against the refusal of bail or the imposition of a condition of bail by a

[36] *S v Swiegers* 1969 (1) PH H110 (A); *S v Tsedi* 1984 (1) SA 565 (A) at 570A-C; *S v Absalom* 1989 (3) SA 154 (A) at 162D-E; *S v Botha en 'n ander* 2002 (1) SACR 222 (SCA) para 13.

high court sitting as a court of first instance.[37] The Superior Courts Act also brought about a change of approach in this regard.[38]

[40] Section 315(4) of the CPA is of some significance:

'An appeal in terms of this Chapter shall lie only as provided in sections 316 to 319 inclusive, and not as of right.'

This section is part of Chapter 31 of the CPA, comprising ss 315 to 324, and deals with appeals in cases of criminal proceedings in superior courts. Chapter 30, comprising ss 302 to 314, must thus be taken to allow for appeals as of right. This chapter deals with reviews and appeals in cases of criminal proceedings in lower courts. We have seen that the proviso to s 309(1)*(a)* and s 310(2) fall into the category of appeals as of right. Section 311 is part of this chapter.

[41] Section 311(2) ties ss 310 and 311 together. It provides that, if an appeal arising from these two sections is dismissed, 'the court dismissing the appeal may order that the appellant pay the respondent the costs to which the respondent may have been put in opposing the appeal'. This provides a check against abusive appeals which might otherwise arise from such a provision.

[42] Similar provisions are found in ss 310A(6) and 316B(3). These allow the State to apply for leave to appeal against a sentence and, if given leave, to appeal against sentence. What is significant is that, in addition to providing for an 'order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing' the appeal, they also provide for an 'order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing' the application for leave to appeal. The absence of a similar provision in s 311(2) for costs of an application for leave to appeal fortifies an interpretation that no such application is necessary.

---

[37] *S v Botha en 'n ander* [2001] ZASCA 146; 2002 (2) SA 680 (SCA); 2002 (1) SACR 222; [2002] All SA 577.

[38] *S v Banger* 2016 (1) SACR 115 (SCA).

[43] As mentioned, s 310(3) specifies that the appeal must be noted and prosecuted in terms of the rules of court. This provision does not find echo in s 311. As such, no procedure for the prosecution of the appeal is set out in the CPA. The question is whether the absence of a provision setting out the procedure to exercise the right of appeal means that it is not one 'regulated in terms of' the CPA. If so, it is not excluded from Chapter 5 of the Superior Courts Act and the provisions of s 16(1)*(b)* requiring special leave to appeal would apply.

[44] Section 16(1)*(b)* of the Superior Courts Act provides that:

'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 . . . .'

What this means is that, until given by this court, there is no right to appeal. The right to appeal can be withheld or given by this court. But s 311 of the CPA already gives that right if the circumstances specified in it are met. In addition, it also specifies that such an appeal lies to this court. What the minority judgment does not explain is why, if a right of appeal is given by s 311, leave is required in order to obtain that right.

[45] It is, of course, instructive that, unlike other sections in the CPA, s 311 does not in terms specify that any form of leave to appeal must be obtained. All of the sections requiring leave specify this requirement. There is also no need to specify the procedure to exercise the right because rule 7(1)*(a)* of the rules of this court does so:[39]

'(1) An appellant shall lodge a notice of appeal with the registrar and the registrar of the court a quo within one month after the date of—

(a) the granting of the judgment or order appealed against where leave to appeal is not required'.

Rule 7(1)*(a)* thus deals in terms with a situation where leave to appeal is not required. Holding that s 311 deals with an appeal as of right accordingly does not give rise to a procedural lacuna.

[46] It is my view that, because a right to appeal is given in s 311 of the CPA, such an appeal is one 'regulated' by the CPA. It is not necessary, in addition, for the CPA to specify

[39] Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa.

the procedure by which to exercise that right. The Director of Public Prosecutions, or other prosecutor, has an appeal as of right. That being the case, an appeal under s 311 is excluded from the operation of Chapter 5 of the Superior Courts Act. As such, the provisions of s 16(1)*(b)* of the Superior Courts Act do not apply. An appeal under s 311 accordingly does not require special leave to appeal.

[47] Arising from this conclusion, accordingly, no application for special leave to appeal was necessary in this matter. It follows that an order granting special leave to appeal is neither necessary nor competent.

[48] In the result the following order is made:

1 The appeal is upheld in respect of the question of law.

2 The order of the high court on sentence is set aside.

3 The sentence imposed by the regional court is reinstated.

4 The matter is remitted to the high court for the appeal to proceed on sentence.

_____

T R Gorven

Acting Judge of Appeal

APPEARANCES:

For the Appellant:	S Mahomed SC (with C P Harmzen) Instructed by: Office Director of Public Prosecutions, Pretoria c/o Director of Public Prosecutions, Bloemfontein
For the Respondent:	H L Alberts (with S Moeng) Instructed by: Legal Aid South Africa, Pretoria c/o Bloemfontein Justice Centre, Bloemfontein