THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 938/12

In the matter between:

OLIVER JON TONKIN **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation:	*Tonkin v The State* (938/12) [2013] ZASCA 179 (29 November 2013)
Coram:	Brand, Lewis, Cachalia, Leach *et* Majiedt JJA
Heard:	**26 November 2013**
Delivered:	**29 November 2013**

Summary: Appeal against refusal of petition for leave to appeal by high court – question whether this court can entertain appeal on the merits revisited – concluded that it has no jurisdiction to do so – *dolus eventualis* – element of reconciliation with foreseen harmful consequences materialising – not satisfied by mere fact that perpetrator proceeded with proposed conduct.

ORDER

On appeal from: Free State High Court, Bloemfontein (Jordaan J and Snellenburg AJ sitting as court of appeal on appeal from the Magistrates' Court):

1 The appeal is upheld.

2 The order of the court a quo is set aside and replaced with the following:

'The applicant is granted leave to appeal to the Free State High Court, Bloemfontein against his conviction of malicious injury to property in the Harrismith Magistrate's Court.'

JUDGMENT

Brand JA (Lewis, Cachalia, Leach *et* Majiedt JJA concurring):

[1] This is an appeal against the refusal by the Free State High Court, Bloemfontein, of the appellant's application for leave to appeal to that court against his conviction of malicious injury to property in the Harrismith Magistrate's Court. The appeal is with the leave of the court a quo. It arose in the following way. The appellant was charged in the Magistrate's Court Harrismith on three counts, to wit: (a) malicious injury to property; (b) assault with intent to do grievous bodily harm; and (c) *crimen injuria*. He was, however, convicted of the first count only. This conviction rested on the basis that he intentionally broke a window-pane thereby causing damages of R120, ie R80 for the pane and R40 for repairs. Thereupon he was cautioned and discharged. His application to the trial court for leave to appeal to the high court against the conviction, under s 309B of the Criminal Procedure Act 51 of 1977, did not succeed. In consequence, the appellant petitioned the Judge President of the Free State High Court in terms of s 309C of the same Act for such leave. In the event, that petition was dismissed by Jordaan J and Snellenburg AJ.

Thereafter he sought and obtained leave in the high court (by Kruger J and Jordaan J) to appeal to this court against the dismissal of his petition. This brought about the rather inconsistent result that, while the high court first held that the appellant had no reasonable prospects of success on appeal, it then decided that the appellant did indeed have reasonable prospects of succeeding in this court.

[2] In *S v Khoasasa* 2003 (1) SACR 123 (SCA) paras 14 and 19-22 this court held that a petition for leave to appeal to a high court is, in effect, an appeal against the refusal of leave to appeal by the Magistrate's court. In consequence it concluded that such refusal of leave by the high court is an order given by the high court on appeal and is therefore governed by s 20(4) of the Supreme Court Act 59 of 1959, which provides in relevant part:

'(4) No appeal shall lie against a judgment or order of a . . . [high court] in any civil proceedings or against any judgment or order of that court given on appeal to it except:–

(a) . . .

(b) . . . 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 [this court].'

[3] This means that the refusal of leave to appeal by the high court in terms of s 309C is appealable to this court with the leave of the high court or, where such leave has been refused, with the leave of this court. In either event, so it was held in *Khoasasa*, the order appealed against is the refusal of leave with the result that this court cannot decide the appeal itself. In *S v Matshona* [2008] 4 All SA 68 (SCA) para 4, Leach AJA described the reasoning in *Khoasasa* as unassailable. It follows, so he said, that in an appeal of this kind, the issue to be determined by this court is not whether the appeal against conviction and sentence should succeed, but whether the high court should have granted leave, which in turn depends on whether the appellant could be said to have reasonable prospects of success on appeal. The position thus stated has since been confirmed in a number of decisions by this court (see eg *S v Kriel* 2012 (1) SACR 1 (SCA) paras 11-12; *S v Smith* 2012 (1) SACR 567 (SCA) paras 2-3; *S v De Sousa*; also referred to as *A D v The State* (334/2011) [2011] ZASCA 215 paras 3-6).

[4] The problem in matters of this kind is of course, that if the appeal were to succeed, the result is cumbersome and wasteful of both time and money. After two rounds before the high court and one round before this court, the appeal process will remain uncompleted. Two judges of the high court will still have to hear the appeal on its merits with the possibility of a further appeal to this court. All this was pointed out in *De Sousa* with the observation (in para 13) that '[i]t is perhaps time for thought to be given to legislative reform so that petitions can be finalised speedily at the High Court level'. Despite two years elapsing since delivery of that judgment, no reaction has thus far been forthcoming.

[5] In this light we considered a different tack. That is, whether this court could perhaps, in the exercise of its inherent jurisdiction and by building on the precedent in *S v Sekhane* 2011 (2) SACR 493 (SCA), short-circuit the cumbersome process by entertaining the appeal against conviction directly. *Sekhane,* or course, concerned appeals against the refusal of condonation by high courts in appeals to them. That decision could therefore at best be relevant by analogy only. Nevertheless, counsel for both parties were invited to either support or oppose the proposition in argument.

[6] In response to our invitation, counsel for the appellant submitted a well prepared argument urging us to entertain the merits of the appeal. But on reflection it appears to me that, unfortunate as it may be, we have no authority to do so. The reasons why this is so have been stated in *Khoasasa* and elaborated upon in the decisions following upon it to which I have referred. On reflection, these reasons cannot, in my view, be faulted. In broad outline they are as follows:

(a) Although this court has inherent jurisdiction to regulate its own procedure, it has no inherent or original jurisdiction to hear appeals from other courts. In the present context, its jurisdiction is confined to that which is bestowed upon it by sections 20 and 21 of the Supreme Court Act. In terms of these sections the jurisdiction of this court is limited to appeals against decisions of the high court.

(b) When leave to appeal has been refused by the high court, that court rather obviously, did not decide the merits of the appeal. If this court were therefore to

entertain an appeal on the merits in those circumstances, it would in effect be hearing an appeal directly from the magistrates' court. That would be in direct conflict with s 309 of the Criminal Procedure Act, which provides that appeals from lower courts lie to a high court. The 'order on appeal' by the high court – in the language of s 20(4) –that is appealed against is the refusal of the petition for leave to appeal and nothing else.

(c) As to this court's inherent jurisdiction to regulate its own proceedings, it goes without saying that it is to be exercised within the confines of statutory limitations. With regard to appeals against judgments and orders by the high court, the procedure is dictated by s 20(4)*(b)*.

(d) In accordance with the procedure thus determined, leave to appeal is first to be sought from the high court before this court can entertain an application to that effect. In this case leave was only sought and obtained to appeal against the refusal of the petition. No leave was sought to appeal against the conviction. It follows that even if this court were authorised to entertain an appeal against conviction – which, for the reasons given, I believe it is not – leave would first have to be sought for that appeal from the high court, which never occurred.

[7] This brings me back to the appellant's contention that the high court had erred in refusing him leave to appeal. Whether or not this is so obviously depends on the background facts, which are as follows. All three charges originally brought against the appellant emanated from events that occurred in the charge office of the Harrismith police station during the early hours of 5 September 2009. In support of these charges the State relied on the testimony of two police officials who were on duty in the charge office at the time. But the trial magistrate found the version of these state witnesses so unreliable that it was incapable of sustaining any conviction. That gave rise to the acquittal of the appellant on the first two charges. As to the third charge of malicious injury to property, the appellant was however convicted on his own version.

[8] The appellant admitted that he broke the glass pane which forms part of the door lending entrance to the charge-office, when he struck it with the palm of his hand. As to how this came about, he explained that he was extremely frustrated by the complete inaction of the police officials on duty in the charge-office when he asked their assistance in securing bail for his friend who was in their custody. Hence the appellant decided to somehow demonstrate his frustration by, as he put it, making his exit in a dramatic way. An essential component of the appellant's account as to how he proposed to do this, was that the entrance to the charge-office consisted of two swing doors which were both made up of glass panes fitted into wooden frames. What the appellant intended, according to his explanation, was to push these doors open with sufficient force to allow them to swing back closed behind him, in the manner he had seen happening in 'western movies'. In executing this manoeuvre he hit both doors with the palms of his hand, incidentally striking the door on his left on one of its glass panes.

[9] When the appellant initially entered the charge-office, so he explained, he used the door on his right which did indeed swing open on its hinges. Unbeknown to the appellant, however, the door on the left, unlike its counterpart on the right, was not allowed to swing open freely, because it was latched to the floor. Because the door unexpectedly resisted his push, so the appellant concluded, the impact of his palm on the pane was much greater than he anticipated which, in turn, caused it to break.

[10] The magistrate accepted the appellant's version that he had no motive or direct intent to break the glass pane. Yet he found the appellant guilty on the basis of *dolus eventualis*. It is clear that the magistrate appreciated that, in accordance with trite principle, the test for *dolus eventualis* in the present context was twofold, namely, whether the appellant (a) subjectively foresaw the possibility of the pane breaking as a result of his conduct; and (b) reconciled himself with that possibility. The magistrate's application of these principles appears from the following statements in his judgment:

'[The appellant] was the project manager of a building site. He knew that if one applies pressure to a window-pane it would break. He knew that better than the average person in the street. Even the average person in the street would know that. . . .
The court finds that the accused did in fact have the knowledge that it is possible that the window-pane broke, nevertheless he proceeded and he reconciled himself with that fact and the accused, on his own version, had the necessary dolus eventualis in breaking the window-pane. . . .'

[11] This statement, as I see it, potentially exposes the magistrate to the criticism that, despite his express reference to the element of reconciliation as an essential ingredient of *dolus eventualis*, he never actually enquired into the presence of that element at all. In consequence he fell into the trap against which this court recently reiterated a note of warning in *S v Humphreys* 2013 (2) SACR 1 (SCA) paras 15-17. Reconciliation, so this court emphasised in *Humphreys*, involves more than the perpetrator merely proceeding with his or her proposed conduct despite the subjective appreciation of the consequences that ensued. If the perpetrator genuinely believed – despite the unreasonableness of that belief – that the foreseen consequences would not materialise, the element of reconciliation cannot be said to be present. The form of fault in this instance would be *luxuria* or conscious negligence, but not *dolus eventualis* (see eg *S v Ngubane* 1985 (3) SA 677 (A) at 685A-H).

[12] The true enquiry under this rubric is therefore, as was said in *Humphreys* (para 17):
'. . . [w]hether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his actions. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible [consequences] he subjectively foresaw would not actually occur, the second element of dolus eventualis would not have been established.'

[13] On the facts of this case, the magistrate's finding of subjective foresight of the consequences on the part of the appellant is, in my view, of at least doubtful veracity. But assuming the correctness of that finding, it can, as I see it, be argued with considerable conviction that, even if the appellant foresaw the possibility that the pane may break, he thought it would not actually happen because the door would give way. Whether or not that argument should be accepted, is a question for the high court to decide in the appeal. For present purposes I am prepared to say, however, that on the scale of prospects of succeeding, this case falls at the higher end. That renders it self-evident, I think, that the present appeal must succeed.

[14] It is ordered that:

1 The appeal is upheld.

2 The order of the court a quo is set aside and replaced with the following:

'The applicant is granted leave to appeal to the Free State High Court, Bloemfontein against his conviction of malicious injury to property in the Harrismith Magistrate's Court.'

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	Estelle Killian
Instructed by:	Tonkin Clacey Attorneys ROSEBANK
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For Respondent:	Colin Steyn Director of Public Prosecutions BLOEMFONTEIN