IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: A1033/2002

CORAM: Selikowitz et Blignault et Knoll JJ

In the matter between:

HEINRICH GENTLE First Appellant
HENDRIK DE VILLIERS Second Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON THIS 20th DAY OF FEBRUARY 2003

KNOLL J:

On the 26th of July 2000, the two appellants were charged, before the Regional Court sitting at Oudtshoorn, with one count of rape. Both appellants were legally represented. They both pleaded not guilty to the charge, but after evidence was adduced by the State and both appellants, they were found guilty as charged. In

finding the appellants guilty, the magistrate specifically found that each appellant had raped the complainant more than once at the time that the offence was committed. Accordingly, the offence was found to be one specified in Part 1 of Schedule 2 ((a) (i) under the sub-heading "Rape") of the Criminal Law Amendment Act 105 of 1997 ("the Act"). In terms of section 51 (1) of the Act the mandatory sentence for such an offence is imprisonment for life, unless *"substantial and compelling circumstances"* exist that justify the imposition of a lesser sentence. (Section 51 (3) (a) of the Act.) In terms of section 52 (1) (b) (i)of the Act, the proceedings were stopped and both appellants committed for sentence by the High Court.

On the 12th of November 2001, the matter came before Griesel J who was presiding at the circuit court in Oudtshoorn. He noted that he was satisfied that the proceedings in the Regional Court were in accordance with justice. Such a finding is a prerequisite to the sentencing of the appellants in terms of section 52 (3) (b) of the Act. He noted further that the judgment of the Regional Court stood for the purpose of sentence.

Griesel J then proceeded to sentence both appellants; first appellant to 15 years imprisonment and second appellant to 10 years imprisonment.

Both appellants applied for leave to appeal to Griesel J against their convictions and sentences. On the same day similar applications were brought before the learned judge in four other similar matters. The learned judge raised the question, *mero motu,* whether leave to appeal was required in matters referred from a Regional to a High Court in terms of section 52 (1) (b) (i) of the Act. He interpreted the provisions of the Act together with the relevant provisions of the Criminal Procedure Act No. 51 of 1977 ("The Criminal Procedure Act") and reached the following conclusion:-

> "*Weens die bostaande redes kom ek tot die gevolgtrekking dat elk van die huidige beskuldigdes´n outomatiese reg van appél teen hul skuldigbevindings het, maar dat verlof om teen hulle vonnisse te appelleer´n voorvereiste is.*
>
> *Sou die Volbank van my bogemelde benadering verskil, òf wat die feite òf wat die reg aanbetref, word geboekstaaf dat ek in elk van die vyf aansoeke wat die onderwerp van die huidige uitspraak vorm sodanige verlof sou geweier het. In daardie geval kan die gebrek aan verlof ondervang word deur die uitoefening deur die hof van appél van sy wye hersieningsbevoegdhede voortspruitend uit die bepalings van artikel 309 (3), gelees met artikel 304 (2) van die Strafproseswet. Dit sou myns insiens wenslik wees vir die onderskeie regsverteenwoordigers van die beskuldigdes sowel as die staat om by voorbereiding vir die appèlle spesifiek met hierdie aspekte te handel."*

The application for leave to appeal against conviction, accordingly, did not succeed and leave was not granted.

The applications for leave to appeal against the sentences were refused.

This matter, therefore, comes before us on the basis that the appellants have an automatic right to appeal their convictions. There is also a submission on behalf of second appellant that Griesel J was incorrect in his finding that leave to appeal was required for an appeal against sentence. It is contended that the automatic right of appeal applies also to the sentence.

Subsequent to the delivery of the judgement of Griesel J, the Supreme Court of Appeal considered the issue of whether a question of law may be reserved in terms of section 319 of the Criminal Procedure Act in matters referred from the Regional to a High Court in terms of section 52 (1) (b) (i) of the Act. (S v B 2003 (1) SACR 52 SCA at 60 b - 61 f). In so doing, it considered whether the question of law reserved in that instance could be said to have arisen "*on the trial in a superior court*" as is required in section 319 of the Criminal Procedure Act, given that the appellant had been charged in the Regional Court, evidence had been heard in the Regional Court and he had been convicted in the Regional Court, whereafter he had been committed to the High Court for sentence. The judgment is in Afrikaans and the relevant Afrikaans wording of section 319 of the Criminal Procedure Act reads "*Indien´n regsvraag by die verhoor van iemand in´n hoër hof weens´n misdryf ontstaan....*" (My underlining).

As in the instant case, the appellant in S v B (*supra*) had pleaded not guilty. The provisions of the Act relevant to such a situation read as follows:-

> "***52. Committal of accused for sentence by High Court after conviction in regional Court of offence referred to in Schedule 2.*** *- (1) If a Regional Court, following on -*
>
> *(a)....*
>
> *(b).... A plea of not guilty*
>
> *has convicted an accused of an offence referred to in -*
>
> *(i) Part 1 of Schedule 2 ...*
>
> *The court shall stop the proceedings and commit the accused for sentence as contemplated in section 51 (1) or (2), as the case may be, by a High Court having jurisdiction.*
>
> *(2) .....*
>
> *(3) (a) Where an accused is committed under sub-section (1) (b) for sentence by a High Court, the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that court.*
>
> *b) The High Court shall, after considering the record of the*

proceedings in the regional court, sentence the accused as contemplated in section 51 (1) or (2), as the case may be, and the judgment of the Regional Court shall stand for this purpose and be sufficient for the High Court to pass such sentence: Provided that if the judge is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he or she shall, without sentencing the accused, obtain from the regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused.

c) *If a judge acts under the proviso to paragraph (b), he or she shall inform the accused accordingly and postpone the case for judgment, and, if the accused is in custody, the judge may make such order with regard to the detention or release of the accused as he or she may deem fit.*

d) *The court in question may at any sitting thereof hear any evidence and for that purpose summon any person to appear to give evidence or to produce any document or other article.*

e) *Such court, whether or not it has heard evidence and after it has obtained and considered a statement referred to in paragraph (b), may-*

   (i) *confirm the conviction and thereupon impose a sentence as contemplated in section 51 (1) or (2), as the case may*

be;

(ii) alter the conviction to a conviction of another offence referred to in schedule 2 and thereupon impose a sentence as contemplated in section 51 (1) or (2), as the case may be.

(iii) alter the conviction to a conviction of an offence other than an offence referred to in schedule 2 and thereupon impose a sentence the court may deem fit;

(iv) set aside the conviction;

(v) remit the case to the regional court with instruction to deal with any matter in such manner as the High Court may deem fit; or

(vi) make any such order in regard to any matter or thing connected with such person or the proceedings in regard to such person as the High Court deems likely to promote the ends of justice."

In S v B (*supra* at page 60 e) Streicher J.A observed that the trial of an accused embraces an investigation into the issues in the case as well as a decision in regard thereto and therefore includes the conviction. The learned judge of appeal referred to the provisions of section 53 (3) (a) to (e) of the Act and concluded as follows, at page 61 c - f:-

> "Uit hierdie bepalings blyk dit dat die verhoor van´n beskuldigde wat deur´n streekhof vir vonnis na´n Hoë Hof verwys word nie afgehandel is nie. Die oorkonde van die verrigtinge in the streekhof maak deel uit van die oorkonde in die Hoë Hof en indien die Hoë Hof van mening is dat die verrigtinge nie ooreenkomstig die reg is nie of dat twyfel bestaan of die verrigtinge ooreenkomstig die reg is, kan die Hof, onder andere, nadat getuienis ingevolge art 52 (3) (d) aangehoor is, die skuldigbevinding bekragtig, wysig, of tersyde stel; die saak na die streekhof terugverwys; of´n bevel maak wat die regspleging waarskynlik sal bevorder. *Die skuldigbevinding in die streekhof is dus, in effek,´n voorlopige skuldigbevinding wat finaal word indien dit aanvaar word of bekragtig word deur die Hoë Hof. Met ander woorde die Strafregwysigingswet het´n spesiale prosedure geskep ingevolge waarvan die verhoor van´n beskuldigde in die streekhof begin en in die Hoë Hof afgehandel kan word."* (My underlining)

Accordingly, the Supreme Court of Appeal held that it was competent to have reserved a question of law because it had arisen "*on the trial in a superior court*".

The Act was amended in certain respects, with effect from the 23rd of March 2001, by the Judicial Matters Amendment Act No. 62 of 2000. It will be noted that the provisions of section 53 (3) (a) to (e), referred to by Streicher J.A, have

been amended in minor respects. In my view, the amendments do not affect the substance of the provisions in such a way as to make them distinguishable from the provisions referred to by Streicher J.A when considering the relevant issue in S v B (*supra*) and accordingly, the conclusion which he reached, as set out above, is binding on this court.

The issue is what effect this judgment has, if any, on the correctness of the judgment of Griesel J wherein he concluded that the appellants in the instant case have an automatic right of appeal against their convictions.

Griesel J's judgment is based on his view that the conviction of the appellants in the Regional Court was a conviction of an inferior court and that neither the High Court's subsequent having to satisfy itself that the proceedings in the lower court were in accordance with justice, nor the High Court's consequent non-interference therewith, transformed it into a conviction of a High Court.

In terms of the provisions of the Criminal Procedure Act, different procedures apply to appealing against convictions in the lower courts from those applicable to convictions by a superior court. Section 309 thereof, which relates to convictions in a lower court, does not limit the right of a convicted person to appeal his conviction to a higher forum. Section 316 thereof, which deals with convictions by a superior court provides that the convicted person must apply for leave to appeal to the provincial or local division concerned and so limits the automatic right of appeal. Thereafter, where an application for leave to appeal is refused by the provincial or local division the convicted person may petition the Supreme Court of appeal for such leave. The decision of the Supreme Court of appeal is final.

Section 315 (4) of the aforesaid chapter provides that "*an appeal in terms of this chapter shall lie only as provided in sections 316 to 319 inclusive and not as of right*".

Although sections 315 (4) and section 316 limit a convicted person's automatic right to appeal, it has been held that these sections are constitutional because the petition procedure allows such person recourse to a Higher Court to review the judgment of the trial court, where leave is not granted. (S v Rens (1996 (1) SACR 105 (CC); S v Twala 1999 (2) SACR 622 (CC)).

Section 309 (1) (a) of the Criminal Procedure Act provides as follows:-

> "*Any person convicted of any offence by any lower court (including a person discharged after conviction), may appeal against such conviction and against any resultant sentence or order to the provincial or local division having jurisdiction.*" (My underlining)

The relevant parts of section 316 (1) (b) of the Criminal Procedure Act provides as follows:-

> "*An accused convicted of any offence before a superior court may, ... apply ... , to the judge who presided at the trial ... for leave to appeal against his conviction or against any sentence or order following thereon..."* (My underlining)

The jurisdictional fact, which must exist for each section to operate, which differs in the two sections, is the identity of the court bringing out the conviction. It is thus highly relevant to determine whether the conviction of the appellants in the

instant case was that of a High Court or that of a Regional Court. It is this very question which the Supreme Court of Appeal decided in S v B (*supra*). Accordingly, the premise from which Griesel J proceeded that a referral in terms of section 52 (1) (b) (i) did not transform a Regional Court conviction into a High Court conviction has been found to be incorrect. As it is a High Court conviction, section 316 of the Criminal Procedure Act is the only section that can apply and accordingly leave to appeal is required.

The next question that arises is whether this court has the jurisdiction to entertain the appeals of the appellants, given that no leave to appeal was granted on either conviction or sentence.

Where a trial judge has granted leave to appeal only against sentence but refused leave to appeal against conviction, the Supreme Court of Appeal has held that a court of appeal lacks jurisdiction to consider any appeal against conviction. (S v Langa 1981 (3) SA 186 (A) at 189 E - H). It has furthermore held that, where a petitioner seeks leave to appeal against sentence only and leave to appeal is granted against conviction as well as sentence, the leave to appeal against conviction is invalid (S v Cassidy 1978 (1) SA 687 (A) at 690 F - 691 A). Where a particular statutory provision allows an appeal against a sentence of death without complying with the provisions of section 316 of the Criminal Procedure Act, it has been held that a court of appeal does not have the

jurisdiction to consider the conviction unless section 316 has been complied with. (S v Mamkeli 1992 (2) SACR 5 (A)). Where leave to appeal against a regional magistrate's decision was refused by two judges of a Provincial Division on petition to them, and no leave was sought from the latter court to appeal to the Supreme Court of Appeal against its decision, the Supreme Court of Appeal has very recently held that it does not have jurisdiction to grant such leave or to entertain such an appeal. [S v Khoasasa 2003 (1) SACR 123 (SCA)].

The decisions in all the above cases are in accord with the view of the then Appellate Division in S v Sefatsa and Others v Attorney General, Transvaal and Another 1989 (1) SA 821 (A) at 834 E that a superior court's jurisdiction in criminal matters is determined by statute i.e. the Criminal Procedure Act and any other relevant statutory provisions as there may be. In that case it was submitted by the petitioners that a superior court has inherent jurisdiction "*to regulate its own procedures so as to do justice and to prevent the abuse of its procedure by a dishonest litigant*", and that a superior court has a jurisdiction which is *"general and unlimited unless cut down or forbidden by law*". It was held at 833 E - F that "*a superior court - including this court - is a creature of statute, and it is not correct to state, as a general proposition, that it has a jurisdiction which is general and unlimited unless cut down or forbidden by law".* Furthermore, at page 839 B - C Rabie ACJ, as he then was, observed that "(*i)t*

hardly needs saying that a court cannot have an inherent jurisdiction which would entitle it to act contrary to an express provision of an act of parliament".

Section 315 (4) allows appeals from superior court convictions only within the confines of sections 316 - 319 of the Criminal Procedure Act. In my view it would be contrary to the express provisions of section 315 (4) read with section 316 of the Criminal Procedure Act if this court were to hear an appeal under the circumstances of the instant case.

Counsel did not submit that there were, and this court is not aware of, any statutory provisions, apart from sections 316 to 319 of the Criminal Procedure Act, which would give this court jurisdiction to hear these appeals.

In S v Fourie 2001 (2) SACR 118 (SCA) at 121 a - c, the Supreme Court of Appeal considered the submission that, where an appellant had been granted leave to appeal against a conviction of culpable homicide but had been refused leave to appeal against a conviction, in the same case, of kidnapping and attempted rape, the Supreme Court of Appeal, nevertheless, had the jurisdiction to consider appeals against the latter two convictions. It was held that the power of a superior court to regulate its procedure does not include the power to hear a matter which is not the proper subject of an appeal. It was reaffirmed that the reason for this is because the court's appellate jurisdiction is not an inherent jurisdiction. It was further held that section 168 of the Republic of South Africa Constitution Act 108 of 1996 ("the Constitution") did not change the position.

In my view, in S v Fourie (*supra*) Mthinyane JA could only have been referring to the provisions of section 168 (3) of the Constitution when expressing the aforesaid opinion. Section 168 (3) of the Constitution provides that the "*Supreme Court of Appeal may decide appeals in any matter....*"

There is no equivalent provision in the Constitution specifying a High Court's jurisdiction to hear appeals. Section 169 (a) of the Constitution provides for the High Court's jurisdiction in certain constitutional matters and subsection (b) thereof provides as follows:-

> *"A High Court may decide*
>
> *a) .....*
>
> *b) any other matter not assigned to another court by an Act of Parliament."*

In my view, in as much as section 168 (3) of the Constitution has been held not to have changed the position that the Supreme Court of Appeals' appellate jurisdiction is not an inherent one, (S v Fourie (*supra*)) so also did, section 169 (b) of the Constitution not change the position with regard to a High Court's appellate jurisdiction.

In the matter of Hansen v the Regional Magistrate, Cape Town and Another 1999 (2) SACR 430 (C) Davis J expressed the view, with which King JP concurred, that the judgment in Sefatsa's case has now to be considered in the light of the

provisions of the Constitution. The learned judge found (at 433 e - g) that section 173 of the Constitution broadened the inherent jurisdiction of the court "*in that it provides that the Constitutional Court, Supreme Court of Appeal and High Courts have inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. Section 173 of the Constitution confirms a concept of inherent jurisdiction which promotes the interests of justice within the context of the values of the Constitution*". Furthermore, he distinguished the case of Sefatsa on the facts.

Should Davis J and King JP be correct, as to which no opinion is expressed, I am not of the view that, on the facts of the instant case, section 173 of the Constitution would permit this court to assume jurisdiction to hear an appeal in circumstances where such assumption would be tantamount to ignoring an express statutory provision that leave to appeal, either from the trial court or the Supreme Court of Appeal, is a requirement for a convicted person to pursue an appeal to this court. The facts of the instant case are entirely distinguishable from those in the Hansen case (*supra*) in that an appeal process is still underway in the instant case and a petition procedure remains available to the appellants.

In the case of Moch v Medtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A) at 7 E - H, Hefer JA held that "*the courts 'inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice' ... does not*

extend to the assumption of jurisdiction not conferred upon it by statute." He furthermore held that the court's inherent power is in any event reserved for extraordinary cases where grave injustice cannot otherwise be prevented. Although this was a civil matter, the same principles as are relevant to criminal matters apply, as may be seen by the learned appeal judge's reference to the matter of Sefatsa (*supra*), *inter alia*. Even were this court to have an inherent jurisdiction to hear the appeals in this case against conviction, I am not of the view that it would be in the interests of justice to do so. It cannot be said that a grave injustice will be done by virtue of this court not hearing the appeals. The appellants have a remedy, in that they are entitled to petition the Supreme Court of Appeal for leave to appeal and seek condonation for the late filing of their applications.

In conclusion, it is my view that this court does not have the jurisdiction to entertain the appeals of either appellant against conviction or sentence in the circumstances of this matter.

Before the hearing, counsel were requested by the presiding judge to make submissions as to the effect of S v B (*supra*) on the correctness of the judgment of Griesel J, as also on the jurisdiction of this court to hear the appeals. Both counsel for appellants and the state were in agreement with the conclusions reached in this judgment in these regards.

Apart from the issues raised in the application for leave to appeal and the heads of argument, certain issues which may arise on the merits, are noted herein and were drawn to counsels' attention at the hearing. These issues are as follows:-

a) Was the magistrate's warning to the minor witnesses, Mario Ewerts and Daniël Malgas, to tell the truth competent? (Cf. S v B (*supra*))

b) What effect, if any, does the absence of an allegation in the charge of a rape more than once by each appellant have on the conviction in the light of the decision in S v Legoa 2003 (1) SACR 13 (SCA)?

In view of the conclusion reached on the jurisdictional point it is neither necessary nor appropriate to express any opinion on these issues.

In the result, in summary, it is my view that the finding by Griesel J that the appellants have the automatic right to appeal to this court against their respective convictions is incorrect in the light of the subsequent decision of the Supreme Court of Appeal in S v B (*supra*) and, accordingly, leave to appeal in terms of section 316 of the Criminal Procedure Act is required should the appellants wish to appeal against their convictions.

The sentence in each case is a *"sentence ... following on*" a superior court conviction (Section 316 (1) (b)) and Griesel J was correct in his finding that leave to appeal is a prerequisite for an appeal against sentence.

Neither leave to appeal against conviction nor sentence was granted in either case and this court, accordingly, has no jurisdiction to hear either the appeals against conviction or the appeals against sentence.

In my view the appeals should both be struck from the roll.

KNOLL J

I concur

BLIGNAULT J

I concur, and it is so ordered.

SELIKOWITZ J