



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1433/2024

In the matter between:

ZOLISA MANDLA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Mandla v The State* (1433/24) [2026] ZASCA 59 (24 April 2026)

Coram: MAKGOKA and NICHOLLS JJA and MAMOSEBO AJA

Heard: Appeal disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013 by consent between the parties.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 24 April 2026 at 11h00.

Summary: Criminal procedure – appeal – leave to appeal against dismissal of petition in terms of s 309C of the Criminal Procedure Act 51 of 1977 – issue for determination whether there are prospects of success such that the order dismissing the petition ought to be set aside.

ORDER

On appeal from: Eastern Cape Division of the High Court, Makhanda (Hartle and Bloem JJ) sitting as court of appeal:

- 1 Condonation for the late filing of heads of argument is granted, and the appeal is reinstated.
- 2 The appeal succeeds.
- 3 The order refusing the appellant leave to appeal is set aside and is replaced with the following order:
‘The applicant is granted leave to appeal against his conviction to the Eastern Cape Division of the High Court, Makhanda.’

JUDGMENT

Mamosebo AJA (Makgoka and Nicholls JJA concurring):

[1] This appeal was disposed of without the hearing of oral argument in terms of s 19(a) of the Superior Courts Act 10 of 2013 (the SC Act), at the request of the parties. The appellant appeals against an order of two judges in the Eastern Cape Division of the High Court, Makhanda, (the High Court) dismissing his application for leave to appeal against a rape conviction by a regional court. He was granted leave to appeal only against the sentence.

[2] The appellant was convicted of rape in the regional court and sentenced to 20 years' direct imprisonment. His application to the regional court for leave to appeal against both his conviction and sentence was dismissed in terms of s 309B of the Criminal Procedure Act, 51 of 1977 (the CPA). On further application to the High Court, in terms of s 309C(2), two judges granted him leave to appeal to the Full Court only against the sentence. They dismissed the application for leave to appeal against the conviction. The appellant further applied to this Court in terms of s 16(1)(b) of the SC Act,¹ for special leave to appeal against the latter order.

[3] On 21 August 2024, two judges of this Court made an order granting the appellant 'special leave to the Supreme Court of Appeal'. This order was erroneous. Given the nature of the application before the two judges, the appellant could only be granted special leave to appeal to the High Court, against the dismissal of his application for leave to appeal.

[4] The appeal has lapsed because of the appellant's failure to deliver his notice of appeal timeously. He also filed his heads of argument out of time. He has applied for condonation of these two procedural lapses, and the applications are unopposed. I am satisfied that a proper case has been made out to reinstate the appeal and to condone the late filing of the appellant's heads of argument.

[5] The issue for determination is whether leave to appeal the conviction should have been granted by the High Court, not the merits of the appeal itself. This is on the authority of *S v Khoasasa*² and a long line of cases in this Court which followed

¹ Section 16(1)(b) states:

'(1) Subject to section 15(1), the Constitution and any other law –

...

(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.'

² *S v Khoasasa* 2003 (1) SACR 123 (SCA); [2002] 4 All SA 635 (SCA) paras 14 and 19-22.

it.³ The essence of these cases is that an application for leave to appeal to a High Court in terms of s 309C of the CPA is in effect an appeal against the refusal of leave to appeal by the magistrates' court in terms of s 309B of the CPA. A refusal of leave to appeal by the High Court was thus a 'judgment or order' of the High Court as contemplated in ss 20(1) and 20(4) of the now repealed Supreme Court Act 59 of 1959, given by the High Court on appeal to it. Therefore, this appeal concerns only the correctness of the High Court's refusal of leave to appeal, not the correctness of the underlying conviction.⁴ This Court lacks the authority to hear appeals directly from the magistrates' court. Whether the appellant was correctly convicted is to be determined by a full bench of the High Court, should leave to appeal be granted.

[6] The applicable test in this regard is the existence of prospects of success. The appellant bears the onus to satisfy this Court that reasonable prospects of success exist on appeal. This Court, in *S v Smith*,⁵ expounded on the test and emphasised that what is required is a dispassionate decision based on the facts and the law.

[7] I turn now to examine the merits of the application for special leave to appeal to this Court in terms of s 16(1)(b) of the SC Act. I do so against the facts underpinning the appellant's conviction.

[8] Briefly, the complainant travelled from East London to Port Elizabeth for a traditional wedding ceremony at the appellant's family home. The appellant and the complainant are cousins. The appellant took her to several taverns where they

³ See, for example, *Van Wyk v S*, *Galela v S* [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA); *S v Matshona* [2008] ZASCA 58; [2008] 4 All SA 68 (SCA); 2013 (2) SACR 126 (SCA); *S v Tonkin* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA) (*Tonkin*); *Dipholo v S* [2015] ZASCA 120 (16 September 2015); *Lubisi v S* [2015] ZASCA 179; *Mthimkhulu v S* [2016] ZASCA 180; *De Almeida v S* [2019] ZASCA 84 (31 May 2019) (*De Almeida*); *Nong and Masingi v S* [2024] ZASCA 25 (20 March 2024) .

⁴ *Tonkin* para 3; *De Almeida* para 5.

⁵ *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

consumed liquor before taking her to his shack. She fell asleep but was awakened by the appellant demanding sexual intercourse. She refused, and the appellant slapped her on her face, injuring her lips. After the assault, she requested him to buy her food, which he did. On their return, and inside his shack, he pushed her and she fell on her back. She testified that he lifted her dress and removed her tights despite her resistance, whereafter he removed his pants up to his knees and penetrated her vaginally.

[9] The doctor who examined the complainant confirmed fresh injuries on her lips. Notwithstanding that the doctor did not observe any injuries on her vagina, she explained that it was not uncommon for a person of a child-bearing age and sexually active, not to have any injuries on the vagina after being raped. The doctor further observed visible trauma and scratches on the complainant's anus, which led to her to conclude that there must have been penetration in that area. No semen was detected in the complainant's vagina. However, the doctor collected swabs and handed them to the police for DNA testing.

[10] The appellant denied having had sexual intercourse with the complainant and asserted that the injury to the complainant's lips was caused by his girlfriend when she found them in the appellant's shack. The assault occurred in the presence of his friend. The said friend testified that he left when the assault by the appellant's girlfriend commenced. After the assault the complainant demanded money for sex.

[11] The appellant raised the following grounds which he contended constituted prospects of success in the envisaged appeal. First, the apparent discrepancy between the complainant's testimony of vaginal penetration, and the medical report indicating that the complainant was most probably anally penetrated. Second, the

absence of DNA evidence, especially given the complainant's testimony that the appellant did not use a condom, and the common cause fact that the complainant's vaginal swabs were collected for DNA testing. Third, that his counsel's cross-examination of the complainant was curtailed or disallowed in certain aspects. Fourth, that there were certain contradictions and inconsistencies between the evidence of the complainant and that of another state witness, Mr Masithole April.

[12] Without dealing with the merits of this case, the grounds that the appellant relies on are debatable. However, the ground based on the lack of DNA evidence seems to be stronger. Although the appellant initially said the sex was consensual, it seems that when he testified, he completely denied having had sex with the complainant. The fact that the complainant alludes to vaginal penetration only, whereas the evidence shows anal penetration, demands further analysis. DNA evidence would have assisted in determining whether the appellant penetrated the complainant, either vaginally or anally, with the complainant. There is also the fact that the complainant had consumed alcohol during the alleged rape, and her evidence is not particularly clear in certain respects. Closer scrutiny is required of the medical evidence to assess the complainant's evidence that she was raped vaginally against the backdrop of the available medical evidence.

[13] Considering the conspectus of the evidence and the appellant's grounds of appeal, there are reasonable prospects of success that another court could come to a different conclusion regarding the conviction. This appeal must therefore succeed.

[14] In the result, the following order is made:

- 1 Condonation for the late filing of heads of argument is granted, and the appeal is reinstated.

- 2 The appeal succeeds.
- 3 The order refusing the appellant leave to appeal is set aside and is replaced with the following order:
‘The applicant is granted leave to appeal against his conviction to the Eastern Cape Division of the High Court, Makhanda.’

M C MAMOSEBO
ACTING JUDGE OF APPEAL

Appearances:

For appellant

M Moolman

Instructed by:

Legal Aid South Africa, Gqeberha

Legal Aid South Africa, Bloemfontein

For respondent:

S Hendricks

Instructed by:

Director of Public Prosecutions, Makhanda

Director of Public Prosecutions, Bloemfontein.