

IN THE CONSTITUTIONAL COURT

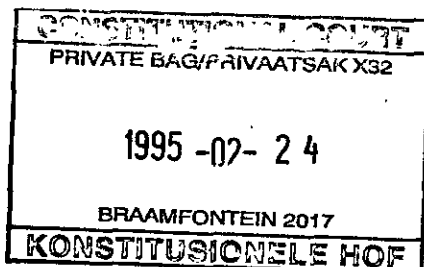
Case no: CCT/1/95.

In the matter between:

PEET RENS

APPLICANT

and



THE STATE

RESPONDENT

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1. BACKGROUND

Pursuant to refusing an Application for Leave to Appeal a conviction and sentence handed down on the Applicant the Cape Provincial Division suspended the Application for Leave to Appeal proceedings and referred the matter to this Honourable Court which this Honourable Court in terms of Rule 22(4) of the Rules of the Constitutional Court has formulated as follows:-

"Whether the provisions of Section 316 of the Criminal Procedure Act, 51 of 1977 relating to applications by an accused convicted of an offence before a superior court for

leave to appeal against his conviction and sentence and providing in terms of section 315(4) of the said Act that such Appeal shall be only if such leave to appeal is granted and not as of right, are unconstitutional by reason of inconsistency with section 25(3)(h) of the Constitution of the Republic of South Africa 1993 and of no force and effect pursuant to Section 4 of the Constitution."

2. RELEVANT PROVISIONS

2.1. Section 25(3)(h) of Act 200 of 1993 reads as follows:-

"(3) ~~Every accused person shall have the right to a fair trial which shall include the right to~~

(a)..... (g)

(h) ~~to have recourse by way of appeal or review to a higher court than the court of first instance.~~

2.2. Section 315 (3)(a) and (4) of Act 51 of 1977 read as follows:-

"315(3) An appeal which is to be heard by a full court in terms of a direction under paragraph (a) of subsection (2) which has not been set aside under

paragraph (b) of that subsection, shall be heard-

(a) in the case of an appeal in a criminal case heard by a single judge of a provincial division, by the full court of the provincial division concerned;

(4) An appeal in terms of this Chapter shall lie only as provided in sections 316 to 319 inclusive, and subject to the provisions of section 316(A), not as of right."

2.3. Section 316(1)(b) of Act 51 of 1977 reads as follows:-

"316(1) An accused convicted of any offence before a superior court may, within a period of fourteen days of the passing of any sentence as a result of such conviction or within such extended period as may be allowed by application (in this section referred to as an application for condonation) on good cause be allowed, apply -

(a).....;

(b) if the conviction was by any other court, to the judge who presided at the trial or if he is not available or, if in the case of a conviction before a circuit court the said court is not sitting, to any other judge of the provincial or

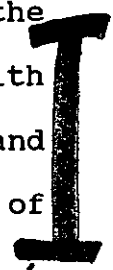
local division of which the aforesaid judge was a member when he so presided, ~~for leave to appeal against his conviction or against any sentence or order following thereon~~ (in this application referred to as an application for leave to appeal), and an accused convicted of any offence before any such court on a plea of guilty ~~may~~ within the same period, ~~apply for leave to appeal against any sentence or any order following thereon.~~

3. REPUGNANCE

3.1. Section 4(1) of Act 200 of 1993 provides as follows:-

"4(1) This Constitution shall be the supreme law of the Republic and ~~any law or act inconsistent with its provisions shall~~, unless otherwise provided expressly or by necessary implication by this Constitution, be of no force and effect to the extent of the inconsistency."

3.2. It is submitted that a comparison of the two (conflicting) provisions immediately reveals that the provisions of Section 315 (3) (a) and 315(4) read with 316(1)(b) of Act 51 of 1977 are repugnant to and irreconcilable with Section 25(3)(h) of Act 200 of



1993. ("The Constitution")

3.3. It is submitted therefore, that prima facie, ~~the onus~~
~~is on the State to justify the purported denial of or~~
~~limitation to, as the case may be, the right granted~~
~~in terms of Section 25(3)(h)~~ of the Constitution.

See: S vs Sefadi 1994 2 BCLR 23 at 39 D - G. ✓

S vs Majavu 1994 2 BCLR 56 at 84 A - D. ✓

3.4. It will be argued that, notwithstanding the provisions of Section 35(2) of the Constitution, in applying the relevant tests to determine whether the leave to appeal procedure should be struck down in its entirety or reconciled to whatever degree may be found to be acceptable, this Honourable Court will find that the provisions are in fact irreconcilable with the right accorded in terms of the Constitution and must be struck down as being irreconcilable therewith.

3.5. Section 35 (2) reads as follows:-

"35(2) No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used prima facie exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted

interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation."

4. APPROACH TO INTERPRETATION

4.1. It is submitted that the general approach of this Honourable Court to the interpretation of the Constitution should be "purposive and teleological, ie ~~to go beyond the words of the text itself in order to~~ determine the spirit, purport and objects of the bill of rights."

See: Kruger & Currin Interpreting a Bill of Rights Juta & Co, 1994 at 133 as well as the (with respect) instructive chapter at 103 "Towards a new interpretive theory." ✓

It is submitted that these sentiments have been echoed in a number of judgements inter alia

See: Khala vs The Minister of Safety and Security 1994 2 BCLR 89 W at 92 - 94 (and the authorities there cited). ✓

Majavu, supra.

Contrast however the comments in S vs Saib 1994 2 BCLR 48 D at 52 by His Lordship Thirion J. It is respectfully submitted that the view there expounded would lead to:-

(a) a too narrow construction of the extent of the rights embodied in the Constitution; and

(b) a rigid adherence to the literal wording of the Constitution which could result in inflexible application.

5. LIMITATIONS CLAUSE

Section 33 of Act 200 of 1993 specifies the extent to which any right granted in terms of Chapter 3 of the Constitution may be limited.

It reads as follows:-

"33(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation -

(a) shall be permissible only to the extent that it is -

(i) ~~reasonable~~; and

(ii) ~~justifiable in an open and democratic society based on freedom and equality~~; and

(b) ~~shall not negate the essential content of the right~~ in question, provided further that any limitation to -

(aa) a right entrenched in section25.....; or

(bb)

shall, in addition to being reasonable as required in paragraph (a) (i), also be ~~necessary~~."

6. APPLICATION OF LIMITATIONS CLAUSE

6.1. It is submitted that Section 33 bears a very close resemblance to the Canadian Charter of Rights and Freedoms and that any interpretation of this section in South African law should take place by reference to applicable case law in the Canadian system.

See Harold Rudolph; "The 1993 Constitution - some thoughts on it's effect on certain aspects of system of criminal

procedure."

August 1994 South African Law Journal Vol 111 Part III a page 497 and further.

Jacques de Ville; "the chapter on fundamental rights" SA Public Law 1994 Vol 9 Nr.2. 287 at 288 - 289.

C.J.Botha; "Interpretation of the new Constitution" SA Public Law 1994 Vol 9 Nr.2 257 at 258 - 259.

6.2. It is argued by the learned author Rudolph, at 498 and further that it was held in R vs Oakes (1986) 26 DLR (4th) 200, that a two stage enquiry be conducted into a government infringement of a fundamental right.

6.2.1. The two stages are:-

(i) Firstly, whether the objective of the government action is sufficiently important to override a constitutionally protected right of freedom, ie the action complained of must relate to matters that are "pressing and substantial" in a free and democratic society; and

(ii) Secondly, having passed the first test, whether the means chosen to achieve the objective are proportional. In this test there is a three stage enquiry:-

- (a) Is the government infringement ~~"rationally connected" to its objective and not arbitrary, unfair or based upon irrational considerations?~~
- (b) ~~The government infringement must impair the right or freedom as little as possible;~~
- (c) ~~The effects of infringement on the limitation of rights and freedoms are proportional to the objective.~~

It is submitted that this is the correct approach to adopt.

Consequently, it is submitted that the primary consideration is to determine the actual content of the right accorded by the Constitution before any attempt is made at limiting or fully recognizing it.

7. THE RIGHT DEFINED

It is submitted that the actual content of the right accorded by Section 25(3)(h) is as follows:-

"That every Accused person, on conviction and sentence, is entitled to have access to a Court of

higher status than the Court in which he/she was tried for the purpose of determining the correctness, via comprehensive traverse of the facts and the law, of his/her conviction and sentence."

It is further submitted that the "essential content" is revealed by the foregoing exposition of the actual content of the right to be, ~~a "real and substantial" reassessment of the issues by a more competent tribunal.~~

8. UNIQUENESS

It is submitted that the only sphere in which the repugnance manifests itself is in fact one arising from a concatenation of the facts as in the instant case, ie where an accused is tried before single judge of a provincial or local division of the Supreme Court and convicted and sentenced.

It is submitted that ~~this in itself presents so startling a departure from what is elsewhere in our law an accepted norm ie the right to an appeal from the court of first instance, that it demands of even greater explanation to justify its existence besides the norm(s) against which it must be measured in terms of Section 33.~~

It is further submitted that the fact that an accused may

be tried in the Supreme Court by a single judge itself is an arbitrary and frequently irrational decision based on considerations other than a consistent measure of the seriousness of the offence, the sentence likely to be imposed, the nature of offence, etc, etc.

The decision to prosecute an accused in the Supreme Court is, it is submitted, frequently based on considerations such as, state of the Court rolls, the need to provide sufficient cases for a Circuit, the need for speedy disposal after a matter has been much remanded, etc, etc.

The reason for the denial of the fundamental right of appeal then becomes likened to a lottery, ie if the Accused is arraigned in the Supreme Court on the basis of an arbitrary reason his access to an appeal tribunal evaporates.

The fundamental reason for the denial of his right to appeal is then the decision to prosecute in that forum.

9. JUSTIFICATIONS

It is submitted that possible justifications for the procedure could be postulated as follows:-

- 9.1. That the Legislature, ~~in order to prevent a~~
~~plethora of appeals "clogging" the legal system~~
~~saw fit to deal with the situation in the manner~~
~~set out in order to save time and money;~~
- 9.2. That the Legislature, ~~satisfied as to the~~
~~competence of the Bench at the Provincial and~~
 Local Division levels found it superfluous to
~~allow an appeal without the leave of the relevant~~
~~(or similar status) Judge;~~
- 9.3. That the Legislature ~~found it an undesirable and~~
~~unnecessarily time consuming and expensive~~
~~process to allow the Appellate Division Bench to~~
~~be burdened with the number of appeals directed~~
~~at them.~~

It is submitted that in the light of the approach to interpretation of the rights contained in the Constitution, as contained in inter alia Section 35(1), which reads as follows:-

"35(1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have

regard to comparable foreign case law."

as well as the principles referred to in the various dicta set out hereinabove, ~~the aforementioned policy considerations are unacceptable as reasons of "sufficient importance" for the limitation of so fundamental, basic and important a right as that accorded by Section 25(3)(h).~~

It is furthermore submitted that when regard is had to the values which underlie the Constitution and the reasons for the promulgation thereof, to attempt to justify so fundamental a right as that of Appeal by recourse to what can only be described as administrative policy reasons, the requirements set out in paragraph 5 hereinabove can not be said to have been met and the provisions must be struck down.

10. ALTERNATIVES

It is respectfully submitted that the maintenance of the procedure envisaged by Sections 315 & 316 as applicable to the leave to appeal procedure, in any form, would totally negate the essential content of the right contained in Section 25(3)(h) for those of the accused whose applications would be refused.

It is submitted therefore that the approach which must be adopted is one which recognizes the important principle that the constitution is seen to be working by the people

for them. (See C.J.Botha, supra at 259 and further.)

Consequently, it is submitted, the approach must recognize that the right must not be negated for any of the class of persons likely to be affected by it. (See Jacques de Ville, supra, at 305 and further.)

~~With regard to acceptable alternatives to discourage frivolous appeals see Monnell and Morris vs United Kingdom European Human Rights Reports, 10 E.H.R.R. at~~

~~205.~~

See: Khala vs The Minister of Safety and Security 1994 2 BCLR 89 W with regard to the definition of the concept of "essential content".

It is humbly submitted that petition proceedings do not satisfy the accepted criteria of an appeal with regard to traversing of the facts, law, and role of the "other side", in casu, the State.

With regard to the meaning of "appeal" see the majority view in Ekbatani vs Sweden European Human Rights Reports, 13 E.H.R.R. 506 at 511 - 512.

Consequently, it is humbly submitted that the appeal procedure, when recognized, in it's final form should embody structures and principles which will enhance and

manifest it's inherent legitimacy for the peoples of the Republic as a whole and not only the affected class.

~~Consequently, it is humbly submitted, an appeal to a full bench, as constituting a court of "peers" of the judges of first instance will not be seen to have sufficient legitimacy.~~ (It is however submitted that as an interim measure this may be acceptable.)

It is therefore humbly submitted that such, (final) appeal structure, should enhance and reflect the principles of objectivity, fairness and higher status.

11. CONSEQUENCES OF UNCONSTITUTIONALITY

It is submitted that if this Honourable Court were to immediately declare the provisions of Section 315 and Section 316, insofar as the oblige an Accused convicted in the Supreme Court ~~to apply for leave to appeal~~, unconstitutional, the resulting lacuna could create chaos.

It is humbly submitted that this Honourable Court, acting in terms of Section 98(5) and 101(4) of Act 200 of 1993, could make an Order which might embody the following principles:-

- 11.1. That the provisions of Section 316 of the Criminal Procedure Act, 51 of 1977 relating

to applications by an accused convicted of an offence before a superior court for leave to appeal against his conviction and sentence and providing in terms of section 315(4) of the said Act that such Appeal shall be only if such leave to appeal is granted and not as of right, are unconstitutional by reason of inconsistency with section 25(3)(h) of the Constitution of the Republic of South Africa 1993 and of no force and effect pursuant to Section 4 of the Constitution;

11.2. That within the time prescribed by the Rules of this Court, all accused persons convicted and sentenced before a single judge of the provincial or local division of the supreme court, shall, as of right have an appeal;

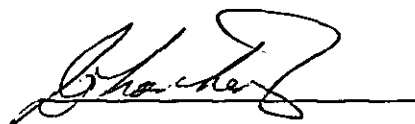
11.3. That such appeal shall lie, until such time as the Legislative Assembly has enacted a system in terms of the guidelines and within the period to be set out hereinafter, to the full bench of the provincial divisions of the supreme Court;

11.4. That the Legislative Assembly is hereby enjoined to create a system of appeal

courts, higher in status to the provincial divisions but not replacing or infringing the appellate division jurisdiction to inter alia hear and adjudicate upon appeals emanating from trials before single judges of the provincial and local divisions of the supreme court;

- 11.5. That such Legislation shall be enacted within 12 months of the date of this Order.

DATED AT CAPE TOWN THIS 23RD DAY OF FEBRUARY 1995



D.J. CHARTERS

PRO DEO COUNSEL FOR APPLICANT

LIST OF AUTHORITIES

- ✓ 1. S vs Sefadi 1994 2 BCLR 23 at 39 D - G.
- ✓ 2. S vs Majavu 1994 2 BCLR 56 at 84 A - D.
3. Kruger & Currin Interpreting a Bill of Rights Juta & Co,

1994 at 133 as well as the (with respect) instructive chapter at 103 "Towards a new interpretive theory."

- ✓ 4. Khala vs The Minister of Safety and Security 1994 2 BCLR 89 W at 92 - 94 (and the authorities there cited).
- ✓ 5. S vs Saib 1994 2 BCLR 48 D at 52.
6. Harold Rudolph; "The 1993 Constitution - some thoughts on it's effect on certain aspects of system of criminal procedure."
August 1994 South African Law Journal Vol 111 Part III at page 497 and further.
- ✓ 7. Jacques de Ville; "the chapter on fundamental rights" SA Public Law 1994 Vol 9 Nr.2. 287 at 288 - 289.
- ✓ 8. C.J.Botha; "Interpretation of the new Constitution" SA Public Law 1994 Vol 9 Nr.2 257 at 258 - 259.
9. Monnell and Morris vs United Kingdom European Human Rights Reports, 10 E.H.R.R. at 205.
- ✓ 10. Khala vs The Minister of Safety and Security 1994 2 BCLR 89 W.
11. Ekbatani vs Sweden European Human Rights Reports, 13 E.H.R.R. 506 at 511 - 512.