IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 1/95

In the matter of:

THE STATE	Applicant
v	
PEET RENS	Respondent
Heard on:	19 May 1995
Delivered on:	28 December 1995

JUDGMENT

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[1] **MADALA J**: After hearing an application for leave to appeal against conviction and sentence, Rose-Innes J of the Cape of Good Hope Provincial Division suspended the proceedings and referred this case to us, on the question:

> **"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 or 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] Section 316(1)(b) of the Criminal Procedure Act, 51 of 1977 ("the Act") - alleged to be in conflict with Section 25(3)(h) of the Constitution - states:

> **"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 on 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,**
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> **for leave to appeal against his conviction or against any sentence or order following thereon (in this section 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] The matter was argued before us by Mr Charters who appeared on behalf of Mr Peet Rens, the accused in the Court *a quo*; Mr Cilliers represented the State. Mr Rens was neither an applicant nor an appellant before this Court, but purely for reasons of convenience and also because the last proceedings by him or on his behalf in the court *a quo* were in the form of an application, I shall refer to him, in this matter, as the applicant, and to the State as the respondent, again for the same reasons.

[4] The applicant was charged with and convicted of abduction and of attempted murder, and received a suspended sentence and a fine in respect of the first charge and ten years' imprisonment on the second. He then sought to appeal against the conviction on both counts as well as against

the sentence imposed on the charge of attempted murder. For purposes of this judgment it is not necessary for me to deal with the grounds on which the application for leave to appeal was based, or with any arguments advanced in favour of or against the application. Suffice it to say that Rose-Innes J came to the conclusion that there was no reasonable prospect of another court reversing the conviction or interfering with the sentence of imprisonment. He accordingly would have refused the application for leave to appeal but for the constitutional issue in respect of which he had no jurisdiction.

[5] Section 25(3)(h) forms part of Chapter Three of the Constitution which sets out the entrenched fundamental rights and freedoms. It provides:

> **"25(3) Every accused person shall have the right to a fair trial, which shall include the right -**
>
> **.....**
>
> **(h) to have recourse by way of appeal or review to a higher court than the court of first instance;"**

It was contended on behalf of the applicant, in the court *a quo*, that this Section afforded him an automatic right to appeal, and that, therefore, the provisions of Section 316(1)(b) of the Act were unconstitutional in that they were repugnant to and in conflict with Section 25(3)(h). If this submission is correct, it means that a person convicted in the superior courts does not require leave in order to appeal to a higher court than the court of first instance.

[6] The legal provisions relating to appeals in criminal proceedings in the superior courts in South Africa are set out in Chapter 31 of the Act. Section 315 provides that an appeal in terms of Chapter 31 shall lie not as of right but in accordance with the provisions of Sections 316 - 319. These provisions are a legacy of a preceding Act, the Criminal Procedure Act, 56 of 1955[1], whose predecessor, the Criminal Procedure and Evidence Act, 31 of 1917, which consolidated the different procedure codes existing at Union, also contained substantially similar provisions[2].

[7] Applications for leave to appeal are governed by Section 316 of the Act. A person who has been convicted by a superior court may apply for leave to appeal against such conviction and/or sentence, and must satisfy the court, on a balance of probabilities, that there are reasonable prospects of success[3]. Such application may be made orally at the end of the trial by the accused or by the accused's legal representative to the presiding Judge. Alternatively, the accused person may submit a written application for leave to appeal within a prescribed period. The procedure allows for condonation of late applications in appropriate circumstances. The test of reasonable prospects of success on appeal is lower than that which is applied in deciding

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[1]Section 363 of Act 56 of 1955.

[2]Section 369 of Act 31 of 1917.

[3]See *R v Ngubane and Others* 1945 AD 185 at 186 - 187, *R v Baloi* 1949 (1) SA 523 (A) at 524 - 525; *S v Shabalala* 1966 (2) SA 297(A) and *S v Sikosana* 1980 (4) SA 559(A) at 561 - 562.

whether the appeal ought to succeed or not.[4] If the trial judge refuses the application for leave to appeal, Section 316(6) provides that the accused may petition the Chief Justice. I shall deal with this procedure later. The underlying purpose of these requirements is to protect the appeal court - either the Appellate Division or the full court of the provincial or local division - against the burden of having to deal with appeals in which there are no prospects of success.

[8] The leave to appeal procedure contained in Section 316 is supplemented by the provisions of Section 317 of the Act. This Section makes provision for the special entry of an alleged irregularity or illegality, in connection with the proceedings, and Section 319 makes provision for questions of law to be reserved for consideration by the Appellate Division.

[9] In terms of the special entry provisions of Sections 317 and 318, the accused is afforded the opportunity to appeal to the Appellate Division against the decision of a superior court, acting as a court of first instance, where the accused alleges there has been an irregularity or illegality in connection with the proceedings which has resulted in prejudice.

[4] See S v N 1991 (2) SACR 10 (A) at 13 B - C.

[10] An application for a special entry is ordinarily made to the judge who presided over the trial proceedings. The judge to whom the application is made is obliged to make the special entry unless he or she is of the view that the application is not *bona fide* or is frivolous or absurd. An application can only be refused on these grounds if "...**it is quite certain that there is no prospect at all of an appeal based on the alleged irregularity succeeding."**[5] And even then, the appellant has the right in terms of Section 317(5) to petition the Chief Justice for the special entry to be made on the record.

[11] Section 319, which makes provision for the reservation of a question of law for consideration by the Appellate Division, permits an accused person who has been convicted at the trial to raise a question of law, as a ground for appeal. Although the question of law can be raised under Section 316, there may be cases in which it is convenient to use Section 319 as the basis for the appeal[6]. The judge to whom the application for the reservation of a question of law is made is obliged to reserve it if there is a reasonable prospect of success in regard to that question. If the application to reserve a question of law is dismissed, the convicted person once again has the right to petition the Chief Justice for the question to be reserved.

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[5] *S v Xaba* 1983 (3) SA 717 (A) at 733 D.

[6] *R v Nzimande* 1957 (3) SA 772 (A) at 774A - B.

[12] It follows that the procedures available to an accused person who has been convicted, are to apply generally for leave to appeal, to apply specifically for a special entry to be made on the record, concerning any irregularity or illegality connected with the proceedings, and to apply for a question of law to be reserved for the consideration of the Appellate Division. The question we have to decide in this case is whether, notwithstanding these provisions, the procedures prescribed by Section 316 are inconsistent with the Constitution.

[13] It was contended by Mr Cilliers, that Section 102(11) of the Constitution was dispositive of the issue under consideration, because it supports the proposition that a procedure for leave to appeal is expressly contemplated and sanctioned by the Constitution and that such a procedure could, therefore, never be unconstitutional.

[14] Section 102(11) states:

> **"Appeals to the Appellate Division and the Constitutional Court shall be regulated by law, including the rules of such courts, which may provide that leave of the court from which the appeal is brought, or to which the appeal is noted, shall be required as a condition for such appeal."**

In *S v Madasie and Others*[7], the same issue as in the present case as well as Section 102(11) was raised for decision. The accused in that case, had taken the

[7]Case No SS 105/94 : unreported judgment of the CPD.

point that the need for leave to appeal against the conviction and sentence had been eliminated by the provisions of Section 25(3)(h) of the Constitution.

Conradie J held at page 2:

> **"The point is without merit. Section 102(11) of the Constitution Act makes it permissible for an Act of Parliament to require (as section 316(1) of the Criminal Procedure Act 51 of 1977 does) leave as a condition for an appeal. Since both provisions are contained in the Constitution Act they must be accorded equal force. Section 102(11) therefore necessarily qualifies section 25(3)(h). It follows that section 316(1)(b) of the Criminal Procedure Act is not open to attack."**

He accordingly dismissed the application, and also refused to refer the issue to the Constitutional Court, holding that he was only entitled to refer the issue of the validity of Section 316(1)(b) if it should be considered to be in the interests of justice to do so. In that case, so his judgment ran, it was not in the interests of justice to refer an unarguable point to the Constitutional Court or to any other court.

[15] It was contended for the applicant that if Section 102 (11) is construed in this way it would be inconsistent with section 25(3)(h). It was argued that Section 25(3)(h) makes provision for a fundamental right and should therefore prevail over Section 102(11), or alternatively, that section 102(11) should be given a

restricted operation so that it does not detract from the rigour of the fair trial rights contemplated by Section 25(3)(h).

[16] Section 102(11) could be construed narrowly within the context of Section 102 of the Constitution as meaning no more than that Sections 102(4),(5),(6),(12),(16) and (17) do not confer an unlimited constitutional right of appeal on litigants, and not as detracting in any way from the provisions of Section 25(3)(h). If this is the correct construction of the Section, the answer to the question referred to us would depend upon the proper construction of Section 25(3)(h) of the Constitution.

[17] But even if the section is construed as a general provision, textually unlimited, which contemplates rules which provide for leave to appeal in respect of all appeals to the Appellate Division and the Constitutional Court, it would still be necessary to have regard to the provisions of Section 25(3)(h). It is not to be assumed that provisions in the same constitution are contradictory and the two provisions should, if possible, be construed in such a way as to harmonise with one another. Section 102(11) does not

mention specific criteria which have to be complied with for the purpose of a leave to appeal procedure, and, in my view, it should not be construed as authorising procedures that would be inconsistent with Section 25(3)(h).

[18] Section 25(3) protects **"the right to a fair trial"**. The framers of the Constitution provided in Section 25(3) that a fair trial **"shall include"** certain specific rights, but as Kentridge AJ observed in *S v Zuma and Others* 1995 (4) BCLR 401 (CC) at 411 G - H, the right so conferred by that Section

> **"...is broader than the list of specific rights set out in paragraphs (a) to (j) of the subsection."**

The criterion set by section 25(3) is fairness and in order to harmonise Section 102(11) with Section 25(3)(h), the leave to appeal procedures should be consistent with this requirement. And this is so whether Section 102(11) is construed narrowly as referring only to appeals mentioned in Section 102, or generally as applying to all appeals.

[19] It was contended by Mr Charters that any procedure that requires leave to appeal to be obtained from the court *a quo* would be inconsistent with Section 25(3)(h). In this regard it was argued that the procedure prescribed by Section 316 of the Criminal

Procedure Act offends against the provisions of Section 25(3)(h), firstly, because it requires the trial judge to pronounce on prospects of success on appeal against his or her own judgment, and secondly because the petition procedure does not involve a full hearing with a comprehensive traversing of the facts of the case in the court *a quo*.

[20] There is no substance in the first submission. The trial judge is not required to say that the judgment is wrong; the test is simply that another court may reasonably come to a different conclusion. If leave is refused Section 316(6) of the Act allows the accused, whose application for leave to appeal has been refused by the trial judge, to make use of the petition procedure. In so doing it allows the accused to approach a higher court. The question that has to be decided is whether this constitutes a resort to a higher court by way of appeal or review within the meaning of Section 25(3)(h) of the Constitution, and if so, whether the prescribed procedures are consistent with the requirements of fairness implicit in Section 25(3)(h).

[21] It was contended on behalf of the applicant that only a reassessment of the issues based on full oral argument would serve to meet the requirements of the right contemplated by Section 25(3)(h). I cannot agree

with this submission. The words used in Section 25(3)(h) are **“... to have recourse by way of ...”**. The Oxford Dictionary meaning of **“recourse”** is:

> **“(n) resorting to a possible source of help; person or thing resorted to; <u>have recourse to</u> turn to (person or thing) for help.”**

The use of the phrase **"have recourse by way of"** supports a broad construction of the words **“appeal or review”.** What the Section requires, in my view, is that provision be made either for an appeal in the conventional manner, or for a review in the sense of a re-assessment of the issues by a court higher than that in which the accused was convicted. Such a construction would bring the provisions of Section 25(3)(h) and Section 102(11) into harmony with one another.

[22] The provisions of Section 25(3)(h) were also considered by Magid J in *S v Bhengu*[8]. The applicant in *Bhengu*’s case had been convicted and sentenced in a circuit local division of the supreme court. He sought leave to appeal against his conviction, alternatively, a postponement of the matter and its referral to the Constitutional Court on the same question which is before us. For the applicant, it was argued that Section 25(3)(h) was intended to

[8]1995(3) BCLR 394(D).

confer an absolute right of appeal from a judgment of the trial court.

Magid J held at 397 I:

> **"I should indicate that I have very grave doubts whether this provision entitles a convicted person to an absolute right of appeal. The phrase `to have recourse by way of appeal' is in my view perfectly capable of meaning `to have recourse to a court of appeal if the proper procedure is followed'."**

In coming to the conclusion that Section 25(3)(h) of the Constitution does not confer an absolute right of appeal on a convicted person, and that leave to appeal provisions are not inconsistent with its requirements, Magid J said, at 397 J - 398A:

> **"If that had been the intention (to create an absolute right of appeal) I should have expected the words `to have recourse by way' to have been omitted from the provision of section 25(3)(h)."**

Subject to the qualification that the leave to appeal procedures must be consistent with the requirements of fairness demanded by section 25(3), I agree with this conclusion.

[23] Section 316(1)(b) of the Act gives the convicted person two bites of the cherry. On being convicted and sentenced, the accused person has an opportunity of approaching the trial court and seeking leave from that court to appeal against the conviction or

sentence, or both. If the application is refused, the person may then seek leave to appeal from the Chief Justice by way of petition. The Chief Justice is required to refer the matter to two members of the Appellate Division. Procedural irregularities and points of law are taken care of by Sections 317 to 319 in terms of which the accused person is given an extensive right to appeal, and if leave is refused, the opportunity of placing such issues before two judges of the Appellate Division through the petition procedure. In all petitions, whether under Section 316 or Sections 317 to 319, if the two judges of the Appellate Division fail to agree, a third member of the Appellate Division is assigned to the case. The prescribed procedures make provision for argument to be set out in writing in the petition. In terms of the Act, the judges of the Appellate Division to whom the petition is referred, may call for further information from the trial judge or the judge who heard the application for leave to appeal, and may also call for oral argument on the application for leave to appeal, or refer the matter to the Appellate Division for its consideration. The judges of the Appellate Division will refuse the leave sought only

if they are satisfied that there are no reasonable prospects of success on appeal.

[24] It is true that the re-assessment of the case usually lacks full oral argument or a full re-hearing of the matter, but this does not in itself mean that the procedure is not fair, or that it does not constitute resort to a higher court within the meaning of Section 25(3)(h). In *Monnell and Morris v United Kingdom*[9], the European Court of Human Rights held that an application for leave to appeal did not necessarily call for the hearing of oral argument at a public hearing or the personal appearance of the accused before the higher court, and that an accused who had been denied leave to appeal without such a hearing, could not contend for that reason alone that there had been a denial of the right to a fair and public hearing by an independent tribunal. The trial had been conducted in public and this was sufficient in the circumstances to meet the requirements of the Charter. There are indeed other jurisdictions in which oral argument in connection with appeals or

[9](1987) 10 E.H.R.R. 205 at 220-5.

leave to appeal is not allowed, or where it is curtailed to some extent.[10]

[25] The doors of the appeal court are not closed to a person convicted in the supreme court, and in my view, the requirements of fairness are satisfied. It cannot be in the interests of justice and fairness to allow unmeritorious and vexatious issues of procedure, law or fact to be placed before three judges of the appellate tribunal sitting in open court to re-hear oral argument. The rolls would be clogged by hopeless cases, thus prejudicing the speedy resolution of those cases where there is sufficient substance to justify an appeal.

[26] In my view the petition procedure which is available to every accused whose application for leave to appeal has been refused by the supreme court in which he or she was convicted, allows such accused recourse to a higher court to review, in a broad and not a technical sense, the judgment of the trial court. The procedure involves a re-assessment of the disputed issues by two judges of the higher court, and provides a framework

[10] *Axen v Germany* (1984) 6 E.H.R.R. 195, para. 28; *Sutter v Switzerland* (1984) 6 E.H.R.R. 272, para. 29-30. In the United States of America and Canada oral argument in appeals is often subject to strict time limits.

for that reassessment, which ensures that an informed decision is made by them as to the prospects of success. In this respect the procedure is materially different to the procedure for judges' certificates which we found to be inconsistent with the Constitution in the as yet unreported decision in *S v Ntuli.*[11]

[27] It was also contended on behalf of the applicant that the procedures for appeal prescribed by Section 316 are open to the objection that they permit a direction to be given that the appeal be made to the full bench of the supreme court of the provincial division in which the accused was convicted, and not to a higher court. There is no substance in this contention. The full bench is clearly a higher tribunal than a court composed of a judge sitting alone with or without assessors.

[28] Finally it was argued on behalf of the applicant that a denial to persons tried in the supreme court of an absolute right of appeal is discriminatory and in breach of the provisions of Section 8 of the Constitution. On this aspect of the case, it was

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[11] CCT 17/ 95: Delivered on 8 December 1995, at pp 8-9.

contended that, whereas Section 309 of the Act affords an accused person convicted in a lower court a right of appeal to a provincial or local division of the supreme court having jurisdiction, no such right is available to an accused person convicted in a superior court. It was argued that the leave to appeal procedure was so startling a departure from what was elsewhere in our law an accepted norm - the right to an appeal from the court of first instance - that it demanded an explanation to justify its existence. This argument is not sound. As indicated above the successive criminal procedure codes of South Africa did not give to an accused person an automatic right of appeal from the court of first instance at all levels of the court structure. On the contrary, at certain levels of our court system, appeals have always been possible only after leave had been granted. The fact that appeals from the supreme court are treated differently from appeals from the magistrates' courts, is due to differences in the standing and functioning of the courts. Counsel for the applicant conceded that the underlying purpose of the leave to appeal procedure - to protect the higher court from the burden of having to deal with appeals

in which there is no prospect of success - is a legitimate and rational purpose.

[29] The challenge to the constitutionality of the leave to appeal procedure on the grounds that it is inconsistent with the provisions of Section 8 of the Constitution was not mentioned in the applicant's heads of argument, nor was it thoroughly canvassed during argument. In my view, Section 8 does not assist the applicant in this matter. The principle that there be equality before the law and equal protection of the law does not require identical procedures to be followed in respect of appeals from or to different tiers of courts. As long as all persons appealing from or to a particular court are subject to the same procedures the requirement of equality is met. It was not suggested that the distinction between people tried in the superior courts and those tried in the inferior courts resulted in unfair discrimination, either direct or indirect, on any of the grounds listed in Section 8(2) of the Constitution or any other analogous ground. Nor was any cogent reason suggested as to why cases tried in the superior courts must follow identical procedures to those applicable in the lower courts. It is true

that both categories of accused persons are entitled to a fair trial, but it is quite rational that different procedures be followed in the different courts given the different circumstances. In my view, there was no force at all in the argument that the different appellate procedures applicable in the superior and lower courts could be constitutionally challenged under Section 8.

[30] I accordingly find that Section 316 of the Criminal Procedure Act is not inconsistent with Section 25(3)(h) or Section 8 of the Constitution. The following order is made:

1. The question referred by Rose-Innes J. is answered as follows: The provisions of Section 316 of the Criminal Procedure Act, 51 of 1977, are not inconsistent with the provisions of Section 25(3)(h) of the Republic of South Africa Constitution Act, 200 of 1993.

2. The case is referred back to the Cape Provincial Division to be dealt with in accordance with the terms of this order.

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T.H. Madala: Justice of the Constitutional Court.

Chaskalson P, Mahomed DP, Ackermann J, Didcott J, Kriegler J, Langa J, Mokgoro J, O'Regan J, Sachs J and Trengove AJ concur in the judgment of Madala J.

Counsel for the Applicant/Accused	:	D.J. Charters (Pro Deo)
Counsel for the Respondent/State	:	C.A. Cilliers
Instructed by	:	The Attorney-General Cape Town