CONSTITUTIONAL COURT OF SOUTH AFRICA

THE STATE Case CCT 17/95

versus

NICKO NTULI

Heard on 24 August 1995
Decided on 8 December 1995

JUDGMENT

DIDCOTT J:

[1] Section 25(3) of the Constitution (Act 200 of 1993) proclaims "the right to a fair trial" that every person charged with a crime enjoys in South Africa nowadays. A general principle of fundamental importance has thus been introduced into our system, one which it previously lacked according to the decision reached in *S v Rudman and Another; S v Mthwana* 1992(1) SA 343(A). The former position was this, as the Appellate Division described it on that occasion. The rules regulating the conduct of criminal trials, either statutorily or at common law, had been designed to take full care of their fairness and set all the legal standards for that. Infringements of those specific rules were judicially cognisable as defects in the proceedings. But no broader grounds were recognised for any complaint about the unfairness of a trial. The view then taken of such complaints was expressed by Nicholas AJA, who declared (at 387 A-B):

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> "What an accused person is entitled to is a trial initiated and conducted in accordance with those formalities, rules and principles of procedure which the law requires. He is not entitled to a trial which is fair when tested against abstract notions of fairness and justice."

Section 25(3) has removed the restriction and enlarged the enquiry. The import of the sub-section was noted in paragraph [16] of the judgment delivered by this Court in *S v Zuma and Others* 1995(2)SA 642(CC), where Kentridge AJ wrote (at 651J - 652A):

> "The right to a fair trial conferred by that provision... embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force."

The result is that criminal trials must now be run not only in compliance with the old requirements mentioned by Nicholas AJA but also, as Kentridge AJ then added (at 652D), in conformity with those "notions of basic fairness and justice" which have entered the reckoning at last. The significance of that development was underestimated by Erasmus J, I believe, when he dismissed the sub-section in *S v Shuma and Another* 1994(4)SA 583(E) (at 591 A-B) as "no radically new phenomenon", as "not a startling innovation", but a provision which contributed nothing momentous to the "distillation of wisdom" on the subject that he ascribed to our earlier jurisprudence.[1]

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[1] See also paragraphs [28] and [29] of the judgment, not yet reported, which Mahomed DP delivered on 29 November 1995 in *Shabalala and Others v Attorney-General of the Transvaal and Another* (CCT 23/94).

[2] Section 25(3) lists some particular rights that are deemed to be covered by the general right to a fair trial, bestowing and protecting them individually. One of those, which paragraph (h) specifies, is -

> "... the right ... to have recourse by way of appeal or review to a higher court than the court of first instance."

The paragraph has been invoked in the matter that we now have before us.

[3] The case concerns a man named Nicko Ntuli. A regional magistrate convicted him of rape, attempted murder and assault with intent to do grievous bodily harm. For those crimes he was sentenced by the magistrate to terms of imprisonment which amounted effectively to an aggregate of thirteen years. He went to gaol at once. There he resolved to appeal against the convictions and the sentences. He had not been legally represented at his trial. Nor, it seems, could he get a lawyer to prepare and present his appeal. So he planned to perform the tasks personally. But a hurdle had to be surmounted at first, one erected by the provisions of the Criminal Procedure Act (51 of 1977) which regulated appeals lodged by convicts like him.

[4] Section 309(1)(a) of the statute decrees that:

> "Any person convicted of any offence by any lower court ... may appeal against such conviction and against any resultant sentence or order to the provincial or local division having jurisdiction."

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A magistrate's court is a lower one for that purpose, and the provincial and local divisions of the Supreme Court are those thus mentioned. In Ntuli's circumstances, however, his right to appeal was qualified. Section 309(4)(a) stipulates that:

> "When an appeal under this section is noted, the provisions of ... section 305 shall *mutatis mutandis* apply in respect of the conviction, sentence or order appealed against."

And this is how section 305 goes in turn:

> "Notwithstanding anything to the contrary in any law contained, no person who has been convicted by a lower court of an offence, and is undergoing imprisonment for that or any other offence, shall be entitled to prosecute in person any proceedings for the review of the proceedings relating to such conviction unless a judge of the provincial or local division having jurisdiction has certified that there are reasonable grounds for review."

A condition of the same nature therefore governs every appeal that is noted by a prisoner against his or her conviction or sentence.

[5] Ntuli wrote a letter to the authorities, an informal one protesting at the outcome of his trial. The letter was forwarded to the Witwatersrand Local Division of the Supreme Court since the matter fell within its jurisdiction. There Cloete J considered the complaint in chambers. Taking the course usually followed in such a situation, he treated the letter as both a notice of appeal and an application for a judge's

certificate. He then wrote a short judgment, saying that he saw -

> "... no prospect whatever of an appeal court interfering with either the convictions or the sentences."

He did not, however, refuse the application. Instead he made this order *mero motu*:

> "The question whether the provisions of section 309(4)(a) as read with section 305 of the Criminal Procedure Act are in conflict with the provisions of section 25(3)(h) of the Constitution is referred to the Constitutional Court in terms of section 102(1) of the Constitution for its decision. Pending the decision of the Constitutional Court, the application is suspended in terms of section 102(2) of the Constitution."

[6] A second item was placed on our agenda, this time by us after a perusal of the record when we sent the parties a note worded thus:

> "The arguments on both sides are to deal also with a point not specifically raised by the order of referral. Section 305 of the Criminal Procedure Act, as read with section 309(4)(a), applies only to prisoners who are not legally represented. It touches neither prisoners who are represented nor convicted persons, represented or unrepresented, who are not serving sentences of imprisonment. The questions that must be argued in those circumstances are whether it infringes sections 8(1) and 8(2) of the Constitution or either and, if so, whether the infringement is permissible under section 33(1)."

Section 8(1) dictates that "every person shall have the right to equality before the law", while section 8(2) forbids "unfair discrimination" against anyone.

[7] By the time when we issued that direction Ntuli no longer lacked the services of a lawyer. The Legal Resources Centre had kindly stepped into the breach and was already acting for him *pro amico* in the proceedings before us. The Government of South Africa entered the lists afterwards, exercising the privilege of intervention which it derived from section 102(10) of the Constitution. The arguments that we heard eventually were advanced as a result by separate counsel whom the Centre and the Government had instructed, in addition to those representing the Attorney-General of the Witwatersrand Local Division.

[8] Applications for judges' certificates were compared, during the debate that followed, with the sort made under the same statute[2] whenever a person who had been convicted and sentenced in the Supreme Court applied to the Appellate Division for the leave which was required for an appeal and could be obtained from that quarter on its refusal by the judge presiding over the trial. The two processes were said to be analogous. They certainly have some features in common.

[9] Each process affords access, for the purposes of the order sought at that stage, to a court higher than the one of first instance. Both types of application are normally considered there in chambers, by a single judge of the provincial or local division in the one case, by two judges of the Appellate Division in the other or by three if they

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[2] Section 316 of the Criminal Procedure Act, as read with section 315(4).

disagree. Oral argument does not have to be heard in either situation and is rare

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at most in each. Indeed I know of no occasion when that has ever happened in an application for a judge's certificate, and I understand that it seldom occurs in applications for leave to appeal apart from the few which are set down, before benches fully constituted, to be argued together with the appeals themselves. A second omission from both mechanisms is this. In neither case is the complete record of the trial placed as a rule in front of the judge or judges dealing with the application. He, she or they may call for the lot, and that will then be supplied. Otherwise the papers filed in the application are augmented only by the judgments of the court below, those delivered at the trial when the verdict was entered and the sentencing ensued, with the addition once leave to appeal is requested of the judgment refusing it there.

[10] A further similarity between the two processes lies in the tests which the applications need to meet, and in the consequences of their not doing so. The question posed by an application for leave to appeal is whether the prospects of success on appeal are reasonable. The one asked in an application for a judge's certificate is whether there are reasonable grounds for the appeal. What amounts in substance to the same test, so one sees, is set for both applications. Each question has to be answered in the affirmative. The application must be refused once no such answer is forthcoming. That decision then bars the appeal, in the first situation without further ado, in the second unless the applicant manages afterwards to procure the services of a lawyer and is no

longer hit by the ban imposed on its personal prosecution.

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[11] The result is the elimination of appeals which appear to be futile. To achieve that object has always been the avowed purpose of the demand for leave to appeal. The refusal of judges' certificates serves it too in the cases calling for them, although the original reason for their stipulation was apparently a rather different one that still gets advanced and to which I shall come later.

[12] Whether applications for leave to appeal are proceedings that satisfy the requirements of section 25(3)(h) once they cater for recourse to the Appellate Division, or a scheme that falls foul of those requirements by obstructing the free flow of appeals, is an issue confronting us elsewhere. It arose in *S v Rens* (CCT 1/95), a case which we have heard already but not yet decided. I am anxious not to impinge on or anticipate the outcome of our current deliberations in that matter. No more than this shall I say in the meantime about the question presented there. It does not follow in my opinion that, if leave to appeal is a condition compatible with section 25(3)(h), the same must necessarily go for judges' certificates. For the similarities between the two mechanisms are accompanied by a difference important enough, as I view it, to distinguish the one from the other.

[13] The difference concerns the form and contents of the papers filed in the

proceedings, and therefore the material ordinarily supplied for the judicial enquiry that ensues. It is a factor which needs to be examined against the background of the circumstance that, whereas persons who are tried nowadays by the Supreme Court

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seldom lack legal representation either then or in any subsequent applications made by them for leave to appeal, those in need of judges' certificates always do, by definition, when it comes to their appeals at all events.

[14] The statute lays down the procedure that has to be followed whenever leave to appeal is requested. Every application for it must "set forth clearly and specifically" the grounds on which the applicant wants to appeal. That is required at the outset, at the initial stage where he or she applies for leave to the judge who tried the case. The grounds of appeal are forwarded to the Appellate Division in turn when, persisting with the request, the applicant seeks leave there on its refusal by the court below. So are the reasons for the refusal that emerge from the judgment announcing it . A formal petition addressed to the Chief Justice must be lodged in support of the application at the same time. The purpose which the petition should serve, and no doubt does on the whole, is to amplify those grounds, to explain their settings, and to describe the features of the case that seem to be salient. Both the grounds and the petition are likely to have been drafted by counsel, in all probability by the very counsel who appeared for the defence during the trial, one acquainted with the evidence adduced there and alive to the issues that an appeal would raise. In practice, so I understand, copies of the judgments

delivered at the trial are added regularly to the petition, and would certainly be requisitioned if they were not. A framework has thus been established for the consideration of all such applications in the Appellate Division. The judges handling each one are furnished as a matter of course with the basic information which pertains

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to it. From that they can tell whether they have enough material by then to assess the prospects of success on appeal and may safely proceed to do so, or whether more is needed and had better be gathered first. They can see, in particular, how helpful or not they might find it to obtain and study either the entire record of the trial or some selected excerpts, with special reference to the passages cited in the petition.

[15] Judges' certificates do not fall within a comparable framework. Nor indeed is any procedure prescribed for use when they are sought. The lack of statutory control fashions a pattern with no clear design. It marks the communication from the prisoner which sets the proceedings in motion. He or she has usually composed that, either alone or with the help of some imprisoned sea lawyer. The typical product of such efforts, a product familiar to all with experience of it and hardly surprising in view of its source, is a rambling and incoherent commentary on the trial which misses points that matter, takes ones that do not, and scarcely enlightens the judge about any. The only impressions of the case which the judge gains at the start are those derived from the reasons given by the magistrate for the conviction and the sentence. And they will remain sole impressions unless the record is procured and read. The pattern is noticed again when we look next

at calls for the record or their absence. No uniform practice prevails there. Some judges obtain the record habitually, once the case is not the sort where the information already available satisfies them that a certificate should be granted straight away. Others do so rarely, being content by and large to rely rather on the magistrate's account of the trial. The refusal of a certificate on that footing

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worries one. Those judges who do not read the record will have no means of knowing whether the evidence substantiated the findings made by the magistrate on the credibility of witnesses and other factual issues. They will not learn of any procedural irregularities that may have marred the trial. Nothing dispels their ignorance on those scores. Nothing alerts them to flaws in the magistrate's findings or conduct of the proceedings which are hidden for the time being but the record may in due course reveal. No petition prepared by counsel is there to guide them in that direction. Nor is the possible presence of such defects likely to have been mentioned either by the prisoner or even by the magistrate, the one oblivious to the true character of the features in question, the other failing to attribute any such character to them.

[16] The scheme, one therefore sees, is unsystematic and works in a haphazard way. It exposes the process to the real danger that appeals which deserve to be heard are stifled because their merits never attract judicial attention. The inherent likelihood of some worthy appeals suffering that fate surely speaks for itself. The number of cases

where it actually happens is unascertainable, but may well be substantial. We cannot remove the danger by dictating to the judges of the provincial and local divisions what practice they should adopt uniformly to remedy the shortcomings in the scheme. That is not our business. Instead we must apply our minds to the constitutional tolerability of the statutory provision in point which, by neglecting to regulate the process, opens the door to such a state of affairs.

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[17] The requirement that a judge's certificate has to be obtained obviously operates, in each case hit by it, as a restriction on the full access to the Supreme Court which is enjoyed by those who are free to prosecute their similar appeals to finality and usable for the determination of the appeals themselves. That is not, however, the end of the matter. The question which we must answer is this. Does a prisoner seeking a certificate exercise his or her constitutional right "to have recourse by way of appeal or review to a higher court" in that very application, by means of that very application, and irrespective of its result ? Does the requirement itself cater sufficiently, in other words, for such "recourse by way of appeal or review"? That phrase sounds rather vague. But the minimum that it envisages and implies, I believe, is the opportunity for an adequate reappraisal of every case and an informed decision on it. The statute makes no provision for that opportunity. Nor does it ensure that certificates will never be refused without it. So applications for them do not amount to exercises of the constitutional right. And no other occasion for its exercise can arise once a certificate has been refused. The requirement is therefore incompatible with section 25(3)(h).

[18] It follows, in my opinion, that the requirement is inconsistent with section 8 as well. There I have in mind the right to equality proclaimed by sub-section (1) rather than the prohibition against unfair discrimination which sub-section (2) pronounces. I find it unnecessary to look at the latter, irrespective of its rating either as an independent provision or as a corollary to the former. Nor do I need to explore the outer reaches of the "equality before the law" guaranteed by sub-section (1). It suffices for the present

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to say that the guarantee surely entitles everybody, at the very least, to equal treatment by our courts of law. Such treatment must accordingly be administered within the area controlled by section 25(3)(h).

[19] The scheme which provides for judges' certificates differentiates, as we mentioned in our note to the parties, between two groups of prospective appellants, those in prison who have no lawyers acting for them on the one hand and all the rest on the other. That second group consists of prisoners who are legally represented in their appeals and every convicted person, represented or unrepresented, who is free. Some may have been fined. Others may have received wholly suspended sentences of imprisonment. Or perhaps, though sent to gaol, they were released on bail pending their appeals. It is trite, however, that differentiation does not amount *per se* to unequal treatment in the constitutional sense.

[20] Counsel agreed that, in its circumstances and consequences, the particular differentiation encountered now did have that effect. I take the same view. No more need be said in support of it than to point out the result. The right derived from section 25(3)(h) is respected in the cases of all who fall within the one group. It is denied, potentially and sometimes actually, to those comprising the other and consisting of the people who labour under the greatest disadvantage in managing their appeals without that extra handicap. That the guarantee of "equality before the law" is violated could hardly be clearer.

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[21] Whether the infringements of sections 25(3)(h) and 8(1) are nevertheless defensible under section 33(1) of the Constitution is the next question that arises. It necessitates an examination of the circumstances which are said to excuse the perpetuation of the scheme.

[22] Judges' certificates were introduced as requirements for the appeals which they regulated, so counsel told us, in order to obviate a mischief peculiar to those noted by unrepresented prisoners, the mischief that was perceived of ones lodged frivolously with a view to no gain but the opportunity for an excursion to court and some temporary relief from the tedium of imprisonment. Such an abuse of the appellate process could not be allowed. It increased the risk of escapes from custody and attempts to escape. Extra precautions to guard against those had to be taken, which put the staff of the

prisons to much inconvenience. So did the constant arrangements that were needed for the transport of prisoners and their escorts from gaol to court and back.

[23] The idea of prisoners lodging appeals for no reason better than the one suggested is wholly conjectural and, it seems to me, probably exaggerated if not downright fanciful when entertained about any significant number. That an appeal is objectively hopeless does not make it, after all, subjectively frivolous. Bad appeals are a lot likelier to be noted with undue optimism, but in earnest even so. Perhaps it is instructive to look in that connection at the actual excursions taken to court nowadays on the tickets of judges' certificates. They occur only in the Transvaal Provincial Division

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and the Witwatersrand Local Division, where most prisoners still argue their appeals in person. Everywhere else advocates perform the work for them, and have done so for many years, at the request of the court and in their absence. Yet I have never heard it said that, in proportion to the populations of the respective prisons, applications for certificates are more numerous in those two divisions than they happen to be in the others. The sincerity which I impute to the general run of appeals does not detract, to be sure, from the administrative difficulties caused by the excursions that continue. Such difficulties would increase, what is more, were the abolition of certificates to result in a much larger flow of appeals presented by prisoners. That consideration counts. But I do not regard it as a factor important enough to override the protection of the constitutional rights in question.

[24] The purpose for which judges' certificates were originally designed was not the sole one asserted in argument. Store was set in addition by the usefulness of refusals in blocking appeals that were devoid of discernible merit. No sound objection can be laid in principle against an aim like that. The cause of fairness is hardly served when judicial rolls are crammed with futile appeals which delay the hearings of better ones, to the detriment of the appellants awaiting their determination, often in gaol. Attributing such an effect alone to the refusal of certificates is, however, another matter. The trouble encountered there lies in the postulate that no appeals but those without substance get stopped. Of that, to say the least, nobody can feel certain. The means used to achieve the end therefore go beyond it.

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[25] In order to pass one of the tests for their permissibility which section 33(1) sets, the infringements of sections 8(1) and 25(3)(h) have to be rated as reasonable. They are not in my opinion. They fail another test too, I believe, the test of justifiability in a "society based on ... equality". How they fare on the rest I need not consider. Each of the failures found suffices on its own to dispose of the defence raised under section 33(1). The statutory provisions that clash with sections 8(1) and 25(3)(h) cannot consequently be allowed to stand.

[26] Our powers in that regard are gained from section 98(5) of the Constitution, which ordains that:

> "In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the Constitutional Court may, in the interests of justice and good government, require Parliament ..., within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified."

Whether the declaration of invalidity which must now follow should be qualified by an order made in terms of the proviso is the question that remains.

[27] Some statistics were supplied to us which have a bearing on that question. They show that during the period of three years from the beginning of 1992 until the end of 1994, and in all the divisions of the Supreme Court taken together, slightly more than

8000 applications for certificates were received and almost 7000 were rejected. The expansion of legal aid that is now under way would no doubt affect the picture if certificates survived, decreasing the occasions for those to be sought and reducing them eventually to anachronisms. But the pace and extent of that development is not yet easy to predict, and I shall omit it from the reckoning. I have not managed to correlate the figures thus furnished with some further information that we were given about the number of appeals from the magistrate's courts, regional and district, which got heard in several parts of the country throughout the same period. But one can assume with confidence

that, for the time being at any rate, the total will be swollen substantially by allowing prisoners who need certificates at present to appeal in the future without them.

[28] The need to cope with the increase is clear, should judges' certificates be abolished altogether instead of being retained within an adequately improved system. In that event new structures will have to be established. A variety of alternative ones were canvassed in argument. To choose between them, to imagine others or to recommend any falls outside our province. The decision rests with Parliament. In the meantime it will want advice. Perhaps the matter will be referred to the South African Law Commission. Concrete proposals are likely to be put in due course to the Chief Justice, to the Judges-President, to the Attorneys-General and to the professional bodies of advocates and attorneys. Their reactions and suggestions will be awaited and then evaluated. Legislation will have to be drafted and circulated. All that will take time,

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lots of time. Nor should we overlook the pressures on Parliament once everything else is ready. The preparation and enactment of the final Constitution and the transitional arrangements associated with each phase will no doubt preoccupy its members for much of next year. The long perpetuation of an unconstitutional scheme is admittedly unfortunate. But the statute book cannot be purged suddenly of all its old elements that are now repugnant to the Constitution. And, if fresh problems are to be avoided, the removal of the objectionable parts and their replacement by ones that are sound and

realistic has to be both thorough and thoughtful. That, I have no doubt, is "in the interests of justice and good government". We must therefore provide the opportunity for it.

[29] I had better mention something else before finishing. It has to do with Ntuli's lack of legal representation at his trial and in his subsequent endeavour to appeal. We do not know what accounted for it at either stage. The circumstances explaining that are not before us. Nor is a question which suggests itself, the question whether section 25(3)(e) of the Constitution entitled Ntuli to be provided with a lawyer's services at the expense of the state and, if it did, how the want of them may now be remedied. Indeed the referral could not competently have raised that issue, according to our judgment in *S v Vermaas; S v Du Plessis* 1995(3) SA 292(CC). The point seems not to have been considered yet in the Witwatersrand Local Division. It should receive attention once the case returns there.

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[30] In the result this order is made. Section 309(4)(a) of the Criminal Procedure Act is declared to be invalid on the score of its inconsistency with the Constitution. Parliament is required to remedy the defect by 30 April 1997, with the result that our declaration of invalidity is suspended until that happens or that date arrives, whichever occurs earlier, when it will come into force. The case is remitted to the Witwatersrand Local Division, which must deal with it accordingly.

Chaskalson P, Mahomed DP, Ackermann J, Kriegler J, Langa J, Madala J, Mokgoro J,

Ngoepe J, O'Regan J, and Sachs J all concur in the judgment of Didcott J.

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