CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 27 /99

THE STATE

versus

J M TWALA Applicant

SOUTH AFRICAN HUMAN RIGHTS COMMISSION Intervening Party

Heard on : 16 November 1999

Decided on : 2 December 1999

JUDGMENT

YACOOB J:

[1] This application for leave to appeal requires us to consider the constitutionality of section 316 read with section 315(4) of the Criminal Procedure Act 51 of 1977 (the Act). They afford a right of appeal against conviction or sentence to any person convicted of a crime in a high court only if that person has been granted leave to appeal by either that court or the Supreme Court of Appeal. Section 315(4) provides that appeals against conviction or sentence by a high court are not competent as of right and are available only as provided for in sections 316 to 319 of the Act.

Section 316, in so far as it is relevant, provides:

"(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 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,

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.

. . .

(6) If an application under subsection (1) for condonation or leave to appeal is refused or if in any application for leave to appeal an application for leave to call further evidence is refused, the accused may, within a period of twenty-one days of such refusal, or within such extended period as may on good cause be allowed, by petition addressed to the Chief Justice submit his application for condonation or for leave to appeal or his application for leave to call further evidence, or all such applications, as the case may be, to the Appellate Division . . .

(7) (*a*) The petition shall be considered in chambers by two judges of the Appellate Division designated by the Chief Justice.

(*b*) If the judges differ in opinion, the petition shall also be considered in chambers by the Chief Justice or by any other judge of the Appellate Division to whom it has been referred by the Chief Justice.

(8) The judges considering the petition may ─

(*a*) call for any further information from the judge who heard the application for condonation or the application for leave to appeal or the application for leave to call further evidence, or from the judge who presided at the trial to which any such application relates;

(*b*) order that the application or applications in question or any of them be argued before them at a time and place appointed;

(*c*) [permits the judges of the Appellate Division (now Supreme Court of Appeal) hearing applications for condonation, leave to appeal, or leave to adduce further evidence to grant or refuse these applications and to make appropriate consequential orders];

(*d*) refer the matter to the Appellate Division for consideration, whether upon argument or otherwise, and that division may thereupon deal with the matter in any manner referred to in paragraph (*c*).

(9) (*a*) The decision of the Appellate Division or of the judges thereof considering the petition, as the case may be, to grant or refuse any application, shall be final.

(*b*) For the purposes of subsection (7) any decision of the majority of the judges considering the petition, shall be deemed to be the decision of all three."

The statutory provisions under consideration will be referred to as the leave provisions.

[2] This is the second occasion upon which this Court has been called upon to consider the validity of the leave provisions. In *S v Rens*[1], these provisions fell to be evaluated against the

[1] 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC).

provisions of section 25(3)(h)[2] of the interim Constitution which provided for every accused person to have a right to a fair trial which included the right to have recourse by way of appeal or review to a higher court. This Court held in *Rens* that the leave provisions were consistent with section 25(3)(h). The constitutionality of the leave provisions must now be determined by reference to equivalent provisions in the Constitution,[3] namely, section 35(3)(o) which accords to every accused person the right to a fair trial including the right "of appeal to, or review by, a higher court."

[3] This Court received a handwritten letter apparently prepared by Mr Twala himself dated 12 March 1999 in which we were informed that:

(a) Mr Twala had been convicted of murder by Cameron J in the Witwatersrand High Court on 25 February 1998;

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2 Section 25(3)(h) provides:

> "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".

3 Which came into operation on 4 February 1997.

(b) an application for leave to appeal was dismissed by the presiding judge;

(c) a petition for leave to appeal and for leave to lead further evidence was thereafter directed to the Supreme Court of Appeal; and

(d) on 27 November 1998 the applicant received a fax transmission dated 23 November 1998 from the Registrar of the Supreme Court of Appeal to the effect that the petition had been refused on both counts.

[4] The letter is not on its face an application for leave to appeal but is described as an application in terms of section 35(3)(o). The applicant states that he has spent most of his money in seeking to exercise his right of appeal and contends that "the criterion used in determining whether or not [he had] a reasonable prospect of success on appeal was exercised unfairly and arbitrarily." It appears from the application that Mr Twala was under the impression that *Rens* had determined the constitutionality of the leave provisions in relation to section 35(3)(o), and that he based his application to this Court on the circumstance that his application and petition for leave to appeal had not been properly or adequately considered. The essence of the application was, however, that the applicant had been frustrated in the exercise of his right to appeal.

[5] After the application had been considered by the Justices of this Court, the President issued directions which, apart from setting a date of hearing and the dates on which argument was to be filed by the parties, provided:

"1. The application by the applicant will be treated as an application for leave to appeal to the Constitutional Court in terms of rule 18 for the purposes of determining the following

question:

> 'Whether the procedure for appeals to the Supreme Court of Appeal prescribed by section 316 of the Criminal Procedure Act 51 of 1977, read with section 315(4) of that Act complies with the requirements of section 35(3)(o) of the Constitution.

2. The question will be dealt with as an abstract question of law, and no record need be prepared for such purpose.
3. . . .
4. . . .
5. . . .
6. In their written argument counsel are required to consider whether the decision of the Constitutional Court in *S v Rens* remains applicable to this question, bearing in mind the difference between the wording of section 35(3)(o) of the Constitution, and the wording of section 25(3)(h) of the interim Constitution, and the fact that there is no provision in the Constitution comparable with the provisions of section 102(11) of the interim Constitution.
7. Notice of these directions is to be given to the Minister of Justice, the National Director of Public Prosecutions, and the Human Rights Commission, who are entitled to make submissions to this Court in respect of the question referred to in paragraph 1 above. . . "

[6] The South African Human Rights Commission (the Commission) took up the invitation, presented written argument and was represented at the hearing by Mr Wessels. The applicant wrote to the Court to the effect that he was impecunious and had no legal representation with the result that this Court requested the Johannesburg Bar Council to arrange for the accused to be represented. Mr Wepener SC with Mr Coetzer appeared *pro bono* on behalf of the applicant. We are indebted to the Commission, to the Johannesburg Bar Council and, in particular, to counsel who represented the Commission and the applicant for their help.

[7] It is clear, and it was indeed common cause, that section 35(3)(o) requires some kind of appeal or review. The contention on behalf of both the applicant and the Commission was that the right to appeal in section 35(3)(o), properly construed, confers upon all accused persons an unqualified right to a full rehearing before a higher court on a complete record on all issues regardless of the prospects of success. In addition it was submitted on behalf of the applicant that, because the judgment in *Rens* had relied on the phrase "to have recourse by way of" (the recourse phrase) in section 25(3)(h) to conclude that the leave provisions were constitutional, the omission of that phrase in the subsequent formulation of section 35(3)(o) demonstrated the intention of the makers of the Constitution to afford to all accused persons the right to appeal to, or review by, a higher court without the leave of any court. Counsel for the state, on the other hand, contended that there was no basis for giving the words "appeal" and "review" a technical meaning and that section 35(3)(o) did not render the leave provisions unconstitutional. The state relied on a judgment delivered by Snyders J in the Witwatersrand High Court[4] to the effect that the leave provisions complied with section 35(3)(o). That judgment, relying on the finding of this Court in *Rens* that the procedure required by the leave provisions satisfies the broad requirement of fairness mandated by section 25(3), rejected the submission that the omission of the recourse phrase shows an intention to confer an absolute right of appeal of the nature contended for by the applicant. In the view of Snyders J, "section 25(3) of the interim

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4 *S v Msenti* 1998 (3) BCLR 343 (W); 1998 (1) SACR 401(W).

Constitution is essentially the same as section 35(3) of the Constitution".[5]

[8] This Court must determine what is required by section 35(3)(o). Does the section require a full rehearing on a record on all issues regardless of prospects of success, or does it demand a review in the broad sense of a reassessment of the issues by the higher court that is fair, in the circumstances? The applicant and the Commission contended that the language of section 35(3)(o) is clear, that the paragraph does not contain any built-in limitation, and that there is no room for any interpretation which will have the effect of diminishing the right to appeal. They argued that the judgment in *Msenti* was wrong, and that "review" ought to be given a technical meaning because that is the meaning ordinarily ascribed to the term in the context of criminal law and procedure. It was further submitted that the word "or" in the phrase "appeal or review" should be interpreted to mean "and/or" so that section 35(3)(o) would permit accused persons to determine whether they wished to exercise the unqualified right to an appeal on the record, to a review in the technical sense or both. The applicant and the Commission conceded, however, that section 35(3)(o) should be read so as to permit some mechanism aimed at ensuring that the rolls of higher courts are not clogged with meritless appeals, but it was contended that the leave provisions go too far in limiting the rights of the accused.

[9] The ambit of the right enshrined in section 35(3)(o) must be determined by having regard to the context in which it appears and the purpose for which it is intended. The right of appeal

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[5] Id at 347 G-H.

to, or review by, a higher court is not a self-standing right; it is an incidence or component of the right to a fair trial contained in section 35(3) and appears in that context. It follows that any statutory provision which is concerned with the right to a fair trial must, at the very least, be in harmony with the notion of a fair trial and, more generally, with the standard of fairness which is inherent in the concept of a fair trial. The purpose of section 35(3) read as a whole is to minimise the risk of wrong convictions and the consequent failure of justice, and section 35(3)(o) is intended to contribute towards achieving this object by ensuring that any decision of a court of first instance convicting and sentencing any person of a criminal offence would be subject to reconsideration by a higher court. The provision requires an appropriate reassessment of the findings of law and fact of courts of first instance and is clearly not intended to prescribe in a technical sense, the nature of the reassessment that will always be appropriate. The reason for this is that the nature of the reassessment that is appropriate will depend on the prevailing circumstances. Section 35(3) does not provide for specifics. It creates a broad framework within which the lawmaker is afforded flexibility in order to provide for the kind of reassessment mechanism which is both appropriate and fair.

[10] In my view the section does not confer an unqualified right of appeal of the nature contended for by the applicant even where there are no prospects of success. Whether fairness requires this must depend on all the relevant circumstances. There is nothing in the language of section 35(3) which conveys an intention to confer a right of appeal or review in any technical sense. The suggestion that the words “appeal” and “review” in section 35(3)(o) are terms of art which have some fixed technical meaning is of no substance. I am accordingly of the view that section 35(3)(o) requires that provision be made for an appropriate reassessment of the issues by

a court higher than that in which the accused was convicted, provided that the prescribed procedure is fair as demanded by section 35(3).

[11] This conclusion is compatible with article 14(5) of the International Covenant on Civil and Political Rights[6] which South Africa has ratified.[7] The article says:

> "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

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6 Adopted on 16 December 1966, entered into force on 23 March 1976, G.A. Res. 2200A (XXI), UN Doc. A/6316 (1966), 999 UNTS 171, reprinted in 6 ILM 368 (1967).

7 On 3 October 1994.

It cannot be suggested that "review" in the article has any technical meaning nor can it be argued that there is an internationally accepted technical meaning which ought to be given to the word. It plainly has a broad meaning which is consistent with the meaning ascribed to the phrase "appeal or review" in this judgment.[8]

[12] It is now appropriate to consider whether the reasoning in the *Rens* judgment in the construction of section 25(3)(h), and the subsequent omission of the recourse phrase in section 35(3)(o) shows that the Constitutional Assembly intended that there should be an appeal or review in a technical sense. Two differences that could be material to the determination of the precise ambit of the right emerge from a comparison of the interim Constitution and the Constitution. The first difference is that section 25(3)(h) provides for the right to have *recourse by way of* appeal or review by a higher court; section 35(3)(o) simply confers the right of appeal to, or review by, a higher court. It will be seen that the recourse phrase has been omitted in section 35(3)(o). The second difference is that the Constitution has no equivalent to section 102(11) of the interim Constitution which 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 appeal is noted, shall be required as a condition for such appeal."

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8 See section 39(1)(b) of the Constitution which provides that:
"When interpreting the Bill of Rights, a court, tribunal or forum -
(a) . . .
(b) must consider international law; . . .".

Although the directions of this Court required the parties to make submissions concerning the second difference, no one relied on it. In *Rens*, this Court was of the view that the inclusion of this provision had no effect on the proper interpretation of section 25(3)(h).[9] Similarly in this case the omission of such a provision from the Constitution can have no bearing on the proper interpretation to be accorded to section 35(3)(o).

[13] It is evident that the reasoning of Madala J in the *Rens* judgment is fundamental to the submissions of all the parties concerning the impact of the omission of the recourse phrase. It is therefore necessary to look briefly at the salient features of this reasoning. The essence of the judgment is concerned with the definition of the phrase "appeal or review" and with the determination of the precise ambit and requirements of section 25(3)(h). That central core is constituted by the conclusion that:

> "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",[10]

which is subject, however,

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9 *Rens*, above n 1, at para 17.

10 Id n 1, at para 21.

". . . to the qualification that the leave to appeal procedures must be consistent with the requirements of fairness demanded by section 25(3), . . .".[11]

[11] Id n 1, at para 22.

Madala J expressed the view that this determination of the ambit of section 25(3)(h) had the effect of harmonising this section with section 102(11) of the interim Constitution and that the recourse phrase "supports a broad construction of the words 'appeal or review'". My colleague was inclined to agree with the comment of Magid J in *Bhengu*[12] to the effect that if it had been the intention of the makers of the constitution to create an absolute right of appeal in section 25(3)(h), "I should have expected the words 'to have recourse by way' to have been omitted . . .". Finally, the judgment analyses the meaning and effect of the leave provisions, measures them against the provisions of section 25(3)(h) as construed earlier and concludes that these provisions permit a review of the judgment of a high court (then Supreme Court) in a broad, non-technical sense, which must be fair.[13]

[14] It is necessary to elaborate to some extent on the core finding of this Court in *Rens* that is mentioned in the previous paragraph. The essential conclusion was that section 25(3)(h) required an appeal or a review in the broad sense of a reassessment of the findings of a trial court, provided that any statutory requirement governing appeal or review should be fair. This evaluation is made obligatory by section 35(3)(o). It must be emphasised that the requirement of fairness is crucial to the effective evaluation of any provisions which concern themselves with

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12 *S v Bhengu* 1995 (3) BCLR 394 (D) at 397 J.

13 *Rens,* above n 1, at paras 23-27.

the section 35(3)(o) right. Factors which will be relevant to this determination include the nature of the proceedings, and the nature of the court of first instance.

[15] The essence of the submission on behalf of the applicant in relation to the changed intention of the Constitutional Assembly comprised three inter-related propositions. The first of these was that Madala J "attached decisive meaning" to the words "recourse by way of" and derived considerable support from them in reaching the conclusion that the section is satisfied if provision is made for a reassessment of the issues by a higher court. Secondly it is said, quite correctly, that these words have been omitted in the equivalent section 35(3)(o). The third proposition reflects a conclusion to be drawn from the first two propositions, that is, that the Constitution makers have, by the omission of the recourse phrase, signified an intention to confer an absolute right of appeal.

[16] The argument is not good. All Madala J said in the *Rens* judgment was that the recourse phrase "supports" a broad construction of the phrase "appeal or review". It was one of several factors taken into account by Madala J in reaching his conclusion. The *Rens* judgment does not expressly or by implication suggest that the absence of the recourse phrase would produce an unqualified right of appeal and review.

[17] We are here concerned with the construction of a provision in a Constitution; we are not concerned with either a statutory or constitutional amendment. The choice of language by the drafters of the Constitution could have been influenced by various factors. A change in expression between the interim Constitution and the Constitution could conceivably indicate that

the drafters intended a change in meaning. However it should not necessarily be understood to convey a change in meaning if the language in its context does not require this. The language in section 35(3)(o) is clear in its context and does not indicate any intention to ascribe a technical meaning to "appeal" and "review". In my view, the change in language is immaterial, does not indicate any intention on the part of the drafters to give to section 35(3)(o) a meaning different to that intended by section 25(3)(h) and is fully consistent with a desire to use plain language. It does not detract from the conclusion that section 35(3)(o) requires an appropriate reassessment of the case in a broad sense, provided that the statutory provisions concerned are fair in all the circumstances. There is no material difference between section 25(3)(h) and section 35(3)(o).

[18] It remains to consider whether the leave provisions comply with section 35(3)(o). Save for the issue of fairness in relation to which the Commission seeks to advance an additional contention, the reasoning in the *Rens* judgment in which the same leave provisions were measured against a constitutional mandate which imposed similar requirements upon the law-maker would apply. Unless the additional submission proffered by the Commission makes a material difference to the analysis, the leave provisions must be found to be constitutional and the application for leave to appeal must be dismissed. It is, however, appropriate to briefly summarise the circumstances which were taken into account in the evaluation which led to the conclusion that the leave provisions passed the test of fairness imposed by section 25(3)(h) of the Constitution.

[19] Madala J emphasised that the provisions of section 316 read with 315 (4) of the Act must be evaluated in their context and in the light of the provisions of sections 317 to 319 of the Act.

It was pointed out that sections 317 and 318 make provision for a special entry to be made of an alleged irregularity or illegality in the proceedings, that the accused has a right to appeal against a decision where the accused alleges that the irregularity or illegality has resulted in prejudice, and that the judge to whom the application for special entry is made is obliged to make the entry unless the application is not bona fide or is frivolous or absurd. It was also pointed out that section 319 makes provision for the reservation of questions of law. In the circumstances, section 316 relates in the main to appeals of fact.[14]

[14] *Rens*, above n 1, at paras 8-12.

[20] The *Rens* judgment places considerable store by the fact that any accused person may, upon being refused leave to appeal by the high court, petition the Chief Justice for such leave; that the Chief Justice must appoint two judges to consider the petition in terms of sections 316, 317 or 319 of the Act; and that a third judge must be appointed if those appointed initially do not agree. Emphasis was also placed on various details and safeguards built into the legislation.[15] Madala J concludes, relying extensively on decisions of the European Court of Human Rights that the absence of full oral argument or a complete re-hearing does not mean that the procedure is unfair.[16] It is also made clear in the judgment that it cannot be in the interests of justice and fairness to allow meritless and vexatious issues to be heard by the Supreme Court of Appeal and to clog the roll with hopeless cases.[17] Of particular importance is the finding that the procedure involves a reassessment of the disputed issues by two judges of the higher court, and provides a framework for that reassessment which ensures an informed decision as to the prospects of

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15 Id n 1, para 23.

16 Id n 1, para 24.

17 Id n 1, para 25.

success.[18]

[21] Counsel for the Commission contended that this Court was wrong in *Rens* in holding that the leave provisions were fair. They pointed out that the leave provisions had an unequal impact and were unfair because accused persons without financial resources were unable to properly take advantage of these provisions. I cannot accept this argument. Section 35(3)(g) of the Constitution provides that an accused person has a right to legal representation at state expense if substantial injustice would otherwise result. Criminal cases tried in the high court are ordinarily serious. Persons tried in the high court are almost always represented by counsel, unless they choose not to be, and the services of legal representatives should ordinarily include professional assistance in making the application for leave to appeal to the high court and, if necessary, the preparation of the petition for the Supreme Court of Appeal. It may be that an accused who is not afforded legal representation to prepare an application for leave to appeal or a petition may complain of a breach of the right entrenched by section 35(3)(g). Such a complaint did not arise here. Whether such a breach has occurred must be determined on a case by case basis.

[22] I accordingly conclude that:

(a) There is no material difference between a convicted person's right to appeal to, or review by, a higher court encapsulated in section 25(3)(h) of the interim Constitution and section 35(3)(o) of the Constitution;

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[18] Id n 1, para 26.

(b) section 35(3)(o) of the Constitution requires that provision be made for a reassessment of the issues by a court higher than that in which the accused was convicted, and that the statutory provision concerned be fair in all the circumstances;

(c) section 316 of the Criminal Procedure Act 51 of 1977 read with section 315(4) of that Act is not inconsistent with the provisions of section 35(3)(o) of the Constitution.

[23] The application for leave to appeal is accordingly dismissed.

Chaskalson P, Langa DP, Ackermann J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, and Sachs J concur in the judgment of Yacoob J.

For the applicant: L Wepener SC and M Coetzer as Amici Curiae.

For the state: ECJ Wait instructed by the State Attorney, Johannesburg.

For the South African

Human Rights Commission: L Wessels.