IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 56/06
[2007] ZACC 3

MANDLAKHE KHEHLA SHINGA — Applicant

versus

THE STATE — Respondent

and

THE SOCIETY OF ADVOCATES (PIETERMARITZBURG BAR) — Amicus Curiae

Heard on : 14 November 2006

Decided on : 8 March 2007

Case CCT 80/06

DANIEL O'CONNELL — First Applicant

ABDUL GAFFOOR GANIEF — Second Applicant

RONALD OLINCE — Third Applicant

GRAHAM GREENTREE — Fourth Applicant

RICARDO ADAMS — Fifth Applicant

RASHIED STAGGIE — Sixth Applicant

versus

THE STATE — Respondent

Confirmation referred on : 29 November 2006

Decided on : 8 March 2007

JUDGMENT

YACOOB J:

Introduction

[1] These are confirmation proceedings.[1] They concern the constitutionality of some requirements in the procedure for criminal appeals from Magistrates' Courts. The findings of invalidity of two High Courts concerning these provisions have been referred to this Court for confirmation. The first is a unanimous judgment delivered by a full bench[2] in the KwaZulu-Natal High Court[3] declaring sections 309(3A), 309B and 309C of the Criminal Procedure Act[4] to be inconsistent with the fair trial rights guaranteed in the Constitution (the *Shinga* judgment). The second, delivered some three months after the *Shinga* judgment and a few days before oral argument in the confirmation proceedings was heard, is a unanimous judgment[5] of the Cape High Court[6] declaring the procedure and requirements set out in sections 309B and 309C of this legislation to be inconsistent with the Constitution (the *O'Connell* judgment). The *O'Connell* judgment was to hand when we heard argument in *Shinga*. However, the formal confirmation referral of the *O'Connell* decision was received by the

[1] In terms of section 172(2)(a) of the Constitution.

[2] Comprising Theron J, who delivered the judgment, Hugo J and Koen AJ.

[3] *S v Mandlakhe Khehla Shinga and the Society of Advocates (Pietermaritzburg Bar Intervening as* Amicus Curiae) (NPD) Case No AR 969/04, 3 August 2006, unreported.

[4] Act 51 of 1977.

[5] *S v O'Connell and Others* (CPD) Case No P15/05; P71/2005; P34/06; P 65/06, 6 November 2006, unreported.

[6] Comprising Blignault J, who delivered the judgment of the Court, and Allie J.

registrar of this Court only after argument in *Shinga* had been concluded. Since the constitutionality of sections 309B and 309C had already been fully debated in the *Shinga* matter and because there was no appeal in the *O'Connell* matter, it was deemed unnecessary to entertain further argument in relation to the *O'Connell* confirmation proceedings. This judgment therefore decides both the *Shinga* and *O'Connell* cases.

[2] The interaction between this Court and Parliament concerning the constitutional validity of the criminal appeal procedure in respect of judgments of the Magistrates' Courts has spanned more than ten years. This is the third occasion on which this Court has been called upon to consider the procedure for criminal appeals from the Magistrates' Courts. This Court has twice previously declared aspects of these prescriptions to be inconsistent with the Constitution.[7] Parliament responded each time by putting in place a procedure and requirements different from those that had been declared unconstitutional in an effort to remedy the defect. It is advisable in the circumstances to set out this interaction in some detail. It is the context within which the correctness or otherwise of the declarations of invalidity in this case may be considered.

Criminal appeals from the Magistrates' Courts after 1994

[3] At the inception of the new constitutional order in 1994, criminal appeals against conviction or sentence by a magistrate were governed by certain provisions in

[7] See *S v Ntuli* 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC); 1996 (1) SACR 94 (CC); *S v Steyn* 2001 (1) SA 1146 (CC); 2001 (1) BCLR 52 (CC).

the Criminal Procedure Act which created a regime generally described as conferring an automatic right of appeal upon the accused. Although this Act did permit "any person convicted of any offence" by any Magistrates' Court to appeal against that conviction to the High Court,[8] the right did not apply to everyone. The right was qualified in that any convicted person "undergoing imprisonment" was not entitled to appeal in person unless a High Court judge[9] certified that "reasonable grounds" for appeal existed.[10] In effect the right of appeal was available only to convicted people who were not in prison and to convicted people who were in prison but who enjoyed legal representation. All people who were in prison and who had no legal representation had to apply for a judges' certificate. For the sake of completeness, I might add that all appeals whether automatic or consequent upon a judges' certificate were argued in open court before two or three judges.

[4] The constitutionality of this limitation on the right to appeal of unrepresented imprisoned people was challenged in this Court eleven years ago in the matter of *Ntuli*.[11] In that case, this Court measured the limitation of the right to appeal against the fair trial guarantee in the interim Constitution[12] which conferred the right to a fair trial including the right "to have recourse by way of appeal or review to a higher court than the court of first instance". This Court held the judges' certificate requirement to

[8] Then referred to as the Provincial or Local Division of the Supreme Court.

[9] Then a judge of the Provincial or Local Division of the Supreme Court.

[10] Section 309(4)(a) read with section 305 of the Criminal Procedure Act, as it then read.

[11] *Ntuli* above n 7.

[12] Section 25(3)(h) of the Constitution of the Republic of South Africa, Act 200 of 1993.

be inconsistent with the interim Constitution and invalid. Salient features of that judgment for present purposes are set out:

(a) The judgment pointed out that the statute prescribed no procedure by which the judges' certificate might be applied for and that, in practice, the procedure was set in motion by a "communication from the prisoner" which Didcott J described as follows:

> "He or she has usually composed that, either alone or with the help of some imprisoned sea lawyer. The typical product of such efforts . . . 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."[13]

(b) In relation to the procurement of the record, this Court said:

> "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 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."[14]

[13] *Ntuli* above n 7 at para 15.

[14] Id.

(c) Then in relation to what was required by the interim Constitution:

> "[T]he minimum that it envisages and implies, I believe, is the opportunity for an adequate reappraisal of every case and an informed decision on it."[15]

[5] The reasoning depicted in the previous paragraph may be summarised as follows. The quality of representations made by an unrepresented accused in support of an application for a judges' certificate was so poor that it was ordinarily very difficult if not impossible to make any appropriate reassessment of the findings of the magistrate without recourse to the record. On this basis, as I have already said, the judges' certificate requirement was found to be inconsistent with the interim Constitution.[16] The declaration of invalidity was suspended for a period of about one year and five months[17] to enable Parliament to cure the defect.

[6] Parliament responded two years later[18] by passing legislation[19] aimed at curing the defect by amending the criminal appeal procedure (the first amendment). The legislation came into force only on 28 May 1999 with the result that an automatic right of appeal became available to everyone for some two years. The effect of this legislation may, to the extent relevant, be summarised as follows:

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[15] Id at para 17.

[16] The certificate requirement was also found to be contrary to the equality provisions contained in section 8(1) of the interim Constitution but it is not necessary to traverse this aspect here. *Ntuli* above n 7 at paras 18-20.

[17] 8 December 1995 to 30 April 1997.

[18] An application for an extension of the suspension of the declaration of invalidity made after the expiry of the period was dismissed in *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC); 1997 (2) SACR 19 (CC).

[19] Criminal Law Amendment Act 76 of 1997.

(a) All appeals without exception were subject either to leave to appeal granted by a magistrate[20] or absent leave granted by the magistrate, leave granted on petition to the Judge President of the High Court concerned.[21] Automatic criminal appeals from Magistrates' Courts were abolished altogether.

(b) Sections 309B and 309C constituted a single leave-to-appeal procedure with two possible stages. Only if leave to appeal was refused by the magistrate in the application for leave postulated by section 309B did section 309C become applicable.

(c) The material aspects of section 309C for these proceedings were the following. First, as I have already pointed out, refusal of leave to appeal by the magistrate obliged an accused, intent upon pursuing an appeal, to petition the Judge President of the High Court having jurisdiction for leave to appeal.[22] Secondly, the clerk of the court was obliged to submit to the registrar of the relevant High Court only two documents: a copy of the application for leave to appeal to the magistrate and the magistrate's reasons for the refusal of the application.[23] Thirdly, the petition had to be considered in chambers by two judges but if the two judges differed, the petition had also to be considered by a third judge.[24]

[20] Section 309(1)(a) read with section 309B as introduced by the first amendment.

[21] Section 309C as introduced by the first amendment.

[22] Section 309C(2).

[23] Section 309C(4).

[24] Section 309C(5).

Fourthly, the judges hearing the petition were empowered to call for any further information from the magistrate who heard the application.[25]

(d) It would have been noted that, despite the decided accent in *Ntuli* on the importance of the record and the difficulties of relying only on the reasons of the magistrate in applications for judges' certificates, the clerk of the court in applications for leave to appeal was not obliged to provide the record or even the judgment of the magistrate concerned on the merits. It was left to the judges considering the petition to decide whether any further information should be called for.

(e) The first amendment also introduced a new section 309(3A)[26] which sought to authorise the disposal of an appeal after leave had been granted in chambers and upon written argument; not in open court and after hearing oral argument. This could be done, however, only if the parties agreed and if the Judge President of the court concerned directed.[27]

[7] After the judgment in *Ntuli* had been given and before any remedial legislation had been enacted, this Court was called upon to consider the constitutional validity of the application for leave-to-appeal procedure for criminal appeals from the High

[25] Section 309C(5)(a).

[26] By section 2(c) of the first amendment.

[27] Section 3(A)(b).

Court[28] in the case of *Rens*.[29] I need describe that procedure in broad and general terms only. It provided that criminal appeals from the High Court to the full bench of the High Court or to the Supreme Court of Appeal[30] were competent only if leave was granted by the trial court, or absent leave from that court, by the Supreme Court of Appeal. *Rens* held the procedure to be consistent with the fair trial provisions in the interim Constitution.[31]

[8] Three years after the first amendment had been passed, the constitutionality of the criminal appeal requirements and procedures introduced by it were challenged in this Court in *Steyn*.[32] Significantly, the State contended in that case that the application for leave-to-appeal procedure from the Magistrates' Court to the High Court was constitutionally acceptable because it was equivalent to that from the High Court which had passed constitutional muster in *Rens* and *Twala*.[33] This argument was rejected in a unanimous judgment by Madlanga AJ. The Court:

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

[29] *S v Rens* 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC) delivered on 28 December 1995.

[30] Called the Appellate Division when *Rens* was decided.

[31] Above n 29 at para 30. Section 25(3) of the interim Constitution. It was held in *S v Twala* (*South African Human Rights Commission Intervening*) 2000 (1) SA 879 (CC); 2000 (1) BCLR 106 (CC); 1999 (2) SACR 622 (CC) at para 22, that the application for leave-to-appeal procedure from the High Court was consistent with s 35(3)(o) of the 1996 Constitution.

[32] *Steyn* above n 7.

[33] *Rens* above n 29; *Twala* above n 31.

(a) emphasised that the clerk of the Magistrates' Court was required to submit to the High Court only copies of the refused application for leave and the magistrate's reasons for refusing the application;[34]

(b) concluded that "the paucity of information, which . . . must be lodged with the high court does not allow for an adequate reappraisal and the making of an informed decision on the application"[35] as required by the judgment in *Ntuli*;[36]

(c) dismissed the notion that the situation is significantly improved by the provision[37] that permits judges seized with the petition to call for more information on the basis that, as pointed out by Didcott J,[38] some judges may call for the record and some may not;

(d) in responding to the argument that the first amendment was unobjectionable because it was comparable to the appeal procedure from the High Court, analysed, carefully and in detail, the differences between the Magistrates' Court and the High Court[39] and concluded that the "risk of an error leading to

[34] *Steyn* above n 7 at para 9.

[35] Id at para 11.

[36] Above n 7 at para 10.

[37] Section 309C(6) as introduced by the first amendment.

[38] In the quotation at para 4(b) of this judgment.

[39] *Steyn* above n 7 at paras 15-21.

an injustice is substantially greater in the magistrates' courts than in the high courts";[40]

(e) held that the appeal procedure introduced by the first amendment limited the rights of appeal to or review by a higher court as entrenched by section 35(3)(o) of the Constitution[41] and that the limitation could not be justified;[42] and

(f) suspended the declaration of invalidity for six months so that Parliament could take appropriate curative measures.[43]

[9] The leave-to-appeal procedure was amended by an Act of Parliament[44] for the second time some three years later[45] as a direct consequence of the judgment in *Steyn* (the second amendment). The provisions of the second amendment that are material to a decision of this case and which represent changes to the procedure created by the first amendment must be set out briefly:

(a) The automatic right of appeal is restored in two situations. It has now become available to any accused person who is below the age of fourteen years when

[40] Id at para 22.

[41] Id at para 27.

[42] Id at para 37.

[43] Id at para 53.

[44] Criminal Procedure Amendment Act 42 of 2003.

[45] This meant that automatic appeals came to life once more for two and a half years.

sentenced to any form of imprisonment;[46] and to any person between the ages of fourteen and sixteen who is convicted and sentenced to imprisonment by a regional court while not represented by a lawyer.[47]

(b) In all other cases, convicted people must be granted leave to appeal in terms of section 309B or section 309C before they can appeal.[48] Sections 309B[49] and

[46] Section 309(1)(a)(i) read with section 309(1)(a)(iii).

[47] Section 309(1)(a)(ii) read with section 309(1)(a)(iii).

[48] Section 309(1)(a).

[49] Section 309B now provides:

"Application for leave to appeal

(1) (a) Any accused, other than a person contemplated in the first proviso to section 309(l)(a), who wishes to note an appeal against any conviction or against any resultant sentence or order of a lower court, must apply to that court for leave to appeal against that conviction, sentence or order.

(b) An application referred to in paragraph (a) must be made—

(i) within 14 days after the passing of the sentence or order following on the conviction; or

(ii) within such extended period as the court may on application and for good cause shown, allow.

(2) (a) Any application in terms of subsection (1) must be heard by the magistrate whose conviction, sentence or order is the subject of the prospective appeal (hereinafter referred to as the trial magistrate) or, if the trial magistrate is not available, by any other magistrate of the court concerned, to whom it is assigned for hearing.

(b) If the application is to be heard by a magistrate, other than the trial magistrate, the clerk of the court must submit a copy of the record of the proceedings before the trial magistrate to the magistrate hearing the application: Provided that where the accused was legally represented at a trial in a regional court the clerk of the court must, subject to paragraph (c), only submit a copy of the judgment of the trial magistrate, including the reasons for the conviction, sentence or order in respect of which the appeal is sought to be noted to the magistrate hearing the application.

(c) The magistrate referred to in the proviso to paragraph (b) may, if he or she deems it necessary in order to decide the application, request the full record of the proceedings before the trial magistrate.

(d) Notice of the date fixed for the hearing of the application must be given to the Director of Public Prosecutions concerned, or to a person designated thereto by him or her, and the accused.

(3) (a) Every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires to appeal.

(b) If the accused applies orally for such leave immediately after the passing of the sentence or order, he or she must state such grounds, which must be recorded and form part of the record.

309C continue to represent a single integrated appeal procedure as before.[50] Section 309B concerns the grant of leave to appeal by the magistrate. Section

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(4) (a) If an application for leave to appeal under subsection (1) is granted, the clerk of the court must, in accordance with the rules of the court, transmit copies of the record and of all relevant documents to the registrar of the High Court concerned: Provided that instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be transmitted of such parts of the record as may be agreed upon by the Director of Public Prosecutions and the accused to be sufficient, in which event the High Court concerned may nevertheless call for the production of the whole record.

(b) If any application referred to in this section is refused, the magistrate must immediately record his or her reasons for such refusal.

(5) (a) An application for leave to appeal may be accompanied by an application to adduce further evidence (hereafter referred to as an application for further evidence) relating to the conviction, sentence or order in respect of which the appeal is sought to be noted.

(b) An application for further evidence must be supported by an affidavit stating that—

(i) further evidence which would presumably be accepted as true, is available;

(ii) if accepted the evidence could reasonably lead to a different decision or order; and

(iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.

(c) The court granting an application for further evidence must—

(i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and

(ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.

(6) Any evidence received under subsection (5) shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question."

[50] Section 309C now provides as follows:

"Petition procedure

(1) In this section—

(a) 'application for condonation' means an application referred to in the proviso to section 309(2), or referred to in section 309B(1)(b)(ii);

(b) 'application for leave to appeal' means an application referred to in section 309B(1)(a);

(c) 'application for further evidence' means an application to adduce further evidence referred to in section 309B(5)(a); and

(d) 'petition', unless the context otherwise indicates, includes an application referred to in subsection (2)(b)(ii).

(2) (a) If any application—

(i) for condonation;

(ii) for further evidence; or

(iii) for leave to appeal,

is refused by a lower court, the accused may by petition apply to the Judge President of the High Court having jurisdiction to grant any one or more of the applications in question.

(b) Any petition referred to in paragraph (a) must be made—

(i) within 21 days after the application in question was refused; or

(ii) within such extended period as may on an application accompanying that petition, for good cause shown, be allowed.

(3) (a) If more than one application referred to in subsection (1) relate to the same matter, they should, as far as is possible, be dealt with in the same petition.

(b) An accused who submits a petition in terms of subsection (2) must at the same time give notice thereof to the clerk of the lower court referred to in subsection (2)(a).

(4) When receiving the notice referred to in subsection (3), the clerk of the court must without delay submit to the registrar of the High Court concerned copies of—

(a) the application that was refused;

(b) the magistrate's reasons for refusal of the application; and

(c) the record of the proceedings in the magistrate's court in respect of which the application was refused: Provided that—

(i) if the accused was tried in a regional court and was legally represented at the trial; or

(ii) if the accused and the Director of Public Prosecutions agree thereto; or

(iii) if the prospective appeal is against the sentence only; or

(iv) if the petition relates solely to an application for condonation,

a copy of the judgment, which includes the reasons for conviction and sentence, shall, subject to subsection (6)(a), suffice for the purposes of the petition.

(5) (a) A petition contemplated in this section must be considered in chambers by a judge designated by the Judge President: Provided that the Judge President may, in exceptional circumstances, at any stage designate two judges to consider such petition.

(b) If the judges referred to in the proviso to paragraph (1) differ in opinion, the petition must also be considered in chambers by the Judge President or by any other judge designated by the Judge President.

(c) For the purposes of paragraph (b) any decision of the majority of the judges considering the petition, shall be deemed to be the decision of all three judges.

(6) Judges considering a petition may—

(a) call for any further information, including a copy of the record of any proceedings that was not submitted in terms of the proviso to subsection (4)(c), from the magistrate who refused the application in question, or from the magistrate who presided at the trial to which any such application relates, as the case may be; or

(b) in exceptional circumstances, order that the petition or any part thereof be argued before them at a time and place determined by them.

(7) Judges considering a petition may, whether they have acted under subsection (6)(a) or (b) or not—

(a) in the case of an application referred to in subsection (2)(b)(ii), grant or refuse the application; and

309C is concerned with the petition procedure for leave to appeal to the High Court in circumstances where the magistrate has refused leave to appeal.

(c) This petition procedure is different from its predecessor in three material respects. The first is that the clerk of the court is in every case required to submit to the registrar of the High Court concerned, in addition to the application for leave to appeal and the magistrate's reasons for refusing the application, a copy of the judgment including the reasons for conviction and sentence of the Magistrates' Court on the merits of the criminal case.[51] Secondly, the record must be sent to the High Court in all cases subject to certain exceptions. A record need not be sent if the accused was legally represented at his trial in the regional court,[52] if the accused and the Director of

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(b) in the case of an application for condonation, grant or refuse the application, and if the application is granted—

(i) direct that an application for leave to appeal must be made, within the period fixed by them, to the court referred to in section 309B(1); or

(ii) if they deem it expedient, direct that an application for leave to appeal must be submitted under subsection (2) within the period fixed by them as if it had been refused by the court referred to in section 309B(1); and

(c) in the case of an application for leave to appeal, subject to paragraph (d), grant or refuse the application; and

(d) in the case of an application for further evidence, grant or refuse the application, and, if the application is granted the judges may, before deciding the application for leave to appeal, remit the matter to the magistrate's court concerned in order that further evidence may be received in accordance with section 309B(5).

(8) All applications contained in a petition must be disposed of—

(a) as far as is possible, simultaneously; and

(b) as a matter of urgency, where the accused was sentenced to any form of imprisonment that was not wholly suspended.

(9) Notice of the date fixed for any hearing of a petition under this section, and of any place determined under subsection (6) for any hearing, must be given to the Director of Public Prosecutions concerned, or to a person designated by him or her, and the accused."

[51] Section 309C(4)(c).

[52] Section 309C(4)(c)(i).

Public Prosecutions agree,[53] if the appeal is against sentence only,[54] or in the case of an application for condonation.[55] Thirdly, the number of judges who are to consider the petition in chambers is reduced from two to one subject to the Judge President designating two judges to consider the petition but this may be done only in exceptional circumstances.[56]

(d) Finally section 309(3A), which was introduced by the first amendment and which sought to permit appeals in chambers subject to agreement between the accused and the prosecution and to directions by the Judge President, was amended to encroach upon the right to appeal even further. It now provides that all appeals (which by definition are considered only after leave to appeal has been granted either by the magistrate or the High Court) must be disposed of in chambers on the written argument of the parties or their legal representatives, unless the court is of the opinion that the interests of justice require that the parties or their legal representatives submit oral argument to the court regarding the appeal. In other words, absent exceptional circumstances and a direction by the Judge President, an appeal will not be heard in open court and no oral argument may be permitted.

Condonation

[53] Section 309C(4)(c)(ii).

[54] Section 309C(4)(c)(iii).

[55] Section 309C(4)(c)(iv).

[56] Section 309C(5)(a) as introduced by the second amendment.

[10] The directions required the Minister of Justice and Constitutional Development (the Minister) if she wished to join in the proceedings, to file an affidavit by 22 September 2006 and to file written argument by 23 October 2006. The Minister did file an affidavit requesting to be joined and also filed a supplementary affidavit on 27 October 2006. The Minister's written argument was filed four days late. The Minister sought leave to file the affidavit and condonation for the late filing of the argument. There was no opposition to these applications. It was helpful to receive the supplementary affidavit and no material harm was caused by the late filing of the written argument. In the circumstances, both applications are granted.

The approach

[11] The finding of unconstitutionality in respect of section 309(3A) was made in *Shinga* only. On the other hand, sections 309B and 309C were declared to be inconsistent with the Constitution in their entirety in *Shinga* and in *O'Connell* although the latter court identified only aspects of section 309C to be inconsistent with the Constitution. I propose immediately to traverse the background and the circumstances in which each of the courts came to consider the constitutionality of aspects of the appeal procedure. This judgment will then consider the constitutionality of section 309(3A). This will be followed by an evaluation of the constitutionality of sections 309B and 309C in the context of both High Court judgments and the judgment concludes by determining the appropriate remedy.

Background

The Shinga *judgment*

[12] During June 2004 Mr Mandlakhe Khehla Shinga was convicted of robbery in the Regional Court sitting on circuit in Scottburgh and sentenced to ten years' imprisonment. He was represented at the trial. His defence was that he was elsewhere at the time the crime was committed. The issues in the trial were therefore whether he had been identified beyond a reasonable doubt and whether there was a reasonable possibility that his alibi was true.

[13] The magistrate convicted him and granted him leave to appeal in terms of section 309B. This meant that sections 309B and 309C were not directly in issue before the High Court at all. Section 309(3A) was in issue and it was on that issue that the High Court sought argument. It is unfortunate that while doing so the High Court failed to consider the appeal.

[14] It will be remembered that the accused was convicted during June 2004. The appeal first came to court sometime before September 2005. Despite the fact that the accused was in custody, the High Court, instead of considering the appeal, invited the Society of Advocates (Pietermaritzburg Bar) to intervene initially on the issue of the constitutional validity of section 309(3A) which did arise for consideration in the case. The full bench convened on 16 September 2005 and adjourned the appeal until 19 December of that year for notice to be given to the Minister.

[15] After argument was heard, judgment on the constitutional issue was delivered on 3 August 2006 and the matter referred for confirmation to this Court.[57] The net result of all this is that even though Mr Shinga is in prison, his appeal has not yet been considered. Two and a half years have gone by since he was granted leave to appeal and more than a year has passed since the appeal was brought to the attention of the judges in the High Court. All of this renders it urgent for this case to be resolved as quickly as possible so that the matter can be referred back to the High Court for it to determine the appeal.

[16] In summary, it was right for the KwaZulu-Natal High Court to decide the issue of the constitutionality of section 309(3A). The position is rather different, however, when we come to consider whether it was appropriate for the High Court to determine the constitutionality of the appeal procedure in sections 309B and 309C. The reason for this has already been alluded to. The accused had been granted leave to appeal and sections 309B and 309C did not come into the picture at all. However, once the High Court held these provisions to be inconsistent with the Constitution, its order had to be referred to this Court for confirmation and this Court has to decide whether the order should be confirmed unless the matter has been rendered moot in the

[57] The terms of the order were as follows:

> "Sections 309(3A), 309B and 309C of the Criminal Procedure Act 51 of 1977 are inconsistent with section 35(3) of the Constitution of the Republic of South Africa Act 108 of 1996 and are declared invalid. This matter is referred to the Constitutional Court for confirmation."

meanwhile.[58] I now set out the background against which the Cape High Court decision was made.

The O'Connell *judgment*

[17] There were six applicants in the case before the High Court. All were convicted of: housebreaking with the intention of stealing; the theft of firearms and quantities of ammunition; and the possession of a total of 32 rifles.[59] All the applicants were also convicted of the possession of other firearms and ammunition. The offences related to breaking into, and theft of firearms and ammunition from, police premises in the Western Cape.[60]

[18] The applicants were all sentenced to long terms of imprisonment ranging from ten to fifteen years.[61] The applications for leave to appeal of all six applicants were refused[62] and they all applied for leave to appeal to the High Court. According to the High Court the application for leave to appeal was

> "referred for argument before us in open court . . . on the question whether the provisions of section 309C of the Act are constitutionally valid and, if invalid, whether the applicants can be exempted from the requirement of obtaining leave to appeal."[63]

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[58] See *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC).

[59] Some of the applicants were also convicted of the possession of other weapons and ammunition which is not necessary to detail here.

[60] Above n 5 at paras 1-4.

[61] Id at para 5.

[62] Id at para 6.

[63] Id at para 10.

[19] The appeal before the Cape High Court did involve the provisions of section 309C and the determination of their constitutionality was a legitimate element of the determination of the petition for leave to appeal before that court. We are therefore obliged to consider the constitutionality of section 309C as a result of the *O'Connell* judgment as well. It should be noted that the court in *O'Connell* instructed that the applications for leave to appeal be considered on the full record by two judges and should not await the outcome of these confirmation proceedings.[64]

Section 309(3A)

[20] Section 309(3A) (declared invalid in the *Shinga* judgment) reads as follows:

> "(a) An appeal under this section must be disposed of by a High Court in chambers on the written argument of the parties or their legal representatives, unless the Court is of the opinion that the interests of justice require that the parties or their legal representatives submit oral argument to the Court regarding the appeal.
>
> (b) If the Court is of the opinion that oral argument must be submitted regarding the appeal as contemplated in paragraph (a), the appeal may nevertheless be disposed of by that Court in chambers on the written argument of the parties or their legal representatives, if the parties or their legal representatives so request and the Judge President so agrees and directs in an appropriate case."

[64] The order in the *O'Connell* matter provided as follows:

> "(a) It is declared that sections 309B and 309C of the Criminal Procedure Act, and the reference to them in section 309(1)(a), are invalid as they are inconsistent with the Constitution.
>
> (b) This matter is referred to the Constitutional Court for consideration of the confirmation of the above order.
>
> (c) It is ordered that applicants' applications for leave to appeal be argued with reference to the entire record of the proceedings in the regional court before two judges and that applicants be permitted in the meanwhile to prosecute their intended appeals in such a manner that the appeals can be heard in the same forum and at the same time as their applications for leave to appeal."

[21] The section is in two parts. Paragraph (a) sets out as the ordinary rule that appeals must be heard in chambers on written argument unless the court is of the opinion that oral argument is required. Paragraph (b) is different. It disposes of the need for oral argument only if the legal representatives agree and the Judge President agrees and directs. The High Court starts its analysis by reference to the tradition, statutory and constitutional provisions in South Africa which require that all court proceedings must be held in public.[65] The *Shinga* judgment then advances the proposition that the trial envisaged in section 35(3)(o) of the Constitution "would include any subsequent proceedings in the course of endeavouring to appeal or review the initial proceedings."[66] On this hypothesis the High Court concludes that the provision in question requires the presence of the accused or a legal representative both at the trial proper and at the appeal.[67] The High Court rightly emphasises that "we have no tradition in our courts of appeals being decided upon written, *in lieu* of, oral argument."[68] It emphasises that fairness requires that the opportunity for oral argument be given on appeal[69] and that oral argument is an invaluable tool in the hands of the accused or her legal representative and the prosecution alike in order to advance the case.[70]

[65] Above n 3 at paras 6-7.

[66] Id at para 10.

[67] Id at paras 11-12.

[68] Id at para 14.

[69] Id at para 14.

[70] Id at para 15.

[22] Counsel for the amicus in the *Shinga* case submitted that, insofar as the object of section 309(3A) is to save judicial time and resources and to streamline the processing of criminal appeals, the potential administrative and practical difficulties that would arise from the implementation of the section and from the publication of the decisions in criminal appeals is likely to have quite the opposite effect. So, for example, if the judges who read the record and the written argument in chambers agree that the interests of justice require oral argument, the arrangements necessary to arrange a date upon which all the relevant parties – the same judges, defence counsel and/or the appellant and counsel for the State – are available will cause long delays and burden court resources. This is particularly so in those divisions where the judges change duty roster on a regular basis. The alternative of enrolling the matter for an appeal hearing before two different judges would mean that at least four, instead of two, judges would be required to read and engage with the record and the written arguments.

[23] As was pointed out by counsel for the amicus, section 309(3A) also gives no indication of how the decisions in criminal appeals dealt with in chambers are to be published. Either the preparation and handing down in open court of a written judgment in every case, or the subsequent delivery of an oral judgment in the presence of all the relevant parties, would result in a waste of judicial time and resources. The alternative of publishing the orders in criminal appeals dealt with in chambers without giving reasons for the orders would dramatically undermine the important requirements of judicial transparency and accountability.

[24] Counsel for the Minister also had no answer to these submissions. As is apparent from what follows, however, the provisions are so objectionable in principle that even practical merit would not easily render them acceptable.

[25] It is important that the significance of this deviation from the rule of law, fairness and justice be fully understood. The section makes dangerous inroads into our system of justice which ordinarily requires court proceedings that affect the rights of parties to be heard in public. It provides that an appeal can be determined by a judge behind closed doors. No member of the public will know what transpired; nobody can be present at the hearing. Far from having any merit, the provision is inimical to the rule of law, to the constitutional mandate of transparency and to justice itself. And the danger must not be underestimated. Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based.

[26] The importance of criminal appeals being argued and heard in open court cannot thus be gainsaid. The survivors of crime, those accused of it and the broader community have a right to see that justice is done in criminal matters. Seeing justice done in court enhances public confidence in the criminal justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. Open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate. Were criminal appeals to be dealt with behind closed

doors, faith in the criminal justice system may be lost. No democratic society can risk losing that faith. It is for this reason that the principle of open justice is an important principle in a democracy. As was recently reasoned in this Court:

> "Courts should in principle welcome public exposure of their work in the courtroom, subject of course to their obligation to ensure that proceedings are fair. The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. These values underpin both the right to a fair trial and the right to a public hearing (i.e. the principle of open courtrooms). The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness."[71]

[27] It is true, of course, that the principle of open justice is not without exception. This Court has held that leave-to-appeal procedures may be heard in chambers,[72] but this is an exception to the general rule of open justice permitted only to ensure that judicial resources are preserved for deserving cases. This narrow exception may not be extended to the very appeals a court has held to be potentially of merit.

[28] Our approach to the matter is that there can be no doubt that section 35(3)(o) contemplates that the review or appeal it guarantees is as fair as the trial itself must be. In determining the requirements for fairness of an appeal, it must be borne in mind that the accused person in prosecuting an appeal exercises a right which inures consequent upon leave to appeal having been granted either by the Magistrates' Court

[71] *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (2) BCLR 167 (CC) at para 32 (per Langa CJ *et al*). See also the remarks of Moseneke DCJ at paras 98-99.

[72] See for example *S v Rens* above n 29 at para 24.

or two judges of the High Court. In exercising this right to appeal, the accused person exercises the right to review or appeal conferred by the Constitution. A fair appeal must require that every accused and the prosecution be given an opportunity to advance their case in every reasonable way they can. To deny the accused or the prosecution the right to present oral argument in open court is fundamentally unfair bearing in mind the importance of oral argument as a significant tool in the hands of both an accused and the prosecution in the appeal process.

[29] The requirement of fairness must also take into account that all victims and their families have an abiding interest in the outcome of the appeal and have a right to attend the proceedings so that if the appeal should succeed, they have at least been given the opportunity to witness the process that gave rise to this result. It is a fundamental tenet of the administration of justice and the rule of law that appeals, particularly criminal appeals, are not held behind closed doors. In the circumstances, I would support the general reasoning of the High Court in relation to the provision with which we are now concerned.

[30] Counsel for the Minister tried to justify this provision. She said that consideration in chambers with written argument and the denial of the right to present oral argument in open court on appeal was somehow acceptable because the accused would have had the trial in open court and would have been able to present oral argument to the magistrate. This amounts to saying that a fair trial justifies an unfair appeal. The submission has no substance.

[31] I conclude therefore that the provision requiring an appeal ordinarily to be determined in chambers on written argument limits the right in section 35(3)(o) of the Constitution because it renders the process of appeal or review unfair and unjust. Strong and cogent justification will be required if the provision were to stand. In any event, none has been put forward. In the circumstances the provisions of section 309(3A) must be held to be inconsistent with the Constitution.

Sections 309B and 309C

[32] The two High Courts differed in their approaches to the constitutionality of these provisions. The *Shinga* court held both sections to be inconsistent with the Constitution in their entirety, and the *O'Connell* court identified certain aspects of section 309C to be inconsistent with the Constitution but held that whether the two subsections could survive through the process of reading-in and severance should be a matter left to this Court. I summarise each approach in turn.

The Shinga *judgment*

[33] The *Shinga* judgment held that:

> "The procedures contemplated in sections 309B and 309C taken as a whole and in the broad context within which the lower courts operate, limit the rights afforded to an accused person, particularly an unrepresented accused, in terms of section 35(3)(o) of the Constitution."[73]

[73] Above n 3 at para 24.

The starting point was the conclusion of this Court in *Steyn* that the paucity of information required to be sent to the High Court by the appeal procedure mandated by the first amendment[74] did not allow for an adequate and informed reappraisal.[75] The next link in the argument was that:

> "The new sections contain differences in grammar as well as some less material changes such as the exemption of certain categories of youth from having to seek leave to appeal and the omission of the provision, previously contained in section 309B(3)(b), for an oral application for leave to appeal immediately after the passing of sentence. . . . However, the only material difference in the new subsection is that it now requires, in addition, that a copy of the record of the proceedings also be included unless the applicant for leave was tried in a regional court and was legally represented at the trial."[76]

[34] On this basis, the judgment in *Shinga* concludes that sections 309B and 309C:

> "do not adequately address the deficiencies in and criticisms levelled by the Constitutional Court against the former similarly numbered sections. The disadvantages to an applicant for leave to appeal, especially an unrepresented applicant, have not been removed." (Footnote omitted.)[77]

Finally the court expresses the conclusion:

> "Even where a record of the proceedings in the lower court accompanies the petition to the Judge President for leave, the other adverse factors which prevailed at the time

[74] It will be recalled that section 309C(3) required only the application for leave to appeal to the magistrate and the magistrate's reasons for refusing it to be sent to the High Court.

[75] Above n 3 at para 21.

[76] Id at para 22.

[77] Id.

> when *Steyn* was decided, remain unaffected by the otherwise superficial changes in sections 309B and 309C."[78]

The O'Connell *judgment*

[35] The *O'Connell* judgment begins its analysis on the basis that "there may well be substance" in the submission "that an unqualified right of appeal may lead to an unacceptable proliferation of unmeritorious appeals."[79] It however identifies two aspects of the section 309C procedure to be unconstitutional. First, subsection (4)(c) which provides for trial records to be made available to petition judges in all cases except:

> "(i) if the accused was tried in a regional court and was legally represented at the trial; or
> (ii) if the accused and the Director of Public Prosecutions agree thereto;
> (iii) if the prospective appeal is against sentence only; or
> (iv) if the petition relates solely to an application for condonation . . . ".[80]

[36] Second, subsection (5)(a) has reduced the number of judges who are to consider a petition from two judges to one judge, unless other directions are given by the Judge President. In its order, however, the *O'Connell* court holds sections 309B and 309C to be inconsistent with the Constitution. Although the court noted that argument had been addressed to it on the possibility of saving the provisions through severance and reading-in, it preferred to leave that possibility to this Court.

[78] Id at para 23.

[79] Above n 5 at para 36.

[80] Subsection 4(c)(i)-(iv).

[37] In relation to subsection (4)(c), the *O'Connell* judgment accepts the criticism that the four categories in relation to which a record need not be provided were not logically or practically justifiable.[81] It holds there was no basis for making an exception in relation to people who were represented at the trial but not represented in the application for leave-to-appeal procedure.[82] The High Court also holds that the absence of a record does not provide an opportunity for adequate reappraisal and that the position is not cured by the judges concerned being empowered to call for the record.[83] Finally, the judges add a further practical consideration that additional inevitable delay and inconvenience would be occasioned if judges call for the record after they have first considered the application.[84]

[38] With respect to subsection (5)(a), the court in *O'Connell* finds it difficult to understand why the number of judges considering petitions for leave to appeal had been reduced from two to one.[85] The judgment drew attention to the fact that this Court had, in both *Rens*[86] and *Twala*,[87] placed considerable emphasis on the importance of two judges considering petitions for leave to appeal from the High Court.[88] They emphasise that the version of the Bill initially placed before the

[81] Above n 5 at para 32.

[82] Id at para 32 read with para 49.

[83] Id at para 49.

[84] Id at para 50.

[85] Id at para 43.

[86] Above n 29 at para 23.

[87] Above n 31 at para 20.

[88] Above n 5 at paras 44-46.

Parliamentary Portfolio Committee required two judges to consider the petition[89] and concluded that the departure from two judges was a "fundamental defect".[90]

The leave-to-appeal issues

[39] Three issues accordingly arise concerning the constitutional validity of the leave-to-appeal procedure provided for in section 309B and section 309C. First we must determine whether the fact that subsection (4)(c) does not require the record to be provided to the petition judge in every case is constitutionally acceptable. The second question we must answer is whether subsection (5)(a) which enables a single judge to consider the petition is consistent with the right to appeal or review provided for in the Constitution. Finally, we should consider whether the leave-to-appeal procedure as a whole is inconsistent with the Constitution because it does not in substance address the defects and difficulties identified in *Steyn* as held by the *Shinga* court.

Subsection (4)(c)

[40] Subsection (4)(c) must first be discussed. As I have already pointed out, the *O'Connell* judgment held that the record of the case should as a matter of course be placed before the petition judges on the basis that an adequate reappraisal is not possible without the record. I think that this proposition is sound. As this Court held in *Ntuli*,[91] reading the record enables a judge considering an application for leave to

[89] Id at para 47.

[90] Id at para 48.

[91] Above n 7 at para 15.

appeal to determine whether the evidence led in the trial substantiated the findings of fact made against an accused and to consider whether there were material irregularities in the conduct of the trial that may vitiate the conviction. Without the record, such an assessment cannot reliably be made and accordingly without a record it cannot be said that the accused has been afforded an opportunity to have the conviction and sentence "adequately reappraised". Once this is so accepted as sound, the question arises as to whether there is any rational basis for the suggestion that an adequate review is possible without the record in relation to each category posed by the exceptions. It must be borne in mind that the categories of people in respect of whom no record is sent are at a considerable disadvantage in comparison to those accused people in relation to whom records are made available to the petition judges. The question that must be asked is whether there is any justification for subjecting people covered by the exceptions to this disadvantage.

[41] The first exception is postulated by subsection (4)(c)(i) which does not require the record to be sent if the accused was legally represented at the trial in the Regional Court. This provision is unconstitutional for two reasons. First, there can be no justification whatsoever for the record exemption to apply to petitions of accused people who are represented at the trial but who thereafter are obliged to prepare their own petition because they have no lawyer. In these circumstances, the petitions for leave to appeal are, as in the case of applications for judges' certificates as of old, likely to be no more than "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".[92] I cannot imagine how a petition of this quality absent the record can ever result in an adequate reappraisal.

[42] Subsection (4)(c)(ii) says that the record need not be sent if the prosecution and the accused agree. This provision assumes that all accused people including those who are unrepresented and those who are not particularly competently represented will be able to determine whether a record is required in order to enable the petition judges to determine whether leave to appeal is to be granted. There is no foundation for such a thesis. There can be no justification for this provision either.

[43] Subsection (4)(c)(iii) permits the record not to be sent if the appeal relates to sentence alone. The suggestion that the record would be ordinarily unnecessary in every petition for leave to appeal against sentence regardless of whether the accused was represented at the trial competently or otherwise, regardless of whether the petition was prepared by an accused or a lawyer however competent, and regardless of the seriousness of the offence or the complexity of the case, defies common sense. It is entirely possible that neither the judgment of the magistrate on the merits and sentence nor the petition would pick up on matters favourable to the accused that would have an effect on sentence. The absence of the record in these cases might well perpetuate an error made by a magistrate.

[92] Id.

[44] Finally, the same can be said of subsection (4)(c)(iv) which exempts the clerk of the court from sending a record to petition judges in applications for condonation. This provision wrongly assumes that prospects of success are not relevant to condonation cases. Prospects of success are self-evidently important. This exception too cannot be justified.

[45] Counsel for the Minister was understandably unable to present any persuasive argument in support of any of the exceptions. The record exemption provisions therefore limit the right of the accused to appeal to or review by a higher court. Rightly, no justification has been attempted. I would therefore conclude that section 309C is inconsistent with the Constitution to the extent that the exceptions contained in subsections 4(c)(i), 4(c)(ii), (4)(c)(iii) and 4(c)(iv)[93] cannot be justified. Each of them is an unjustifiable barrier to the right of review or appeal guaranteed by section 35(3)(o) of the Constitution.

Subsection (5)(a)

[46] Like the Cape High Court I find it "difficult to understand the reasons for introducing the one judge procedure".[94] In *Rens*[95]and *Twala*[96] this Court regarded the fact that applications for leave to appeal from the High Court to the Supreme Court of Appeal are, in the first place, considered by two judges as an important pillar in the process of finding the application for leave-to-appeal procedure constitutionally valid.

[93] The texts of these provisions are set out above at n 50.

[94] Above n 5 at para 43.

[95] Above n 29 at para 23.

[96] Above n 31 at para 20.

The *O'Connell* judgment was alive to this important factor.[97] If it is appropriate for two judges in the Supreme Court of Appeal to consider applications for leave to appeal to it from judgments of the High Court, the question to be asked is why one judge is enough to consider petitions for leave to appeal from the Magistrates' Court. Unless cogent reasons have been given for a different approach (and no reason has been provided in this case) it must follow that two judges of the High Court ought in the first instance to consider petitions for leave to appeal against decisions of magistrates for the procedure to result in an adequate reappraisal.

[47] There are powerful reasons for requiring more than one judge to reconsider a criminal record to determine whether leave to appeal should be granted. A decision by the court that leave should not be granted is the end of the road for the accused whose conviction and sentence will then stand. Many of the criminal cases heard by Regional Courts are of a very serious nature and can result in long periods of imprisonment. Collegial discussion in considering a record is valuable and enhances the quality of reappraisal of a record and it is not surprising therefore that it has been the general practice in our courts for more than one judge to be engaged in such reconsideration. The practice enhances the quality of justice and is a safeguard to ensure that the right to appeal is not precluded improvidently. It is not surprising then that it appears from the record before us that High Court judges, in submitting their comments to the Minister of Justice and Constitutional Development in relation to the

[97] Above n 5 at para 46.

criminal appeals procedure from Magistrates' Courts, endorsed the value of two judges considering applications for leave to appeal.

[48] Counsel for the Minister was unable to make any submission in favour of this restriction. Nor could counsel point to any reasons of practice that would support it. I conclude therefore that the constitutional requirement of an adequate reappraisal of the record requires two judges to consider the record. That right is limited by subsection 309C(5)(a). No justification has been attempted. I see none. I would accordingly hold that subsection 309C(5)(a) is inconsistent with the Constitution to the extent that it provides for the petition for leave to appeal to be heard by a single judge.

Is the procedure as a whole constitutionally compliant?

[49] Mr van Zyl and Mr van Schalkwyk appeared for the amicus in the *Shinga* case before the High Court and before this Court. We are grateful for the help that they provided. They vigorously defended the High Court judgment in *Shinga* and contended that in the South African context, and more particularly in the light of the conditions that prevail in the Magistrates' Courts in South Africa today, nothing less than an automatic right of appeal would fulfil the constitutional mandate. The Minister contended that an automatic right of appeal would unduly clog the court rolls.

[50] In considering whether the procedure established by sections 309B and 309C is inconsistent with the Constitution, I do so on the assumption (flowing from the reasoning above) that once leave to appeal has been refused by a magistrate, the record in all matters will be placed before two High Court judges to determine whether leave to appeal should be granted. On that basis, I cannot agree with the reasoning and conclusion of the *Shinga* judgment in relation to sections 309B and 309C. I should note that, contrary to the reasoning in *Shinga*, the second amendment does permit an oral application for leave to appeal immediately after the passing of sentence.[98]

[51] This Court has never held that a leave-to-appeal procedure is inevitably in breach of the requirements of the Constitution. There are practical reasons why a leave-to-appeal procedure is desirable. It allows unmeritorious appeals to be identified and prevented and therefore not result in a waste of judicial resources. It is true that the requirement that two judges must peruse the full record does not result in a significant saving, but any more abbreviated reconsideration may result in meritorious appeals being refused which would fall foul of the requirements of a fair trial.

[52] The leave-to-appeal procedure provided for in sections 309B and 309C requires that the magistrate's judgment has to be provided in relation to every petition. Moreover, as we have found, the record must also be provided in all cases and

[98] This provision is equivalent to section 309B(3) of the first amendment.

considered by two judges. These features permit an adequate reappraisal of whether the applicant for leave to appeal was correctly convicted and whether the sentence is appropriate. In so doing, the procedure with the alterations that must follow as a result of this judgment will afford a right to appeal or review by a higher court as contemplated by section 35(3)(o) of the Constitution.

[53] In these circumstances, the declaration of invalidity of the provisions as a whole on the broad basis contemplated in the *Shinga* judgment cannot be confirmed. In reaching this conclusion, it is important to emphasise the judicial character of the task conferred upon magistrates, in particular, in determining whether to grant leave to appeal. Although the magistrate will have convicted and sentenced the accused, the magistrate is called upon to consider carefully whether another court may reach a different conclusion. This requires a careful analysis of both the facts and the law that have underpinned the conviction, and a consideration of the possibility that another court may differ either in relation to the facts or the law or both. This is a task that has been carried out by High Court judges for many years, but it is new to magistrates under the section 309B procedure. It is a judicial task of some delicacy and expertise. It should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate court.

The appropriate remedy

[54] In summary, I have found that section 309(3A) is unconstitutional in its entirety and that the procedure established by sections 309B and 309C is inconsistent with the Constitution in two specific aspects, but that apart from these aspects, the procedure established is not inconsistent with the Constitution. The appropriate remedy[99] in relation to section 309(3A) therefore needs to be considered separately from the appropriate remedy in respect of section 309C. As we have found section 309(3A) to be unconstitutional in its entirety, we therefore need to confirm the order made by the *Shinga* court and declare the section to be unconstitutional and invalid. The 309B and 309C procedure has been found inconsistent with the Constitution in two respects. Accordingly, it will not be in the interests of justice to declare the whole of those sections invalid. The extent of the declaration of invalidity is the following:

> (a) subsection 309C(4)(c) provides by way of exception for categories of cases in which the record need not be sent to the petition judges by the clerk of the Magistrates' Court; and
>
> (b) subsection 309C(5)(a) permits the petition for leave to appeal to be heard and determined by a single judge.

Each of these must be considered separately.

[55] It is not appropriate to set aside the whole of section 309C(4)(c) in order to cure the defect identified in sub-paragraph (a) of the previous paragraph. This is so because if we do so the clerk of the court will not be obliged to send any record in any

[99] In terms of section 172(1)(b) of the Constitution.

case to the petition judges. I am satisfied that the severance from section 309C(4)(c) of the proviso to subsection 309C(4)(c) including sub-paragraphs (i), (ii), (iii) and (iv) would be right. Severance in this case complies with the test that has thus far been applied by this Court.[100] The severance of the proviso to subsection 309C(4)(c) including sub-paragraphs (i), (ii), (iii) and (iv) from section 309C(4)(c) results in the separation of the good from the bad in circumstances where the good is not dependent on the bad. Moreover it results in the fact that part of the statute which is good is retained. After the severance, section 309C(4) will read as follows:

> "(4) When receiving the notice referred to in subsection (3), the clerk of the court must without delay submit to the registrar of the High Court concerned copies of –
>
> (a) the application that was refused;
>
> (b) the magistrate's reasons for refusal of the application; and
>
> (c) the record of the proceedings in the magistrate's court in respect of which the application was refused."

There is no doubt that what remains carries out the object of the statute. The effect of this order is that the record must be furnished in every case.

[56] Similar considerations apply to the finding of unconstitutionality based on the fact that subsection (5)(a) is objectionable. The setting aside of the whole of section 309C(5) will create a void in the petition procedure which would then become unworkable. The defect can be remedied only by adjusting the provision so as to increase the number of judges required to consider petitions for leave to appeal. The remedies of severance and reading-in can effectively be used to craft this provision so

[100] See *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae) 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 15.

that it is consistent with the Constitution. This is because the guidelines set out in the cases of this Court for this kind of re-crafting have been met.[101] Subsection 5(a) may be cured by using a combination of severance and reading-in so that two judges are required to consider a petition which will be consistent with the Constitution and its basic values. The words "a judge" as well as the proviso, "Provided that the Judge President may, in exceptional circumstances, at any stage designate two judges to consider such petition", must be severed from the subsection. In place of the words "a judge", the words "two judges" must be substituted. The result will interfere with the statute as little as possible for it is hardly conceivable that the legislature would opt to have the petition considered by more than two judges. Finally this exercise can be performed with sufficient precision and does not carry adverse budgetary consequences to justify not resorting to it. Section 309C(5)(a) will after the severance and reading-in read as follows:

> "A petition contemplated in this section must be considered in chambers by two judges designated by the Judge President."

Retrospectivity

[57] It will not be just and equitable for any of the orders of inconsistency or invalidity to operate retrospectively and apply to appeals that have been finalised. All orders of inconsistency and invalidity should therefore be made applicable to all criminal appeals from Magistrates' Courts to High Courts in which judgment has not been delivered within fourteen days of the date of this order. This delay is necessary

[101] See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 62-76.

to cater for the situation where judgments already prepared by High Courts that have considered appeals in chambers are delivered shortly after this judgment and to give a reasonable time for judges to have this judgment brought to their attention. The registrar of this Court must, in the circumstances, be requested to ensure that this judgment is drawn to the attention of all Judges President immediately upon delivery of this judgment.

Legal aid concern

[58] The *O' Connell* judgment expresses some concerns about the fact that legal aid is often not granted to enable convicted people to make applications for leave to appeal after conviction.[102] This issue cannot be dealt with in these proceedings as the Legal Aid Board has not been joined as a party nor been given an opportunity to respond to it. All that need be said is that if it is true that there are a large number of cases in which this happens, it is a matter of grave concern. Legal aid is ordinarily granted to an accused for the purpose of the trial because of a conclusion by the Legal Aid Board that substantial prejudice would otherwise result.[103] An accused person who has been granted legal aid on this basis and who is convicted should ordinarily be entitled to make an application for leave to appeal to the Magistrates' Court and if necessary, to the High Court. This paragraph must be drawn to the attention of the Legal Aid Board by the registrar.

[102] Above n 5 at para 41.

[103] Section 35(3)(g) of the Constitution provides that:

> "Every accused person has a right to a fair trial, which includes the right to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

Order

[59] The following order is made:

1. Section 309(3A) of the Criminal Procedure Act 51 of 1977 is declared to be inconsistent with the Constitution and therefore invalid.
2. The proviso to subsection 309C(4)(c) including subsections 4(c)(i), (ii), (iii) and (iv) of the Criminal Procedure Act 51 of 1977 is declared to be inconsistent with the Constitution and invalid and is severed from section 309C(4)(c).
3. The words "a judge" and the proviso to subsection 309C(5)(a) of the Criminal Procedure Act 51 of 1977 are declared to be inconsistent with the Constitution and invalid and are severed from section 309C(5)(a).
4. The omission of the word "two judges" in subsection 309C(5)(a) of the Criminal Procedure Act 51 of 1977 is declared to be inconsistent with the Constitution and invalid.
5. The words "two judges" are to be read into subsection 309C(5)(a) of the Criminal Procedure Act 51 of 1977 in substitution of the words "a judge" that have been declared invalid and severed from that section in terms of paragraph 3 of this order. Subsection 309C(5)(a) now reads:

   "A petition contemplated in this section must be considered by two judges designated by the Judge President."
6. Paragraphs 1-5 of this order do not apply to any criminal appeal from a Magistrates' Court to a High Court in which the judgment of the High

Court has already been delivered as at the date of the judgment in this case or in which the judgment of the High Court is delivered on or before 22 March 2007.

7. The registrar of this Court is directed to draw this judgment to the attention of all Judges President of each High Court.
8. The registrar is also directed to send a copy of this judgment to the Legal Aid Board.

S v Mandlakhe Khehla Shinga

9. The application for confirmation in the case of *S v Mandlakhe Khehla Shinga*, Case No AR 969/04 (NPD), is upheld in part and dismissed in part as set out in paragraphs 1-6 of this order.
10. The order made by the High Court is set aside.
11. The appeal is referred back to the KwaZulu-Natal High Court to be finalised in accordance with this judgment.

S v O'Connell and Others

12. Paragraph (a) of the order in *S v O'Connell and Others* (CPD) Case No P15/05; P71/2005; P34/06; P 65/06 made on 6 November 2006, is upheld in part and dismissed in part as set out in paragraphs 2-6 of this order.

Langa CJ, Moseneke DCJ, Kondile AJ, Madala J, Mokgoro J, Nkabinde J, O'Regan J, Sachs J, van der Westhuizen J, van Heerden AJ concur in the judgment of Yacoob J.

For the First Respondent:	Advocate AA Watt instructed by the Department of Public Prosecutions (KZN).
For the Second Respondent:	Advocate N Cassim SC and SM Lebalala instructed by the State Attorney, Pretoria.
For the Amicus:	Advocate A van Zyl SC, C van Schalkwyk instructed by the Society of Advocates.