CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 78/09
[2010] ZACC 2

In the matter between:

MUSA JOE MOLOI	First Applicant
GEORGE GRAHAM MIDDELTON	Second Applicant
MASOUD MSELEM YUUNUS	Third Applicant
THABO LAWRENCE MOHLALA	Fourth Applicant

and

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Respondent
DIRECTOR OF PUBLIC PROSECUTIONS SOUTH GAUTENG HIGH COURT, JOHANNESBURG	Second Respondent
SENIOR MAGISTRATE KEMPTON PARK MAGISTRATE'S COURT	Third Respondent

Decided on : 4 February 2010

JUDGMENT

THE COURT:

Introduction

THE COURT

[1] Before us is an application brought on the basis of urgency for direct access to this Court to set aside the convictions and sentences imposed on the applicants by certain Magistrate's Courts, Kempton Park, in Gauteng for dealing in drugs in contravention of section 5(b)[1] read with sections 1,[2] 13,[3] 17,[4] 18,[5] 20,[6] 21,[7] 22[8] and 25[9] of the Drugs and

---

[1] Section 5(b) provides:

> "No person shall deal in—
>
> (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance".

[2] Section 1 provides the following definition:

> "'deal in', in relation to a drug, includes performing any act in connection with the transhipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug".

[3] Section 13 provides:

> "Any person who—
>
> (a) places any drug in the possession, or in or on the premises, vehicle, vessel or aircraft, of any other person with intent that the latter person be charged with an offence under this Act;
>
> (b) contravenes a provision of section 3;
>
> (c) contravenes a provision of section 4(a);
>
> (d) contravenes a provision of section 4(b);
>
> (e) contravenes a provision of section 5(a); or
>
> (f) contravenes a provision of section 5(b),
>
> shall be guilty of an offence."

[4] Section 17 provides:

> "Any person who is convicted of an offence under this Act shall be liable—
>
> (a) in the case of an offence referred to in section 16, to a fine, or to imprisonment for a period not exceeding twelve months, or to both such fine and such imprisonment;
>
> (b) in the case of an offence referred to in section 13(a) or (c), to such fine as the court may deem fit to impose, or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment;
>
> (c) in the case of an offence referred to in section 13(e), to such fine as the court may deem fit to impose, or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment;
>
> (d) in the case of an offence referred to in section 13(b) or (d), 14 or 15, to such fine as the court may deem fit to impose, or to imprisonment for a period not exceeding 15 years, or to both such fine and such imprisonment; and

(e) in the case of an offence referred to in section 13(f), to imprisonment for a period not exceeding 25 years, or to both such imprisonment and such fine as the court may deem fit to impose."

[5] Section 18 provides:

> "If in any prosecution for an offence under this Act it is proved that a sample which was taken from any substance by means or in respect of which the offence allegedly was committed possesses particular properties, it shall be presumed, until the contrary is proved, that any such substance possesses the same properties."

[6] Section 20 provides:

> "If in the prosecution of any person for an offence under this Act it is proved that any drug was found in the immediate vicinity of the accused, it shall be presumed, until the contrary is proved, that the accused was found in possession of such drug."

[7] Section 21 provides:

"(1) If in the prosecution of any person for an offence referred to—

(a) in section 13(f) it is proved that the accused—

(i) was found in possession of dagga exceeding 115 grams;

(ii) was found in possession in or on any school grounds or within a distance of 100 metres from the confines of such school grounds of any dangerous dependence-producing substance; or

(iii) was found in possession of any undesirable dependence-producing substance, other than dagga,

it shall be presumed, until the contrary is proved, that the accused dealt in such dagga or substance;

(b) in section 13(f) it is proved—

(i) that dagga plants of the existence of which plants the accused was aware or could reasonably be expected to have been aware, were found on a particular day on cultivated land; and

(ii) that the accused was on the particular day the owner, occupier, manager or person in charge of the said land,

it shall be presumed, until the contrary is proved, that the accused dealt in such dagga plants;

(c) in section 13(e) or (f) it is proved that the accused conveyed any drug, it shall be presumed, until the contrary is proved, that the accused dealt in such drug;

(d) in section 13(e) or (f) it is proved—

(i) that any drug was found on or in any animal, vehicle, vessel or aircraft; and

(ii) that the accused was on or in charge of, or that he accompanied, any such animal, vehicle, vessel or aircraft,

it shall be presumed, until the contrary is proved, that the accused dealt in such drug.

(2) For the purposes of subsection (1)(a)(ii)—

"'school' means any educational institution, except a university, a college of education or a technikon, where full-time education, including pre-primary education, is provided to pupils;

'school grounds', in relation to a school, means land, whether it is contiguous or not, buildings or accommodation, sporting or other facilities used for or in connection with the activities of the school."

[8] Section 22 provides:

"If in the prosecution of any person for an offence referred to in section 14(a) it is proved that the accused was found in possession of any property which was the proceeds of a defined crime, it shall be presumed that the accused knew at the time of the acquisition of such property that it was the proceeds of a defined crime, unless he proves—

(a) that he acquired that property in good faith; and

(b) that the circumstances under which he acquired that property were not of such a nature that he could reasonably have been expected to have suspected that it was the proceeds of a defined crime."

[9] Section 25 provides:

"(l) Whenever any person is convicted of an offence under this Act, the court convicting him shall, in addition to any punishment which that court may impose in respect of the offence, declare—

(a) any scheduled substance, drug or property—

(i) by means of which the offence was committed;

(ii) which was used in the commission of the offence; or

(iii) which was found in the possession of the convicted person;

(b) any animal, vehicle, vessel, aircraft, container or other article which was used—

(i) for the purpose of or in connection with the commission of the offence; or

(ii) for the storage, conveyance, removal or concealment of any scheduled substance, drug or property by means of which the offence was committed or which was used in the commission of the offence;

(c) in the case of an offence referred to in section 13(e) or (f), any immovable property which was used for the purpose of or in connection with the commission of that offence, and which was seized under section 11(1)(g) or is in the possession or custody or under the control of the convicted person, to be forfeited to the State.

(2) Anything forfeited under subsection (1) shall, if it was seized under section 11(1)(g), be kept or, if it is in the possession or custody or under the control of the convicted person, be seized and kept—

(a) for a period of 30 days from the date of the declaration of forfeiture; or

(b) if any person referred to in section 26(1) has within the period contemplated in paragraph (a) made an application to the court

Drug Trafficking Act[10] (the Act). All four applicants are serving prison terms at Modderbee Correctional Centre, Benoni and do not have legal representation. They also seek condonation for the late filing of the application for leave to appeal and for their failure to file the prescribed number of copies of the application.

[2] The applicants have cited as first respondent, the Minister for Justice and Constitutional Development; as second respondent, the National Director of Public Prosecutions; and as third respondent, the Kempton Park Magistrate's Court.

[3] All the applicants were charged with and convicted of dealing in drugs in terms of section 5(b) read with the presumptions of dealing in drugs found in section 21(1)(a)(i), (b), (c) and (d) of the Act. In the alternative, they were charged with the possession of drugs in terms of section 4(b) read with sections 21(1)(a)(i), (b), (c) and (d) of the Act.

[4] The first applicant is Mr Musa Joe Moloi. He pleaded not guilty to the main and alternative counts charged. He was, however, found guilty on the main count of dealing in drugs and sentenced to 12 years' imprisonment.

[5] The second applicant is Mr George Graham Middleton. He pleaded guilty to all the counts and was sentenced to 25 years' imprisonment on the main count of dealing in

concerned regarding his interest in such thing, until a final decision has been rendered in respect of any such application."

[10] 140 of 1992.

drugs. He successfully appealed to the High Court against the sentence which was reduced to 15 years' imprisonment and backdated to 28 June 2006, being the original date on which the sentence was imposed.

[6] The third applicant is Mr Masoud Mselem Yuunus. He pleaded not guilty to all the counts. However he was convicted on the main count of dealing in drugs and sentenced to 18 years' imprisonment. After his conviction, he unsuccessfully applied to the Magistrate's Court for leave to appeal to the High Court. It is not clear on what grounds the application for leave to appeal was refused.

[7] The fourth applicant is Mr Thabo Lawrence Mohlala. He pleaded guilty to all counts and was convicted on the main count of dealing in drugs and sentenced to 12 years' imprisonment. His appeal against sentence was dismissed by the High Court.[11] Reasons for dismissing the appeal do not form part of the record before us.

Condonation for late filing of the application

[8] The applicants seek condonation for the late filing of the application for direct access to this Court. The respondents do not deal with the applicants' request for condonation and from this it may be inferred that they do not oppose condonation. The applicants were convicted several years ago. They do not provide a full explanation for the delay, but advance reasons only for the last few weeks' lateness. Ordinarily an

[11] The appeal was dismissed on 22 March 2007 by Blieden and Tsoka JJ in the South Gauteng High Court.

applicant who seeks condonation must furnish a satisfactory explanation for the delay for the full period of the delay.[12] However, in this case, the applicants are incarcerated and without legal representation. Given the passage of time, it is apparent that the issues they raise have come to them recently. The issues are of considerable constitutional importance. They concern the liberty of the applicants and may concern the liberty of others. In the circumstances, condonation should be granted. We should emphasise that we are dealing only with condonation in relation to direct access to this Court. Should the applicants approach the High Court on appeal, that court would be well placed to consider an application for condonation for the late filing of the appeal in conjunction with the merits of the convictions.

[9] In respect of the applicants' failure to file the requisite number of copies of the application, this Court notes that they are serving prison sentences at the Modderbee Correctional Centre; that they have no legal representation; and that they do not have access to amenities which would have assisted them in complying with the Rules of this Court. Their failure in this regard is condoned.

Applicants' submissions

[10] In this Court, the applicants complain that their right to a fair trial has been violated and that their convictions and sentences fall to be set aside because they were

[12] *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 22.

found guilty of dealing in drugs on the strength of the presumptions on dealing in drugs to be found in section 21(1)(a)(i), (b), (c) and (d) of the Act. They submit that, in the decision of *S v Bhulwana; S v Gwadiso*[13] this Court found that the presumptions in section 21(1)(a)(i) of the Act are unconstitutional and invalid, and that for that reason, their convictions fall to be set aside.

[11] Section 21(1)(b) of the Act was declared to be constitutionally invalid in *S v Ntsele*.[14] In *S v Mjezu*,[15] the provisions of sections 21(1)(c) and (d) were declared unconstitutional. In *S v Manyonyo*,[16] this Court declared section 21(1)(c) to be unconstitutional and of no force and effect. This Court stated further[17] that the finding in *S v Mjezu*, that the provisions of sections 21(1)(c) and (d) were unconstitutional, "is clearly correct".

[12] The applicants also attach the review judgment in *S v Phillipe Kouame Jean*[18] in which Makume AJ (Mathopo J concurring) set aside a conviction of dealing in drugs where it appeared that the state had relied on the constitutionally invalid provisions of section 21(1)(a)(i) of the Act. The Court ordered that the accused be convicted on the alternative charge of possession of drugs in contravention of section 4(b) of the Act and

---

[13] [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC).

[14] [1997] ZACC 14; 1997 (2) SACR 740 (CC); 1997 (11) BCLR 1543 (CC).

[15] 1996 (2) SACR 594 (NC).

[16] [1999] ZACC 14; 1999 (12) BCLR 1438 (CC).

[17] *Manyonyo* above n 16 at para 11.

[18] High Court, Witwatersrand Local Division, as it then was, Case No 301/2008, 16 April 2009, unreported.

remitted the matter to the Magistrate's Court for fresh sentencing in accordance with the new conviction.

[13] The applicants drew our attention to the decision in *S v Tshali*.[19] In that case, the Cape High Court held that a charge and a subsequent conviction that is based on a statutory provision that has been declared unconstitutional and invalid is incompetent. It set aside the resultant convictions and sentences.

Directions

[14] On 2 November 2009, this Court issued directions to each of the magistrates who presided in the criminal trial of the applicants. The directions enquired:

(a) whether the presumption in section 21 of the Act was relied upon by the learned magistrate in convicting the applicants; and

(b) if section 21 of the Act was not relied upon, why was the charge sheet not amended?

[15] The magistrates concerned furnished this Court with reports which are couched in identical terms. Their essence is that each of the charge sheets did refer to the presumption contained in section 21 of the Act; that each charge sheet was put to the accused in those terms for purposes of pleading; and that even though the charge sheets referred to section 21 of the Act, the presumptions on dealing in drugs were not relied

[19] 2007 (2) SACR 23 (C).

upon and played no part in the convictions of the applicants. In relation to the amendment of the charge sheet the learned magistrates confirmed that the charge sheets had not been amended but drew our attention to the provisions of section 86(4) of the Criminal Procedure Act[20] (CPA) which provides that "[t]he fact that a charge is not amended as provided in this section, shall not, unless the court refuses to allow the amendment, affect the validity of the proceedings thereunder."

[16] The second respondent is the Director of Public Prosecutions, South Gauteng High Court, Johannesburg (DPP) who, in these proceedings, is represented by Mr Van Zyl. He opposes the application on a number of grounds. First, he submits that this Court has no jurisdiction to hear the application because it does not raise a constitutional issue. Second, he argues that it is not in the interests of justice for this Court to decide the specific issues the applicants raise as a court of first and last instance. He further submits that although the charge sheets erroneously referred to section 21 of the Act, the presumptions it provides for were not relied upon or played no part in the conviction of the applicants. The second respondent makes common cause with the attitude of the learned magistrates that the fact that the charge sheets were not amended does not undermine the fairness of the trials of the applicants.

Does the applicants' complaint raise a constitutional issue?

[20] 51 of 1977.

[17] The applicants' complaint is that they did not receive a fair trial because the charge that the prosecution put to them and on which they were convicted invoked an invalid statutory presumption. It is common cause that the respective charges were defective because they relied upon a constitutionally invalid section and were not amended in terms of the CPA.[21] The magistrates contend that although the charge sheets were not amended the resultant convictions are valid because section 86(4) of the CPA provides that a failure to amend a charge sheet before the end of a trial does not in itself vitiate the proceedings concerned.

[18] Section 86(1) of the CPA plainly authorises the court to amend at any time before judgment any conceivable defect in the charge, including the inadvertent inclusion of the impugned section,[22] provided the accused will not be prejudiced thereby.

---

[21] Section 86 of the Criminal Procedure Act provides:

> "(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof, where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.
>
> (2) The amendment may be made on such terms as to an adjournment of the proceedings as the court may deem fit.
>
> (3) Upon the amendment of the charge in accordance with the order of the court, the trial shall proceed at the appointed time upon the amended charge in the same manner and with the same consequences as if it had been originally in its amended form.
>
> (4) The fact that a charge is not amended as provided in this section, shall not, unless the court refuses to allow the amendment, affect the validity of the proceedings thereunder."

[22] See section 21(1)(a)(i), (b), (c) and (d) above n 7.

[19] Section 86(4) on the other hand provides that even if the charge is not amended, the proceedings based on the defective charge may nevertheless remain valid. However, the question is whether section 86(4) may be invoked if the accused may be prejudiced by an amendment not having been made. Pre-constitutional judicial authority suggests not.[23] Whether the accused may be so prejudiced is dependent upon the facts of each case. What is cardinal, however, is that prejudice, actual or potential, will always exist unless it can be established that the defence or response of the accused person would have remained exactly the same had the state amended the charge.[24]

---

[23] Section 180 of the former Criminal Procedure Act 56 of 1955 (former CPA) provided:

> "(1) Whenever, on the trial of any charge, there appears to be any variance between the statement therein and the evidence offered in proof of such statement, or if it appears that any words or particulars that ought to have been inserted in the charge have been omitted, or that any words or particulars that ought to have been omitted have been inserted, or that there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the necessary amendment in the charge will not prejudice the accused in his defence, order that the charge (whether or not it discloses an offence) be amended, so far as it is necessary, both in that part thereof where the variance, omission, insertion, or error occurs and in every other part thereof which it may become necessary to amend.
>
> (2) The amendment may be made on such terms (if any) as to postponing the trial as the court thinks reasonable.
>
> (3) Upon the amendment of the charge in accordance with the order of the court, the trial shall proceed at the appointed time upon the amended charge in the same manner and with the same consequences in all respects as if it had been originally in its amended form.
>
> (4) The fact that a charge has not been amended as provided in this section shall not, unless the court has refused to allow the amendment, affect the validity of the proceedings thereunder."

In *S v Nyathi* 1978 (1) SA 289 (T) at 291A, the High Court found that the provisions of section 86 of the current CPA are materially similar to the provisions of section 180 of the former CPA. In *S v Kearney* 1964 (2) SA 495 (A) at 503D, the court held that section 180(4) of the former CPA could not "be invoked where the variance is important or the accused may be prejudiced." This view was endorsed in *S v Nyathi* at 291A-B.

[24] *S v Pillay* 1975 (1) SA 919 at 922D.

[20] The question whether an accused person has been prejudiced by a defective charge in the proper conduct of his or her case speaks to the fairness of the trial. Section 35(3)(a) of the Constitution guarantees every accused person the right to a fair trial which includes the right to be informed of the charge with sufficient detail to answer it and the warranty to be presumed innocent until proven guilty.[25]

[21] Whether the applicants were afforded a fair trial is dependent, amongst other requirements, upon the competence of the charge on which they were convicted. In *S v Tshali*[26] it was held that a charge based in part on the presumption in section 21 of the Act which had been declared invalid was incompetent and that the conviction could not, even on a plea of guilt, be valid. A similar decision was reached in *S v Phillipe Kouame Jean*.[27]

[22] The DPP contends that the application does not raise a constitutional issue because although the charge sheet referred to an invalid presumption, the trial courts did not rely upon it for the convictions. This contention cannot be supported. The applicants' complaint does raise important constitutional issues on whether they have been afforded a fair trial within the meaning of section 35(3) of the Constitution. The question whether the applicants have been adequately informed of the charges they were to face as required

---

[25] See section 35(3)(a) and (h) of the Constitution.

[26] Above n 19 at para 11.

[27] Above n 18.

by section 35(3)(a) of the Constitution entails, amongst other things, a construction of section 86 and in particular of section 86(4) of the CPA in the light of the fair trial rights entrenched in the Constitution. The application also raises the correctness of the decisions in *S v Tshali* and in *S v Phillipe Kouame Jean* that the reference to the invalid presumption of dealing in drugs renders the charge incompetent and the ensuing conviction vulnerable.

[23] Put otherwise, the question is whether the right to a fair trial will be infringed if the charge sheet invoked invalid statutory presumptions on dealing in drugs. Would this be the case, even where the accused has pleaded guilty and even where the accused person has furnished a written explanation in support of a plea of guilt? The further question is whether in order to exercise this right to a fair trial it is necessary for the accused person to be informed of the precise provisions of the Act upon which the state seeks to rely? It may also be asked whether it is permissible for the prosecution to leave it to the accused to speculate on the exact statutory provisions which it will ultimately rely upon for conviction?

[24] We conclude that this case presents an important constitutional issue on whether the applicants were afforded a fair trial.

Interests of justice

[25] A finding that the matter is a constitutional issue is not decisive of an application for direct access. The application may be refused if it is not in the interests of justice for this Court to sit as a Court of first and last instance. In considering what is in the interests of justice, prospects of success, although not the only factor, are ineluctably an important factor to be taken into account.

Are there reasonable prospects that the convictions may be set aside?

[26] The applicants were charged at times from 2002 to 2005 under section 5(b), which made reference to the invalid section 21(1) of the Act. The affidavit filed on behalf of the DPP has conceded that the practice of routinely formulating charge sheets relying on the presumption in section 21(1) still continues. Lamentably, the affidavit fails to shed any light on why the practice continues without correction. It imputes this irregular formulation of charge sheets related to the possession of or dealing in drugs to probable error and oversight. The seemingly endemic practice of framing charge sheets in this manner, more than a decade after the offending presumptions were declared invalid, is cause for concern.

[27] All three magistrates emphasise that they did not rely on the presumption of dealing in drugs for convicting each of the applicants. However, the affidavit of the DPP and the reports compiled by the magistrates proffer no explanation of why at the start of the trial the accused persons were required to plead to defective charges; why neither the prosecution nor any of the magistrates sought to amend the charge sheets; and why their

verdicts or judgments do not reflect a clear disclaimer that the invalid presumptions was not relied upon.

[28] The first and third applicants did not proffer evidence in support of their plea of not guilty. The residual enquiry is whether, if the respective charge sheets had been properly framed to exclude the offending presumptions, they might well have elected to mount their defence or response to the charges differently. In *S v Hugo*[28] it was held that where the state elects to make representations on the charge sheet upon which it relies, the accused is entitled to regard these as exhaustive and to prepare his defence in respect of these representations and no other. In *R v Alexander*,[29] quoted with approval in *S v Pillay*,[30] the purpose of the charge sheet was found to be—

> "to inform the accused in clear and unmistakable language what the charge is or what the charges are which he has to meet. It must not be framed in such a way that an accused person has to guess or puzzle out by piecing sections of the indictment or portions of sections together what the real charge is which the Crown intends to lay against him."

[29] A court of appeal may refuse to validate the proceedings in the light of the potential, if not actual, prejudice the first and the third applicants may have suffered because of a defective charge sheet. That court would be well positioned to explore all relevant factors on the record which point to prejudice or its absence flowing from the

[28] 1976 (4) SA 536 (A).

[29] 1936 AD 445 at 457.

[30] Above n 24 at 922A.

defective proceedings. There is thus some reasonable prospect that on appeal, a court, being properly confronted with the complaint the first and third applicants make, may consider whether to set aside convictions following on a plea of not guilty.

[30] The second and fourth applicants pleaded guilty on the strength of the same offending presumptions. The second applicant's plea explanation, in particular, expressly includes an allusion to section 21, thus perpetuating and highlighting the prosecution's error.[31] He successfully appealed to the High Court, but only against the severity of the imprisonment term. He did not appeal against his conviction and thus the appeal court did not deliberate on the appropriateness of his conviction. A court of appeal, focused on the merits of the conviction through the prism of the applicants' complaint, may refuse to validate the proceedings on the grounds of real or potential prejudice envisaged by section 86(4) of the CPA. Therefore, second and fourth applicants too, despite their respective pleas of guilt, have a reasonable prospect that a court of appeal may decline to uphold their convictions.

---

[31] The section 112 statement of the second applicant states:

> "1. I the undersigned George Graham Middleton do hereby affirm that I am the accused in this matter.
>
> 2. The facts herein contained are within my personal knowledge and are to the best of my knowledge and belief both true and correct save where it appears otherwise from the context.
>
> 3. I plead guilty to the charge of dealing in drugs laid against me and I do so freely and voluntarily without being influenced thereof.
>
> 4. On or about 4 September 2005, at or near Johannesburg International Airport in the district of Kempton Park, I did unlawfully deal in dangerous dependants producing substance to wit 631.4 grams of cocaine a derivative from cacao leaf, by importing and or exporting.
>
> 5. . . .
>
> 6. . . .
>
> 7. I further **admit that I am guilty of contravening Section 5(b) read with sections** 1, 15, 17, 18, 20, **21** and 25 of Act 140/1992, as amended." (Emphasis added.)

Court of first and last instance and interests of justice?

[31] This, however, is not the end of the enquiry into what is in the interests of justice. Apart from prospects of success, the applicants must show exceptional circumstances justifying this Court granting them direct access as a court of first and last instance on the new challenge they mount against their conviction. No other court has been confronted with an appeal directed at the merits of the convictions and on the discrete grounds the applicants now advance.

[32] Their application for direct access is sketchy; not unexpected of litigants who are applying to this Court without legal representation. They urge this Court to hear and determine their application urgently and as a court of first instance because they may have been improperly convicted and imprisoned on an incompetent charge. The DPP contends that the interests of justice do not require this Court's consideration of the matter as there are other appropriate remedies that remain available, which include an appeal to the High Court.

[33] The deprivation of one's liberty on a conviction that may not be sustained on appeal is always an urgent matter. However, the power to grant litigants direct access outside the Court's exclusive competence is one this Court rarely exercises, particularly where a High Court has jurisdiction in constitutional matters such as this one. Besides, the views of the High Court on criminal justice matters that may arise on appeal would be

of assistance to this Court, should the matter reach this Court again. We are not persuaded that anything is likely to prevent the High Court from urgently considering the appeal. In the result, it would not be in the interests of justice to bypass the High Court and grant the application for direct access at this stage.

Legal representation or assistance

[34] The Registrar of this Court is directed to furnish a copy of this judgment to the head office of Legal Aid, Johannesburg, the Law Society of the Northern Provinces and to the Society of Advocates, Johannesburg, in addition to the applicants and the respondents, with the request that they consider whether any of their members would be amenable to providing legal assistance and representation to the applicants, should they wish to prosecute an appeal against their convictions.

Order

[35] In the result the Court makes the following order:

(a) The application for condonation is granted.

(b) The application for direct access is dismissed.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J.