IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 803/2011

Reportable

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS **FIRST APPELLANT**

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **SECOND APPELLANT**

and

ANDREW LIONEL PHILLIPS **RESPONDENT**

Neutral Citation: *The DPP and Minister of Justice and Constitutional Development v Phillips* (803/11) [2012] ZASCA 140 (28 September 2012)

Coram: NAVSA, CLOETE, SHONGWE and TSHIQI JJA and PLASKET AJA

Heard: **3 September 2012**

Delivered: **28 September 2012**

Summary: **Permanent stay of prosecution – Criminal Procedure Act 51 of 1977 – Constitution – assertion of fair trial rights – right to have trial begin and conclude without unreasonable delay – undue delay by the Director of Public Prosecutions in prosecuting appeal – trial having endured for many years – factors to be taken into account and weighed in determining whether permanent stay of prosecution warranted**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Satchwell J sitting as court of first instance).

(1) The appeal is dismissed with costs, including the costs of two counsel.

(2) Paragraph 1 of the order of the court below is altered to read as follows:

'1. The appeal of the first respondent ("Director of Public Prosecutions") against the judgment and order handed down by Mr S.P. Bezuidenhout in the Regional Magistrates Court for the Regional Division of Gauteng in case No 41/1899/00 on 26 November 2008 in which the Learned Magistrate acquitted the applicant ("Andrew Lionel Phillips") is permanently stayed.'

JUDGMENT

NAVSA JA (Cloete, Shongwe and Tshiqi JJA and Plasket AJA concurring)

Introduction

[1] This is an appeal, with the leave of this court, against a judgment of the South Gauteng High Court, Johannesburg (Satchwell J). It arises because of an abortive appeal – at least up until now – in terms of s 310 of the Criminal Procedure Act 51 of 1977 (the Act), by the first appellant, the Director of Public Prosecutions (the DPP), against an acquittal by the Johannesburg regional court of the respondent, Mr Andrew Lionel Phillips.

[2] Pending the appeal in terms of s 310 – referred to in the preceding paragraph, which, it must be said at the outset, the DPP did not prosecute with any real intent or efficiency – Phillips brought an application in the court below, in terms of which he initially sought, inter alia, that the appeal be

permanently struck off the roll on the basis that s 310, read with s 39(2)[1] of the Constitution, did not authorize the hearing of an appeal by the State against an acquittal. He contended that this was particularly so where the necessary consequence of a successful appeal would be the re-opening of the criminal trial as this would result in him being tried twice for the same offence. An alternative basis was that, if s 310 did authorize such an appeal, it was unconstitutional and therefore invalid. Later, he added to the relief sought, an order that the prosecution against him be permanently stayed on the bases referred to above, as well as on the basis of an unjustifiable delay in the prosecution of the appeal. In this regard, it was contended that the delay in prosecuting the appeal which in itself was inordinate, had to be considered alongside the elapsed time from his arrest through a very lengthy trial. It was submitted that this infringed his right in terms of s 35(3)*(d)* of the Constitution to have his trial begin and conclude without unreasonable delay.

[3] Phillips was successful. The court below struck the appeal from the roll on the basis of the inordinate delay in finalizing both the trial and the appeal and declared the DPP's right to appeal the acquittal permanently stayed. The court also ordered the DPP and the second appellant, the Minister of Justice and Constitutional Development (the minister), jointly and severally, to pay Phillips' costs. It is against these conclusions that the present appeal is directed.

[4] A detailed background leading up to the appeal is set out hereafter. For reasons that will become apparent and, in part, due to the manner in which the present appeal arose, the record before us is undesirably sketchy, compounding an already shambolic litigation history.

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[1] Section 39(2) provides:

'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

Background

[5] Phillips was arrested and detained on 2 February 2000 and, on 22 December 2000, certain of his property was attached in terms of the provisions of the Prevention of Organised Crime Act 121 of 1998 (POCA). The charges on which he had been arrested, and later prosecuted, are related to the keeping of a brothel and alleged further breaches of the law, apparently connected to that main activity. More specifically, the following were the charges faced by Phillips:

Contraventions of:

i Section 2 of Act 23 of 1957 (Keeping a brothel);

ii Section 10*(a)* of Act 23 of 1957 (Procuring females to have carnal intercourse);

iii Section 12A of Act 23 of 1957 (Foreseeing that a person may have intercourse against payment of a fee);

iv Section (1)*(a)* of Act 23 of 1957 (Living off the proceeds of prostitution);

v Section 32(1)*(a)* of Act 96 of 1991 (Contravening the Immigration Act);

and

vi Perjury.

[6] In January 2004 the trial commenced in the regional court, Johannesburg. Phillips pleaded not guilty to the charges and proceedings in that court continued until November 2006. During the duration of the State's case a number of prosecutors were engaged in the prosecution. After the State closed its case on 20 November 2006, Phillips applied for a discharge in terms of s 174 of the Act, which was refused.

[7] The defence case was scheduled to commence on 2 June 2008. Prior and subsequent to that date Phillips' legal representatives sought further information from the prosecuting authority. On 24 June 2008 Phillips raised an additional plea in terms of s 106(1)*(h)*[2] of the Act, namely, that a number of the

[2] Section 106(1)*(h)* reads as follows:

'When an accused pleads to a charge he may plead–

prosecutors who conducted his prosecution lacked title to prosecute. The regional magistrate considered the question whether such a plea could be raised at any stage of the trial as opposed to only at the beginning when an accused is required to plead to the charges, and answered it affirmatively in favour of Phillips. The magistrate went on to consider whether the appointment as prosecutors of members of the private bar, to assist in Phillips' prosecution, had taken place in terms of the National Prosecuting Authority Act 32 of 1998 (the NPA Act). He concluded, after considering relevant sections of that Act, that they had participated in the prosecution unlawfully and held that this had the result of vitiating the entire prosecution. He then proceeded to acquit Phillips on all the aforesaid charges. This occurred on 26 November 2008.

[8] Aggrieved, the DPP required the magistrate, in terms of s 310[3] of the Act, to state a case for consideration on appeal by the South Gauteng High Court. On 26 January 2009 the magistrate formulated the questions of law as follows:

'i) Is it permissible to raise a plea in terms of section 106(1)*(h)* of the CPA at any stage of a trial or could it only be raised before the commencement of the trial?

ii) If a plea succeeds in terms of section 106(1)*(h)* of the CPA, is a court compelled to acquit the accused in view of the peremptory provisions of section 106(4)[4] of the CPA, or may it resort to alternative relief instead?

. . .

(h) that the prosecutor has no title to prosecute.'

[3] Section 310(1) of the Act provides as follows:

'When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, including an order made under section 85(2), the attorney-general or, if a body or a person other than the attorney-general or his representative, was the prosecutor in the proceedings, then such other prosecutor may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law.'

[4] Section 106(4) reads as follows:

iii) Does section 20 of the National Prosecuting Authority Act 32 of 1998 (the NPA) provide for the appointment of prosecutors or does it merely regulate a prosecutor's powers and functions?

iv) Is the taking of an oath in terms of section 32 of the National Prosecuting Authority Act of 1998 a prerequisite for a person appointed in terms of section 38(1) of the Act?

v) If, during the course of a trial, more than one person acted as prosecutor, and one or more of them are not properly appointed as such, will this affect the entire trial, or only those portions which were dealt with by the prosecutor not properly appointed?'

[9] Delays occurred in the prosecution of the appeal, with the DPP and Phillips' legal representatives ostensibly unable to agree about the extent of the appeal record, and whether the record, allegedly improperly compiled, could be 'corrected'.[5] It appears that the full record of the trial, at that stage, was voluminous – apparently comprising more than 6000 pages. The DPP then contended that, given the narrow ambit of the questions formulated by the magistrate in terms of s 310 of the Act, a very limited part of the record

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'An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.'

[5] Rule 67 of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa regulates the preparation of a record of proceedings on appeal to the high court. Rule 67(5) provides:

'Upon an application for leave to appeal being granted the registrar or clerk of the court shall prepare a copy of the record of the case, including a transcript thereof if it was recorded in accordance with the provisions of rule 66(1), and place such copy before the judicial officer who shall within 15 days thereafter furnish to the registrar or clerk of the court a statement in writing showing–

(a) the facts he or she found to be proved;

(b) his or her reasons for any finding of fact specified in the appellant's statement of grounds of appeal; and

(c) his or her reasons for any ruling on any question of law or as to the admission or rejection of evidence so specified as appealed against.'

was relevant. Phillips' legal representatives disagreed. Correspondence was exchanged between the parties and the Deputy Judge President of the high court concerning the appeal. The Deputy Judge President insisted that an appeal record be prepared and the appeal be enrolled in the ordinary course. Several months passed without any real progress being made by the DPP in the prosecution of the appeal. In July 2009 Phillips launched the application referred to in para 2 above, requesting that it be considered at the hearing of the appeal. I shall, later in this judgment, revert to correspondence between the DPP's office and the Deputy Judge President which is an aspect that has to be addressed, and in respect of which the DPP's office is deserving of censure.

[10] It is necessary to record that subsequent to Phillips' acquittal by the magistrate, his legal representatives wrote to the curator appointed in terms of the provisions of POCA to Phillips' seized assets, concerning the release thereof, notifying him of an intended application to the high court for a rescission of the restraint order in terms of which his assets were being held. Because of the pending appeal, the threatened application did not eventuate.

[11] Subsequent to the launching of the application to have the appeal struck from the roll, and after failed attempts to reach agreement on the compilation and extent of the record, Phillips filed a supplementary affidavit indicating that, over and above the legal bases already provided for striking the matter from the roll, he would rely on the additional ground of the inordinate delay in prosecuting the appeal.

[12] In opposing the application, the DPP contended that the appointment of private counsel as prosecutors had occurred in terms of the provisions of the NPA Act. Because of the basis on which the present appeal is to be decided, it is not necessary to consider any further the legality of the appointment of private counsel.

[13] In respect of the delay in the prosecution of the appeal, the DPP stated that Phillips' legal representatives had contributed thereto by not reaching agreement on the nature and extent of the record to be placed before the high court, acting as a court of appeal. The DPP persisted in the view that the plea in terms of s 106 of the Act (that had been upheld), raised legal issues within a narrow compass that required the appeal record to comprise only the documents related to the plea itself and the magistrate's reasons for upholding it. It was contended that the issues on appeal were legal issues that did not involve the facts or evidence placed before the regional court during the trial. The following part of the answering affidavit by Ms Xolisile Jennifer Khanyile, on behalf of the DPP, is relevant:

'I further submit that the matter could have been dealt with expeditiously by placing a core bundle of documents and the relevant portions of the record before the court of appeal.'

[14] In her opposing affidavit, Khanyile assured the court below that the filing of an appeal record 'is being attended and a workable record has now been obtained and will be filed in due course. I have also been informed that the process is near to completion'. It is common cause that by the time Phillips launched his application to have the appeal struck from the roll, namely 3 July 2009, the record, as envisaged by the DPP, had not been filed. Before us counsel on behalf of the DPP rightly conceded that it was inexcusable that this had not been done.

[15] Moreover, it is common cause that, when the application for the striking of the appeal from the roll and for the permanent stay of the prosecution was ripe for hearing, no appeal record of any kind had been filed and an appeal could thus not properly have been enrolled. This was recognized and expressly recorded by Satchwell J at para 31 of her judgment. She went on to hear the application as a single judge, which is the usual manner in which applications are heard in motion court. Counsel representing the DPP ultimately and expressly agreed in the court below that Satchwell J was entitled to hear the application sitting as a single judge.

[16] Satchwell J considered the delay in the prosecution of the appeal, related in the main to the filing of the record, to be the primary question to be addressed. She stated that since the DPP was *dominus litis* in the appeal, it was his primary responsibility to ensure its compilation and filing with the court of appeal. She had regard to the DPP's tardiness in obtaining funding for obtaining the record. The learned judge noted that it took almost eight months after the DPP's notice of appeal before his office applied for such funding. Satchwell J took into account that details of the difficulties the DPP allegedly encountered in respect of the record that had been supplied by the service provider, had not been communicated to Phillips' legal representatives. This, she reasoned, rightly caused them to be sceptical, which scepticism was borne out by the service provider failing to provide the record because of non-payment of its fees. Against that background, so Satchwell J reasoned, it was disingenuous for the DPP to approach Phillips' legal representatives to agree to a limited record. The real reason for the delay, she held, was funding and bureaucratic ineptitude. Satchwell J had regard to the inexplicable extensive delays that occurred subsequent to the record being supplied by the service provider. This, she reasoned, was due to waning enthusiasm for the pursuit of the appeal on the part of the DPP. She rejected a plea on behalf of the DPP to have regard to systemic problems, both in the magistrate's court and the office of the DPP.

[17] The court below stated the following:

‘ 52. I cannot find other than that the DPP has been dilatory in attending to procurement of the record, naïve in failing to appreciate the need for funds to be made available in advance of contracting with service providers, stubborn in seeking to resolve the problems of an inadequate record by unilateral reconstruction thereof, disingenuous in advising that the DPP was still reconstructing alternatively that portion only of the record need be utilized.

53. I am in agreement with the view of the DPP that there has been *“an inordinate delay”* in filing the record. The result has been an inordinate delay in pursuing the appeal. This delay can be laid at the door of the DPP and nowhere else.’

[18] Satchwell J went on to consider whether the delay was such as to justify a permanent stay of the DPP's appeal. The following is the greater part of the factors the court below considered relevant:

' 59. First, more than eleven years have elapsed since Phillips was arrested. Seven years have passed since he first pleaded. The trial concluded some four and a half years ago. There has been a hiatus of two and a half years since judgment was handed down. I have no knowledge that any delay has been irregularly or deliberately occasioned by Phillips in order to frustrate the conduct of the trial.

60. Second, the State noted its appeal two years and five months ago on 17th February 2009. That appeal has not yet been heard which delay, as I have already discussed in this judgment, must be ascribed to the office of the DPP.

61. Third, absent a complete record, the epic continues without land in sight. There is no indication when or how the missing portions of the record will be reconstructed to the approval of an appeal court. Even if this task were completed in the course of 2011, it is unlikely that a date for the hearing of the appeal could be allocated before 2012 – twelve years after arrest, in the sixth year after acquittal, three years after noting an appeal. I repeat that such further delay would continue to fall upon the shoulders of the office of the DPP.

62. Fourth, Phillips was charged with four counts in terms of the Sexual Offences Act No 23 of 1957, one count in terms of the Aliens Control Act No 96 of 1991 and one count of perjury.

63. Fifth, this is not an appeal by a convicted accused but an appeal by the prosecution against the acquittal of Phillips. The purpose of the appeal is to have his acquittal set aside and have him referred back to trial. I leave, for this moment, the question of the constitutionality or otherwise of section 310 of the CPA. Instead, I note that the clear intention and possible result of the appeal will be to once again place Phillips in jeopardy of conviction. I am mindful of section 35(3)*(m)* of the Constitution which prohibits that an accused person *"be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted."* Accordingly, if such an appeal is permitted, this would constitute an extraordinary process. At the very least, it would have to be prosecuted with greater diligence, knowledge of law and cognizance of constitutional principles than required in ordinary appeals. Intrinsic to such requirements is promptitude.

64. Sixth, if Phillips' acquittal is overturned and the trial is reopened, then Phillips will have to mount his defense at least eleven to twelve years after he was initially charged. The prejudice to Phillips is considerable: witnesses become unavailable

and neither Phillips nor defense witnesses can be expected to remember events more than eleven years ago clearly or confidently. *Au contraire,* the State has already led all its evidence and closed its case some five to seven years ago when events were less distant. There can be no doubt that the prosecution in this trial would have an unfair advantage over the defence.

65. Seventh, Phillips suffers ongoing prejudice as a result of the delays in pursuit of and finalizing this appeal. Some of these would be suffered by all accused persons in his position. Others are unusual and unique to himself.

a. First, for over a decade he has been identified as an accused person with criminal charges pending against him. He is described in this application as the *"notorious accused",* whose frequently successful litigation against the NPA shows *"the attitude and character of the accused."* The stigma in all circles in South Africa is considerable. There must have been and continues to be anxiety and stress in contemplating this apparently neverending saga. It is not inappropriate to describe this as the *"exquisite agony of the accused".* Where imposition of psychological stress and social stigma is unwarranted, such imposition would violate Phillips' constitutional rights to dignity and personal security.
b. Secondly, the financial burden cannot have been or continue to be inconsiderable. The State has disclosed it has spent *"millions"* on this litigation and so, I must assume, has Phillips.
c. Thirdly, Phillips exercises no control over the future conduct of this process. He is precluded from finalizing the criminal proceedings against him. He is dependant upon the office of the DPP to finalise this matter and their endeavours, thus far, cannot inspire confidence that this ordeal will be expeditiously concluded.
d. Fifth, certain of Phillips' assets were restrained at the instance of the NPA in terms of Chapter 5 of POCA in December 2000. No judge of the South Gauteng Division can fail to have knowledge of this restraint and the differences of opinion between Phillips and the curator of these assets over the past eleven years. Notwithstanding his acquittal by a court of competent jurisdiction, these assets have not been released from restraint and returned to Phillips unencumbered. For so long as the appeal is pending, these assets are not returned to Phillips. This is most significant curtailment of Phillips' use and enjoyment of his property.'

[19] The court below went on to conclude that any prosecutorial appeal and any ensuing trial would place Phillips in double jeopardy. This is another aspect to which I will revert in due course.

[20] Satchwell J was satisfied that Phillips' right to a fair trial had been infringed by the delay in finalizing the appeal. She took the view that the delay in prosecuting the appeal served inevitably and irremediably to taint the overall substantive fairness of the trial. The learned judge reasoned that an appeal may be struck from the roll in exceptional circumstances and that it is a measure to be resorted to with due caution. She concluded as follows:

'75. I take the view that the appropriate remedy is to order a permanent stay of the appeal noted by the DPP against the conviction of Phillips. The appeal will therefore be permanently struck off the roll.'

[21] Although the court below did not find it necessary to consider the constitutionality of s 310 of the Act, it nevertheless thought it necessary to criticize the deponent who opposed the application on behalf of the minister, for failing to engage with the question whether such limitation which s 310 might impose on fair trial rights, was justified in terms of s 36 of the Constitution. The minister's deponent was criticized for merely referring to the work of the South African Law Commission which had found that such limitation is permitted in certain foreign jurisdictions. I shall say something about this in due course.

[22] Before us the DPP and the minister relied on only three grounds of appeal. First it was submitted that Satchwell J sitting as a single judge had no jurisdiction to hear a matter related to the appeal in terms of s 310. In this regard sections 22 and 13 of the Supreme Court Act 59 of 1959 were relied upon. The relevant part of s 22 reads as follows:

'The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power–

(a) . . .

(b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.' (Emphasis added.)

The relevant parts of s 13 read as follows:

'Constitution of courts of provincial or local divisions-

(1)*(a)* Save as provided in this Act or any other law, the court of a provincial or local division shall, when sitting as a court of first instance for the hearing of any civil matter, be constituted before a single judge of the division concerned: Provided that the judge president or, in the absence of both the judge president and the deputy judge president, the senior available judge of any division may at any time direct that any matter be heard by a full court consisting of so many judges as he may determine.

(b) . . .

(2)*(a)* The court of a provincial or local division shall, except where it is in terms of any law required or permitted to be otherwise constituted–

(i) for the hearing of any appeal against a judgment or order of an inferior court, be constituted before not less than two judges.' (Emphasis added.)

[23] It was submitted on behalf of the DPP that counsel representing him and the minister had wrongly agreed in the court below that Satchwell J had jurisdiction to hear the application and that they were not bound by his error of law.

[24] The second point relied on before us is that the DPP could not be blamed for the delay in filing the appeal record. As stated earlier, it was contended that the delay was occasioned principally by the unreasonable insistence of Phillips' legal representatives to have a full record placed before the court that would hear the appeal in terms of s 310. It was submitted that an appeal in terms of s 310 is, by its nature, a very limited one and that findings of fact are not susceptible to alteration on appeal. Thus, so it was argued, only a limited record was required to be placed before the court that would hear the appeal.

[25] The third point relied on by the DPP and the minister was that the relief granted by the court below had not been properly foreshadowed in the application brought by Phillips or in the supporting documentation. This point can be dealt with briefly and immediately. Counsel on behalf of the DPP and the minister rightly did not press this point with any enthusiasm or conviction. There is no merit whatsoever in this point. The further basis for seeking a striking of the appeal from the roll, namely the undue delay in prosecuting the appeal, was communicated by way of a letter to the DPP and was fully traversed in a supplementary affidavit as was the consequence of reliance on that additional ground, namely a permanent stay of the appeal. The DPP and the minister could have been under no illusion as to the nature and extent of the relief sought by Phillips. In any event, the notice of motion was amended *ex abudante cautela.*

[26] As noted by the court below, the DPP had not, up until the application had been heard, sought condonation for the inordinate delay in filing the appeal record. Indeed, as stated before, as things presently stand, no appeal record of any kind has been filed.

Conclusions

Jurisdiction

[27] It is common cause that the DPP had removed the appeal against the magistrate's decision from the roll on the day prior to the hearing of the application by Satchwell J.

[28] It was rightly conceded by counsel representing the DPP and the minister that, notionally, one could have an application to the high court in respect of a trial that has not been completed and that the application could be unrelated to substantive issues raised on appeal by the prosecution in terms of s 310 of the Act. Counsel was constrained to accept that in those

circumstances the high court could hear the application in the ordinary course. In those circumstances a single judge would usually hear the matter.

[29] The submission on behalf of the minister and the DPP in respect of the jurisdictional point is misplaced. It fails to take into account that the appeal in terms of s 310 could not be heard because no record of any kind had been finalized or filed. Thus, it could as a first step not be properly enrolled. If the appeal in terms of s 310 had in fact been heard by the high court constituted as a court of appeal, that court would have been confined to dealing with only those issues raised as a result of the magistrate's conclusions in relation to the plea by Phillips in terms of s 106 of the Act and to procedural matters directly related to that appeal.

[30] An appeal court becomes seized of an appeal when it has been duly prosecuted in terms of the rules of that court, and in accordance with any applicable statutory provision.[6]

[31] The application before Satchwell J was not interlocutory and certainly was not accessory or subordinate to the appeal in terms of s 310 of the Act.[7] It was a self-standing application, distinct from the main proceedings. This is particularly so in respect of reliance by Phillips on the delay in the prosecution of that appeal, which he contended ultimately infringed his rights to a fair trial guaranteed by s 35(3) of the Constitution. I agree with the submission that this part of his case is based on distinct facts which arose, in the main, subsequent to the order that is intended to be appealed against in terms of s 310 of the Act.

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[6] See *D & H (Pty) Ltd v Sinclaire* 1971 (2) SA 157 (W) at 158C-E, citing *Campbell v Monto* 1952 (3) SA 82 (T) at 84H-85A and *R v Kluyts* 1951 (1) SA 474 (C) at 478F-H

[7] See *Massey-Ferguson (South Africa) Ltd v Ermelo Motors (Pty) Ltd* 1973 (4) SA 206 (T) at 214G-H.

[32] In the event that any accused intends to challenge procedural irregularities in the magistrates' court, or raise the kind of issues raised by Phillips in the application before Satchwell J, particularly in respect of the undue delay in prosecuting the appeal, it would ordinarily require a proper notice of motion, specifying the relief sought supported by the necessary affidavits. Interested parties would have to be given notice and the matter would ultimately be decided after all the affidavits had been filed. In the present case that was done. The application was ripe for hearing. The appeal was not.

[33] Furthermore, a litigant such as Phillips would, according to the DPP and the minister's view, have to wait until the DPP finally properly enrolled an appeal, if at all. This would mean that a litigant such as the DPP could unduly frustrate an accused who might well have legitimate grievances concerning irregularities in a criminal trial or about the prosecution of an appeal, not directly related to the issues raised in a contemplated appeal.

[34] The concession on behalf of the DPP, set out in para 28 above, was rightly made and the point was not pursued with any real conviction. It is clear that the court below was properly constituted in terms of s 13(1)*(a)* of the Supreme Court Act 59 of 1959. I do not wish to be understood as laying down the principle that an application, such as that brought by Phillips, can only be heard by a single judge.It may be considered necessary or convenient for the matter to be heard by two, or indeed, by three judges.

Delay in filing the appeal record

[35] It is necessary to record that counsel for the DPP and the minister rightly admitted that there was no evidentiary material before us, or indeed, before Satchwell J, that demonstrated any wilful obstruction by Phillips of the appeal process. As stated earlier, counsel for the DPP and the minister conceded that, at the very least, the DPP could have filed the limited record his office insisted was all that was required for the hearing of the appeal in

terms of s 310 of the Act. The DPP could then have abided a decision by the court of appeal on whether the record was adequate.

[36] In my view the communication and litigation history between the DPP's office and Phillips, noted by the court below and recorded in paras 17 and 18 above, in respect of the prosecution of the appeal, as well as its conclusion that the inordinate and continuing delay can rightly be placed at the door of the DPP, cannot be faulted.

[37] Rule 51(3) of the Uniform Rules of Court, which applies in general to the setting down of criminal appeals from magistrates' courts, provides that the ultimate responsibility of ensuring that all copies of the appeal record are in all respects properly before the court, rests on the appellant or his or her legal representative. Further, it provides that, where an appellant is unrepresented, that responsibility rests on the DPP. The latter can hardly escape responsibility when *he* appeals from the magistrates court in terms of s 310 of the Act.

[38] Generally speaking, where there is a delay in prosecuting an appeal, courts require an appellant to apply for condonation for failure to comply with prescribed time limits and to fully explain why there has been a delay. In *Napier v Tsaperas* 1995 (2) SA 665 (A), there was no such application for condonation when an appellant filed the record more than four months late. At 671A-C this court stated the following:

'I must not, however, be taken to express, in this judgment, any firm views on the merits of an application for condonation. For present purposes, it suffices to say that there appear to be several weaknesses in the explanations offered for the late lodging of the record, and that the Court, in deciding on condonation, may also have regard to the appellant's failure to bring the application timeously. In *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129G it is said that an appellant, when he realises that he has not complied with a Rule of Court, should apply for condonation without delay. His inaction may also be relevant, in my view, when he should have realised, but did not, that he has not complied with a Rule. The matters to be taken into account in an application for condonation include the respondent's interest in the

finality of a judgment, the avoidance of unnecessary delay in the administration of justice and, last but not least, the convenience of the Court.'

In *Napier,* absent an application for condonation, this court struck the matter from the roll.

[39] In *Beira v Raphaely-Weiner* 1997 (4) SA 332 (SCA) at 337D-E, the following appears:

'There is no explanation on the papers for the delay between the second and the third dates. In the circumstances of this case this is fatal, even should there be prospects of success, because an application for condonation must be made as soon as it is realised that the Rules have not been complied with; the petitioner is required to give a full and satisfactory explanation for whatever delays have occurred; and the respondent's interest in the finality of the judgment is a factor which weighs with the Court . . . .'

[40] In *Toyota South Africa Motors (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (4) SA 281 (SCA) para 15, Howie JA, with reference to *Beira,* said the following:

'A party seeking condonation must, among other things, give a full and satisfactory explanation for whatever delays non-compliance has occasioned; an inadequate explanation could well bar the grant of condonation . . ..'

[41] It is more than two years beyond the time envisaged by rule 67 of the magistrates' court rules for the provision of the record to the court of appeal, in respect of which, as pointed out above, an appellant holds ultimate responsibility. As noted by Satchwell J, there is still no end in sight. I recorded earlier that counsel for the DPP was at pains to explain to this court that he was unable to justify the failure by the DPP's office to file even the limited record it insisted was all that was required. The asserted justification by the DPP for the inordinate and continued delay was rightly rejected by the court below. Having regard to the authorities set out above, an application for condonation in the ordinary course might well be doomed to failure. In addition, where there has been a flagrant disregard of the rules of court, that on its own may render prospects of success irrelevant. In this regard see

Darries v Sheriff, Magistrate's Court, Wynberg 1998 (3) SA 34 (SCA) at 41B-E.

[42] I interpose to state that, arguably, a more extensive record than contended for by the DPP was required to answer the questions of law posed by the magistrate in terms of s 310. It might well have been necessary for the high court sitting as a court of appeal to consider the extent of the involvement of the 'private' prosecutors and their impact on the trial. As stated earlier, and as will become clear, that is a question that does not require to be addressed by us. I merely restate that, in any event, the DPP was entitled to assert his perspective on the extent of the appeal record by filing the limited record he contended was justifiable, and then abiding the court of appeal's decision in relation thereto.

[43] I now turn to deal with whether the decision by the court below to order a permanent stay of the prosecution was correct. In order to do so, it is necessary to address Phillips' contention that his right to a fair trial was infringed, more especially because of the delay in prosecuting the appeal.

[44] Section 35(3)*(d)* of the Constitution provides:

'Every accused person has a right to a fair trial, which includes the right–

. . .

(d) to have their trial begin and conclude without unreasonable delay.'

[45] Ordinarily, when fair trial rights are asserted on the basis of any of the sub-categories of s 35, including, for example, the right to have a legal practitioner assigned by the State, if substantial injustice would otherwise result, it is pre-eminently a matter for the trial court to adjudicate upon. This would involve having regard to the alleged infringement of rights and the resultant prejudice, if any.[8] It does not, however, exclude a higher court, in the

[8] See *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 30; *The Legal Aid Board (Ex parte) v Pretorius* [2007] 1 All SA 458 (SCA) para 43 and *Betts v Brady* (1941) 316 US 455 at 472.

event of established facts clearly indicating an infringement of rights, from making that determination.

[46] In *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), the Constitutional Court dealt with a case of an accused who was well known in entertainment circles who had allegedly sexually interfered with two young girls years before his arrest. For various reasons, there was a lengthy delay in bringing him to trial in the regional court. The accused approached the high court seeking a permanent stay of the prosecution on the basis that there had been an unreasonable and inexcusable two year delay in prosecuting him, infringing his rights to a speedy trial as provided for in the interim Constitution. He failed in the high court and proceeded to appeal the matter in the Constitutional Court. Kriegler J considered why the right to a trial within a reasonable time was included as one of the specifically enumerated elements of a fair trial. He had regard to comparative constitutional provisions. The Constitutional Court held that liberty, security, trial and non trial-related interests should all be regarded as protected.

[47] In *Sanderson,* the Constitutional Court considered that an accused person is subject to various forms of prejudice and penalty, merely by virtue of being an accused. That court noted that socially, doubt would have been sown in the eyes of family, friends and colleagues as to the accused's integrity and conduct. The repercussions would vary from case to case but with the reality of the criminal justice system. In addition to social prejudice, an accused is subject to invasions of liberty that range from incarceration to onerous bail conditions to repeated attendance at remote courts for formal remands. Kriegler J recorded that this kind of prejudice resembled closely the kind of 'punishment' that ought ideally to be imposed on convicted persons. He had regard to our apartheid past in which the machinery of the criminal justice system was abused. The response of the Constitution has been pragmatic. The trial accompanied by the forms of prejudice set out above must be 'within a reasonable time'.

[48] The Constitutional Court, in *Sanderson*¸ addressed the critical question of how to determine whether a particular lapse of time is reasonable. First, the amount of elapsed time is obviously central to the enquiry. Factors generally relied on by the State, such as waiver, the inherent time requirements of the case and systemic reasons for delay, all seek to diminish the impact of elapsed time. In *Sanderson* at para 30 the Constitutional Court said the following:

'The courts will apply their experience of how the lapse of time generally affects the liberty, security and trial-related interests that concern us. Of the three forms of prejudice, the trial-related variety is possibly hardest to establish, and here as in the case of other forms of prejudice, trial courts will have to draw sensible inferences from the evidence. By and large, it seems a fair although tentative generalisation that the lapse of time heightens the various kinds of prejudice that s 25(3)*(a)* seeks to diminish.'

[49] The following were considered to be the most important factors bearing on the enquiry. First, the nature of the prejudice suffered by the accused, from incarceration to restrictive bail conditions and trial prejudice even carried through to mild forms of anxiety. The greater the prejudice, the shorter should the period be within which the accused is tried. Second, the nature of the case is important. In this regard, judges must bring their own experiences to bear in determining whether a delay is over-lengthy. Third, systemic delay should be considered. Systemic failures, so the Constitutional Court stated, are probably more excusable than cases of individual dereliction of duty. Nevertheless, there comes a time when systemic causes can no longer be regarded as exculpatory.

[50] Kriegler J, in *Sanderson*, considered that it is by no means only the accused who has a legitimate interest in a criminal trial commencing and concluding reasonably expeditiously. At para 37 he stated the following:

'Since time immemorial it has been an established principle that the public interest is served by bringing litigation to finality.'

[51] Importantly the Constitutional Court noted that barring a prosecution – in *Sanderson*, there was an application for an order in those terms before the trial began – was far reaching. In that case, because the trial had not begun, there was no real opportunity to ascertain the real effect of the delay on the outcome. Kriegler J observed that such an order prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct and that in the absence of significant prejudice to an accused, it would seldom be warranted. In favour of the prosecution, the Constitutional Court considered the difficulty in handling complaints of sexual abuse in children. In *Sanderson*, after weighing all the necessary factors, the Constitutional Court held that it was not an appropriate case to order a stay of the prosecution.

[52] In *Bothma v Els* 2010 (2) SA 622 (CC), the Constitutional Court dealt with a 37-year pre-trial delay. It concerned the prosecution of someone for allegedly having raped a 13-year-old school girl and thereafter repeatedly subjecting her to sexual abuse. The alleged victim had waited decades before turning to the criminal justice system. In *Bothma,* the Constitutional Court considered that in the balancing of the various factors relating to prejudice to the accused, the nature of the offence was a necessary counter weight to be taken into account. It referred with approval to the decision of this court in *Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 (SCA), in which it was considered important to have regard to those distressed by the horrors of the alleged offence. In *Zanner*, this court thought that against the accused's interests should be juxtaposed the societal demand in serious offences that an accused should stand trial. The Constitutional Court noted that child rape is an especially egregious form of personal violation. It had regard to the fact that only recently have adult women come to grips with sexual abuse they suffered as children and were more willing to confront their abusers. This process, however, generally takes quite a long time. It is clear in *Bothma*, that the special character of the sexual abuse of children, its impact on them and the time it takes to come to terms with it, are

especially important when a permanent stay of prosecution is sought in relation thereto.

[53] In my view, Satchwell J properly weighed up the necessary factors. Even contemplating that the position of women, as a vulnerable class, might well have come into play in the trial, given the lack of particularity supplied by the DPP, it is difficult to take it into account. There is no engagement by the DPP on affidavit about how such factors impacted on the duration of the trial and on the delay in the prosecution of the appeal. There is no indication that the prosecution has endured for so long and the appeal was unduly delayed due to the difficulties attendant upon a particularly vulnerable class of victims. There was no reliance thereon by the DPP.

[54] It is true that there is reference by the DPP to foreign nationals who apparently had testified that they had been brought to South Africa and forced into prostitution. One would have expected that the DPP, allegedly concerned about the issues thrown up by the evidence already adduced, would act with greater purpose and commitment. Should a court, without an end in sight in respect of the proposed appeal (in terms of s 310) and therefore no indication of when the trial might resume, in the event of a successful outcome for the DPP, expect an accused to continue to be in limbo? In the totality of the circumstances of this case, I think not.

[55] I can find no fault with Satchwell J's reasoning in her path toward concluding that a permanent stay of the prosecution was justified. She was correct in laying the fault for the delay at the door of the DPP. She was correct to conclude that the inordinate delay was inexcusable. The learned judge was correct in her reasoning about the impact of the delay on the trial that itself was unduly prolonged. This was ironic, given that the justification for engaging 'private' prosecutors was that it would result in greater efficiency and expedition.

[56] In my view, the permanent stay of the prosecution ordered by the court below was justified. I express caution concerning Satchwell J's remarks about a successful result in the appeal by the DPP in terms of s 310, resulting in double jeopardy for Phillips or, indeed, for any accused. It is an open question whether an irregularity resulting in an acquittal or conviction is in effect a decision properly arrived at on the merits and whether it truly results in double jeopardy. The answer to that question might very well depend on the circumstances of the case, more particularly the nature of the irregularity, the evidence already heard and the prejudice that might ultimately result for an accused. We do not make any pronouncement on that issue and it was unnecessary for the court below to say anything in that regard. Additionally, it was not necessary for the court below and, considering the reasons provided above, it is also not necessary for us to engage in a discussion on the constitutionality of s 310 of the Act. Phillips was arrested more than twelve years ago. An appeal record has still not been finalised. The time has come to put an end to a sorry saga. This, the high court below rightly attempted to do.

[57] Satchwell J's criticism of the deponent on behalf of the minister for failing to provide justification for the right of an appeal by the DPP in terms of s 310 was in my view not well-grounded. An extensive international comparative study of the right by prosecution authorities to appeal decisions against acquittals was referred to. That study was relevant and would certainly have been of assistance in the event that the constitutionality of s 310 of the Act had to be decided.

[58] It is now necessary to address an issue referred to earlier, namely an unethical letter sent to the Deputy Judge-President of the South Gauteng High Court by the DPP's office, concerning the prosecution of the appeal in terms of s 310 of the Act. In a letter dated 3 June 2010 Mr GS Maema, the then Acting Director of Public Prosecutions, based at the South Gauteng High Court, Johannesburg stated, inter alia, the following:

'1. The accused is the owner of a well-known brothel – The Ranch - that was situated in Rivonia.

. . .

3. This case is a prime example of human trafficking as some of the prostitutes testified that they were brought to SA under false pretences and forced to work at The Ranch. The trafficker testified that he brought the women to SA in conjunction with the accused. The accused also paid for the traveling expenses of the women brought to SA.'

[59] Counsel representing the DPP rightly conceded that the letter was indefensible and ethically questionable. He agreed that it was deserving of censure. It is unacceptable for the office of the DPP to engage in a communication, in a tone that was rightly described by Phillips' legal representatives as being familiar and collaborative. The Deputy Judge President rightly registered his dismay in a letter to the DPP's office. The office of the DPP should know better than to communicate with the head of a court on the merits of an appeal before it is heard.

[60] There is one remaining aspect that requires brief attention. The court below ordered that the appeal in terms of s 310 be permanently struck from the roll. Given that the appeal in terms of s 310 had not been properly enrolled, and that, in any event, it had been withdrawn from the roll, that part of the order of the court below is difficult to understand. The permanent stay of the prosecution of the appeal ordered by the court below would in any event have been the end of the litigation path between the parties. Accordingly the order requires to be adjusted minimally. The parties were agreed that in the event of an outcome favourable to Phillips, the order was to be altered in the form that appears hereafter.

[61] The following order is made:

1 The appeal is dismissed with costs, including the costs of two counsel.

2 Paragraph 1 of the order of the court below is altered to read as follows:

'1. The appeal of the first respondent ("Director of Public Prosecutions") against the judgment and order handed down by Mr S.P. Bezuidenhout in the Regional Magistrates Court for the Regional Division of Gauteng in case No 41/1899/00 on 26

November 2008 in which the Learned Magistrate acquitted the applicant (“Andrew Lionel Phillips”) is permanently stayed.’

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MS NAVSA

JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	P. Ellis SC
	Instructed by:
	The State Attorney, Johannesburg
	The State Attorney, Bloemfontein
FOR RESPONDENT:	MR Hellens SC (with him David Unterhalter SC)
	Instructed by
	Shannon Little Attorneys, Alberton
	Webbers Attorneys, Bloemfontein