CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 224/17

In the matter between:

DANE CONRADIE Applicant

and

THE STATE Respondent

Neutral citation: *Conradie v S* [2018] ZACC 12

Coram: Mogoeng CJ, Zondo DCJ, Cameron J, Froneman J, Jafta J, Kollapen AJ, Kathree-Setiloane AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ

Judgments: Froneman J (unanimous)

Decided on: 25 April 2018

Summary: Section 35(3)(o) of the Constitution — right to a fair trial— is trial record of proceedings relevant for leave to appeal application?

ORDER

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1. The application for leave to appeal is dismissed.

JUDGMENT

FRONEMAN J (Mogoeng CJ, Zondo DCJ, Cameron J, Jafta J, Kollapen AJ, Kathree-Setiloane AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ concurring):

[1] The applicant was convicted on two counts of rape[1] in the Wynberg Regional Magistrate's Court (Regional Court) and sentenced to 18 years' imprisonment. Both counts were taken together for purposes of sentence. He was also declared unfit to possess a fire-arm.[2] He was granted leave to appeal to the High Court of South Africa, Western Cape Division, Cape Town (High Court) where the appeal against the convictions was dismissed, but the sentence was reduced to an effective term of 12 years' imprisonment.[3] A further application for special leave to appeal[4] was refused by the Supreme Court of Appeal, as was an additional application for reconsideration of that order by the President of the Supreme Court of Appeal.[5]

[2] The applicant seeks leave to appeal to this Court against the decision of the High Court in respect of the conviction and sentence, alternatively for the matter to be referred back to the Supreme Court of Appeal to "reconsider the applicant's application for special leave to appeal after having regard to the record of proceedings pertaining to the application".

[3] The basis for the application is the contention that the trial record was necessary for both applications in the Supreme Court of Appeal. The applicant contends that

[1] Contraventions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[2] Section 103(1) of Firearms Control Act 60 of 2000.

[3] *Conradie v S*, unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town , Case No A229/2016 (15 February 2017) at para 51.

[4] Section 16(1)(b) of the Superior Courts Act 10 of 2013.

[5] Id at section 17(2)(f).

without regard to the trial record his right to a fair hearing on appeal as contemplated by section 35(3)(o) of the Constitution could not have occurred.[6]

Condonation

[4] The Supreme Court of Appeal dismissed the applicant's application on 25 July 2017. The applicant contends that he was only informed of this decision on 31 July 2017, and has since then "made every effort to attain legal advice and assistance" on the matter. His application in this Court was filed on 5 September 2017. In the light of the difficulties in obtaining legal advice it is in the interest of justice to grant condonation for the late filing of the application.

Leave to appeal

[5] The object of the right to a fair trial to minimise the risk of wrong convictions, inappropriate convictions and the consequent failure of justice "pervades all stages of a trial until the last word has been said on appeal".[7] The requirement of first seeking leave to appeal before lodging an appeal against a criminal conviction or sentence in a High Court is not, however, inconsistent with the constitutionally guaranteed right of appeal.[8]

[6] The general test for the constitutional adequacy of leave to appeal procedures is that it must provide for an "adequate reappraisal . . . and [making of] an informed decision" in respect of the decision against which leave to appeal is sought.[9] The application of this test depends on the context within which it is applied, and that context

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[6] Section 35 reads:

> "(3) Every accused person has a right to a fair trial, which includes the right—
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> . . .
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> (o) of appeal to, or review by, a higher court."

[7] *S v Steyn* [2000] ZACC 24; 2001 (1) SA 1146 (CC); 2001 (1) BCLR 52 (CC) at para 13.

[8] See *Steyn* id; *S v Twala* [1999] ZACC 18; 2000 (1) SA 879 (CC); 2000 (1) BCLR 106 (CC) and *S v Rens* [1995] ZACC 15; 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC).

[9] See *Steyn* id at para 6 referring to *S v Ntuli* [1995] ZACC 14; 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC).

includes our court hierarchy.[10] These institutional concerns led this Court to differentiate between leave to appeal procedures in respect of appeals from the Magistrates' Court and those from the High Court.[11] In regard to the former it has held that the absence of a trial record vitiated the legislative provisions that allowed consideration of an application for leave to appeal without the record.[12]

[7] But the same considerations do not necessarily apply to direct appeals from the High Court, sitting as a court of first instance. In *Twala* Yacoob J stated:

> "The ambit of the right enshrined in section 35(3)(o) must be determined by having regard to the context in which it appears and the purpose for which it is intended. The right of appeal to, or review by, a higher court is not a self-standing right; it is an incidence or component of the right to a fair trial contained in section 35(3) and it appears in that context. . . . [T]he purpose of section 35(3), read as a whole is to minimise the risk of wrong convictions and the consequent failure of justice, and section 35(3)(o) is intended to contribute towards achieving this object by ensuring that any decision of a court of first instance convicting and sentencing any person of a criminal offence would be subject to reconsideration by a higher court. The provision requires an appropriate reassessment of the findings of law and fact of courts of first instance and is clearly not intended to prescribe in a technical sense, the nature of the reassessment that will always be appropriate. The reason for this is that the nature of the reassessment that is appropriate will depend on the prevailing circumstances. Section 35(3) does not provide for specifics. It creates a broad framework within which the lawmaker is afforded flexibility in order to provide for the kind of reassessment mechanism which is both appropriate and fair."[13]

[8] Adopting that approach, the then provisions of section 316 of the Criminal Procedure Act,[14] dealing with applications for leave to appeal in criminal cases heard at first instance in the High Court, were held not to be inconsistent with the

[10] *Steyn* id at paras 13-22.

[11] Id.

[12] Id.

[13] *Twala* above n 8 at para 9.

[14] 51 of 1977.

provisions of section 35(3)(o) of the Constitution.[15] The procedure under the section allowed consideration of the application, or petition, for leave to appeal in the Supreme Court of Appeal without the necessity of the trial record being available, albeit with provisions allowing the Supreme Court of Appeal Judges dealing with the matter to call for further information.[16]

[9] A similar legislative provision obtained in *Qhinga*, another decision of this Court:

> "At this juncture, it is necessary to note that section 316(10)(c) of the Criminal Procedure Act, as it read at the time of the petition, generally required the registrar of the High Court to forward a copy of the trial record to the registrar of the Supreme Court of Appeal. However, section 316(10)(c)(i) provided that, if the accused were legally represented at the trial (as the applicants were), 'a copy of the judgment, which includes the reasons for conviction and sentence, shall, subject to subsection (12)(a), suffice for the purposes of the petition.' Section 316(12)(a), as it read at the time of the petition, provided that the judges considering a petition 'may call for any further information, including a copy of the record of the proceedings that was not submitted in terms of the proviso to subsection (10)(c)'. This position is mirrored in Supreme Court of Appeal rule 6(6)."[17] (Footnotes omitted.)

[10] The constitutional validity of these provisions was not decided upon in *Qhinga*.[18] The matter concerned an application for leave to appeal against the finding of the High Court of South Africa, Eastern Cape Local Division, Bhisho.[19] A petition for leave to appeal was brought in the Supreme Court of Appeal challenging the rulings in the trials-within-the-trial in the High Court. These were neither included nor discussed in the judgment of the High Court. They were to be found only in the record. The Judges deciding the petition did not call for the record or for the reasons for the rulings.

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[15] *Twala* above n 8 at para 22.

[16] Id at para 1.

[17] *Qhinga v S* [2011] ZACC 18; 2011 (2) SACR 378 (CC); 2011 (9) BCLR 980 (CC) at para 17.

[18] Id at para 18.

[19] Id at para 1.

Leave to appeal and the appeal succeeded to the extent that the petition was remitted to the Supreme Court of Appeal for reconsideration on the ground that the Supreme Court of Appeal would not have been able to assess whether those rulings were reasonably open to challenge on appeal.[20]

[11] None of this assists the applicant. He challenges the findings of fact and credibility made in the Regional Court and confirmed on appeal by the High Court. The reasons for these findings served before the Supreme Court of Appeal in the application for special leave and the President in the application for reconsideration. In both judgments they are detailed and extensive. These were not applications for leave to appeal from the High Court sitting as a court of first instance. The applicant was seeking a third and then fourth bite of the cherry in the Supreme Court of Appeal.

[12] In essence the applicant is seeking an appeal on the facts, clothed in the garb of an infringement of his fair trial rights. The facts of the sexual assaults were largely common cause. The applicant's defence that the complainant consented to the sexual acts was rejected in the Regional Court and the rejection confirmed on appeal. In both instances extensive reasons were given for the finding in the judgments, including the overwhelming improbability of consensual sex in the particular circumstances. In these circumstances it is not in the interest of justice to grant leave to appeal. No fair trial rights have been infringed.

Order

[13] The application for leave to appeal is dismissed.

[20] Id at paras 31-2 and 35.

For the Applicant:	A du Toit instructed by Riley Incorporated.
For the Respondent:	S M Galloway instructed by the Director of Public Prosecutions, Western Cape.