IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

Petition Nos: P 15/2005
P 71/2005
P 34/2006
P 65/2006

In the applications for leave to appeal of

DANIEL O'CONNELL	First applicant
ABDUL GAFFOOR GANIEF	Second applicant
RONALD OLINCE	Third applicant
GRAHAM GREENTREE	Fourth applicant
RICARDO ADAMS	Fifth applicant
RASHIED STAGGIE	Sixth applicant

and

THE STATE	Respondent

JUDGMENT ON THE CONSTITUTIONALITY OF SECTION 309C OF THE CRIMINAL PROCEDURE ACT
DELIVERED ON 6 NOVEMBER 2006

BLIGNAULT J:

[1] This judgment is concerned with the constitutionality of the leave to appeal procedure contained in section 309C of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act").

[2] The six applicants in this matter were indicted (with five other accused) in the regional court at Parow on seven counts relating to the housebreaking and theft, and the subsequent possession, of large numbers of firearms and ammunition from police premises at Faure, Western Cape Province. The offences were committed on 7 June 1998. The seven counts may, for present purposes, be summarised as follows:

(i) Housebreaking with the intention of stealing and theft of various firearms and quantities of ammunition;

(ii) Unlawful possession of 20 R5 rifles and 12 R1 rifles;

(ii) Unlawful possession of 42 tear grenades, 5 light grenades and 2 shock grenades;

(iv) Unlawful possession of 2 detonaters;

(v) Unlawful possession of 40 R1 rounds and 810 R5

rounds;

(vi) Unlawful possession of 12 shotguns and 9 9 mm pistols;

(vii) Unlawful possession of 398 shotgun rounds and 135 9 mm rounds.

[3] There were originally 11 accused in the matter. The applicants were numbered as follows:

First applicant (Daniel O'Connell)	-	accused 3
Second applicant (Abdul Gaffoor Ganief)	-	accused 4
Third applicant (Ronald Olince)	-	accused 5
Fourth applicant (Graham Greentree)	-	accused 6
Fifth applicant (Ricardo Adams)	-	accused 7
Sixth applicant (Rashied Staggie)	-	accused 11

[4] The charges were withdrawn against accused 1 and accused 10 and the court ordered that the charges against accused 8 be tried separately. The remaining accused, being the six applicants and Roderick Collins (accused 2) and Charles Benjamin (accused 9) were convicted on 8 March 2004 on the following counts:

Accused 2:	Counts 2, 3, 4, 5, 6 and 7.
First applicant (accused 3):	All seven counts.
Second applicant (accused 4):	Counts 1, 2, 3, 5, 6 and 7.
Third applicant (accused 5):	Counts 1, 2, 5, 6 and 7.
Fourth applicant (accused 6):	Counts 1, 2, 5, 6 and 7.
Fifth applicant (accused 7):	Counts 1, 2, and 6.
Accused 9:	Counts 1, 2, 5, 6 and 7.
Sixth applicant (accused 11):	Counts 1, 2, 5, 6 and 7.

[5] The accused were sentenced on 12 May 2005. All of them are to serve lengthy periods of imprisonment, some of which are to run concurrently. The effective periods of imprisonment thus imposed vary from ten to fifteen years.

[6] Each of the applicants brought an application in the regional court in terms of section 309B of the Criminal Procedure Act for leave to appeal against his conviction and sentence. The regional magistrate refused each of these applications.

[7] The applicants thereafter filed petitions to this court in terms

of section 309C of the Criminal Procedure Act. There have been unfortunate delays in the processing of these petitions. The reasons for these delays are complex. They are, however, not relevant to the issues presently before us.

[8] First applicant (accused 3) and second applicant (accused 4) filed separate applications to this court for leave to appeal against their convictions and sentences. In preparing these applications they did not have the benefit of legal representation. The applications were drafted by them in person. These applications are at present still pending.

[9] Third to sixth applicants (accused 5, 6, 7 and 11) filed a joint petition for leave to appeal against their convictions and sentences. These applications were lodged on their behalf by an attorney. They are also still pending.

[10] The above six applications were consolidated and referred for argument before us in open court on 3 November 2006 on the question whether the provisions of section 309C of the Act are

constitutionally valid and, if invalid, whether the applicants can be exempted from the requirement of obtaining leave to appeal.

[11] Advocates J C Butler, M L Norton and M A O'Sullivan were appointed as *amici curiae* to represent the interests of first and second applicants. The third to sixth applicants were represented at the hearing by advocate M Gerber, instructed by attorneys Francois Potgieter and Partners. Mr W B Tarantal of the Office of the Director of Public Prosecutions represented respondent. This court is indebted to counsel for their considerable assistance.

The history of the leave to appeal procedures contained in sections 309B and 309C of the Criminal Procedure Act

[12] Before turning to the specific arguments that were raised before us, it may be useful to provide a summary of the history of the leave to appeal procedures contained in sections 309B and 309C of the Criminal Procedure Act. At the time when the Constitution of the Republic of South Africa Act 200 of 1993 ("the Interim Constitution) came into operation any person convicted of

an offence by any lower court had the right, in terms of section 309(1)(b) of the Criminal Procedure Act, to appeal to the High Court (formerly the Supreme Court) against his conviction and resultant sentence. In terms of section 309(4)(a), read with section 305 of the Criminal Procedure Act, that right was, however, subject to the following qualification:

> *'No person who has been convicted by a lower court of an offence, and is undergoing imprisonment for that or any other offence, shall be entitled to prosecute in person any proceedings for the [appeal] of the proceedings relating to such conviction unless a Judge of the Provincial or Local Division having jurisdiction has certified that there are reasonable grounds for [appeal]'.*

[13] Section 25(3) of the Interim Constitution conferred upon all accused persons a right to a fair trial. It listed some of the particular rights that were covered by the general right to a fair trial. One of these, specified in para (h), was:

> *'. . . the right . . . to have recourse by way of appeal or review to a higher Court than the court of first instance'.*

[14] In *S v Ntuli* 1996 (1) SA 1207 (CC) the Constitutional Court

held that the provisions of section 309(4)(a), read with section 305 of the Criminal Procedure Act, were in conflict with an accused person's right to a fair trial in terms of section 25(3)(h) of the Interim Constitution. The court made the following order:

> *'Section 309(4)(a) of the Criminal Procedure Act is declared to be invalid on the score of its inconsistency with the Constitution. Parliament is required to remedy the defect by 30 April 1997, with the result that our declaration of invalidity is suspended until that happens or that date arrives, whichever occurs earlier, when it will come into force.'*

[15] The Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") came into effect on 4 February 1997. Section 35(3) of the Constitution provides as follows:

> *'Every accused person has a right to a fair trial, which includes the right-*
>
> *… … …*
>
> *(o) of appeal to, or review by, a higher court.'*

[16] The legislature reacted to the *Ntuli* judgment by introducing, with effect from 28 May 1999, a new procedure contained in sections 309B and 309C of the Criminal Procedure Act. (I propose

to refer to those provisions as the 1999 versions of each of these sections.) In substance the 1999 version of section 309B provided that an appeal against a conviction or sentence in a magistrate's court could be lodged only after leave had been obtained from that court. If leave were refused, the 1999 version of section 309C of the Criminal Procedure provided a procedure for the filing of a petition to the appropriate High Court for leave to appeal.

[17] In *S v Steyn* 2001 (1) SA 1146 (CC), a judgment delivered on 29 November 2000, the Constitutional Court held that the 1999 versions of sections 309B and 309C of the Criminal Procedure Act were inconsistent with the Constitution. These sections were declared invalid but the declaration of invalidity was suspended for a period of six months from the date of the order, ie until 29 May 2001.

[18] In terms of the Criminal Procedure Amendment Act 42 of 2003 the legislature introduced, with effect from 1 January 2004, new sections 309B and 309C which contain the leave to appeal procedure in its current form. I shall refer to them as the 2004 versions of sections 309B and 309C.

The full text of the 2004 versions of sections 309B and 309C

[19] Section 309 of the Criminal Procedure Act, after the 2004 amendments, provides, *inter alia,* as follows:

> *'(1) (a) Any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction:*

[20] The 2004 version of section 309B reads as follows:

> ***'309B Application for leave to appeal***

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

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

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

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

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

(b) If the application is to be heard by a magistrate, other than the trial magistrate, the clerk of the court must submit a copy of the record of the proceedings before the trial magistrate to the magistrate hearing the application: Provided that where the accused was legally represented at a trial in a regional court the clerk of the court must,

subject to paragraph (c), only submit a copy of the judgment of the trial magistrate, including the reasons for the conviction, sentence or order in respect of which the appeal is sought to be noted to the magistrate hearing the application.

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

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

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

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

(4) (a) If an application for leave to appeal under subsection (1) is granted, the clerk of the court must, in accordance with the rules of the court, transmit copies of the record and of

all relevant documents to the registrar of the High Court concerned: Provided that instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be transmitted of such parts of the record as may be agreed upon by the Director of Public Prosecutions and the accused to be sufficient, in which event the High Court concerned may nevertheless call for the production of the whole record.

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

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

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

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

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

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

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

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

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

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

[21] The 2004 version of section 309C reads as follows:

'309C Petition procedure

(1) In this section-

(a) 'application for condonation' means an application referred

to in the proviso to section 309 (2), or referred to in section 309B (1) (b) (ii);

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

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

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

(2) (a) If any application-

(i) for condonation;

(ii) for further evidence; or

(iii) for leave to appeal,

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

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

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

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

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

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

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

(a) the application that was refused;
(b) the magistrate's reasons for refusal of the application; and
(c) the record of the proceedings in the magistrate's court in respect of which the application was refused: Provided that-

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

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

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

(iv) if the petition relates solely to an application for condonation, a copy of the judgment, which includes the reasons for conviction and sentence, shall, subject to subsection (6) (a), suffice for the purposes of the petition.

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

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

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

(6) Judges considering a petition may-

(a) call for any further information, including a copy of the

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

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

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

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

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

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

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

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

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

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

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

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

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

The Natal Full Bench judgment in *Shinga*

[22] After this matter had been referred for the hearing of the

constitutional issue before two judges, it came to our notice that the constitutionality of sections 309(3A), 309B and 309C of the Criminal Procedure Act had been considered in a judgment of a Full Bench of the Natal Provincial Division in *Shinga and The Society of Advocates (Pietermaritzburg Bar) v The State,* Appeal No AR 969/2004, delivered on 3 August 2006.

[23] We may point out that the question of the constitutionality of the provisions of section 309(3A) of the Criminal Procedure Act, which deal with the disposal in chambers of appeals from the lower courts, was also considered in the *Shinga* judgment. That issue is, however, not before us as all criminal appeals in this Division are, as a matter of course, heard in open court.

[24] The Natal Full Bench decided in *Shinga* that the 2004 versions of sections 309B and 309C did not adequately address the deficiencies in the 1999 versions of these sections and the criticism levelled against them by the Constitutional Court in *Steyn.* The disadvantages to a convicted person wishing to appeal, the Full Bench held, especially an unrepresented applicant, have not

been removed. These procedures limit the rights of an accused person in terms of section 35(3)(o) of the Constitution and such limitation could not be justified in terms of section 36 of the Constitution. Sections 309B and 309C were accordingly declared invalid (together with section 309(3A)), and the matter was referred to the Constitutional Court for confirmation.

[25] We have been informed that the question of the confirmation of the *Shinga* decision has been enrolled for hearing in the Constitutional Court on 14 November 2006. We have had sight of the heads of argument that have been filed to date in the *Shinga* matter in the Constitutional Court. Counsel for the *amicus curiae* (The Society of Advocates (Pietermaritzburg Bar)) and counsel representing the Director of Public Prosecutions in Natal support the decision of the Natal Full Bench that sections 309B and 309C of Criminal Procedure Act are inconsistent with the Constitution. Counsel representing the Minister of Justice and Constitutional Development defend the validity of the legislation in question. They contend, in summary, that the abolition of these sections will lead to an unacceptable clogging of the court rolls with

unmeritorious appeals.

[26] In view of the pending hearing of the *Shinga* matter in the Constitutional Court we had to decide whether to proceed with the present hearing or not. It would have been convenient to wait for the decision of the Constitutional Court in *Shinga* which might provide clarity on some of the issues raised before us. It appeared to us, however, that it would be unfair to the applicants to cause any further delay in the determination of the applications before us. The applicants are incarcerated and obviously wish to prosecute their intended appeals. We accordingly proceeded with the hearing of the constitutional issue.

The principal contentions advanced in this court

[27] In a most helpful argument the *amici curiae* emphasised two vital aspects of the context in which the constitutionality of section 309C of the Criminal Procedure Act falls to be determined. They

pointed to the remarks of Madlanga AJ, in paras [13] to [22] of *Steyn,* on the institutional context, summarised by him in the statement in para [22] that '*the risk of an error leading to an injustice is substantially greater in the magistrates' courts than in the High Courts.'* These remarks, they submitted, are as valid today as they were in 2000.

[28] The second vital aspect, the *amici* submitted, is the reality of the extent of legal aid assistance today. Despite the clear wording of section 35(2)(g) of the Constitution (which provides that an accused person has the right '*to have a legal practitioner assigned to [him] by the state and at state expense, if substantial injustice would otherwise result")*, it is apparent from the provisions of the 2002 Legal Aid Guide, as amended by Circular 2 of 2006, dated 1 April 2006, that the actual provision of legal aid in a particular case is, apart from a means test, subject to the Legal Aid Board's own screening process. I revert to this aspect hereunder.

[29] The *amici curiae* did not contend that any limitation of an accused person's right of appeal by means of a leave to appeal procedure would *per se* be invalid. They pointed to the following

remarks of Madlanga J in para [25] of *Steyn*:

> *'A highly restrictive form of appeal is not appropriate where, as in the magistrates' courts, the margin of error is greater. In my view the procedure under consideration is highly restrictive. The unsatisfactory features of the ss 309B and 309C procedure discussed above make it unsuitable for the purpose envisaged in the Constitution, in that the procedure does not accord with an adequate reappraisal and the making of an informed decision. Obviously, the automatic right of appeal, the right recently displaced by the impugned sections, satisfies the constitutional prescripts. I want to make it clear that there is no intention to suggest that Parliament may not come up with an appeal procedure that falls short of the automatic right of appeal, but still satisfies the constitutional requirement of fairness or is justified in terms of the Constitution. Of course, that is something that will be considered if and when it arises.'*

[30] The *amici curiae* submitted, however, that any qualification or limitation (such as the procedures presently under consideration) would only be justifiable if (i) it is motivated by considerations justifying the limitation and (ii) is not more limited as would be reasonably necessary. They submitted that two essential features of the qualifications contained in the 2004 version of section 309C do not pass either of these tests.

[31] The first objectionable feature is that the present procedure envisages that a petition would in the normal course of events be considered by a single judge in chambers. The *amici curiae* submitted that the consideration of the petition in chambers would not necessarily violate the petitioner's right to a fair trial but the procedure should ensure that the hearing in chambers is as meaningful as possible. They submitted accordingly that a petition for leave to appeal should, as a matter of course, be determined by two judges. The benefit of two minds, as opposed to one, being applied to the same factual and legal issues, speaks for itself, particularly in marginal cases. The *amici* also submitted that these two judges should have a wide discretion to refer matters for oral argument. That discretion should not be confined, as it is at present, to *'exceptional circumstances'.*

[32] The second objectionable feature, the *amici curiae* submitted, is that in terms of the present procedure inadequate material may be made available to the judge upon which the decision to grant or refuse leave to appeal is to be taken. An

'adequate reappraisal' and *'informed decision*' in respect of the application for leave to appeal depends upon adequate information being available to the judges. The full record should therefore as a matter of course be placed before the judges and not be excluded in the four specific situations described in the proviso to sub-section 309C(4)(c), namely

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

The definition of these four exceptional categories, they submitted, is in any event not logically or practically justifiable. In a typical case, for example, such as that of first and second applicants in this matter, a convicted person might have had legal representation at the trial but by the time a petition is to be

launched to the High Court, he may be without legal aid assistance.

[33] Mr Gerber appeared on behalf of third to six applicants. He also attacked the constitutionality of the section 309C procedure and he associated himself with the submissions advanced by the *amici curiae.*

[34] Mr Tarantal, appearing on behalf of the Director of Public Prosecutions, defended the constitutionality of the 2004 version of section 309C. He submitted that this procedure adequately addresses the concerns raised by the Constitutional Court in *Steyn.* He annexed a number of documents to his heads of argument in order to support the submissions advanced by him. These documents included a number of the submissions made to the Parliamentary Portfolio Committee on Justice and Constitutional Development in 2002 when the legislation in question was considered by it. According to Mr Tarantal it is apparent from these submissions that the proposed legislation was welcomed by a number of interested parties. He also referred to various statistics in respect of the numbers of criminal appeals

heard by the courts and submitted that a screening mechanism is necessary to eliminate unmeritorious appeals. Resource related constraints, he submitted, make it practically impossible to introduce a less restrictive screening mechanism.

Conclusions on the constitutionality of section 309C

[35] We pointed out above that we have decided to deal with the applications before us on an urgent basis. We accordingly do not propose to provide elaborate reasons for our decision. We intend to summarise our conclusions in regard to the constitutional issue and to provide brief reasons for those conclusions.

[36] Our conclusions in regard to the constitutionality of section 309C are twofold. The first is that we are not persuaded that any leave to appeal procedure would necessarily be invalid. There may well be substance in the general submission advanced by Mr Tarantal (and by the Minister in the *Shinga* matter) that an unqualified right of appeal may lead to an unacceptable proliferation of unmeritorious appeals.

[37] Our second conclusion, however, is that the present procedure, as contained in the 2004 version of section 309C, is indeed unconstitutional. It would be convenient to discuss the reasons for this conclusion under three headings, namely legal representation, the single judge consideration procedure and the question of the full record.

Legal representation

[38] We agree entirely with the contention advanced by the *amici curiae* that the validity of any leave to appeal procedure can only be judged in the context of the realities regarding the availability of legal representation to accused persons at the time when they apply for leave to appeal. In para 7.7 of the affidavit filed on behalf of the Minister in the *Shinga* case it is said in unqualified terms that *'legal aid is made available to those accused deserving such aid in respect of appeals'.* The material before us, however, does not support this statement.

[39] We referred above to para 1.3.3 of the Legal Aid Guide as amended by Circular 2 of 2006 dated 1 April 2006. It appears that

'where leave to appeal has not been requested timeously' legal aid will only be granted if *'there is a reasonable chance that condonation for the late filing will be granted taking into consideration the reason for the delay in applying for leave to appeal and the chances of success on appeal'.* The Legal Aid Board therefore applies its own screening process.

[40] It is not clear to us on what factual material the Legal Aid Board's screening criteria are applied, nor what their effect is in practice. Part of the factual material placed before us is a report, dated 19 March 2003, which the Legal Aid Board submitted to the Justice Portfolio Committee on the subject of criminal appeals. According to this report the Legal Aid Board received 5 895 applications for legal aid for criminal appeals during the period 1 January 2002 to 28 February 2003. Of these applications 4 075 were granted. In our view these statistics are telling. It means, in effect, that about one out of every three applicants that applied for legal aid, was unsuccessful.

[41] Annexure 'MS17' to the affidavit filed on behalf of the

Minister in the *Shinga* matter is a report entitled *'Statistical Evidence on the Impact of Appeals on the Administration of Justice: September 2003'.* We do not propose to discuss these statistics in detail. We do wish to point out, however, that what has **not** been measured is the impact of the denial of legal aid to prospective appellants. It is apparently assumed that those accused persons who are denied legal aid and do not pursue their appeals in person, are to be regarded as *unmeritorious* appellants. What has **not** been measured is the number of potential appellants that give up because they do not qualify for legal aid. **Nor** has the number of appellants in person whose appeals are struck from the rolls because they have not complied with the rules relating to the prosecution of such appeals, been measured.

[42] The unfortunate position of the unrepresented accused lay at the heart of the Constitutional Court's decisions in *Ntuli* and *Steyn*. The petitions which first and second applicants filed in the present case are vivid illustrations before us that the problem has not yet been adequately addressed. Until it has been addressed the remarks made in these decisions of the Constitutional Court

remain valid.

Consideration of the petition by a single judge

[43] We agree with the contention advanced by the *amici curiae* that a petition for leave to appeal should, as a matter of course, be considered by **two judges** and not only one judge. It is difficult to understand the reasons for introducing the one judge procedure. The 1999 version of section 309C that was considered in *Steyn* provided for a consideration of the petition by two judges. This provision was found to be unconstitutional and, on our understanding of the judgment, nothing was said therein that could be interpreted as an indication that a one judge procedure would be regarded as acceptable.

[44] The decisions of the Constitutional Court in *S v Rens* 1996 (1) SA 1218 (CC) and S *v Twala (South African Human Rights Commission Intervening*) 2000 (1) SA 879 (CC) are also relevant. In both cases the Constitutional Court was required to consider the constitutionality of section 316, read with s 315(4), of the Criminal

Procedure Act 51 of 1977. They afford a right of appeal against conviction or sentence to any person convicted of a crime in a High Court only if that person has been granted leave to appeal by either that Court or the Supreme Court of Appeal. In *Rens* these provisions were evaluated against, and held to be consistent with, the provisions of s 25(3)(h) of the Interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993), which provided for every accused person to have a right to a fair trial which included the right to have recourse by way of appeal or review to a higher Court.

[45] In *Twala* the constitutionality of the leave provisions were considered with reference to equivalent provisions in the Constitution, namely s 35(3)(o), which accords to every accused person the right to a fair trial including the right *'of appeal to, or review by, a higher court'.*

[46] In *Rens* the court placed considerable emphasis on the fact that any accused person may, upon being refused leave to appeal by the High Court, petition the Chief Justice for such leave; that the

Chief Justice must appoint two judges to consider the petition and that a third judge must be appointed if those appointed initially do not agree. See the reasoning in para [23] of the judgment:

> *'[23] Section 316(1)(b) of the Act gives the convicted person two bites of the cherry. On being convicted and sentenced, the accused person has an opportunity of approaching the trial Court and seeking leave from that Court to appeal against the conviction or sentence, or both. If the application is refused, the person may then seek leave to appeal from the Chief Justice by way of petition. The Chief Justice is required to refer the matter to two members of the Appellate Division. Procedural irregularities and points of law are taken care of by ss 317-319 in terms of which the accused person is given an extensive right to appeal and, if leave is refused, the opportunity of placing such issues before two Judges of the Appellate Division through the petition procedure. In all petitions, whether under s 316 or ss 317-319, if the two Judges of the Appellate Division fail to agree, a third member of the Appellate Division is assigned to the case. The prescribed procedures make provision for argument to be set out in writing in the petition. In terms of the Act, the Judges of the Appellate Division to whom the petition is referred may call for further information from the trial Judge or the Judge who heard the application for leave to appeal, and may also call for oral argument on the application for leave to appeal, or refer the*

> *matter to the Appellate Division for its consideration. The Judges of the Appellate Division will refuse the leave sought only if they are satisfied that there are not reasonable prospects of success on appeal."*

This aspect of the judgment was commented upon in para [20] of the *Twala* judgment:

> *'[20] The Rens judgment places considerable store on the fact that any accused person may, upon being refused leave to appeal by the High Court, petition the Chief Justice for such leave; that the Chief Justice must appoint two Judges to consider the petition in terms of ss 316, 317 or 319 of the Act; and that a third Judge must be appointed if those appointed initially do not agree.'*

[47] The version of section 309C in the Bill that was considered by the Parliamentary Portfolio Committee on Justice and Constitutional Development (annexure 'MS11A') provided for a consideration of the petition by two judges. The reason for changing it to one judge is not clear to us.

[48] We are accordingly of the view that the provision in sub-section 309C(5)(a) for the consideration of the petition by a single judge, as opposed to two judges, is a fundamental defect in the

2004 version of section 309C. For that reason alone the section is inconsistent with an accused person's constitutional right to a fair trial.

The full record

[49] We also agree with the submission by the *amici curiae* that a full record of the proceedings in the lower court should as a matter of course be placed before the judge or judges considering the petition. The provision in sub-section 309C that the judge considering a petition may call for a full record of the proceedings, does not, in our view, ensure that *'an adequate reappraisal and the making of an informed decision'* will take place.

[50] There is a further practical consideration. If the judges are to consider the petition first and then call for a full record of the proceedings there will be an inevitable delay and inconvenience to the judges concerned as they would have to suspend their own consideration of the petition until the record is furnished to them. By then one or both of them may be on leave or otherwise not

available to deal with the matter expeditiously.

The relief to be granted

[51] We have accordingly concluded that the 2004 version of section 309C of the Criminal Procedure Act is inconsistent with the Constitution. We have not focused in this judgment on the provisions of section 309B but it follows logically that section 309B cannot stand on its own. Its invalidity would follow from the invalidity of section 309C. The same would apply to the phrase, *'subject to leave to appeal being granted in terms of section 309B or 309C*' in section 309 of the Criminal Procedure Act.

[52] The provisions of section 172 of the Constitution read as follows:

> ***'172 Powers of courts in constitutional matters***
>
> *(1) When deciding a constitutional matter within its power, a court-*
>
> *(a) must declare that any law or conduct that is*

inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.'

[53] The *amici curiae* suggested in argument that instead of

merely declaring the impugned provisions unconstitutional, this court could, through a process of reading in certain provisions and reading out other provisions, in substance redraft the section in a manner that would render it consistent with the Constitution. In theory the suggestion is attractive. It seems to us, however, that the question of such redrafting should rather be left for the Constitutional Court, should it agree with our conclusion that section 309C is invalid. The Constitutional Court would enjoy the benefit of additional arguments and evidence that we have not had.

[54] We also wish to draw attention to an aspect that was not debated before us but which may merit consideration if section 309C is to be redrafted. The provisions of sections 309B and 309C do not define the test to be applied in considering the merits of an application for leave to appeal. It appears to be generally accepted that the test is the same as the test that is applied by the High Courts and the Supreme Court of Appeal in considering applications for leave to appeal against decisions of the High Courts. In such cases a reasonable prospect of success on

appeal is an essential requisite (see *S v Rens, supra, para [7]).* There are, however, cases, emanating in particular from the regional courts, where the records are voluminous. The present case falls into that category. In many applications for leave to appeal it would therefore be a waste of time and resources for the judges concerned to consider the entire record for purposes of deciding whether to grant or refuse leave to appeal and then, if leave to appeal is granted, be required to consider that record again when the appeal is argued. The position is even worse when other judges are appointed to hear the appeal. A solution to this problem may be to redefine the criteria for leave to appeal in terms of sections 309B and 309C to allow for a more pragmatic and less restrictive approach to such applications.

[55] The question then arises as to what is to be done in respect of the six applications for leave to appeal that are presently before us. In view of the delays which have already occurred, it would be manifestly unjust, so it seems to us, to await the decision of the Constitutional Court before the merits of the present applications for leave to appeal are considered. In terms of section 172 of the

Constitution we have the power to grant suitable temporary relief. In terms of section 309 of the Criminal Procedure Act an appellant would ordinarily not be entitled to prosecute an appeal without having obtained leave to appeal. It seems to us that the temporary relief that we are empowered to grant to the applicants in this case is an order that their applications for leave to appeal be argued with reference to the entire record before two judges and that they be permitted in the meanwhile to prosecute their intended appeals in such a manner that the appeals can be heard in the same forum and at the same time as the applications for leave to appeal. We propose to make such an order.

[56] In the result we make the following orders:

(a) It is declared that sections 309B and 309C of the Criminal Procedure Act, and the reference to them in section 309(1)(a), are invalid as they are inconsistent with the Constitution.

(b) This matter is referred to the Constitutional Court for

consideration of the confirmation of the above order.

(c) It is ordered that applicants' applications for leave to appeal be argued with reference to the entire record of the proceedings in the regional court before two judges and that applicants be permitted in the meanwhile to prosecute their intended appeals in such a manner that the appeals can be heard in the same forum and at the same time as their applications for leave to appeal.

A P BLIGNAULT

Allie J: I agree.

R ALLIE