

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Shinga v The State

Case CCT 56/06

and

O'Connell and Others v The State

Case CCT 80/06

Decided on 8 March 2007

MEDIA SUMMARY

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

These cases concern the constitutionality of certain sections of the Criminal Procedure Act governing the rights of people convicted of criminal offences in a Magistrates' Court to appeal to the High Court against their convictions or sentences. In the two cases, one from the Pietermaritzburg High Court (*S v Shinga*) and the other from the Cape Town High Court (*S v O'Connell and Others*), the High Court made orders of constitutional invalidity which were referred to the Constitutional Court for confirmation.

The first issue concerned whether section 309(3A) of the Criminal Procedure Act, 51 of 1977, which requires a High Court to decide an appeal in chambers without hearing oral argument unless the court is of the opinion that the interests of justice require it to be heard in open court was constitutional. Yacoob J, writing for a unanimous court, held that hearing appeals in open court is an important aspect of a fair trial procedure. It fosters judicial excellence and enhances public confidence in the criminal justice system. The Court accordingly held the provision to be inconsistent with the constitutional right of every accused person to a fair trial, including the right of appeal to or review by a higher court. It therefore confirmed the order made by the Pietermaritzburg High Court in this regard.

The second issued concerned the procedure for application for leave to appeal to the High Court once the Magistrates' Court has refused leave. Subsection 309C(4)(c) requires the High Court to be furnished with the trial record in the Magistrates' Court save in four circumstances: if the accused was tried in a Regional Court and was legal represented at the trial; if the accused and prosecution agree that no record need be furnished; if the appeal is against sentence only; or if the application for leave involves an application for condonation only (that is, asking for pardon for filling legal papers late). The Court held that the test to determine whether the right to appeal has been afforded is whether the procedure allows for an "adequate reappraisal and informed decision" on the case. The Court held that the court considering an application for leave to appeal from a Magistrates' Court would not be able to adequately reappraise the matter without a full record in all circumstances. The Court accordingly found subsection 309C(4)(c) to be inconsistent with the right to a fair

trial. The exceptions to the rule requiring the furnishing of a record were severed from the provision with the effect that a full record must now be furnished in all applications for leave to appeal under section 309C.

The third issue related to a rule that the number of judges who would consider an application for leave to appeal would be reduced from two judges to one judge except in special circumstances. The Court holds that there are powerful reasons for requiring more than one judge to consider an application for leave to appeal. It emphasised the importance of collegial discussion in affording an adequate and fair reappraisal and pointed to the fact that a refusal of leave to appeal is the end of the road for an accused. It accordingly held that subsection 309C(5)(a) should be declared invalid to the extent it requires only one judge to consider an application for leave to appeal and remedied the unconstitutionality by a declaration of invalidity coupled with an order to read the section as providing for two judges.

Finally, the court rejected the conclusion of the Pietermaritzburg High Court that the application for leave to appeal procedure was bad in its entirety. It therefore upheld the procedure save in the narrow respects described above. The effect of the order is that a person seeking to appeal his or her conviction now has the right to have the record from their previous trial sent to the appellate court; to have the application for leave to appeal considered by two judges; and, if leave to appeal is granted, to argue the appeal in an open hearing in the High Court.