THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 20273/2014

In the matters between:

HENDRICK VAN WYK **APPELLANT**

and

THE STATE **RESPONDENT**

Case No: 20448/2014

BONILE GALELA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Van Wyk v The State* (20273/2014) and *Galela v The State* (20448/2014) [2014] ZASCA 152 (22 September 2014)

Coram: Navsa ADP, Brand, Ponnan, Swain JJA and Mathopo AJA

Heard: **22 September 2014**

Delivered: **29 September 2014**

Summary*:* North Gauteng High Court dismissing appeal on the merits – Western Cape High Court refusing petition in terms of s 309C of the Criminal Procedure Act 51 of 1977 – in either event special leave required of the SCA in terms of s 16(1)(*b*) of the Superior Courts Act 10 of 2013 to appeal further.

ORDER

Hendrick Van Wyk v The State, Case No 20273/2014

On appeal from: North Gauteng High Court, Pretoria (Raulinga J with Louw AJ concurring, sitting as the court of appeal):

1. The appellant is granted special leave to appeal in terms of s 16(1)(*b*) of the Superior Courts Act 10 of 2013 against the sentence of imprisonment imposed by the Regional Court, Pretoria-North, confirmed on appeal by the North Gauteng High Court.

2. The appeal is upheld. The order of the court a quo is set aside and substituted with the following order:

'The appeal is upheld. The sentence imposed by the trial court is set aside and the following sentence is substituted:

The appellant is sentenced to imprisonment for a period of three years five months and 28 days.

The substituted sentence is antedated to 25 March 2011.'

Bonile Galela v The State, Case No 20448/2014

On appeal from: Western Cape High Court, Cape Town (Erasmus J with Rogers J concurring, sitting as the court of appeal):

1. The application for special leave to appeal in terms of s 16(1)(*b*) of the Superior Courts Act 10 of 2013, against the dismissal of the applicant's petition for leave to appeal by the Western Cape High Court in terms of s 309C of the Criminal Procedure Act 51 of 1977 is refused.

JUDGMENT

Swain JA (**Navsa ADP, Brand, Ponnan JJA and Mathopo AJA** concurring):

[1] The passing of the Superior Courts Act 10 of 2013 (the Act) which repealed the Supreme Court Act 59 of 1959 (the SC Act) from 23 August 2013, has given rise to uncertainty concerning the rights of accused persons convicted in the magistrates' court, to appeal against the dismissal of their appeals by the high court, to this court.

[2] Uncertainty has also arisen in regard to the right of accused persons who have unsuccessfully petitioned the high court for leave to appeal to that court against their convictions in the magistrates' court or the sentences imposed pursuant to those convictions, to then seek the leave of this court to appeal to the high court.

[3] The uncertainty relates to whether the high court, sitting as a court of appeal, has jurisdiction to grant leave to appeal against its own order dismissing an appeal on its merits or where, in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA), it dismissed a petition against a magistrates refusal to grant leave to appeal.

[4] The present appeals are representative of each of these categories. In *Hendrick van Wyk v The State* the appellant was convicted by the Regional Court, Pretoria North of one count of rape in terms of s 3 of the Sexual Offences and Related Matters Amendment Act 32 of 2007 (the Sexual Offences Act) and one count of sexual assault in terms of s 5(1) of this Act and sentenced to an effective term of 15 years' imprisonment. An application by the appellant for leave to appeal against conviction and sentence in terms of s 309B of the CPA was dismissed by the regional court. The appellant in terms of s 309C(2) of the CPA then petitioned the North Gauteng High Court, Pretoria against the refusal of leave to appeal. The petition was partially successful in that the appellant was granted leave to appeal against the sentence imposed. This appeal was subsequently dismissed by the high

court (Raulinga J and Louw AJ). The appellant then filed an application for special leave to appeal to this court, in respect of sentence in terms of s 16(1) of the Act.

[5] In *Bonile Galela v The State* the appellant was convicted by the Regional Court, Winburg of one count of rape in terms of s 3 of the Sexual Offences Act and sentenced to a term of 17 years' imprisonment. An application for leave to appeal in terms of s 309B of the CPA was dismissed by the regional court. The appellant in terms of s 309C(2) then unsuccessfully petitioned the Western Cape High Court, Cape Town (Erasmus and Rogers JJ) for leave to appeal. The appellant then applied to this court for leave to appeal in terms of s 16(1) of the Act.

[6] The parties in *Van Wyk* were directed to present argument on the following issues:

'a) Whether, in view of the definition of "appeal" in section 1 of the Superior Courts Act 10 of 2013, the provisions of section 16(1)(*b*) of that Act may be invoked for purposes of applying to the Supreme Court of Appeal for special leave to appeal.

b) If not, whether the North Gauteng High Court, which dismissed the applicant's appeal, has jurisdiction to consider the applicant's application for leave to appeal to this Court.

c) If not, whether leave to appeal is required from this Court for it to consider the appeal? The Applicant and Respondent are referred to *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA) and *American Natural Soda Ash Corporation & another v Competition Commission & others* 2005 (6) SA 158 (SCA).'

[7] To answer the first two questions in relation to criminal appeals it is necessary to briefly set out the law under the SC Act, pertaining to criminal appeals from the then supreme court (now high court) to this court, as well as petitions to this court for leave to appeal to the high court from the magistrates court. Whether the Act has changed the existing law can then be considered.

[8] Section 309 of the CPA provides that subject to leave to appeal being granted in terms of s 309B or 309C, any person convicted of any offence by any lower court may appeal against such conviction and sentence to the high court

having jurisdiction. In terms of s 309B any accused who wishes to note an appeal against any conviction or sentence of a lower court must apply to that court for leave to appeal against the conviction or sentence. If leave to appeal is refused by the lower court, the accused may in terms of s 309C petition the Judge President of the high court having jurisdiction to grant leave to appeal. In terms of s 309C(5) the petition is considered by two judges in chambers. Section 309 was amended to ensure its constitutional validity after a series of cases revealed its constitutional shortcomings.[1]

[9] These provisions of the CPA have to be considered alongside the applicable sections of the SC Act which regulated appeals from the high court to this court. These were ss 20(1), 20(4) and 21(1). Section 20(1) provided that:

'An appeal from a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of such a court given on appeal shall be heard by the appellate division or a full court as the case may be.'

[10] Section 20(4) provided that:

'(4) No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except –

(a) in the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in terms of subsection (3), with the special leave of the appellate division;

(b) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division.'

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[1] *Shinga v The State & another* (Society of Advocates ((Pietermaritzburg Bar)) intervening as Amicus Curiae); *S v O'Connell & others* 2007 (2) SACR 28 CC, *S v Rens* 1996 (1) SACR 105 (CC), *S v Ntuli* 1996 (1) SACR 94 (CC), *S v Steyn* 2001 (1) SACR 25 (CC).

[11] Section 21(1) provided that:

'In addition to any jurisdiction conferred upon it by this act or any other law, the appellate division shall subject to the provisions of this section and any other law, have jurisdiction to hear and determine an appeal from any decision of the court of a provincial or local division.'

Sections 21(2) and (3) of the SC Act made provision for application to be made to this court by way of petition for leave to appeal as referred to in s 20(4).

[12] Section 21(1) of the SC Act was applicable to both civil and criminal cases[2] and conferred a jurisdiction upon this court that it did not possess in terms of s 20 of the SC Act.[3]

[13] This court held in *S v Khoasasa* 2003 (1) SACR 123 (SCA) paras 14 and 19-22, that a petition for leave to appeal to a high court in terms of s 309C of the CPA, was in effect an appeal against the refusal of leave to appeal by the magistrates court in terms of s 309B of the CPA. It concluded that such refusal of leave to appeal by the high court was a 'judgment or order' of the high court as contemplated in ss 20(1) and 20(4) of the SC Act, given by the high court on appeal to it. Accordingly, in terms of s 20(4)(*b*) the refusal of leave to appeal by the high court, was appealable to this court with the leave of the high court (being the court against whose order the appeal was to be made) or where leave was refused, with the leave of this court. The order appealed against was the refusal of leave with the result that this court could not decide the appeal itself.

[14] As pointed out by this court in *S v Matshona* 2013 (2) SACR 126 (SCA) para 4, the issue to be determined is not whether the appeal against conviction and sentence should succeed, but whether the high court should have granted leave,

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[2] *S v Botha en 'n ander* 2002 (1) SACR 222 (SCA) at 225H.

[3] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 8B-C.

which in turn depends upon whether the appellant could be said to have reasonable prospects of success on appeal.[4]

[15] In *S v Tonkin* 2014 (1) SACR 583 (SCA) para 4, Brand JA pointed out that if an appeal of this nature should succeed 'the result is cumbersome and wasteful of both time and money. After two rounds before the high court and one round before this court, the appeal process will remain uncompleted. Two judges of the high court will still have to hear the appeal on its merits with the possibility of a further appeal to this court'.

[16] Brand JA in *Tonkin* (para 6) set out the reasons why this court could not 'short-circuit the cumbersome process by entertaining the appeal against conviction directly' in the exercise of its inherent jurisdiction.

'(*a*) Although this court has inherent jurisdiction to regulate its own procedure, it has no inherent or original jurisdiction to hear appeals from other courts. In the present context its jurisdiction is confined to that which is bestowed upon it by ss 20 and 21 of the Supreme Court Act. In terms of these sections the jurisdiction of this court is limited to appeals against decisions of the high court.

(*b*) When leave to appeal has been refused by the high court, that court rather obviously, did not decide the merits of the appeal. If this court were therefore to entertain an appeal on the merits in those circumstances, it would in effect be hearing an appeal directly from the magistrates' court. That would be in direct conflict with s 309 of the Criminal Procedure Act, which provides that appeals from lower courts lie to a higher court. The "order on appeal" by the high court – in the language of s 20(4) – that is appealed against is the refusal of the petition for leave to appeal, and nothing else.

(*c*) As to this court's inherent jurisdiction to regulate its own process it goes without saying that it is to be exercised within the confines of statutory limitations. With regard to

[4] This position has been followed by this court. *S v Kriel* 2012 (1) SACR 1 (SCA) paras 11-12, *S v Smith* 2012 (1) SACR 567 (SCA) paras 2-3.

appeals against judgments and orders by the high court, the procedure is dictated by s 20(4)(*b*).'

[17] This court in *AD v The State* (334/2011) [2011] ZASCA 215 para 13, called for 'thought to be given to legislative reform so that petitions can be finalised speedily at the high court level'. Whether the Act has provided this reform requires a consideration of s 16(1) of the Act.

[18] Section 1 of the Act provides that 'appeal' in Chapter 5, does not include an appeal in a matter regulated in terms of the CPA, or in terms of any other criminal procedural law. The CPA does not contain any provision dealing with a right of appeal to this court from a decision of the high court taken on appeal to it from a magistrates' court.[5] A right of appeal from the high court sitting as an appeal court to this court in criminal cases, consequently falls within Chapter 5 of the Act. Sections 16(1)(*a*) and (*b*) which are relevant provide as follows:

'(1) Subject to s 15(1), the Constitution and any other law –

(*a*) an appeal against any decision of a division as a court of first instance lies upon leave having been granted -

(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that division, depending on the directions issued in terms of s 17(6); or

(ii) if the court consisted of more than one judge, to the Supreme Court of Appeal;

(*b*) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal, . . .'

[19] The jurisdiction of this court to hear appeals from the high court whether as a court of first instance, or an appeal court is derived from this section and s 19 of the

[5] Sections 315 and 316 of the CPA deal with appeals to this court from the high court sitting as the court of first instance.

Act. Whereas under s 20(4) of the SC Act, the special leave of this court was only required in respect of an appeal from a decision of the full court (three judges) given on appeal to it, the special leave of this court is now also required where leave to appeal is sought in respect of a decision of two judges, given on appeal to it.

[20] A 'decision' of the high court in refusing a petition in terms of s 309C of the CPA for leave to appeal is one taken on appeal to it and is governed by s 16(1)(*b*) of the Act.[6] Accordingly, the refusal of leave to appeal by the high court is appealable with the special leave of this court. Although s 16(1)(*b*) of the Act has ameliorated the 'cumbersome procedure' to the extent that an unsuccessful petitioner in the high court no longer has to obtain the leave of the high court to appeal to this court, it has replaced it with the more stringent requirement that 'special leave' be obtained from this court.

[21] An applicant for special leave to appeal must show, in addition to the ordinary requirement of reasonable prospects of success, that there are special circumstances which merit a further appeal to this court. This may arise when in the opinion of this court the appeal raises a substantial point of law, or where the matter is of very great importance to the parties or of great public importance, or where the prospects of success are so strong that the refusal of leave to appeal would probably result in a manifest denial of justice. See *Westinghouse Brake and Equipment v Bilger Engineering* 1986 (2) SA 555 (A) at 564H-565E.

[22] Rule 6 of the rules of this court, which deals with applications for leave to appeal must be scrupulously followed. The application must succinctly set out the respects in which it is alleged the high court erred and the judgment must be subjected to a critical analysis, either as to the findings of fact or as to the exposition

[6] There is no distinction between a 'decision' of the high court 'on appeal to it' in terms of s 16(1)(*b*) of the Act, or a 'judgment or order' of the high court 'given on appeal to it' in terms of ss 20(1) and 20(4) of the SC Act.

and application of the law.[7] A generalised attack on the findings of the high court is insufficient, as is reliance on the notice of appeal, or a recitation of the grounds of appeal.[8]

[23] Reasons must be given why special leave is justified. The special circumstances relied upon must be clearly and succinctly set out. This is not an invitation to practitioners to conjure up the requisite special circumstances if they do not exist. If these specific requirements are not adhered to, the application may be rejected by the Registrar or an adverse order *de bonis propriis* may be granted.[9]

[24] I turn to consider the questions which were posed in paragraph [6] above.

(a) The definition of 'appeal' in s 1 of the Act renders the provisions of s 16(1)(*b*) applicable to criminal appeals from the high court sitting as a court of appeal to this court.

(b) In *Van Wyk* the Gauteng High Court did not have jurisdiction to hear an application for leave to appeal to this court. This court has jurisdiction to hear the appellant's appeal, against the dismissal by the Gauteng High Court of the appellant's appeal against the sentence imposed by the regional court.

(c) In *Galela* the Western Cape High Court did not have jurisdiction to hear an application for leave to appeal to this court. This court has jurisdiction to hear the appellant's appeal, against the dismissal by the Western Cape High Court of the appellant's petition for leave to appeal in terms of s 309C(2) of the CPA, against his conviction and sentence imposed by the regional court.

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[7] *National Union of Metalworkers of South Africa v Jumbo Products CC* 1996 (4) SA 735 (A) at 739C-H.

[8] D Harms *Civil Procedure in the Superior Courts* at C-37.

[9] H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd 1996 (2) SA 225 (A) at 235H-236B.

(d) In both appeals the appellants will have to satisfy this court that special leave to appeal should be granted. In *Van Wyk* the appellant has to satisfy this court that special leave to appeal against the sentence imposed should be granted. In *Galela* the appellant will have to satisfy this court that special leave to appeal against the refusal of his petition for leave to appeal against his conviction and sentence to the high court should be granted.

(e) The decisions of this court in *National Union of Metalworkers* and *American Natural Soda Ash,* referred to in para 5 supra, are not applicable.[10]

[25] I turn to examine the merits of the applications for special leave to appeal to this court in terms of s 16(1)(*b*) of the Act.

[26] In *Van Wyk*, the applicant seeks special leave to appeal against the dismissal of his appeal against sentence by the Gauteng High Court. The appellant was sentenced to 15 years' imprisonment on one count of rape and two years' imprisonment on one count of sexual assault, the sentences being ordered to run concurrently.

[27] The salient facts giving rise to the appellant's conviction were as follows. The complainant, a 15 year old girl, testified that there had been a party at her home on New Year's Eve 2009. During the course of the evening the complainant a minor had been allowed by her mother to consume vodka, champagne and beer which must have affected her state of sobriety. The appellant who was at the party, asked to

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[10] In the following cases: *Mthethandaba v S* 2014 (2) SACR 154 (KZP), *Tuntubele v S* (A524/12) [2014] ZAWCHC 91 (6 June 2014) and *Hagin, Patrick R v The State* Case No A113/2013 Gauteng Local Division, applications for leave to appeal to this court, against the dismissal of the appellants' appeals, were correctly struck from the roll, on the grounds that the high court lacked jurisdiction to hear the applications. (In *Mthethandaba* the appellant had sought leave to appeal against the refusal of his petition in terms of s 309C of the CPA. In *Tuntubele* and *Hagin* the appellants sought leave to appeal to this court against the dismissal of their appeals on the merits). In the case of *Imador v S* (A167/2013) [2014] ZAWCHC 66 (3 April 2014) the high court incorrectly decided that an accused does not have a further right of appeal to this court after his/her appeal has been determined by two judges in the high court.

sleep at the home after the party, because he did not wish to ride his motorcycle after having consumed alcohol. It was agreed that the appellant could sleep in the complainant's room, whilst the complainant and other children slept in the sitting room. During the night, the appellant approached the complainant and asked her for a beer. She took the appellant to the kitchen and showed him the beers in the fridge. The appellant went outside to smoke, then returned to the house and sat at a table behind the complainant and drank his beer. When he had finished the beer he moved a girl sleeping next to the complainant and lay down next to her on her mattress. The complainant testified that she dozed off but woke up when she realised the appellant was touching her breasts underneath her clothes. The appellant then inserted his finger into her vagina and took the complainant's hand and placed it on his private parts. The appellant then started to pull the complainant's pants down from the back. The complainant turned around to look at the appellant who kissed her. She then pushed the appellant away who asked why she was pushing him away. The complainant insisted he should leave which he did, returning to the room where he was sleeping. The complainant then reported to her mother that the appellant had molested her. The appellant denied the incident and insisted the complainant was falsely implicating him.

[28] In imposing sentence the trial court found that substantial and compelling circumstances were present which justified a departure from the minimum sentence of life imprisonment specified in terms of part 1 of Schedule 2 of the Criminal Law (Sentencing) Amendment Act 38 of 2007 where the victim of the rape was under 16 years of age. The trial court then sentenced the appellant as set out above. The court a quo in dismissing the appeal against the sentence imposed found that there was no misdirection which was improper or unreasonable on the part of the trial court which would entitle the court a quo to interfere with the sentence. No regard was paid by the court a quo as to whether the sentence itself was disproportionate on the facts of this case.

[29] Counsel for the appellant submitted that the trial court failed to have regard to the unique circumstances of this case and as a result sentenced the appellant to a term of imprisonment which was out of proportion to the facts of the case. Counsel

submitted that the trial court failed to consider that no violence or weapon was used during the incident, the appellant did not threaten the complainant and alcohol played a role in the appellant's conduct. Counsel also drew attention to the personal circumstances of the appellant. He was 32 years of age, divorced with two minor children he was supporting from fixed employment and was a first offender. Against this, however, must be considered the fact that the complainant has suffered psychological trauma as a result of the incident and was still undergoing counselling. In addition, the probation officer recommended a custodial sentence be imposed.

[30] In *S v Bogaards* 2013 (1) SACR 1 (CC) para 41 the Constitutional Court held that an appellate court's power to interfere with sentences imposed by lower courts was as follows:

'It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

[31] This court has held that it would interfere with sentences imposed by a trial court only where the degree of disparity between the sentence imposed by the trial court and the sentence this court would have imposed was such that interference was competent and required. The appellate court must be able to arrive at a definite view as to what sentence it would have imposed. It would suffice that a particular range be identified within which it would have imposed sentence.[11]

[32] This is a case where there is a sufficient degree of disparity between the sentence imposed and what this court would have imposed to justify interference. When regard is had to all the facts of the present case, the sentence of 15 years' imprisonment is so disproportionate and shocking that no reasonable court could have imposed it. The trial court appears to have placed undue weight upon the need

[11] *S v Monyane & others* 2008 (1) SACR 543 (SCA) paras 23 and 26.

to deter sexual offenders, without having proper regard to the particular facts of this case. The court a quo appears to have adopted the erroneous view that in the absence of a misdirection by the trial court it was not entitled to interfere with the sentence. Counsel for the state did not with any vigour argue the contrary.

[33] The appellant has been in prison since being sentenced on 25 March 2011. He has served a sentence in excess of three years' imprisonment. If this court had been sitting as the trial court it would not on the facts of this case have imposed an effective sentence of imprisonment which would have resulted in a period of incarceration in excess of that time. It follows that the appellant must be granted special leave to appeal in terms of s 16(1)(*b*) of the Act to this court against his sentence. Special circumstances are present in that a refusal of leave to appeal would result in a manifest denial of justice. The time served by the appellant in prison accordingly constitutes a sufficient term of imprisonment. The effect of the substituted sentence is that the appellant is not to undergo any further period of imprisonment and is entitled to his immediate release.

[34] I turn to the appeal of *Galela*. The appellant was convicted of the rape of a nine year old girl and sentenced to 17 years' imprisonment. His petition to the Western Cape High Court for leave to appeal in terms of s 309C(2) of the CPA was refused. The appellant now petitions this court for special leave to appeal against his conviction and sentence to the high court.

[35] Having considered the evidence, I am satisfied that the appellant does not have reasonable prospects of success on appeal. In addition, there are no special circumstances present which would justify the grant of special leave to appeal to the high court.

[36] The following orders are made:

In the appeal of *Hendrick Van Wyk v The State*, Case No 20273/2014

1. The appellant is granted special leave to appeal in terms of s 16(1)(*b*) of the Superior Courts Act 10 of 2013 against the sentence of imprisonment imposed by the Regional Court, Pretoria-North, confirmed on appeal by the Gauteng High Court.

2. The appeal is upheld. The order of the court a quo is set aside and substituted with the following order:

'The appeal is upheld. The sentence imposed by the trial court is set aside and the following sentence is substituted:

The appellant is sentenced to imprisonment for a period of three years five months and 28 days.

The substituted sentence is antedated to 25 March 2011.'

In the appeal of *Bonile Galela v The State*, Case No 20448/2014

1. The application for special leave to appeal in terms of s 16(1)(*b*) of the Superior Courts Act 10 of 2013, against the dismissal of the applicant's petition for leave to appeal by the Western Cape High Court in terms of s 309C of the Criminal Procedure Act 51 of 1977 is refused.

K G B SWAIN

JUDGE OF APPEAL

Ponnan JA (**Navsa ADP, Brand, Swain JJA and Mathopo AJA** concurring):

[37] I have had the benefit of reading the judgment of Swain JA, with which I am in respectful agreement. I nonetheless feel constrained to write separately to express feelings of disquiet that I experience in relation to the application of s 16(1)(*b*) of the Superior Courts Act.

[38] For the present I shall restrict my observations to the preliminary jurisdictional prerequisite of petitions for leave to appeal to a high court in terms of s

309C of the CPA. That, as Streicher JA held in *Khoasasa*, is in effect an appeal against the refusal of leave to appeal by the magistrates' court in terms of s 309B of the CPA. Prior to the introduction of s 16(1)(*b*), if the petition failed before the high court, an accused person's recourse was to apply to that court for leave to appeal against that refusal. If that application failed, a petition to this court had to follow. In either event, to succeed such a person had to satisfy the court that the envisaged appeal had reasonable prospects of success. If the petition to this court proved successful then leave was granted to the accused to appeal from the magistrates' court to the high court.

[39] In *Tonkin* (para 4), Brand JA lamented that cumbersome and wasteful procedure. In answer perhaps, s 16(1)(*b*) has done away with an application for leave to appeal to the high court against that court's refusal of a petition. The result is that once a petition is refused by the high court it is to this court that an accused must turn. And, having failed to persuade at least two judges in the high court that there are reasonable prospects of the contemplated appeal succeeding, he or she has to now (perhaps somewhat incongruously) meet the higher 'special circumstances' threshold set by s 16(1)(*b*) for this court. If this court takes the view that the higher threshold has been met then leave to appeal will be granted to the high court for it to enter into the merits of the appeal. The high court will then, no doubt, enter into the merits of the appeal in the full knowledge that this court has already taken the view that 'special circumstances' subsist. If the appeal were to fail on the merits in the high court then, as in the past, a further appeal would lie to this court. The difference though is that now even though just an appeal from a full bench of the high court, it would only lie with the special leave of this court. But, it needs to be remembered, that the higher threshold had previously been met by that accused when this court granted leave to appeal to the high court.

[40] What is more is that whilst the record of the proceedings in the magistrates court would serve before the high court when the petition is there considered (see s 309C(4) of the CPA), it does not serve before this court (SCA rule 6(5)). SCA rule 6(5)(*b*) makes plain that an application for leave to appeal shall not be accompanied by the record, although in terms of rule 6(6), the Judges considering the petition may

call for the record or portions of it. Indeed SCA rule 6(5) emphasizes that every application for leave to appeal must furnish succinctly the information necessary to enable this court to decide whether leave ought to be granted (*H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd* 1996 (2) 225 at 235H – 236C). Thus an accused who has failed to meet the much lower 'reasonable prospects of success' threshold in the high court whilst armed with the full record of the proceedings is somehow expected to thereafter persuade this court, minus that record, that 'special circumstances' are present.

[41] Moreover, the high court is not obliged to furnish reasons for declining to grant the petition. This court will thus be none the wiser as to the considerations that weighed with it. In divesting the high courts of their jurisdiction to consider applications for leave to appeal against decisions on appeal to it, an important filter has been jettisoned by the legislature. That filter has in truth been moved up the judicial hierarchy to this court. The practical consequence of that is that this court will henceforth be burdened by those applications. To be sure many of those applications will be unmeritorious and not truly deserving of this court's attention. On the other hand, there may well be a real danger that appeals which deserve to be heard are stifled because the bar has been set far too high once the petition to the high court fails. Thus in failing to properly regulate the process, the legislature may have opened the door on some worthy appeals failing to make the cut. After all, we need to remind ourselves that an accused person is doing no more at this stage than seeking to exercise a right of appeal from the magistrates' court to the high court.

[42] For now, we fortunately do not need to consider the constitutional tolerability of the statutory provision in issue. Regrettably though it would appear that s 16(1)(*b*) falls far short of the nuanced legislative enactment that Brand JA may have had in mind when he decried the procedure then in force.

V M PONNAN

JUDGE OF APPEAL

Appearances in *Hendrick Van Wyk v The State*:

For the Appellant:	L Augustyn (with her J Mojuto and F van As)
	Instructed by:
	Legal Aid South Africa, Pretoria
	Legal Aid South Africa, Bloemfontein
For the Respondent:	M Jansen van Vuuren (with her P Vorster)
	Instructed by:
	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein

Appearances in *Bonile Galela v The State*:

For the Appellant:	M Calitz
	Instructed by:
	Legal Aid Board, Cape Town
	Legal Aid Board, Bloemfontein
For the Respondent:	S Raphels
	Instructed by:
	Director of Public Prosecutions, Cape Town
	Director of Public Prosecutions, Bloemfontein