

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

High Court Petition No.: P47/2004

Magistrate's Serial No. 1/04

Case No: SHJ 8/2004

In the matter between:

**LUVUYO FUNO**

Petitioner

and

**THE STATE**

**JUDGMENT: 27 JANUARY 2005**

**GRIESEL J:**

1]This is a petition for leave to appeal that was placed before me for consideration in terms of s 309C(5)(a) of the Criminal Procedure Act 51 of 1977, as amended (the Act). Having read the papers, I have come to the conclusion that qualified leave to appeal ought to be granted, as will appear more fully below. The delay in submitting the present petition for consideration, however, is an aspect that calls for specific comment in this context.

2]The accused was convicted in the regional court at Wynberg on 11 May 2004 of attempted rape (count 1) and indecent assault (count 2). He was thereupon sentenced to six years imprisonment on count 1 and two years imprisonment on count two, the two sentences to be served concurrently. An application for leave to appeal against the convictions and sentence was

dismissed by the regional magistrate on 1 June 2004. The petition under consideration was duly served on the clerk of the court on 14 June 2004. The record of proceedings in the regional court, including a full transcript of all the evidence, bears the date stamp of the magistrate's court of 22 December 2004. Thus, a period of more than seven months elapsed since the petition was lodged until it could be finalised.

3]Section 309C(8)(b) of the Act provides that all applications contained in a petition must be disposed of 'as a matter of urgency' where the accused was sentenced (as was the present petitioner) to any form of imprisonment that was not wholly suspended. When measuring the degree of urgency, it is obviously not possible to fix an exact timeframe. However, some guidance may be obtained from the provisions of s 303 of the Act, which requires matters subject to automatic review to be submitted by the clerk of the court *within one week* after the determination of a case. In my view, the case for urgency in terms of s 309C(8)(b) is even stronger, because it concerns the position of petitioners who have been sentenced to an unsuspended period of imprisonment, whereas this is not necessarily the case in matters subject to automatic review.

4]A further indication to the same effect is found in ss 309C(4), which enjoins the clerk of the court, when receiving notice that a petition has been submitted, 'without delay' to submit to the registrar of the High Court the relevant parts of the record.

5]Against the foregoing background, a delay of more than six months clearly falls well outside the parameters envisaged by s 309C(8)(b) and is completely unacceptable.

6]It seems safe to infer that the main reason for the delay in the present matter is the fact that a full record of the evidence led at the trial was transcribed. If this is so, it was unnecessary and premature. Subsection 309C(4) lists the documents that must be submitted – ‘without delay’ – by the clerk of the court to the registrar of the High Court, namely 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.

In terms of the proviso to para (4)(c), however, ‘a copy of the judgment, which includes the reasons for conviction and sentence, shall ... suffice for the purposes of the petition’ in certain circumstances, *inter alia* ‘(i) if the accused was tried in a regional court and was legally represented at the trial’.

7]The present accused falls into that category: he was tried in a regional court and was legally represented at the trial. It was therefore unnecessary to submit the full record of the proceedings in the magistrate’s court. What have to be

submitted, in addition to the application that was refused and the magistrate's reasons for refusal of the application, is simply a copy of the judgment, which includes the reasons for conviction and sentence.

8]Clerks of the court and practitioners should be alive to these provisions, so as to avoid unnecessary waste of time and costs. More importantly, petitioners' constitutional right<sup>1</sup> 'to have their trial begin and conclude without undue delay' is less likely to be jeopardised if these requirements are scrupulously observed.

9]Turning now to the application for leave to appeal, the petitioner, as mentioned above, was charged with and convicted of attempted rape and indecent assault. Both charges relate to the same complainant and were committed on the same occasion. Prima facie, it would appear to me that a court of appeal may conclude that there had been an improper duplication of charges. I would accordingly be inclined to grant leave to appeal against the conviction, but *only* on this limited ground. With regard to sentence, I am likewise of the view that there is a reasonable prospect that another court may come to the conclusion that the sentence(s) imposed are inappropriate and justify interference on appeal.

10]The following order is issued:

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<sup>1</sup> Constitution s 35(3)(d).

- 1. Leave to appeal against his conviction and sentence is granted; provided that the appeal against conviction shall be restricted to the question whether or not there has been an improper duplication of charges.**
- 2. The registrar is requested to bring this judgment to the notice of the clerk of the regional court.**

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**B M GRIESEL**