



CONSTITUTIONAL COURT OF SOUTH AFRICA

Senwedi v The State

CCT 225/20

Date of judgment: 21 May 2021

MEDIA SUMMARY

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

On 21 May 2021 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against the applicant’s conviction and sentence in the High Court of South Africa, Northern Cape Division, Kimberley. The High Court had sentenced him to life imprisonment for murder, and had imposed a 25-year non-parole period. The issue before the Constitutional Court was the validity of that order, given that the maximum non-parole period for such a sentence was 20 years at that time.

On 2 April 2001, Mr Coetzee was shot dead in the course of an armed robbery. The applicant and two co-accused were convicted of his murder on 2 May 2002, and also of housebreaking, robbery with aggravating circumstances, and illegal possession of a firearm and ammunition. They were sentenced to life imprisonment on 14 May 2002, and it was further ordered “that accused one [applicant] and two [Mr Alfred Khonyane] not be considered for release on parole until they have each served at least 25 years of their life imprisonment sentence”.

The applicant attempted to obtain leave to appeal, but was unsuccessful. During January 2017, the applicant was informed by a fellow inmate of the possibility of an application for reconsideration of his conviction and sentence pursuant to section 17(2)(f) of the Superior Courts Act 10 of 2013. The applicant lodged such an application with the Supreme Court of Appeal, but was informed by the Registrar that the application could not be accepted, as the original application was dismissed on 26 January 2009, before the Act came into operation in August 2013.

The applicant then sought leave to appeal to the Constitutional Court in order to remedy the alleged infringement of his constitutional rights by the Supreme Court of Appeal in refusing to entertain the application for reconsideration. In this regard, the applicant submitted that his right to equal protection under the law was infringed, as well as his right to access to court and his right to appeal to, or review by, a higher court. In the alternative, the applicant submitted that the imposition of a non-parole period of 25 years’ imprisonment prior to the enactment of section 276B of the Criminal Procedure Act 51 of 1977 (the CPA) was an infringement of his

constitutional rights. Specifically, it was a violation of his right not to be deprived of freedom arbitrarily and without just cause, and his right to benefit from the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

In a unanimous judgment penned by Majiedt J, the Constitutional Court held that the main ground of appeal was devoid of merit. The Superior Courts Act does not have retrospective application, so the Supreme Court of Appeal was right to dismiss the applicant's application for reconsideration.

However, the Court held that the alternative ground of appeal did have merit. Section 276B of the CPA allows for a non-parole period of 25 years, but only came into operation on 1 October 2004 – after the applicant was convicted and sentenced, and also after he committed his crime. The Court noted that a non-parole period constitutes an increased sentence, and cannot be imposed retrospectively. Consequently, the High Court had fatally misdirected itself in fixing a non-parole period of 25 years. At the time of sentencing, individuals serving life sentences were required to serve a minimum period of 20 years' imprisonment before they became eligible for parole.

In addition, the Court held that when a sentencing court considers ordering a non-parole period, it must afford the parties an opportunity to address that issue. The High Court failed to do this, which is also a fatal misdirection, but it becomes academic in view of the first fatal misdirection that requires a setting aside of that part of the order.

In the result, the Court granted leave to appeal and held that the part of the High Court's order that imposed a non-parole period of 25 years in respect of the applicant should be set aside. The Court also directed the Registrar to bring this judgment to the attention of the erstwhile accused two, Mr Alfred Khonyane, who is in a similar position to that of the applicant but was not party to this application.