IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT _ ___/2010

SCA 585/2009

NGHG 37771/2008

In the matter between:

PAUL FRANCIOUS VAN VUREN Applicant

And

MINISTER OF CORRECTIONAL SERVICES 1st Respondent
MINISTER OF CONSTITUTIONAL DEVELOPMENT 2nd Respondent
MINISTER OF JUSTICE 3rd Respondent
COMMISSIONER OF CORRECTIONAL SERVICES 4th Respondent
CHAIRPERSON, NATIONAL COUNCIL FOR CORRECTIONAL SERVICES 5th Respondent
CHAIRPERSON, CSPB PRETORIA CENTRAL CC 6th Respondent
CHAIRPERSON, CMC PRETORIA CENTRAL CC 7th Respondent

HEADS OF ARGUMENT

Condonation

1. It is respectfully submitted that condonation be granted as:

    1. The application raises a constitutional issue;

    2. Reasonable prospects of success exists;

    3. The degree of non-compliance is slight;

    4. The matter served before both the High Court and the Supreme Court of Appeal already;

    5. The applicant is currently incarcerated and has been for the past almost eighteen years. He has no income, no legal assistance and limited opportunities for research at prison.

    See: *Veldman v Director of Public Prosecutions* CCT 19/05, decided on 5 December 2005 at paragraphs 7 to 11

    ***Mabaso v Law Society, Northern Provinces and Another* 2005 (2) SA 117 (CC) at paragraphs 19 to 20**

Legal position

2. According to the respondents, during the period between August 1987 and March 1994 – when the crimes were committed - the minimum detention policy applied to life imprisoned prisoners was ten years but placement happened only in exceptional cases before fifteen years. The respondents averred that the policy of a ten year minimum detention period was amended to a twenty year non-parole period during 1994.

See: Founding Affidavit (original application) paragraph 20 on page 20

Annexure B (original application) page 56

Respondents' Answering Affidavit (original application) paragraph 2.2.1 on page 409

3. In August 1996, the Department of Correctional Services published a release policy proposal stating that a twenty year minimum detention policy was being considered. In 1997 a law was introduced revising section 65(5) and 5(6) of the 1959 Act stipulating that the release of prisoners sentenced prior to 12 December 1997 were to be governed by the law and policies operational at the time(i.e. prior to 1997).

See: Government Gazette No. 17386 of 30 August 1996 issued by Notice 1222

***S v Bull and Another; S v Chavulla and Others* 2002 (1) SA 535 (SCA) at paragraph 23**

Parole and Correctional Supervision Amendment Act 87 of 1997

Government Gazette No. 18503 dated 12 December 1997

4. The twenty year minimum detention policy is presently contained in subsection 136(3)(a) of Act 111 which came into operation on 1 October 2004. Section 136 reads as follows:

"*(1) Any person serving a sentence of imprisonment immediately before the commencement of chapters IV, V and VII is subject to the provisions of the Correctional Services Act 8 of 1959 relating to his or her placement under community corrections and has to be considered for such release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those chapters.*

(2) When considering the release and placement of a prisoner who is serving a determined sentence of imprisonment as contemplated in subsection (1) such prisoner must be allocated the maximum number of credits in terms of section 22(a) of the Correctional Services Act 59 [Act No. 8 of 1959].

(3)(a) Any prisoner serving a sentence of life imprisonment immediately before the commencement of chapters IV, VI and VII is entitled to be considered for day parole and parole after he or she has served 20 years of the sentence....

See: Section 136 of Act 111 of 1998

5. Section 35(3)(n) of the Constitution provides:

"*Every accused person has a right to a fair trial, which includes the right to the benefit of 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."*

It is not in dispute that when the crimes were committed, the minimum detention period was ten years. By the time the applicant was sentenced to life imprisonment in 2000, the minimum detention period had been increased by one hundred percent to twenty years. It is respectfully submitted that 'punishment' includes minimum detention periods, similar to minimum sentences. It is respectfully submitted that section 35 is sufficiently broad to apply in this instance.

See: *Veldman v Director of Public Prosecution* (supra) at paragraphs 18 to 25

***S v Willemse* 1999 (1) SACR 450 (C) at 452 to 454**

6. The concept of substantive fairness encompasses the notion of the benefit not to be subjected to an increase in punishment not applicable at the time of committing the crime. The increased punishment undermines the rule of law and violates applicant's right to a fair trial under section 35(3)(n) of the Constitution.

See: *Veldman v Director of Public Prosecution* (supra) at paragraphs 60 and 77

7. It is conceded that the applicant does not have a right to parole, but does have a right to be considered for parole when eligible. The applicant also has a legally valid interest in the certainty that his sentence will be dealt with in terms of the applicable law and policy at the time of his plea. The element of fairness should prevent variation of punishment to the substantive disadvantage of an accused person.

"*Penal risk should be upheld consistently throughout the trial..."* according to Mr Justice Mokgoro in the *Veldman*-case.

See: *Veldman v Director of Public Prosecution* (supra) at paragraphs 37, 39 and 60

8. Section 136(3)(a) applies the twenty year minimum detention period retrospectively irrespective of when, prior to 1 October 2004, an offender was sentenced. It does not take into account the policies in place at the time of committing the crime resulting in a violation of applicant's right to a fair trial. The fair trial idea extends beyond the grounds listed in section 35(3) of the Constitution.

See: *Veldman v Director of Public Prosecution* (supra) at paragraphs 22 to 25

***S v Zuma and Others* 1995 (2) SA 642 (CC) at paragraph 16**

***S v Dzukuda and Others; S v Tshilo* 2000 (4) SA 1078 CC at paragraph 9**

9. Even a procedural law may not apply retrospectively if it would adversely affect an applicant's substantive rights. Parole may be an administrative and/or procedural matter, but it clearly affects the time an accused has to remain incarcerated.

See: *Veldman v Director of Public Prosecution* (supra) at paragraph 34

***S v John* 2003 (2) SACR 499 (C) at paragraphs 28 to 29**

***Weaver v Graham, Governor of Florida* 450 US 24 (1981) at 30**

10. Criminal trials should be conducted in accordance with open-ended notions of fairness and justice and should avoid narrow approaches. This Honourable

Court decided in the *Sanderson*-case that section 35 of the Constitution protects both trial and non-trial related interests of an accused.

See: *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) at paragraphs 20 to 24

11. It is respectfully submitted that the applicant has a reasonable prospect of success on appeal

Applicant