



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 215/17

In the matter between:

**HYDEN GODFREY SHIPALANA**

Applicant

and

**THE STATE**

Respondent

**Neutral citation:** *Shipalana v S* [2019] ZACC 20

**Coram:** Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J

**Judgment:** Froneman J (unanimous)

**Decided on:** 17 May 2019

**Summary:** Application for leave to appeal — sentence and conviction — common purpose — interests of justice

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**ORDER**

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On appeal from the High Court of South Africa, Circuit Local Division for the Northern Circuit District, Tzaneen:

1. Condonation is granted.
2. The application for leave to appeal is dismissed.

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## JUDGMENT

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FRONEMAN J (Mogoeng CJ, Cameron J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Nicholls AJ and Theron J concurring):

[1] This is an application for leave to appeal against the conviction of the applicant, Mr Shipalana, on charges of murder and kidnapping, as well as against the sentences imposed in respect of these convictions. It is a straightforward matter that would in the normal course have been dismissed on the ground that it sought to overturn factual findings of the trial court, which is not a ground for this Court to exercise its jurisdiction. And that is indeed the eventual outcome, but it has taken a while longer than usual to get there.

[2] The reason is that this Court's jurisdiction in respect of the application of the common purpose doctrine in criminal matters has come under renewed scrutiny.<sup>1</sup> Because of this, the precaution was taken to call for written argument on whether the Court has jurisdiction to hear the matter.

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<sup>1</sup> *Jacobs v S* [2019] ZACC 4 at paras 1-3. This Court was inconclusive on whether the misapplication of the doctrine of common purpose raises a constitutional issue or not. This Court explained as follows:

“The first judgment in this matter was written by Goliath AJ and was concurred in by Cachalia AJ, Froneman J, Khampepe J and Madlanga J. Froneman J wrote a judgment concurring in the first judgment. Cachalia AJ and Madlanga J concurred in the judgment penned by Froneman J. The effect of these two judgments is that five members of the Court did not grant leave to appeal against the judgment and order of the Full Court.

The second judgment in this matter was written by Theron J and was concurred in by Zondo DCJ, Dlodlo AJ, Jafta J and Petse AJ. Zondo DCJ wrote a judgment concurring in the second judgment. Dlodlo AJ, Jafta J, Petse AJ and Theron J concurred in the judgment of Zondo DCJ. The effect of these two judgments is that five members of the Court held that leave to appeal should be granted and the appeal must succeed to the extent set out in paragraph 86 of the judgment penned by Theron J.

There is thus no majority decision of this Court. The result is that the judgment and order of the Full Court stands.”

[3] The applicant filed written submissions to the effect that (1) the trial court failed to apply the doctrine of common purpose properly; (2) in any event the doctrine may be unconstitutional; (3) there was insufficient evidence to support a finding that his guilt had been proved beyond reasonable doubt; and (4) the trial court had interpreted the facts wrongly, resulting in a violation of his right to be presumed innocent.

[4] On the facts here, there can be no question of the misapplication of the doctrine of common purpose, even if that may amount to a constitutional issue. The deceased was abducted and assaulted over a long period of time and the applicant was present when the various assaults that led to the deceased's death took place. He participated in trying to hide the deceased's body from being found, after these assaults. The trial Judge rejected his evidence as not credible.

[5] There is an additional matter. The application for leave was late and condonation was sought. This Court has been lenient in relation to late applications for leave to appeal by applicants acting in person, who are incarcerated, as is the case here. The time might come where we will have to look more closely at these, but in this case I think it is better to grant condonation and decide the matter solely on the substantive merits.

[6] Accordingly, leave to appeal must be refused on the ground that it is not in the interests of justice to grant leave in these circumstances.

*Order*

[7] In the result the following order is made:

1. Condonation is granted.
2. The application for leave to appeal is dismissed.