CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 115/09
[2010] ZACC 8

In the matter between:

SKHUMBUZO JEROME MTHEMBU Applicant

and

THE STATE Respondent

Decided on : 25 March 2010

JUDGMENT

THE COURT:

The applicant seeks leave to appeal to this Court against his convictions of armed robbery, illegal possession of fire-arms and illegal possession of ammunition, as well as against the effective sentence of 15 years' imprisonment in respect of these offences. The applicant was initially convicted and sentenced on 3 October 2001 in the Vereeniging Regional Court. On appeal to the North Gauteng High Court, Pretoria, on 7 October 2002, the convictions and sentence were confirmed and leave to appeal was

refused (Moseneke J; Van der Walt J concurring). The applicant then petitioned the Supreme Court of Appeal but further leave to appeal was refused by that court on 25 February 2003. The applicant was out on bail during the appeal process and should have reported to the Clerk of the Court, Vereeniging, to serve his sentence when leave to appeal was refused. He did not do so. He started serving his sentence only when he was apprehended at his home on 3 April 2009, more than six years after refusal of his petition to the Supreme Court of Appeal. Once imprisoned, the applicant launched the present application.

The application for leave to appeal against the convictions raises no constitutional issue and has no merit. Nothing further need be said about that.

The applicant contends that his arrest in order to start serving his sentence more than six years after the refusal of his application for leave to appeal to the Supreme Court of Appeal infringed his right to freedom and security of the person under the Constitution.[1] He seeks to use this alleged infringement as the constitutional peg on which to hang the

[1] Section 12 provides:

> "(1) Everyone has the right to freedom and security of the person, which includes the right—
> (a) not to be deprived of freedom arbitrarily or without just cause;
> (b) not to be detained without trial;
> (c) to be free from all forms of violence from either public or private sources;
> (d) not to be tortured in any way; and
> (e) not to be treated or punished in a cruel, inhuman or degrading way.
>
> (2) Everyone has the right to bodily and psychological integrity, which includes the right—
> (a) to make decisions concerning reproduction;
> (b) to security in and control over their body; and
> (c) not to be subjected to medical or scientific experiments without their informed consent."

argument that he should be granted leave to appeal to this Court against the sentences imposed. He claims that he "cannot at the age of 60 be expected to serve a sentence [he] could have served and completed [within] five years", and therefore contends that he should receive a wholly suspended or non-custodial term.

The contention is ingenious but deeply problematic. Convicted persons out on bail pending appeal or application for leave to appeal are under an obligation to ascertain the outcome of their appeal processes and to present themselves to serve their sentences if the appeal processes fail. This obligation in fact formed part of the applicant's bail conditions. The applicant was legally represented throughout those processes. He is an educated person who held a senior position as a director of a prominent football club. His allegation that for six years he was unaware of the outcome of the application for leave to appeal despite repeated efforts to ascertain the outcome cannot be accepted.

While considering the application, the Court issued directions requesting information from the National Prosecuting Authority and various court officials that processed the applicant's attempts to appeal while on bail. From affidavits filed on behalf of the National Prosecuting Authority it is clear that the dismissal of the application to the Supreme Court of Appeal was known to the relevant administrative officials and that a copy of the order was forwarded to the Clerk of the Court at the Vereeniging Magistrates' Court soon after the application for leave to appeal was dismissed. This means there is no reasonable excuse for the applicant not to have ascertained for himself the true

position regarding the outcome of the application for leave to appeal. Different considerations may conceivably apply when a person is not legally represented, indigent and uneducated; this is certainly not such a case.

What is of concern, however, is that it appears that this is by no means an isolated case. The National Prosecuting Authority records in its response to the Court's directions that it does not have the capacity to monitor all criminal appeals until a convicted person, out on bail, has been arrested. Once the prosecution becomes aware of the outcome of an appeal it informs the clerk of the court where the criminal case originated from, of the outcome. Thereafter it becomes the responsibility of that court to issue a warrant of arrest and for the South African Police Service (SAPS) to effect the arrest in order for the convicted person to be committed to prison.

In the present case the clerk of the Magistrates' Court, has been singularly unhelpful in explaining why it took more than six years to arrest the applicant. This is an unsatisfactory situation which should be investigated and rectified by the National Prosecution Authority, court administration services and the SAPS.

A delay in the execution of a sentence not only affects the accused but also affects the victims of the crimes and undermines the credibility of the criminal justice system. It is imperative that once a sentence is imposed it must be executed as soon as reasonably possible and the court order must be complied with promptly.

The application for leave to appeal must be dismissed because it bears no prospects of success.

Order

The following order is made:

a. The application is dismissed.

b. The Registrar is directed to serve copies of this judgment on:

(i) the applicant and his attorneys of record;

(ii) the National Prosecuting Authority;

(iii) the Court Manager, Vereeniging; and

(iv) the National Commissioner of Police.

Ngcobo CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J.