

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 170/18
CASE NUMBER ~~CC-170/18~~

In the matter between:-

KHATHUTSHELO OUPA MAKHONHA Applicant

And

THE STATE Respondent



APPLICANT'S SUBMISSIONS

INTRODUCTION

1. The Court referred this application for leave to appeal to the Johannesburg Bar Council for the purposes of appointing counsel to assist the applicant in this matter.
2. Counsel were requested to assist pro bono in this matter on 4 October 2018 but were not advised that the appointment by the Bar Council

constituted the formal brief. Confirmation of this only occurred on 21 November 2018.

3. This Court was obviously made aware of the appointment of counsel by the Bar Council because the application was submitted to counsel by a registrar of this Court on 19 November 2018.
4. In making enquiries as to the status of the matter on 20 November 2018, a Mr Makgakga confirmed:-
 - 4.1. There was no set down date;
 - 4.2. The Respondent had not yet filed opposing papers; and
 - 4.3. The due date for our heads of argument will be communicated to us in due course.
5. On 28 November 2018, a clerk to the senior registrar, Magda Visagie, forwarded the Directions of the Chief Justice (dated 14 November 2018) to counsel.
6. As more fully discussed below, the lack of information:-

- 6.1. in the application itself;
- 6.2. the Respondent's opposing papers;
- 6.3. relevant information surrounding the prosecution of the applicant in the present matter, details of the present offence and conviction, details of his previous conviction for murder and robbery and related charges, his SAP69 and his committal warrant in the present matter;
- 6.4. the circumstances surrounding the applicant's matter (whether an application or an appeal) being struck off the roll by the Supreme Court of Appeal;

severely hampers counsel's ability to properly consider the matter (in order to do it justice) and, thus, renders these submissions provisional.

THE APPLICATION FOR LEAVE

7. The applicant was convicted in the Regional Court Sibasa after he pleaded guilty on one count of contravention of section 36 of the General Law Amendment Act 62 of 1955 (section 36) and sentenced to 15 years imprisonment which was endorsed as non-parolable, on a date unknown.

8. On 23 September 2008 the applicant's appeal to the High Court of South Africa Venda Provincial Division, against this sentence was dismissed. Thereafter he then approached the Supreme Court of Appeal which application was struck off the roll on 3 February 2011. He resultantly turned to this Court for leave.

THE DIRECTIONS OF THE CHIEF JUSTICE

THE PAROLE ISSUE

9. The issues raised by the Chief Justice in (a) and (b) will be dealt with together.
10. During sentencing the magistrate in the Court a quo made the following comment: "You must never be released on parole".
 - 10.1. It is unclear whether, in this regard, the magistrate intended, and did in fact make an order in terms of section 276B(1) of the Criminal Procedure Act, 1977.

- 10.2. In the absence of the J15 (charge sheet) and the warrant committing the applicant to jail, it is unknown what endorsement, if any, was made by the magistrate.
11. Should the magistrate have endorsed the said warrant to the effect that the applicant can never be released on parole, then such endorsement is patently irregular and contrary to the provisions of section 276B(1). A non-parolable endorsement shall not exceed two thirds of the main sentence and for this reason alone the endorsement falls to be set aside.
12. Additionally, it would appear having regard to the judgment on sentence, that there was no enquiry held to determine whether the magistrate should invoke the provisions of section 276B(1). In the absence of such enquiry, a sentencing Court cannot invoke the provisions of section 276B(1). See *Jimmale*¹.
13. In support of the above, the applicant states in his founding papers that he was given no opportunity to address the magistrate on this issue.²

¹ 2016 (2) SACR 691 (CC).

² See par 9.11 of the founding affidavit.

14. This Court in *Jimmale*³ *supra* dealt extensively with this very issue and based on the reasoning in this judgment, the parole order of the magistrate (if indeed he made such an order) falls to be set aside.

THE CONSECUTIVE/CONCURRENT ISSUE

15. It is difficult to properly consider and formulate a helpful response to this issue due to the lack of information.

16. The following information is lacking:-

- 16.1. Nothing is known about the section 36 offence. All that is known is that the applicant was arrested on 16 September 2003 in Gcwala (accepting his arrest relates to this offence), there were four accused and that the vehicle involved was a Toyota Tazz.

- 16.2. It is not known whether there was a main charge and whether the applicant pleaded guilty to a competent verdict (in this case section 36).

³ 2016 (2) SACR 691 (CC).

- 16.3. It is unknown whether the section 36 offence relates to the murder and robbery offences for which he had previously been convicted or whether it is an independent offence;
- 16.4. If the section 36 offence is an independent offence then it is important to determine whether it was committed before or after the murder and robbery offences for which the applicant was sentenced to life imprisonment.
- 16.5. The applicant was brought to Court as a sentenced prisoner so the section 36 offence was unlikely to have been committed after he was sentenced to life imprisonment. The context of the section 36 offence in relation to the murder and robbery offences is unknown. Such information may be important when assessing why the magistrate ordered the present sentence to run consecutively with his life sentence.
- 16.6. The question as to why the State failed to prosecute the applicant for all offences at the same time becomes an important issue to consider. A piecemeal disposal of criminal trials offends the requirement of legal certainty and finality, which is a very prominent

consideration in criminal law⁴. From an accused point of view, the consolidation of charges and simultaneous disposal thereof allows for the advantage of enabling an accused to appeal against all his convictions and sentences at the same time.

17. Notwithstanding the aforementioned difficulties, from a sentencing perspective, a life sentence means exactly that. The accused must be permanently removed from society for the remainder of his/her life. This, however, does not negate the statutory machinery of Correctional Services to allow deserving prisoners to be released on parole, even those prisoners who have been sentenced for murder and robbery.

18. In addition to the aforesaid, the provisions of Section 39(2) of the Correctional Services Act 111 of 1998; which states that a sentence of life imprisonment should run concurrently with all additional finite sentences that may be imposed on the accused should be considered with the above

⁴ *S v Mathebule and Another* 1978 (2) SA 607 AD.

submission. This approach was confirmed in the case of *Magezi v The State, and others*⁵.

19. On this basis alone, the magistrate seemingly erred in ordering that the applicant's 15 year sentence for the section 36 conviction should run consecutively with his life sentence. It makes no logical sense to impose such a condition given the fact that he is already serving a life sentence.
20. However, as already stated above, a comprehensive consideration of this issue is thwarted by the lack of relevant information.

CONSIDERATION OF THE APPLICATION AT THIS STAGE

21. Without knowing the reasons and circumstances why the applicant's matter was struck off by the Supreme Court of Appeal, this issue also cannot properly be ventilated.

⁵ (247/13) [2013] ZASCA 200 (02 December 2013) para 7 p4 and further confirmed in the following cases: *Mokgale and Another v S* (A739/2016) [2017] ZAGPPHC 476 (11 August 2017) para 22 p8, *Olivier v S* (A517/16) [2018] ZAWCHC 78 (19 June 2018) para 27 p15-16.

22. On the limited issue relating to parole, it is submitted that this Court may entertain the application, in the interests of justice, on the basis of the reasons set out in *Jimmale*⁶.

ADDITIONAL CONCERNS

23. The applicant was unrepresented when preparing and submitting his application for leave to appeal to this Court. He has stated that he is a layman regarding the law.
24. Having regard to his application for leave to appeal and the available information, additional concerns arise which we believe should also be considered and addressed.
 - 24.1. The sentence of 15 years for the conviction of the section 36 offence is on the face of it shockingly inappropriate. No discernible reason or justification emerges from the available information and records why the Court's maximum sentencing jurisdiction of 15 years was necessary or reasonable.

⁶ See par [10] of the judgment.

- 24.2. A further concern, which goes to the heart of the conviction itself, is how two persons (or more) could have simultaneously possessed the vehicle. The basis for and circumstances surrounding the guilty pleas of the two accused must be obtained to consider this issue.
- 24.3. It is also unknown whether the applicant's murder and robbery convictions could properly be regarded as previous convictions in the present matter. No information concerning the relevant facts surrounding the murder and robbery convictions is available. If these convictions could be regarded as previous convictions in the present matter, a further concern arises as to whether they could be regarded as such when they are subject to an appeal.

DATED at JOHANNESBURG on this the 7th day of DECEMBER 2018



ESTELLE KILIAN SC
CLIFF MCKELVEY
PALESA MAFISA
Applicant's counsel
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Sandton
7 December 2018