

---

Explanatory Note

---

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

Dr Allan Boesak, who had occupied a prominent position in church circles and in the anti-apartheid struggle, was convicted on one count of fraud and three counts of theft in the Cape High Court and sentenced to six years imprisonment. The fraud count and the first theft count related to R259 161 donated by an American musician to a children's trust fund controlled by Dr Boesak. The third count related to amounts totalling R147 160 he had taken for himself from another fund he controlled. On appeal the Supreme Court of Appeal (SCA) set aside one of the theft counts, altered the amount involved in another theft count and reduced the sentence to three years imprisonment.

Dr Boesak then applied for special leave to appeal from the SCA to the Constitutional Court, alleging that his constitutional rights had been infringed. The Court decided to invite argument on the application as it raised important questions of principle that had not previously been considered. The Constitutional Court is the highest court in constitutional matters while the SCA is the highest court of appeal except in constitutional matters. The threshold question was therefore whether the case indeed concerned constitutional matters. This necessitated determining what the term "constitutional matters" means. The Constitution contains no definition, leaving the final decision whether a matter is a constitutional matter with the Court. It was also important to harmonise the respective roles of the two courts.

Justice Langa, Deputy President of the Constitutional Court, writing for a unanimous court, drew some guidelines in relation to criminal appeals to the Constitutional Court from the SCA. If the SCA develops, or fails to develop, or applies a common-law rule inconsistently with some right under or principle of the Constitution, that may be a constitutional matter. But a challenge to a decision of the SCA solely on the basis that it is wrong on the facts is not a constitutional matter. To hold otherwise would be to make all criminal cases constitutional matters. The Court then applied these guidelines to the proposed appeal.

On the fraud and first theft counts the SCA relied on a letter - purportedly written and signed by the Dr Boesak, found on his premises and carrying the letterhead of his organisation - to the donor. It acknowledging receipt of the money and advised that it had been deposited into the account of the beneficiary. His counsel argued that the authenticity of the letter had not been proved and therefore the SCA's reliance on it violated his constitutional right to be presumed innocent. This, the Court held, was not a constitutional matter. Properly analysed it depended solely on an evaluation of the facts.

There was also a challenge under the right of an accused person to remain silent at trial. Defence counsel had not directly challenged the authenticity of the letter and Dr Boesak had not testified in his defence. Counsel for Dr Boesak argued that the SCA had drawn an adverse inference from

each of these circumstances and in so doing had infringed the right to silence. The Court concluded that the SCA's approach to the authenticity of the letter had gone to the weight of the evidence, including the failure of the defence to challenge the authenticity, and had not infringed the right to remain silent at trial.

As regards the objection to the weight given by the SCA's reasoning concerning the failure to testify, the Court concluded that it was essentially a factual matter. It reaffirmed that the right to remain silent does not mean that there are no consequences attaching to an election to remain silent at trial. If an accused person chooses to remain silent in the face of evidence calling for an answer, the court may (depending on the weight of the evidence) be entitled to conclude that the evidence is sufficient to prove guilt beyond reasonable doubt. This is what the SCA had done here. Other criticisms of the SCA judgment were found not to be constitutional issues.

In relation to the third charge it was argued that because the evidence did not support the SCA's conclusion, the right to be presumed innocent as well as the constitutional right not to be deprived of freedom without just cause had been infringed. The Court found that this was no more than an attempt to clothe a challenge to the factual findings of the SCA in constitutional garb. As regards the just cause argument, the Court held that the crimes of which Dr Boesak had been duly convicted are universally accepted as just cause for a deprivation of liberty.

As there were no prospects of success the application for leave to appeal was refused.