

Abduraghman Thebus and Another v The State

Constitutional Court – CCT 36/02

Hearing date: 20 February 2003

Judgment date: 28 August 2003

Media Summary

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.

Mr Thebus and Mr Adams (the appellants) were convicted and sentenced by the Cape High Court on a count of murder and two counts of attempted murder. They had been part of a protesting group involved in a shoot-out with a reputed drug dealer in Ocean View, Cape Town. As a result of the cross-fire, a young girl was killed and two others wounded. The shots which killed the girl and wounded the other persons came from the group of which first and second appellant were part. However, there was no direct evidence that any of the appellants fired the shots. Appellants were convicted on the basis of the common law doctrine of common purpose and each was sentenced to a period of eight years imprisonment suspended for five years on certain conditions.

Appellants only raised alibi defences at trial some two years after their arrest. The first appellant testified in support of his defence and called two witnesses. The trial court rejected the alibi evidence as untrustworthy and in doing so took into account the late disclosure of the alibi. The SCA confirmed these findings, upheld the state appeal against sentence, and sentenced each appellant to fifteen years imprisonment.

Appellants approached the Constitutional Court on two issues: firstly, whether the SCA acted unconstitutionally in failing to develop the doctrine of common purpose, thereby violating their rights to dignity and freedom of the person as well as their right to a fair trial, which includes the right to be presumed innocent; secondly, whether the first appellant's right to silence contained in section 35(1)(a) of the Constitution has been infringed by the negative inference drawn by reason of the late disclosure of his alibi defence.

For a unanimous court (on the doctrine of common purpose challenge), Moseneke J endorsing the principles set out in *S v Mgedezi*, held that the common law doctrine of common purpose is constitutional and does not, in this case, require to be developed as commanded by section 39(2) of the Constitution. It did not violate the right to dignity and did not amount to an arbitrary deprivation of freedom. The right to be presumed innocent had not been violated because the doctrine does not place an onus upon the accused and does not presume his or her guilt. Under the doctrine of common purpose, the state is required to prove beyond reasonable doubt, all the elements of the crimes charged.

On the right to pre-trial silence the Court was divided. Moseneke J, with Chaskalson CJ and Madala J concurring, held that the right to silence is an integral part of the right to a fair trial. It was further held that it is impermissible for a court to draw an inference of guilt from the silence of the accused. However, where appropriate,

looking at the evidence as a whole, a court may draw a negative inference from the late disclosure of an alibi defence. This is a justifiable limitation of the right to silence. Consequently, it is permissible to cross-examine an accused person on why he or she chose to remain silent and to have regard to his or her response when making a credibility finding.

The majority of the SCA had improperly made an inference of guilt from the pre-trial silence of the first appellant. However, aside the misdirection, his trial had been substantively fair as required by section 35(3) of the Constitution as the evidence had established his guilt beyond reasonable doubt.

The court dismissed the appeals.

Goldstone J and O'Regan J (Ackermann J and Mokgoro J concurring) disagree with Moseneke J's reasons for refusing the appeal in relation to the right to remain silent. They find that the Supreme Court of Appeal drew an adverse inference from the appellant's failure to disclose his alibi, and breached his constitutional right to remain silent.

They hold that the right to silence has many aspects so a court must identify the underlying purpose of the relevant aspect of the right to silence before considering whether it has been infringed. In the present case they find that the right to silence prohibits the drawing of an adverse inference from the failure of the accused to disclose an alibi before the trial commences for two reasons. First, a rule against the drawing of adverse inferences from pre-trial silence protects arrested persons from improper questioning and procedures by the police. Secondly, once an arrested person has been informed of the right to remain silent and implicitly that she or he will not be penalised for exercising this right, it is unfair subsequently to use that silence to discredit the person.

They hold that were an appropriate rule of law to be adopted tailoring the warning so that accused persons are properly informed that if they fail to disclose a defence or material fact prior to their trial, that failure may be used against them in the trial, it would pass constitutional muster.

Yacoob J, in a separate judgment concurring with the order made by the court holds that:

- (a) The need to ensure a fair criminal trial is key to determining whether the right to silence has been infringed. The right is infringed only if it is implicated in a way that renders the trial unfair.
- (b) Cross examination of witnesses concerning the reason why an alibi was not disclosed infringes the right to silence only if it renders the trial unfair.
- (c) The responses thus obtained may be taken into account by a judicial officer in conjunction with the failure to disclose an alibi in the process of making an inference provided that the way in which the inference is made and the drawing of the inference itself does not render the trial unfair.

- (d) Drawing an inference as to guilt or credibility solely from the silence of the accused would render a trial unfair.
- (e) The inference drawn by the SCA was entirely fair.

In a judgment concurred in by Langa DCJ, Ngcobo J found that the first appellant's right to pre-trial silence was not implicated in the matter because the first appellant had been warned of his right to remain silent but instead chose to make an exculpatory statement which was inconsistent with his alibi. He accordingly found it unnecessary to decide the question whether failing to disclose an alibi defence to the police can ever attract an adverse inference.