



CONSTITUTIONAL COURT OF SOUTH AFRICA

Jacobus Bogaards v The State

Case CCT 120/11

Date of Hearing: 3 May 2012

Date of Judgment: 28 September 2012

MEDIA SUMMARY

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

On Friday, 28 September 2012, the Constitutional Court handed down judgment on an appeal against a judgment of the Supreme Court of Appeal brought by Mr Jacobus Bogaards. The matter stems from the escape from custody of Mr Gouws and Mr Van Rooyen, who were arrested and charged with murder, sabotage and several counts of terrorism under the Internal Security Act, in what is known as the ‘Boeremag trial’. During their trial, these two persons escaped.

The applicant was charged and convicted in Regional Court (trial court), for contravening the Protection of Constitutional Democracy against Terrorist and Related Activities Act (Terrorism Act) for harbouring and concealing the escaped trialists and failing to report their escape. He was also charged in the alternative with contravening the Correctional Services Act (CSA) which criminalises the harbouring or concealing of escaped prisoners. He was sentenced to an effective custodial sentence of three years, under the Terrorism Act. The Supreme Court of Appeal set aside the conviction and sentence and convicted the applicant on the alternative charge, and imposed a sentence of five years’ imprisonment.

On appeal to the Constitutional Court, the applicant challenged his conviction on the basis that prisoners may only be lawfully incarcerated in terms of a valid warrant of detention. Since the escapees were held in terms of a court order, not a valid warrant, the applicant argued that they were held unlawfully and could not be considered to be “prisoners” as required by the CSA. He contended that his conviction was therefore unlawful.

The applicant contended that his right to a fair trial under section 35(3)(o) of the Constitution, was violated when the Supreme Court of Appeal increased the sentence without notifying the applicant of the possible increase in sentence. He argued that the SCA ought to have given him notice of the possible increase in sentence so that he could make submissions on sentence.

The Constitutional Court unanimously found that the escapees were rightfully considered to be “prisoners” under the CSA, and therefore that the applicant’s appeal in respect of his conviction under section 115(e) of the CSA must fail.

Regarding sentence, the majority judgment, held that the requirement of fairness that underpins the right to a fair trial under section 35(3) of the Constitution demands that an accused person be informed if an appellate court contemplates imposing a higher sentence so that he or she has the opportunity to make pointed submissions on why the sentence should not be increased. Accordingly, the majority held that the Supreme Court of Appeal erred in imposing an increased custodial sentence without giving the applicant notice that it was considering doing so.

The majority held that this lack of any formal notice requirement, at common law, fell short of what is required in the constitutional era and constituted an infringement of the right of appeal under section 35(3)(o) of the Constitution. Thus, the Court was obliged to develop the common law and elevate the notice practice to a requirement which gives effect to the right of appeal in terms of section 35(3)(o).

The majority upheld the appeal against the sentence of five years’ imprisonment and remitted the matter to the trial court for it to impose an appropriate sentence.

The minority judgment disagreed that the appeal against the sentence should succeed and that there was any irregularity which lead to a failure of justice. It reasoned that the question whether the applicant’s fair trial rights had been infringed was one of fact and involved a value judgment based on the established facts. It concludes that that there was no increase in sentence and breach of the applicant’s fair trial rights and, as such, the SCA was not obliged to give notice to the applicant. With regard to the development of the common law, the minority held that there were considerations militating against development. Section 35(3) guarantees the right to a fair hearing. According to the minority, this protection is wide enough to cover the complaint raised in this case. Moreover, in the view of the minority, the common law does not exist alongside the Constitution to regulate matters that are governed by the Constitution. The minority would have dismissed the appeal.