

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

S v Dodo

Case CCT 1/01

Decided on 05 April 2001

Media Summary

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

This judgment deals with the constitutionality of section 51 of Act 105 of 1997, which obliges High Courts to sentence people convicted of certain serious offences to life imprisonment unless "substantial and compelling circumstances" justify the imposition of a lesser sentence.

The Eastern Cape High Court declared the section to be constitutionally invalid on the basis that it was inconsistent with both section 35(3)(c) of the Constitution (which guarantees the right to be tried before an ordinary court) and the constitutionally required separation of powers.

In a unanimous decision written by Ackermann J, the Constitutional Court declined to confirm the order, finding the section to be constitutionally valid. In rejecting the argument that there was a violation of the separation of powers principle, the Court held that the legislature and the executive share important interests in punishments imposed by courts. Punishment does not fall within the exclusive discretion of the courts. The separation of powers is not rigid and an overlapping of functions is permissible. However, the legislature's power to prescribe sentences is not unlimited and has to be appropriately balanced with the power of the judiciary. While this balance cannot be formulated in the abstract, as a matter of principle the legislature ought not to oblige the judiciary to impose punishments inconsistent with the Constitution, and in particular with the Bill of Rights. This would happen if a provision obliged courts to pass sentences which unjustifiably violated an accused person's right either not to be sentenced to a punishment which is "cruel, inhuman or degrading" (section 12(1)(e) of the Constitution); or to a fair trial (section 35(3) of the Constitution).

A sentence would be "cruel, inhuman or degrading" if its length was grossly disproportionate, but on the interpretation recently placed on the section by the Supreme Court of Appeal in *S v Malgas*, courts can impose a lesser sentence under section 51 well before gross disproportionality is reached. The section thus does not violate section 12(1)(e) of the Constitution.

As regards the fair trial right in section 35(3)(c) of the Constitution, the Court held that a limitation would only occur if a provision materially affected the independence of courts or deprived them of an exclusively judicial function. That is not the case here.

Accordingly, the Court refused to confirm the declaration of unconstitutionality and referred the case back to the Eastern Cape High Court to be dealt with in accordance with this judgment.