

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**Donald Veldman v The Director of Public Prosecutions**

**CCT 19/05**

**Decided on 5 December 2005**

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**MEDIA SUMMARY**

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*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 5 December 2005, the Constitutional Court handed down a judgment in an application by Donald Veldman challenging the constitutionality of the imposition of a fifteen-year sentence of imprisonment upon him by the regional magistrate's court. Mokgoro J, for the majority, held that the retrospective application of legislation which came into effect after the applicant had pleaded, and which provided for an increase in the regional magistrate court's penal jurisdiction, rendered the sentence imposed by the regional magistrate court unauthorised and a violation of the rule of law, which, in turn, violated the applicant's right to a fair trial under section 35(3) of the Constitution.

The applicant and his co-accused were convicted by the regional magistrate's court on murder, kidnapping, assault, and unlawful possession of ammunition. At the time applicant committed the offences, and when he entered his plea of not guilty, the maximum penal jurisdiction of the regional court for murder under section 92(1)(a) of the Magistrates' Court Act 32 of 1944 was ten years imprisonment. After applicant had pleaded, but before he was sentenced, legislation was passed increasing the regional magistrate court's maximum penal jurisdiction for murder from ten years imprisonment to that of fifteen years. The applicant was sentenced to fifteen years imprisonment on the murder charge and additional imprisonment terms on the other convictions which were not at issue in the present application for leave to appeal. On appeal, the High Court confirmed the conviction of murder and declined to interfere with the sentence. The Supreme Court of Appeal dismissed applicant's further appeal.

Although the constitutional issue in the present case was raised for the first time in the application, the Court nevertheless granted the applicant direct appeal from the decision of the High Court in the interests of justice.

Before this Court, the applicant argued that the dismissal of his appeal and confirmation of the sentence amounted to an infringement of his constitutional right to a fair trial, which entitled him “to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing,” afforded by section 35(3)(n) of the Constitution. The state opposed the application on the basis that a change in a court’s penal jurisdiction is not the same as a change to a prescribed punishment as it is merely a procedural change and therefore may apply retrospectively to the time the offence in issue was committed.

Writing for the majority, Mokgoro J held that the fact that section 92(1)(a) regulates a court’s procedure is not determinative of its retrospective application. A procedural law may not apply retrospectively if the application would adversely affect an applicant’s substantive rights. In this case, the retrospective application of the amendment to section 92(1)(a) did adversely affect applicant’s rights because although he did not have a vested right to a particular sentence, he did have a legal interest in the certainty that his sentence would not exceed the maximum penal jurisdiction of the trial court in terms of the applicable law at the time of plea. Once an accused has pleaded, Mokgoro J stated, the constitutionally enshrined principle of the rule of law requires that certainty as to the boundaries of the prosecution and the penal risk should be upheld consistently throughout the trial.

O’Regan J and Ngcobo J, both agreeing in the conclusion and order of the Court but each writing separately, took a different approach to the issue before this Court. They both agreed that this issue could be resolved on the basis of a proper interpretation of section 92(1)(a). O’Regan J held that the proper interpretation of section 92(1)(a) must be undertaken in the light of the provisions of section 35(3) of the Constitution. Ngcobo J held that to construe section 92(1)(a) as applying to criminal trials that commenced before it came into operation did not promote the spirit, purport and objects of the Bill of Rights.

The Court substituted the fifteen year sentence of imprisonment imposed upon applicant by the regional magistrate’s court with a sentence of ten years imprisonment, being the equivalent of the applicable maximum penal jurisdiction of the regional court prior to 7 October 1998 when section 92(1)(a) came into operation.