



CONSTITUTIONAL COURT OF SOUTH AFRICA

Oscar Vusi Thwala v the State

CCT 329/17

Date of judgment: 27 September 2018

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 27 September 2018 at 11h30 the Constitutional Court handed down judgment in an application for leave to appeal in which the applicant, Mr Thwala, asked for both his conviction and sentence to be set aside and to be immediately released from prison or to be granted leave to appeal to the Full Court of the High Court of South Africa, North Gauteng Division, Pretoria. Mr Thwala also requested to lead further evidence of reports on DNA tests conducted after his conviction and sentencing.

Mr Thwala was convicted on two counts of abduction, three counts of rape and two counts of possession of a firearm and ammunition in the High Court of South Africa, North Gauteng Division, Pretoria (High Court). The High Court imposed three life sentences in terms of section 52(1) of the Criminal Law Amendment Act (Minimum Sentence Act) for the charges of rape with aggravating circumstances, and a further nine years imprisonment for the remaining charges.

Mr Thwala previously applied for leave to appeal to the Constitutional Court in 2016 against his conviction and that application was dismissed by this Court owing to a lack of prospects of success.

Mr Thwala argued that his conviction and sentencing were substantively unfair. To substantiate his argument he made the following arguments: Firstly, the High Court made its determination without considering the DNA evidence that was being processed, despite being notified that the evidence would be available within 15 weeks; Secondly, the High Court proceedings were conducted in Afrikaans which neither Mr Thwala nor his legal

representative understood; Thirdly, the sentencing proceedings were irregular because the presiding Judge failed to properly consider whether substantial and compelling circumstances existed for deviating from the prescribed minimum sentence; and lastly, the Judge's hostile interventions violated Mr Thwala's right to a fair trial.

The Constitutional Court decided the application for leave to appeal without oral hearing. In a unanimous judgment written by Froneman J, the Court decided that the application for leave to appeal be refused.

The Constitutional Court considered the principle of *res judicata* (a matter already judged) and whether the applicant's new grounds of appeal constituted an exceptional circumstance. It concluded that the applicant's new grounds were not exceptional in that the trial court did not need the DNA evidence because the other evidence available to the court was sufficient to convict Mr Thwala and that this Court rightly dismissed the application on the basis of lack of prospects of success. Further, that the Judge's interventions were unfortunate but did not provide a foundation for a finding that the trial was unfair. The applicant was represented and the proceedings were interpreted, so the proceedings being conducted in Afrikaans did not render the trial unfair.

On sentencing, the Constitutional Court held that Mr Thwala's application to this Court in 2016 was limited to an appeal on conviction. As a result, this Court may have jurisdiction to consider sentencing. Notwithstanding the lack of authority presented by the legal representative of the applicant in this part of the appeal, the Court noted that the applicant took the stand in the sentencing proceedings to give evidence in mitigation. After considering the applicant's personal circumstances, the High Court found there to be "no true mitigating factors" or substantial and compelling circumstances to warrant deviation from the minimum sentence.

In the result the Constitutional Court dismissed both legs of the application for leave to appeal on the grounds that they lacked prospects of success.