CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 25/00

ALLAN AUBREY BOESAK Applicant

versus

THE STATE Respondent

Heard on : 12 September 2000

Decided on : 1 December 2000

JUDGMENT

LANGA DP:

Introduction

[1] This is an application for special leave to appeal to this Court from a decision of the Supreme Court of Appeal (the SCA). The applicant was convicted in the Cape of Good Hope High Court (the High Court) on 17 March 1999 on four charges, one of fraud (count 4) and three of theft (counts 5, 9 and 31). An effective sentence of six years imprisonment was imposed.

[2] On appeal, the SCA set aside the conviction on count 9 but dismissed the appeal in respect of counts 4, 5 and 31, although the amount involved in the last-named count was substantially reduced from that found by the High Court to have been stolen. A consequence of the partial success of the appeal was the reduction of the sentence of imprisonment to an

effective three years.[1]

[3] The applicant now seeks special leave to appeal to this Court against the decision of the SCA upholding the convictions on the three counts. The basis of the application is that the decision of the SCA constitutes an infringement of applicant's constitutional rights as enshrined in sections 12(1)(a)[2] and 35(3)(h)[3] of the Constitution, namely, the right not to be deprived of

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1 The SCA judgment is reported as *S v Boesak* 2000 (3) SA 381 (SCA).

2 Section 12(1)(a) of the Constitution provides:

> "(1) Everyone has the right to freedom and security of the person, which includes the right —
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> (a) not to be deprived of freedom arbitrarily or without just cause".

3 Section 35(3)(h) of the Constitution provides:

freedom and security without just cause and the right to a fair trial "to be presumed innocent, to remain silent, and not to testify during the proceedings".

[4] The applicant occupied a prominent position as a minister of the Dutch Reformed Mission Church and was also in the forefront of the anti-apartheid struggle. In 1982 he was elected as President of the World Alliance of Reformed Churches (the WARC). In 1984 applicant's congregation established "The Foundation for Peace and Justice" (the FPJ), a body whose objective was to assist victims of apartheid. Large amounts of money were donated to the FPJ and to the WARC by individuals, as well as international religious and humanitarian organisations. Applicant was the director of the FPJ and the WARC banking account was under his control. A new trust, known as the Children's Trust (the Trust), was formed in 1988 at the instance of an American entertainer as a vehicle to receive donations to be used for the benefit of child victims of apartheid.

[5] Counts 4 and 5 are concerned with the sum of R682 161,21 which had come from this donor and was paid into the WARC account. Applicant advised the trustees of the Trust that

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"(3) Every accused person has a right to a fair trial, which includes the right —

. . .

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings".

R423 000 had been donated and he caused that amount to be transferred from the WARC account into the Trust. The state case was that the applicant fraudulently misrepresented the amount donated to the Trust (count 4) and stole the balance (count 5). The gist of applicant's defence was that there had been no fraud or theft. It was contended that only R423 000 had been donated to the Trust and the balance had been intended for his own use.

[6] Count 31 was originally made up of more than 100 amounts totalling R1 121 947,69, which applicant was alleged to have stolen from the FPJ at various times. The High Court convicted him in respect of six of the amounts only, involving R332 722. The SCA however held that only three of the amounts had been proved to have been stolen and upheld the conviction in respect of amounts totalling only R147 160. The applicant's defence on this count was that he was entitled to the amounts which the state alleged had been stolen, in repayment of money which he had lent and advanced to the FPJ.

Issues before the Court

[7] The issues of constitutionality which the applicant wishes this Court to investigate do not arise from the judgment of the High Court, but from that of the SCA and the manner in which that Court dealt with the appeal from the decision of the High Court. The application in respect of counts 4 and 5 concerns the finding by the SCA that the crimes of fraud and theft had been proved beyond reasonable doubt. In concluding that the applicant was guilty on these two charges, the SCA relied on a letter which had been produced in evidence in the High Court. The applicant challenged this reliance on the letter, contending that its authenticity had not been proved beyond reasonable doubt. He urged us to hold that the confirmation of his conviction on

the basis of the letter violated, under section 35(3)(h) of the Constitution, his right to be presumed innocent, to remain silent, and not to testify during proceedings.

[8] With regard to count 31, two main attacks were launched. The first was that there was no evidence to support the finding by the SCA that guilt had been proved beyond reasonable doubt. The contention was that the conclusions drawn by the SCA were an erroneous interpretation of the facts. In particular, the applicant disputed the conclusion reached by the SCA that he had not been entitled to use the money in the WARC fund as his own and that the evidence proved that the three amounts had been stolen from the trustees of the FPJ. The applicant contended that the SCA's decision confirming his conviction constituted a violation of an element of his right to a fair trial, that is the right to be presumed innocent.[4]

[9] The second attack was based on the sentencing of the applicant to a term of imprisonment in consequence of his conviction on this count. It was contended that the trial court and the SCA erred in their evaluation of the evidence and had wrongly concluded that the guilt of the accused had been proved beyond reasonable doubt. It was submitted that because the conviction was wrong, the sentence imposed consequent thereto amounted to a deprivation of the applicant's freedom without just cause, in violation of section 12(1)(a) of the Constitution.

The jurisdiction of the Constitutional Court to hear appeals from the SCA

[4] Section 35(3)(h) of the Constitution.

[10] Applications for leave to appeal to this Court are governed by section 167(6) of the Constitution, which provides for appeals from any other court "when it is in the interests of justice and with leave of the Constitutional Court". These provisions are echoed in Rule 20 of the Rules of this Court in relation to appeals from the SCA.[5]

[11] A threshold requirement in applications for leave relates to the issue of jurisdiction. The issues to be decided must be constitutional matters or issues connected with decisions on constitutional matters.[6] This is dealt with more fully below.

[12] A finding that a matter is a constitutional issue is not decisive. Leave may be refused if it is not in the interests of justice that the Court should hear the appeal. The decision to grant or refuse leave is a matter for the discretion of the Court, and in deciding whether or not to grant leave, the interests of justice remain fundamental. In considering the interests of justice, prospects of success, although not the only factor, are obviously an important aspect of the

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5 Rule 20(1) of the Rules of the Constitutional Court provides:
> "An appeal to the Court on a constitutional matter against a judgment or order of the Supreme Court of Appeal shall be granted only with the special leave of the Court on application made to it."

6 Section 167(3)(b) of the Constitution.

enquiry.[7] An applicant who seeks leave to appeal must ordinarily show that there are reasonable prospects that this Court will reverse or materially alter the decision of the SCA.[8]

[13] The Constitution declares that the Constitutional Court is the highest court in all constitutional matters. Its jurisdiction is dealt with in section 167(3)(b) of the Constitution which provides that it —

> "may decide only constitutional matters, and issues connected with decisions on constitutional matters".

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7 See *Fraser v Naude and Others* 1998 (11) BCLR 1357 (CC); 1999 (1) SA 1 (CC) at para 7; *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (5) BCLR 465 (CC); 2000 (2) SA 837 (CC) at para 3.

8 See *S v Pennington and Another* 1997 (10) BCLR 1413 (CC); 1997 (4) SA 1076 (CC) at para 52.

The Constitution offers no definition of a constitutional matter, or an issue connected with a decision on a constitutional matter. Section 167(3)(c) leaves that ultimately to the Constitutional Court to decide.[9]

[9] Section 167(3)(c) of the Constitution states:

> "(3) The Constitutional Court —
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> . . .
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> (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."

[14] If regard is had to the provisions of section 172(1)(a)[10] and section 167(4)(a)[11] of the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of state. Under section 167(7)[12], the interpretation, application and upholding of the Constitution are also constitutional matters. So too, under section 39(2), is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights.[13] If regard is had to this and to the wide scope and

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10 Section 172(1)(a) of the Constitution provides:

> "(1) When deciding a constitutional matter within its power, a court —
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> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".

11 Section 167(4)(a) of the Constitution provides:

> "(4) Only the Constitutional Court may —
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> (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state".

12 Section 167(7) of the Constitution provides:

> "A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution."

13 Section 39(2) of the Constitution provides:

application of the Bill of Rights, and to the other detailed provisions of the Constitution such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction. It is neither necessary nor desirable in the present case to attempt to define the limits of that jurisdiction.

"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[15] One of the questions to be determined is which of the issues raised by the applicant relate to constitutional matters. This requires, amongst other things, a purposive approach to the harmonising of section 167(3)(a) and (b)[14] of the Constitution which constitutes the Constitutional Court as the highest court in constitutional matters and section 168(3)[15] which constitutes the SCA as the highest court of appeal except in constitutional matters. Certain broad principles for criminal cases can be identified:

(a) *A challenge to a decision of the SCA on the basis only that it is wrong on the facts is not a constitutional matter*.

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[14] Sections 167(3)(a) and (b) of the Constitution reads:

"(3) The Constitutional Court —

(a) is the highest court in all constitutional matters;

(b) may decide only constitutional matters, and issues connected with decisions on constitutional matters".

[15] Section 168(3) of the Constitution provides:

"The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters . . . ."

In the context of section 167(3) of the Constitution the question whether evidence is sufficient to justify a finding of guilt beyond reasonable doubt cannot in itself be a constitutional matter. Otherwise, all criminal cases would be constitutional matters, and the distinction drawn in the Constitution between the jurisdiction of this Court and that of the SCA would be illusory. There is a need for finality in criminal matters. The structure of the Constitution suggests clearly that finality should be achieved by the SCA unless a constitutional matter arises. Disagreement with the SCA's assessment of the facts is not sufficient to constitute a breach of the right to a fair trial. An applicant for leave to appeal against the decision of the SCA must necessarily have had an appeal or review as contemplated by section 35(3)(o)[16] of the Constitution. Unless there is some separate constitutional issue raised therefore, no constitutional right is engaged when an appellant merely disputes the findings of fact made by the SCA.

(b) *The development of, or the failure to develop, a common-law rule by the SCA may constitute a constitutional matter*.

This may occur if the SCA developed, or failed to develop, the rule under circumstances inconsistent with its obligation under section 39(2) of the

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[16] Section 35(3)(o) of the Constitution reads:

"(3) Every accused person has a right to a fair trial, which includes the right —

. . .

(o) of appeal to, or review by, a higher court."

Constitution or with some other right or principle of the Constitution.[17]

(c) *The application of a legal rule by the SCA may constitute a constitutional matter*.

This may occur if the application of a rule is inconsistent with some right or principle of the Constitution.

The application of these principles to counts 4 and 5

[17] *Shabalala and Others v Attorney-General, Transvaal, and Another* 1995 (12) BCLR 1593 (CC); 1996 (1) SA 725 (CC) at para 9.

[16] The first issue to be considered is the applicant's contention that his right under section 35(3)(h) of the Constitution "to be presumed innocent" was infringed by the SCA. In both the High Court and the SCA the case was dealt with on the basis that the onus was on the state to prove the guilt of the accused beyond reasonable doubt. That is what is required under our law by the presumption of innocence.[18] It is not suggested by the applicant that the SCA applied some other standard; the contention is that in its evaluation of the evidence the SCA reached incorrect conclusions and convicted when it ought to have had a reasonable doubt concerning his guilt. That is no violation of the applicant's right to be presumed innocent. The question whether evidence is sufficient to justify a finding of guilt beyond reasonable doubt is not, for the reasons given above, a constitutional matter.

[17] The next issue is the applicant's contention that his right under section 35(3)(h) of the Constitution "to remain silent and not to testify during the proceedings" was infringed by the SCA. The argument was directed to two aspects of the judgment of the SCA. The first concerned the weight given by the SCA to the failure by the applicant to challenge the

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[18] *S v Bhulwana; S v Gwadiso* 1995 (12) BCLR 1579 (CC); 1996 (1) SA 388 (CC) at para 19; *Scagell and Others v Attorney-General, Western Cape, and Others* 1996 (11) BCLR 1446 (CC); 1997 (2) SA 368 (CC) at para 7; *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (1) BCLR 86 (CC); 2000 (2) SA 425 (CC) at para 15; *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (5) BCLR 491 (CC); 2000 (3) SA 1 (CC) at para 26.

authenticity of the letter. The second concerns the way in which the SCA dealt with the applicant's failure to testify. The applicant's argument rested on a distinction, artificial in a case to be decided on appeal, between proof of a prima facie case and proof beyond reasonable doubt. The result was that two entirely separate submissions were advanced. The first of these was that the SCA erred in the weight it gave to the failure to challenge the authenticity of the letter in concluding that a prima facie case had been made out in relation to authenticity. Counsel for the applicant sought to persuade us that the SCA had taken into account the absence of evidence on behalf of the applicant to conclude that a prima facie case had been made out. This argument however clearly had no merit. They relied on the following passage from the judgment:

> "In cross-examination of [the accountant], she refers to the letter under discussion as 'the letter written by Dr Boesak to . . .' and Mr *Maritz* himself then identifies the letter as the one now under discussion. He never challenged [the accountant] by putting to her that the letter was not written by the appellant. What is more, his subsequent silence on the subject can reasonably be seen as an admission or acquiescence, having regard to the cross-examination quoted above."[19]

This passage in its context clearly refers to the way the defence case was conducted and does not refer to the absence of evidence on behalf of the accused.

[18] The second submission was that, having concluded that a prima facie case had been made out, the SCA improperly relied on the applicant's failure to give evidence to conclude that there

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[19] Above n 1 at para 43.

had been proof beyond reasonable doubt. The question before the SCA was whether the guilt of the applicant had been resolved beyond reasonable doubt. One of the issues relevant to the determination of that question was the authenticity of the letter. The approach adopted by the SCA to this issue was that there was at least prima facie evidence as to the authenticity of the letter. It then considered whether, in the absence of any testimony on behalf of the accused, that evidence was in fact conclusive proof of authenticity. In essence the SCA had to decide whether the letter should be admitted or not. In so doing, it took into account the failure by the applicant to challenge the authenticity of the letter and the absence of any evidence on behalf of the applicant on this issue, together with the other evidence and concluded that the authenticity of the letter had been established. The true issue before us is therefore whether the SCA infringed any constitutional rights in taking these two factors into account. To this question I now turn.

[19] The letter, which bore a signature purporting to be that of Dr Boesak, was produced during the evidence of the accountant. She identified it as one "written by Dr Boesak". It was on a letterhead purporting to be that of the FPJ and was addressed to the personal assistant of the donor. The letter acknowledged receipt of the donated money and advised that it had been deposited into the account of the Trust. It was contended on behalf of the applicant that the state had not proved that Dr Boesak was the author of the letter. The SCA dealt with this contention as follows:

> "Let it be said immediately: there is no direct evidence that the signature on the letter is that of the appellant. No witness saw him signing the letter. But lack of proof that the appellant personally signed the letter is, of course, not the only relevant enquiry. The enquiry includes whether the appellant authorised the letter, or had given instructions for its typing and dispatch, or had knowledge of its contents, or had affirmed its contents by

> signing it. If any one of these factors could be established beyond reasonable doubt, the State would have discharged the *onus*."[20]

The judgment goes on to say that the state's case rests on inferences from circumstantial evidence. Consideration is then given to the evidence to determine whether or not a prima facie case had been made out in relation to the authenticity of the letter and the conclusion is reached that the evidence is sufficient for this purpose.

[20] In its consideration of the evidence the SCA took into account that the applicant's counsel did not specifically put the admissibility and authenticity of the letter in issue. At no stage was it suggested by him that the signature on the letter which purported to be that of the applicant was a forgery. The letter, which was read into the record, acknowledged receipt of the cheque and advised that the money had been deposited into the account of the Trust. It was not disputed that the money had been received nor that part of it was paid over to the Trust. The defence was not that the money had not been received; it was that there was no obligation to pay over the full amount into the Trust, and that the applicant was entitled to retain part of the money that had been received for other purposes.

[21] The SCA held that there had not been a direct challenge in cross-examination or at any other stage of the proceedings to the authenticity of the letter, and that in the absence of such

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[20] Above n 1 at para 32.

challenge or evidence to the contrary, there was sufficient evidence to justify a finding that the letter had been written by the applicant. It found confirmation of this finding in a comparison that it made between the signature on the letter, and Dr Boesak's signature on the affidavit annexed to the application for leave to appeal. The two signatures, so it held, appeared to be identical.

[22] In this Court two objections were taken to this approach of the SCA. First, it was contended that there was no obligation on the defence to challenge the authenticity of the letter because at an early stage of the examination-in-chief of the accountant, defence counsel had said:

> "M'Lord, perhaps at this juncture I should just make our position clear, the witness has referred to some documents called 'auditor's working papers' and no doubt she's going to refer to quite a number of other documents of a hearsay nature. We do not have any objection to this witness testifying about those documents but we do not want by our silence to be understood that we are admitting that such evidence will be admissible. No doubt the State will in due course produce witnesses to testify about this."[21]

Secondly, it was contended that the comparison of the signatures was made after the conclusion of the argument in the SCA, and without counsel for the applicant having been given the opportunity to deal with that matter.

[23] A decision as to the sufficiency of evidence that is required to prove a document in a

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[21] Above n 1 at para 34.

criminal prosecution does not ordinarily involve the interpretation or application of any provision of the Constitution, nor does it involve the application of law inconsistent with the Constitution, or have any other connection with the Constitution that would make that decision a constitutional matter. The Constitution must be implicated in some way before such a finding can be said to raise a constitutional issue within the jurisdiction of this Court. In the present case it is contended that there is something more, namely, the weight attached by the SCA to the accused's failure to challenge the authenticity of the signature. That, so it was contended, was inconsistent with the accused's constitutional right to remain silent.

[24] The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person.[22] It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings.[23] The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the

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22 Sections 35(1)(a) and (c) of the Constitution read:

> "(1) Everyone who is arrested for allegedly committing an offence has the right —
> (a) to remain silent;
> . . .
> (c) not to be compelled to make any confession or admission that could be used in evidence against that person".

23 Above n 3.

remarks of Madala J, writing for the Court, in *Osman and Another v Attorney-General, Transvaal*[24], when he said the following:

> "Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."[25]

[25] Similarly, if in the course of the trial there is evidence that a document was written by the accused, and if the accused fails to challenge that evidence, or raise forgery as an issue, a court may be entitled to hold that in the absence of testimony from the accused the evidence is sufficient to prove that the accused was the author of the document. That is what the SCA did in the present case. It analysed the evidence it considered to be relevant to this issue and came to the conclusion that in the absence of a challenge or evidence to the contrary there was sufficient proof that the letter had been written by Dr Boesak.

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24 1998 (11) BCLR 1362 (CC); 1998 (4) SA 1224 (CC).

25 Id at para 22.

[26] The SCA also concluded that, having regard to the evidence which had been given and the way in which the trial had been conducted, in particular that there had been no challenge to the authenticity of the letter, it could not have been expected of the state to call a handwriting expert to prove Dr Boesak's signature. It said that "[a] criminal trial is not a game of catch-as-catch-can, nor should it be turned into a forensic ambush"[26] and referred with approval to the comments of this Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[27] that —

> "[a]s a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character."[28]

This rule, which is part of the practice of our courts, is followed to ensure that trials are conducted fairly, that witnesses have the opportunity to answer challenges to their

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26 Above n 1 at para 50.

27 1999 (10) BCLR 1059 (CC); 2000 (1) SA 1 (CC).

28 Id at para 61.

evidence, and that parties to the suit know that it may be necessary to call corroborating or other evidence relevant to the challenge that has been raised.

[27] The SCA held that this rule applies to the challenging of all evidence adduced by the other party, whether on the basis of hearsay, inadmissibility, lack of proof of authenticity, or accuracy. It applied this rule to the evidence concerning the letter, holding that the trial had been conducted on the basis that all other instances of what "on the face of it" was Dr Boesak's signature, was indeed his signature, and that it was untenable to single out one document which on the face of it bore his signature, as being a document which had not been properly proved. The judgment went on to say:

> "[T]here is a document which purported to be part of correspondence between the appellant and the recipient which required an explanation from the appellant, more particularly because of his control of the FPJ and its stationery and the extraneous evidence that he was in communication with the recipient and the only person concerned with the recipient. It would be like a typed (but unsigned) note found in exactly the same circumstances: if the only reasonable explanation on the face of it is that the appellant is the author, then its contents would be admissible against him. And, if his explanation in relation to the document is that he was not the only person concerned with the recipient or that it is not authentic or the like, then he must testify to it in his defence."[29]

[28] In effect, this is a finding that in the absence of contrary evidence or any suggestion of a

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[29] Above n 1 at para 55.

forgery the evidence was sufficient to prove the authenticity of the letter. That is a finding as to the weight of the evidence and the inferences that can properly be drawn from it. Whilst the evidence to the contrary need not be the evidence of the accused, there can be no quarrel with the principle that the absence of contrary evidence is relevant to the evaluation of evidence relied upon by the state for a conviction in a criminal trial. It follows therefore that in reaching its conclusion, the SCA was entitled to have regard to the absence of an allegation or evidence to the contrary raising the issue of forgery.

[29] The finding by the SCA is a finding of fact. It is based on an evaluation of the evidence as a whole taking into account the absence of any challenge or evidence to rebut the inference of authenticity drawn by it from such evidence. That evaluation of the evidence by the SCA did not breach the applicant's constitutional right to silence.

[30] Two further matters need to be addressed in relation to counts 4 and 5. The first is concerned with the comparison of signatures by the SCA. It is not clear from the SCA judgment why a comparison of signatures was carried out after the hearing of the appeal. In criticising the conduct of the SCA in this respect, applicant's counsel directed his attack at the inappropriateness of such an exercise being undertaken by a court of appeal, because of the obvious lack of opportunity for the party adversely affected to controvert that item of evidence. I make two observations. It is clear from its judgment that the SCA was satisfied that the authenticity of the letter had been proved beyond reasonable doubt, quite apart from the comparison that it made. Secondly, because of the manner in which the defence case was conducted throughout, and in particular because the authenticity of applicant's signature on the

letter was never put in issue even in this Court, it has not been established how an appeal on this aspect alone could advance applicant's case. Indeed, counsel for the applicant did not suggest any way in which the conduct of the SCA could have prejudiced the applicant. Given the way in which the defence had been conducted in the High Court and the conclusion reached by the SCA without taking the comparison of the signatures into account, it is impossible to see how any prejudice could occur.

[31] The second matter concerns the criticism directed at the judgment of the SCA in regard to the interpretation which the SCA gave to the contents of the letter. It was contended on behalf of the applicant that the contents were neutral, and not consistent only with the guilt of the applicant. The SCA on the other hand held that the contents were consistent only with applicant's guilt on the two counts. The interpretation of the letter by the SCA is clearly not a constitutional matter and nothing further needs to be said about this.

Count 31

[32] In regard to count 31, it was submitted on applicant's behalf that the evidence did not support the finding by the SCA that his guilt had been proved beyond reasonable doubt. The contention was that the conclusions drawn by the SCA were an erroneous interpretation of the facts with regard to the nature of the WARC fund and the relationship between the applicant and the WARC fund on the one hand, and the FPJ account on the other. In particular, the applicant disputed the conclusion reached by the SCA that he had not been entitled to use the money in the WARC fund as his own; that once the money from the WARC fund was paid into the FPJ account, it became the property of the FPJ, and that the evidence which had been presented

proved that the three amounts had been stolen from the trustees of the FPJ.

[33] Building on the above criticism of the SCA's findings of fact, the applicant advanced two contentions. The first was that the applicant's conviction constituted a violation of his right to be presumed innocent.[30] The second was that the SCA, by convicting the applicant and sentencing him to a term of imprisonment, had violated his right not to be deprived of his freedom without just cause.[31]

The presumption of innocence (section 35(3)(h) of the Constitution)

[34] In written argument before this Court, applicant accepted "unreservedly" that the SCA believed that its finding was consonant with the presumption of innocence. Indeed, it is clear from a reading of the judgment that the SCA's conclusions were arrived at as a result of an assessment of the evidence which had been placed before it. Discussion of the evidence relevant to this count takes up some 37 pages in the judgment. Pursuant to its evaluation of the evidence, the SCA decided that the guilt of the applicant had been proved beyond reasonable doubt and accordingly upheld the conviction, albeit in respect of a reduced amount.

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30 Above n 3.

31 Above n 2.

[35] The nub of applicant's constitutional challenge is the contention that the SCA erred in its assessment of the evidence and that the finding of guilt was consequently wrong. It is clear from what I have stated in paragraph 16 above that the right to be presumed innocent is not implicated in circumstances in which all that is being challenged is the purely factual conclusion reached by the SCA. In both the High Court and the SCA, count 31 was considered on the basis that the onus was on the state to prove the guilt of the accused beyond reasonable doubt. The applicant did not contend that the SCA had in any way misdirected itself either on the incidence of the burden of proof nor on what proof beyond reasonable doubt meant. In effect, what the applicant did was to clothe a challenge which was not constitutional at all in constitutional garb. What the applicant disputes amounts to no more than the purely factual findings of the SCA, in respect of which that Court has the final say.

"Just cause" (section 12(1)(a) of the Constitution)

[36] Applicant's second contention is founded on the sentence of imprisonment imposed on the applicant in consequence of his conviction on this count. The submission is that the SCA erred in its evaluation of the evidence and incorrectly concluded that the guilt of the accused had been proved beyond reasonable doubt. Accordingly, so it was submitted, the sentence of imprisonment imposed consequent upon such incorrect conviction constituted a deprivation of the applicant's freedom without just cause, in violation of section 12(1)(a) of the Constitution. The submission is without merit.

[37] This Court has held that section 12(1)(a) entrenches two different aspects of the right to

freedom, the substantive and the procedural.[32] The substantive aspect is the right not to be deprived of freedom arbitrarily or without just cause; differently stated, the right not to be deprived of freedom for reasons that are not acceptable, an aspect guaranteed by section 12(1)(a). The procedural aspect is implicit in section 12(1) and guarantees a fair trial. This aspect of the freedom right in respect of an accused person is described in and guaranteed by section 35(3). No infringement of section 35(3) has been established.

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32 *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC) at paras 22-5; *Bernstein and Others v Bester and Others NNO* 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) at paras 145-6 and in *S v Coetzee and Others* 1997 (4) BCLR 437 (CC); 1997 (3) SA 527 (CC) at para 159.

[38] As far as the substantive aspect of this right is concerned, "just cause" must be grounded upon and consonant with the values expressed in section 1[33] of the Constitution and gathered from the provisions of the Constitution as a whole.[34] The commission of a theft of a sufficiently serious nature, clearly constitutes just cause for depriving a person duly convicted of such crime of personal freedom by means of imprisonment. This is universally accepted. The applicant has, on count 31, been duly convicted of theft of a serious nature in a trial which was conducted in conformity with the provisions of section 35(3) of the Constitution. There is accordingly substantive just cause for his imprisonment.

[39] Where just cause, in the sense described above, exists for the applicant's imprisonment, and no infringement of his section 35(3) fair trial right has been established, the question

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[33] Section 1 of the Constitution reads:

> "(1) The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[34] *De Lange* above n 32 at para 30.

whether, on the facts, the SCA correctly came to the conclusion that the applicant's guilt had been proven beyond reasonable doubt, does not trench on this freedom right. For the reasons already mentioned, it is not a constitutional matter or an issue connected with a constitutional matter over which this Court has jurisdiction. It is a matter on which the judgment of the SCA is final.

Conclusion

[40] To summarise therefore, the contentions advanced in respect of all three counts are without merit and the application for special leave to appeal must accordingly fail.

Order

[41] The application for leave to appeal is refused.

Chaskalson P, Ackermann J, Goldstone J, Kriegler J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Yacoob J and Madlanga AJ concur in the judgment of Langa DP.

For the applicant:	W Trengove SC, MC Maritz SC and J Celliers instructed by Stegmanns Attorneys.
For the respondent:	JA van S d'Oliveira SC and JC Gerber instructed by the Office of the Director of Public Prosecutions, Cape Town.