



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
DATE 8 May 2015
STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

Johannes Windvogel v The State (20091/2014) [2015] ZASCA 63

Today the Supreme Court of Appeal (SCA) handed down a judgment in which it granted the appellant special leave to appeal in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 and upheld the appeal.

The issue before the SCA was whether special leave to appeal should be granted to the appellant and if so whether the custodial sentence imposed upon the appellant was shockingly inappropriate in the circumstances.

The appellant was arrested on 28 June 2000 in consequence of a trapping operation by members of the South African Police Service. He was charged with 12 counts of dealing in prohibited substances in contravention of s 5(b) of the Drugs and Drug Trafficking Act 140 of 1992. At the end of the trial, the appellant was convicted on four counts of dealing in prohibited substances.

On 31 January 2003 the trial court imposed a sentence of eight years' imprisonment on each count. An effective term of 32 years' imprisonment was thus imposed. The trial court ordered this sentence to run concurrently with a sentence of 20 years' imprisonment that the appellant was already serving for a previous conviction for a similar offence. On 18 February 2004 the appellant's previous conviction and sentence of 20 years' imprisonment were set aside on appeal. Subsequently, the trial court granted the appellant leave to appeal against the sentence imposed in this matter. On 6 July 2005 the appellant was released on bail pending appeal. At that stage, he had already served a period of almost two and a half years of his sentence. On 7 November 2013, almost nine years after leave to appeal had been granted by the trial court, the appeal came before the Gauteng Division, Johannesburg. It concluded that the total sentence of 32 years' imprisonment had been appropriate. The court a quo expressed its intent to afford the appellant the benefit of the period served. It therefore set aside the sentence imposed by the trial court and replaced it with an identical sentence but antedated it to 7 November 2010. The court a quo thereafter granted the appellant leave to appeal to this court.

On appeal to this court it became apparent that the court a quo did not have jurisdiction to hear an application for leave to appeal to this court as s 16(1)(b) of the Superior Courts Act 10 of 2013 provided that an appeal against any decision of a division on appeal to it lies to the Supreme Court

of Appeal upon special leave having been granted by this court. The parties were apprised of the applicable provisions and the appellant was requested to lodge a formal application for special leave to appeal to this court which it did.

The SCA noted that the merits of an appeal were relevant when determining whether special circumstances existed in order to grant special leave to appeal. The SCA held that it was common cause that the appellant was not incarcerated during November 2010 nor was he serving a sentence when the appeal was heard as he was on bail from July 2005 until November 2013. The SCA concluded that the court a quo misdirected itself as the effect of antedating the sentence to 7 November 2010 had the opposite effect- that of increasing the sentence imposed by the trial court by a period of more than two and a half years-a period that should have accrued to his benefit. The misdirection resulted in a failure of justice which rendered the appeal unfair. This entitled this court to intervene and consider sentence afresh.

After considering all the relevant factors, the SCA concluded that the appellant was an unrepentant dealer and that the sentence of eight years' imprisonment on each count was appropriate. It however held that the cumulative effect of that sentence was shockingly excessive. The appeal was thus upheld in this respect only. The court therefore ordered portions of the sentences imposed on three counts should run concurrently with the sentence imposed on the first count. The effect thereof was that the appellant will serve an effective term of 20 years' imprisonment. The court further antedated the sentence to 31 January 2003 being the date when the trial court imposed the sentence. The period of two and a half years already served by the appellant will thus be taken into account by the Department of Correctional Services.

--- ends ---