



CONSTITUTIONAL COURT OF SOUTH AFRICA

Schabir Shaik and Others v The State

Case CCT 86/06

Medium Neutral Citation [2007] ZACC 19

Date of Judgment: 2 October 2007

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.

On 23 and 24 May 2007 the Constitutional Court heard an application for leave to appeal against the convictions and sentences of Mr Schabir Shaik and his ten companies, and the related confiscation of their assets. The Court did not hear argument on the merits of the appeal. It only considered the preliminary question whether leave to appeal should be granted. This consideration involved the question whether the applicants raised a constitutional issue and furthermore whether there were reasonable prospects of success on appeal. The application was argued in two parts: the first related to the criminal proceedings and the second to the subsequent confiscation of assets.

The Criminal Proceedings

On 2 June 2005 the Durban High Court convicted Mr Shaik on two counts of corruption and one of fraud. The companies with which he was associated were all convicted of corruption, four were convicted of fraud and two of money laundering. The charges related to payments that Mr Shaik and the companies had made to Mr Jacob Zuma, when he was the MEC for Economic Affairs and Tourism in KwaZulu-Natal and later when he was the Deputy President of the Republic of South Africa, to secure his political influence for their financial benefit. This included an arrangement facilitated by Mr Shaik in terms of which a payment was made by a director of Thint (Pty) Ltd, Mr Alain Thétard, to Mr Zuma in connection with a transaction regarding the acquisition of arms. Mr Shaik was sentenced to an effective fifteen years imprisonment and the companies to an array of fines. Mr Shaik and the companies appealed to the Supreme Court of Appeal against the convictions and sentences. On 6 November 2006 the Supreme Court of Appeal dismissed the appeals against conviction and sentence and confirmed the High Court's judgment.

In this Court the applicants argued that their trial was unfair. Originally their attack was broad, and included questioning the validity of certain searches and seizures and the alleged influence of the media on the Supreme Court of Appeal. However, in oral argument they limited their challenge regarding the fairness of the trial to (a) the effect of the State's decision not to charge Mr Zuma and/or Thint together with the applicants; and (b) the

contention that the actions of the lead prosecutor, Mr William Downer, amounted to prosecutorial misconduct in that he had stepped over the line between prosecutor and investigator. They specifically disavowed any reliance on the other contentions.

Their arguments were to some extent founded on a considerable amount of new evidence, much of which formed part of the criminal proceedings before the High Court in relation to Mr Zuma, which took place after the conclusion of the proceedings involving Mr Shaik and his companies. The applicants applied to have the evidence admitted in this Court.

The applicants also wished to challenge the sentences imposed, on the ground that the High Court and Supreme Court of Appeal failed to give proper consideration to Mr Shaik's personal and socio-economic background, in particular the fact that he was a victim of the discriminatory system of apartheid, and his role in the struggle against this system. They also argued that the minimum sentence legislation in terms of which Mr Shaik was sentenced was not applicable because the payments had started before the legislation had come into force.

The State objected to the applicants raising arguments for the first time in this Court, as it was open to them to raise the issues at an earlier stage. The State further contended that, even if the applicants were allowed to raise the issues, none of them had any prospects of success.

The unanimous judgment of this Court is as follows:

The application to introduce new evidence is dismissed, as much of the evidence in question is not undisputed, and the evidence is also irrelevant to the issues to be decided by this Court.

The Court held that the applicants' submissions on the alleged unfairness of the trial based on the failure to charge Mr Zuma and/or Thint and the alleged prosecutorial misconduct, bear no prospects of success. The decision to charge Mr Shaik and the companies, without also charging other parties possibly suspected of being involved in the same offences, did not constitute an irregularity that rendered the trial unfair. Nor did the conduct of the lead prosecutor, which accorded with the Constitution and the National Prosecuting Act 32 of 1998.

The Court furthermore held that the applicants' submissions concerning the sentences bear no prospects of success. The High Court and Supreme Court of Appeal properly considered Mr Shaik's history and other personal circumstances. The suffering of past discrimination is not a general excuse for crime committed after the dawn of democracy. The minimum sentencing legislation was also clearly applicable to Mr Shaik's sentence of imprisonment.

An appeal against the convictions and sentences does not bear reasonable prospects of success. It would thus not be in the interests of justice to grant leave to appeal.

The Confiscation Proceedings

Following the conviction, the High Court granted an order authorising the confiscation of various proceeds of the unlawful activities in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA). The Supreme Court of Appeal partially upheld the appeal in respect of the confiscation.

In this Court, the applicants argued that the unlawful activities were not the cause, or at least not the direct or sole cause, of the benefit. In addition, they contended that the confiscation was disproportionate to the crime.

The Court unanimously held that the applicants' submissions raise a constitutional issue. POCA must be interpreted in conformity with the Constitution, which provides that no one may be arbitrarily deprived of his or her property. The Court held that the submissions cannot be said to bear no reasonable prospects of success. Accordingly, it concluded that it is in the interests of justice for the application for leave to appeal against the confiscation order to be granted.

Conclusion

The application for leave to appeal against the convictions and sentences is therefore dismissed. The application for leave to appeal against the confiscation order is upheld and leave to appeal is granted. Further directions will be issued regarding the hearing of the appeal on the confiscation orders.