CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 28/00

WILLEM HENDRIK NIEMAND Appellant

versus

THE STATE Respondent

Heard on : 22 February 2001

Decided on : 8 October 2001

JUDGMENT

MADALA J:

Background

[1] The appellant, presently an inmate of Zonderwater Prison, has a long history of committing criminal offences including theft and fraud for which he has served several terms of imprisonment, until he was declared an habitual criminal ─ this last sentencing following upon an offence committed while he was on parole. An appeal to the High Court in Pretoria and an application for leave to appeal to the Supreme Court of Appeal failed.

[2] The appellant thereafter turned to this Court for relief. This Court granted him leave to appeal on the issue of constitutionality only and requested the Johannesburg Bar to appoint

counsel to argue the case on his behalf. We are indebted to Ms Kathree who appeared *pro bono* on behalf of the appellant.

[3] Therefore the only issue before us is whether the provisions of section 286 of the Criminal Procedure Act 51 of 1977 (the CPA) read with section 65(4)(b)(iv) of the Correctional Services Act 8 of 1959 (the CSA) are consistent with the Constitution. These sections provide that a person who has been declared an habitual criminal must be detained in prison for a minimum period of seven years before he/she is considered for parole.

[4] Before this Court Mr Niemand poses three questions:

1. Does the declaration of a person as an habitual criminal in terms of section 286 of the CPA read with section 65(4)(b)(iv) of the CSA not violate the provisions of sections 12(1)(e), 9(1) and 34 of the Constitution?
2. Does the possibility exist that an accused person so sentenced may be detained for the rest of his/her life, without end or any certainty as to the duration of such incarceration?
3. Are the courts not shirking their duties when they leave it to the parole board to determine the period a convicted person will remain in prison?

[5] In this Court the appellant has rightly not sought to question his being declared an habitual criminal. Accordingly, it is unnecessary for me to consider the merits or demerits of such declaration. Suffice it to say that his record of previous convictions is confirmation that he

has a high propensity to commit crimes of dishonesty. The last offence was committed even while the appellant was on parole.

[6] The argument on behalf of Mr Niemand was that being declared an habitual criminal violates the fundamental right to be sentenced by a court of law. In the case of persons declared habitual criminals, the duration of their sentence is determined by the parole board and the Commissioner of Correctional Services, these being members of the executive branch of government. Such punishment or treatment is also cruel, inhuman or degrading and violates the provisions of section 12(1)(e)[1] of the Constitution and it unfairly discriminates between habitual criminals and dangerous criminals. Furthermore, the appellant contends that his right of access to court[2] has been violated in consequence of such declaration. Less restrictive means could have been adopted to protect society from criminals and therefore the challenged provisions should be struck down.

[7] The state argued that such a sentence is not literally indeterminate ― implicitly its maximum period is fifteen years. The sentence means imprisonment for a minimum of seven and a maximum of fifteen years, so it was argued. Although no such maximum period was prescribed by the legislation, the Department of Correctional Services has a practice in terms of

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1 "**12. Freedom and security of the person**.–
(1) Everyone has the right to freedom and security of the person, which includes the right–
. . .
(e) not to be treated or punished in a cruel, inhuman or degrading way."

2 "**34 Access to courts**.–
Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

which no habitual criminal is incarcerated for a period exceeding 15 years. It was further submitted that the parole board and the Commissioner are well qualified and best suited to determine parole eligibility. In any event the exercise of their powers and duties is legislatively prescribed and subject to judicial review. However, should the sentence be found to infringe the rights in question, it is justifiable in terms of section 36 of the Constitution, there being no less restrictive means available to serve the purpose for which it is intended.

[8] The CPA and the CSA establish a scheme for the declaration of certain offenders as habitual criminals and for the sentencing of such persons to prison for an indeterminate period. Section 286 of the CPA provides as follows:

> "(1) **Declaration of certain persons as habitual criminals.–**
> Subject to the provisions of subsection (2), a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person habitually commits offences and that the community should be protected against him, declare him an habitual criminal, in lieu of the imposition of any other punishment for the offence or offences of which he is convicted.
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> (2) No person shall be declared an habitual criminal—
> (a) if he is under the age of eighteen years; or
> (b) . . .
> (c) if in the opinion of the court the offence warrants the imposition of punishment which by itself or together with any punishment warranted or required in respect of any other offence of which the accused is simultaneously convicted, would entail imprisonment for a period exceeding 15 years.
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> (3) A person declared an habitual criminal shall be dealt with in accordance with the laws relating to prisons."

For the sake of convenience the declaration of a person as an habitual criminal will be referred to as "a declaration".

[9] Before a court makes such a declaration, it must be convinced:

(i) that the person habitually commits crimes;

(ii) that detention for at least seven years is the right protection of the community against him/her;

(iii) that he/she is not under the age of eighteen years; and

(iv) that the punishment does not warrant that the accused be sentenced to a term of imprisonment exceeding fifteen years.

Whether or not to make such a declaration is a matter for judicial discretion.[3] Even if the court is convinced that a person habitually commits crimes and that the community ought to be protected, the court still has a discretion whether to make the declaration.

[10] Section 65(4)(b)(iv) of the CSA states that:

> A person who has under any law been sentenced to--
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> . . .
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> (iv) an indeterminate sentence, by virtue of his having been declared an habitual criminal, shall be detained in a prison until, after a period of at least seven years, he is placed on parole."

The CPA also provides for another form of indeterminate sentence ― the declaration of a

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[3] Steytler "*Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South*

person as a dangerous criminal.[4] In this instance the court must be satisfied that the convicted person represents a danger to the physical and mental well-being of others and that the community needs to be protected against him/her. The difference between section 286A and section 286 lies in the fact that in the former the court is obliged to direct that the convicted person be brought before it upon the expiration of a period determined by it so as to review the situation.[5]

Africa, 1996" (Butterworths Publishers (Pty) Ltd, Durban (1998) at 421-2.

4 Section 286A.

5 Section 286B.

[11] Section 286 is the product of frequently amended legislation that has existed in South Africa in one form or another since Union. In *S v Nawaseb*,[6] Kritzinger AJ summarised the origin of section 286, and in Du Toit et al,[7] the purpose of the declaration is explained as follows: "to protect the community against those who habitually commit crimes".[8]

[12] The crux of the matter is that the law seeks to punish a person who manifests a persistent tendency to commit crime by sentencing him/her to what amounts to preventive detention. Under section 65(4)(b)(iv) of the CSA the consequence of a prisoner being declared an habitual criminal is that such person is sentenced to an "indeterminate sentence" which, under section 1 of

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6 *S v Nawaseb* 1980 (1) SA 339 (SWA) at 343–4.

7 Du Toit, De Jager, Paizes, Skeen and Van der Merwe *Commentary on the Criminal Procedure Act* Revision Service 16 (Juta & Co, Cape Town 1987).

8 Id at 28–24.

the CSA means "a sentence of imprisonment for an indefinite period."[9] Conversely a determinate sentence means a sentence of imprisonment for a definite period. It also seeks to remove him/her from society for the protection of the public.

Cruel, inhuman or degrading punishment

[13] The substratum of the appellant's argument is that being declared an habitual criminal imposes on the accused an indeterminate prison sentence which constitutes cruel, inhuman or degrading punishment. The duration of incarceration remains unknown to the prisoner. The prisoner is, so to speak, at the mercy of the executive since it is the parole board, part of the executive branch of government, that will determine when he will be released. It was argued for the appellant that because the legislation does not provide for a maximum period of incarceration, the habitual criminal could be detained for the rest of his life.

9 Definition of "indeterminate sentence" in section 1 of the CSA.

[14] The earlier cases decided in terms of previous legislation, so it was argued, are clear as to the consequences of the indeterminate sentence. In *R v Edwards*[10] Greenberg JA held, with reference to section 47 of Act 13 of 1911 and section 380 of the Criminal Procedure Code of 1917, that:

> "These statutory provisions show that he may be kept in gaol for the rest of his life. He may be released on probation or on conditions. It is therefore a sentence that may operate with the utmost severity."[11]

This view found favour in a number of cases in our jurisdiction.[12]

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10 1953 (3) SA 168 (A).

11 Id at 170B.

12 *R v Swarts* 1953 (4) SA 461 (A); *R v S* 1958 (3) SA 102 (A).

[15] Later decisions have referred to a possible fifteen year maximum sentence but, except for *S v Mkhize*,[13] in which Munnik CJ refers, obiter, to a maximum of fifteen years,[14] the courts have held that the maximum of 15 years is in the nature of a practice rather than a prescribed maximum. In *Mkhize*'s case Munnik CJ quoting *S v Kok*[15] said:

> "In Kok's case the application of section 335(1) [the forerunner to S 286(1) of the CPA] to the appellant meant that for an offence which by statute carried a maximum penalty of seven years' imprisonment and ten strokes the accused would receive a sentence which would result in his being in prison for a minimum of nine years (and a maximum of 15 years)".

[16] It was further argued on behalf of the appellant that the meaning of the statutes is clear and unambiguous, and applying a literal interpretation to the actual wording of the individual sections does not lead to any inconsistency within the context of the other sections or produce absurd results contrary to the scope and object of the Acts. There is, therefore, no basis or justification for ascribing any extended, qualified or inferred meanings to the clear and simple

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13 1978 (3) SA 1104 (Tk).

14 Id at 1107F–G.

15 1963 (1) SA 514 (A).

language of the legislation.

[17] Counsel for the state submitted that because the Acts were silent on this issue it should be inferred from section 286 and section 65(4)(b)(iv) that the period of detention for an accused person who had been declared an habitual criminal would be seven to fifteen years. In my view there is no valid basis for drawing such an inference and I accordingly decline to draw it.

[18] Section 286(2)(c) provides that a person shall not be declared an habitual criminal if the court is of the opinion the offences warrant the imposition of punishment which would entail imprisonment for a period exceeding 15 years. This, in my view, does not assist us in distilling a definite maximum period from the section. Section 286(3) provides that a person who has been declared an habitual criminal should be dealt with in terms of the legislation relating to Correctional Services. I accordingly conclude that even when read together the relevant provisions of the CPA and CSA do not prescribe any maximum period of incarceration.

[19] Because the legislation does not provide for a maximum period of incarceration, the habitual criminal could be detained for the rest of his/her life. The mere possibility of detention for the rest of his/her life for crimes which do not constitute violence or a danger to society could, in the circumstances, amount to punishment which is grossly disproportionate to the offence and as such constitute cruel, inhuman or degrading punishment.[16] Additionally, there is in the case of a declaration as an habitual criminal no provision for the review of the sentence as

16 Cf *S v Dodo* 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) at paras 37-8.

is the case with dangerous criminals.

[20] In the context of the death penalty[17] and juvenile whipping[18] this Court has had occasion to pronounce on the ambit of the right in question. Although in these cases the right was analysed in the light of the interim Constitution,[19] the wording of section 11(2)[20] of that Constitution is substantially the same as section 12(1)(e). Both sections are similar to equivalent provisions in international human rights instruments.[21]

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17 *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

18 *S v Williams and Others* 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC).

19 Act 200 of 1993.

20 Section 11(2) of the interim Constitution provides:
"No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."

21 Article 7 of the International Covenant on Civil and Political Rights states:
"No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

In similar vein, Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides:

[21] In *S v Williams*, in construing the words in the phrase "cruel, inhuman and degrading" this Court said that they were disjunctive:

> " . . .[w]hen the words of section 11(2) of the Constitution are read disjunctively, as they should be, the provision refers to seven distinct modes of conduct, namely: torture; cruel treatment; inhuman treatment; degrading treatment; cruel punishment; inhuman punishment and degrading punishment."[22]

[22] I would adopt the same disjunctive approach to the question to be determined in this case in so far as the appellant contends that continued detention constitutes cruel, inhuman or degrading punishment. In the case before us Mr Niemand does not attack his declaration as an habitual criminal. He questions the indeterminate nature of the punishment and that he could find himself in prison for the rest of his life.

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

22 *S v Williams* above n 18 at para 20.

[23] The effect of an indeterminate sentence on a detained person's right to dignity was eloquently expressed by Mahomed CJ in *S v Tcoeib*,[23] albeit in the context of a life sentence:

> "It must, I think, be conceded that if the release of the prisoner depends entirely on the capricious exercise of the discretion of the prison or executive authorities leaving them free to consider such a possibility at a time which they please or not at all and to decide what they please when they do, the hope which might yet flicker in the mind and the heart of the prisoner is much too faint and much too unpredictable to retain for the prisoner a sufficient residue of dignity which is left uninvaded."[24]

[24] The rationale behind such declaration is the acceptance of the fact that there are

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23 1996 (1) SACR 390 (NmS), 1996 (7) BCLR 996 (NmS).

24 Id at 1006G–H.

certain persistent and intractable offenders who are not only a nuisance but have a tendency to commit crimes repeatedly, consequently making themselves a menace to society. It then becomes imperative that such persons be removed from society for the purpose of rehabilitating them. In this way the protection of the public against such offenders is achieved. As was held in *S v Dodo*[25] a sentence which is grossly disproportionate to the length of sentence merited by the offences in question constitutes cruel, inhuman and degrading punishment or treatment.

[25] Life imprisonment for crimes such as murder and rape may be proportional to the heinous nature of the crimes. However, the imposition of life imprisonment, in the guise of an indeterminate sentence, for an habitual criminal who is neither violent nor a danger to society as contemplated in section 286A of the CPA is a different matter. That sentence is grossly disproportionate to the length of the imprisonment merited by such offences and as such constitutes a violation of section 12(1)(e) of the Constitution. The imposition of such a sentence is clearly grossly disproportionate to the stated purpose for which it is imposed, namely to protect society against repeat offenders. The class of habitual criminal that we are concerned with here does not pose a threat to society that warrants indefinite incarceration.

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25 *S v Dodo* above n 16

[26] The indeterminacy of the sentence also exacerbates the cruel, inhuman or degrading nature of the punishment on the grounds that the maximum period of incarceration remains at all times unknown to the prisoner and the period of his/her incarceration is dependent on the executive. This, no doubt, is the cause of considerable torment. I therefore conclude that to sentence a person to what may potentially constitute a life long imprisonment, infringes the right of such person not to be subjected to cruel, inhuman or degrading treatment or punishment. Moreover, the respondent rightly did not persist in argument that the infringement is justifiable in terms of section 36 of the Constitution. This would have been untenable in the light of the impending legislation and the "practise" of the Department to put a cap of 15 years on the imprisonment term.[26]

[27] Because of my finding that the impugned sections of the CPA and the CSA read together constitute an unjustifiable infringement of the appellant's right to freedom and security of the person which includes the right not to be treated or punished in a cruel, inhuman or degrading way in terms of section 12(1)(e) of the Constitution, it is unnecessary for me to consider the other submissions made by the appellant on the provisions of sections 9 and 34 of the Constitution as well as the question whether the courts are shirking their judicial functions by leaving it to the Commissioner and the parole board to determine when an habitual criminal will be released.

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[26] See para 29 below

[28] It was stated in argument that a new Correctional Services Act 111 of 1998 was assented to on 19 November 1998, and that a section thereof now explicitly defines a period of 15 years as the maximum period of detention. This is clearly a determinate sentence which in fact reflects an attempt by the legislature to cure the unsatisfactory situation obtaining hitherto.

[29] Section 73(6)(c) of Act 111 of 1998 provides:

> "A person who has been declared an habitual criminal may be detained in a prison for a period of 15 years and may not be placed on parole until after a period of at least seven years."

However, despite the coming into force of some of the Act's provisions, section 73(6)(c) has not. In a letter from the Ministry of Correctional Services to the Director of this Court, dated 5 January 2001, the Minister informed the Court that "The reasons why the relevant sections of Act 111 of 1998 are not yet in operation is due to the fact that Parliament must still pass the Correctional Services Amendment Bill, 2000 amending the composition of Correctional Supervision and Parole Boards". It is almost four years since that legislation was passed. In my view, the Department of Correctional Services has been neglectful of the fate of those persons who have been declared habitual criminals.

[30] This Court has on many occasions[27] pronounced on the power given to it by

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[27] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 65; S v Manamela *and Another (Director-General of Justice Intervenening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 54 - 56 and *Hoffmann v South*

section 172 (1) of the Constitution. The section provides as follows:

> "(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; and
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> (b) may make any order that is just and equitable, including –
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> (i) an order limiting the retrospective effect of the declaration of invalidity; and
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> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

The Court is thus empowered in granting appropriate relief to anyone whose rights have been infringed to make an order that is 'just and equitable'.

[31] The declaration of a person as an habitual criminal as contemplated by section 286

African Airways 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 42

of the CPA serves an important sentencing purpose. The constitutional flaw in such declaration, as indicated above, is the omission to provide for a maximum period of imprisonment, either in the CPA or the CSA. As was held in the *Gay and Lesbian Equality Immigration* case,[28] it is not possible, where the invalidity of a statutory provision results from an omission, to achieve notional severance by using words such as "invalid to the extent that", or other expressions indicating notional severance.[29] In this case, as in the *Gay and Lesbian Equality Immigration* case, there are only two options;[30] declaring the whole of section 286 of the CPA to be invalid, or reading-in provisions, either in this Act or the CSA, to cure such invalidity. If this Court were to strike down section 286 of the CPA in its entirety the effect would be to deprive the courts of this sentencing option and to require the sentences to be reconsidered in respect of all persons presently serving sentences in consequence of being declared habitual criminals. That would obviously be inappropriate and a consequence to be avoided, if constitutionally permissible.

[32] While this Court has recognised that, in a proper case, the reading-in of provisions into a statute is a permissible and appropriate remedy consequent upon a declaration of constitutional invalidity, it has at the same time advocated caution:

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28 Above n 27.

29 Id para 64.

30 Id.

> "[74] . . . In deciding whether words should be severed from a provision or whether words should be read into one, a Court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and, secondly, that the result achieved would interfere with the laws adopted by the Legislature as little as possible. In our society where the statute books still contain many provisions enacted by a Parliament not concerned with the protection of human rights, the first consideration will in those cases often weigh more heavily than the second.
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> [75] In deciding to read words into a statute, a Court should also bear in mind that it will not be appropriate to read words in, unless in so doing a Court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a Court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. Even where the remedy of reading in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion. . . ."[31]

None of the dangers referred to exist in the present case. Here, if remedial reading-in is to be considered, it would be appropriate to do so in section 65(4)(b)(iv) of the CSA, by reading in after the word "parole;" the words "provided that no such prisoner shall be detained for a period exceeding 15 years." Such a reading-in is consistent with the Constitution and its fundamental values. It moreover accords precisely with the legislative scheme in question, the way the legislature has chosen to remedy the defect in

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[31] Id paras 74 -75, footnotes omitted.

section 73(6)(c) of Act 111 of 1998 and indeed with the current practice of the Correctional Services. It also does not result in any budgetary intrusion. The above suggested reading-in is accordingly the appropriate constitutional remedy in this case and a just and equitable order under section 172(1)(b) of the Constitution.

[33] Although the appellant has therefore succeeded in his appeal to the extent of persuading this Court of the constitutional invalidity of section 65(4)(b)(iv) of the CSA as read with section 286 of the CPA, he cannot succeed in the consequential relief sought by him, namely to have the sentence declaring him an habitual criminal set aside. The reading-in order proposed does however fix the maximum term of his imprisonment and makes certain that he cannot be detained for more than 15 years, thereby ensuring that he is not treated or punished in a cruel, inhuman or degrading way. Although the order I propose will only come into effect from the moment it is made, this does not mean that other persons currently detained in prison under section 65(4)(b)(iv) of the CSA will not benefit from such order. Imprisonment is an ongoing process, and the terms of the order will apply to all such persons, despite the fact that they were declared to be habitual criminals before the coming into effect of the order.[32]

[34] I accordingly make the following order:

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[32] *S v Makwanyane and Another* above n 17 at para 148.

(1) The order of the High Court in Pretoria made on 26 August 1999 is hereby set aside and for it the following substituted:

(a) Section 65(4)(b)(iv) of the Correctional Services Act 8 of 1959, read with section 286 of the Criminal Procedure Act 51 of 1977, is declared to be inconsistent with the Constitution;

(b) Section 65(4)(b)(iv) of the Correctional Services Act 8 of 1959 is to be read as though the following words appear therein after the word "parole;":

> "Provided that no such prisoner shall be detained for a period exceeding 15 years."

(2) The order in paragraph 1 only comes into effect from the moment of the making of this order.

(3) Save for the above the appeal is dismissed.

Chaskalson P, Ackermann J, Goldstone J, Kriegler J, Mokgoro J, Ngcobo J, Sachs J, Yacoob J

and Madlanga AJ concur in the judgment of Madala J.

MADALA J

For the applicants: F Kathree instructed by the Johannesburg Bar Council.

For the respondents: JA van S d' Oliveira SC instructed by The National Director of Public Prosecutions, Pretoria.