

SOUTH AFRICA / JUDGMENT

Barlow v S (CCT233/15) [2017] ZACC 27; 2017 (2) SACR 535 (CC); 2017 (11) BCLR 1357 (CC) (3 August 2017)

[2017] ZACC 27

COURT
Constitutional Court

BEFORE
Nkabinde, Cameron, Froneman, Jafta, Khampepe,
Madlanga, Mhlantla, Mojaelo, Pretorius, Zondo

CASE / FILE NUMBER
CCT233/15

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CONSTITUTIONAL COURT OF
SOUTH AFRICA
Case CCT 233/15

In the matter between: DESHWIN
 BARLOW
 Applicant
 and
 THE
 STATE
 Respondent
 Neutral citation: Barlow v S [2017]
 ZACC 27

Coram: Nkabinde ADCJ,
 Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga
 J, Mhlantla J, Mojaelo AJ, Pretorius AJ and Zondo J

Judgments: Froneman J (majority): [1] to [18]
 Zondo J (partially dissenting): [19] to [46]

Heard on: 7 March 2017

Decided on: 3 August 2017

Summary: Application for leave to appeal — no prospects of success — not in the interests of justice to grant leave — application is dismissed

Section 35(3)(a) of the Constitution — right to be informed of charge with sufficient detail to answer to it — inadvertent omission — detail given in the course of judgment — no violation

Section 35(3)(o) — right to appeal — no express consideration — no reason to interfere with factual finding of trial Court — no violation

ORDER

On appeal from the Full Court in the High Court of South Africa, Gauteng Local Division, Johannesburg, the following order is made:

1. The application for leave to appeal is dismissed.

JUDGMENT

FRONEMAN J (Nkabinde ADCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ and Pretorius AJ concurring):

[1] Some carelessness and inaccuracies in the judgments of both the Trial Court and on appeal, the Full Court, in the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court), raised the question whether Mr Barlow (applicant) was deprived of his right to a fair trial.

[2] According to the Trial Court judgment, the applicant was charged with eight counts: (1) unlawful pointing of a firearm; (2) murder;

(3) robbery with aggravating circumstances; (4) attempted murder; (5) unlawful possession of a firearm; (6) unlawful possession

of ammunition; (7) another count of unlawful possession of a firearm; and (8) another count of unlawful possession of ammunition. He pleaded not guilty to all the charges.

[3] At the close of the State's case, the applicant applied for discharge, on all counts, in terms of section 174 of the Criminal

Procedure Act.[1] The application succeeded in respect of count 1 (unlawful pointing of a firearm) and counts 5 and 6 (the first counts of unlawful possession of a firearm and ammunition), but not in respect of the remaining counts 2 (murder), 3 (robbery with aggravating circumstances), 4 (attempted murder) and 7 and 8 (unlawful possession of a firearm and ammunition).

[4] When delivering the judgment in the Trial Court, Mabesele J started by stating that:

“The accused stands trial on counts of pointing a firearm, murder (read with the provisions of section 51 of Act 105 of 1997), robbery with aggravating circumstances (read with the provisions of [s]ection 51(2) of Act 105 of 1997), unlawful possession of firearms and unlawful possession of ammunition.”[2]

[5] This statement was incorrect because the applicant had already been discharged on the count of pointing a firearm (count 1) and it

did not refer to the count of attempted murder (count 4). From the rest of the judgment, however, it is clear that it was an inadvertent mistake. Mabesele J dealt fully with the evidence relating to all the remaining charges and found the applicant guilty of murder (count 2), theft (a competent verdict on count 3 – robbery), attempted murder (count

4) and the unlawful possession of a firearm and ammunition (counts 7 and 8).

[6] On 1 April 2011, Mr Barlow was sentenced to 10 years’ imprisonment on count 2 (murder), three years on count 3 (theft), five years on count 4 (attempted murder) and three years for counts 7 and 8 (unlawful possession of a firearm and ammunition). The sentences on counts 3, 4, 7 and 8 were all ordered to run concurrently. The result was that the accused is sentenced to an effective term of 15 years’ imprisonment.

[7] Mr Barlow launched an opposed application for leave to appeal against the convictions. This was on the grounds that the State

did not prove his guilt beyond a reasonable doubt for the convictions of murder and attempted murder and that the element of intention to permanently deprive the deceased of his firearm was not established. Leave to appeal to the Full Court was granted.

[8] The appeal turned on the facts and involved no challenge to the fairness of the trial. The Full Court found that the undisputed facts were that the deceased and the applicant had an argument; the deceased had his firearm on his person; and that the deceased died of a gunshot fired by the applicant from that firearm. The deceased’s companion sitting in the back of his vehicle, Ms Botha, was shot at by the applicant shortly after the deceased was shot. The applicant then fled from the scene taking with him the deceased’s firearm. Given these facts, the Full Court found no misdirection in the manner in which

the Trial Court evaluated the evidence and that its conclusion that the State had proved its case beyond a reasonable doubt could

therefore not be faulted.

[9] So far, so good. An ordinary appeal on the facts that would normally not attract this Court’s jurisdiction.[3] But now another glitch. Although the Full Court dismissed the applicant’s appeal against his convictions, it failed to mention that he had been found guilty of theft on count 3 (the robbery charge).

[10] The inaccuracies in the introductory paragraph of the Trial Court's judgment relating to the charges he faced may be argued

to have infringed his right to a fair trial and this infringement may also have been compounded by the Full Court's failure to mention the theft conviction in the appeal judgment.

[11] The right to a fair trial in the Bill of Rights includes the right to be informed of the charge with sufficient detail to answer

it.[4] There is no suggestion that the applicant's rights in this regard were infringed. Although not expressly spelled out in the section, it seems evident that an accused person is entitled to be provided with reasons for each charge he is convicted of and that this also extends to the right of appeal to a higher court.[5]

[12] As noted earlier, the initial wrong reference to the charge of pointing a firearm (count 1) instead of attempted murder (count 4)

was clearly an inadvertent error. In the course of the judgment Mabesele J dealt extensively with the evidence, including the evidence relating to the attempted murder charge, and came to the conclusion that the applicant was guilty on that count. He was then duly sentenced for the conviction on that charge.

[13] In the course of his judgment in the Trial Court, Mabesele J also considered and gave reasons why robbery with aggravating circumstances was not established in relation to count 3, and why a competent verdict of theft was called for. However, on appeal, the Full Court did not expressly consider the reasons the Trial Court gave for the theft conviction. Nor did it expressly consider the basis upon which the applicant appealed, namely, that intention on his part to permanently deprive the deceased of his firearm was not established beyond a reasonable doubt.

[14] The right to a fair trial includes the right to appeal.[6] Because the Full Court did not expressly consider Mr Barlow's appeal on theft, it may be argued that he has had no appeal on the theft conviction. Consequently it may be argued that the applicant has not had a fair trial regarding his appeal on the theft conviction. The application for leave to appeal against the conviction of theft on the basis of a violation of the applicant's right to a fair trial must therefore be considered with care.

[15] It nevertheless does not assist the applicant materially. Although the Full Court on appeal did not specifically make mention of the theft charge, it dismissed the appeal on the basis that there was no reason to interfere with the factual findings made by Mabesele J in the Trial Court. There is no ground for faulting that approach. On those findings the applicant

appropriated the firearm and did not return it. The rejection of his version by Mabesele J in the Trial Court as untrustworthy

means that his defence of no intention to permanently deprive the owner of the firearm cannot stand. Although this aspect of the application raises a constitutional issue, there are no prospects of success.

[16] There is another reason why it is not in the interests of justice to grant leave on this aspect alone. In another case it might have been appropriate to refer the matter back to the Full Court. But in this case it would not be in the interests of justice to do so. The trial court sentenced the applicant to three years' imprisonment on count 3 (theft).

The sentences on counts 3, 7 and 8 together (unlawful possession of a firearm and ammunition), were ordered to run concurrently with the five-year sentence on count 4 (attempted murder). It thus makes no difference on sentence whether the theft conviction stands or falls.

[17] The application regarding the remaining convictions on murder, attempted murder, unlawful possession of a firearm and ammunition must also stand. That said, though, it must be reiterated and emphasised that clear and careful reasons for the findings on criminal charges are vital for the administration of justice not to fall into disrepute.

[18] The following order is issued:

1. The application for leave to appeal is dismissed.

ZONDO J

Introduction

[19] The applicant, Mr Deshwin Barlow, applies to this Court for an order:

“Declaring the decision of the Full Court of the Gauteng Local Division, Johannesburg, [Makgoka J, Mphahlele J and Baloyi AJ] . . . dismissing the applicant’s appeal against his conviction by the Gauteng Local Division (Mabesele J) . . . on one count of murder, one count of theft, one count of attempted murder, one count of unlawful possession of a firearm and one count of unlawful possession of ammunition, unconstitutional and set aside to an extent that the verdict was inconsistent with regard to the following constitutional factors.”

Thereafter, the applicant sets out the bases for his attack on the decision of the Full Court.

[20] The applicant’s application was not prepared by an attorney or counsel. The applicant either prepared it himself or he got someone else with some knowledge of the preparation of court papers to prepare it for him. It seems to me that we must treat the application as an application for leave to appeal against the judgment and order of the Full Court which heard his appeal. I shall, therefore, approach this judgment on this basis.

Background

[21] The applicant initially faced eight charges before Mabesele J in the Gauteng Local Division of the High Court. He was acquitted of three at the end of the State's case and was left with five charges to face. In the view I take of this matter, it is not necessary to give a detailed background to the matter. According to the judgment of the trial court the applicant faced the following counts before it:

- (a) pointing a firearm;
- (b) murder (read with the provisions of section 51(1) of Act 105 of 1997);
- (c) robbery with aggravating circumstances (read with the provisions of section 51(2) of Act 105 of 1997);
- (d) unlawful possession of firearms; and
- (e) unlawful possession of ammunition.

The trial court must have meant that these were the charges the applicant faced after his acquittal of three other charges at the end of the State's case.

[22] The applicant pleaded not guilty to all the charges. The events that gave rise to the charges had occurred on 24 October 2009

at about 02h00 at Reiger Park, Johannesburg. The applicant had attended a certain function at Reiger Park on the evening of 23 October 2009. The function went on until the early hours of 24 October 2009. At about 02h00 at the parking of the venue where the function had been held, Mr Frederick Flagg died as a result of a gunshot to his stomach. There were two or three other gunshots to one or both of his legs.

[23] There are different versions concerning the circumstances under which Mr Flagg died. According to one witness, the applicant shot Mr Flagg deliberately as he was asking him not to shoot. This was after an argument which had arisen between Mr Flagg and someone else and/or the applicant at the parking. According to the applicant, an argument arose between himself and the

deceased after the applicant had accidentally bumped against the mirror of Mr Flagg's motor vehicle. The deceased had a firearm and the two struggled for the firearm and, in that struggle, shots went off from the deceased's firearm and wounded the deceased in his stomach and legs.

[24] It is common cause that the shot that killed Mr Flagg came from his firearm. According to the State witnesses, the applicant got the firearm from Mr Flagg. After Mr Flagg had been shot, a Ms Botha, who was in Mr Flagg's car, was also shot in the arm. Ms Botha raised her arm to protect her head as she was being shot at by, according to her, the applicant. Had she not raised her arm, she would have been shot in the head. Mr Flagg had come out of his motor vehicle (of which he was the driver) and he died outside his motor vehicle. After Mr Flagg had been shot, the applicant left the scene with Mr Flagg's firearm and ammunition.

The charge of robbery was based on the fact that the applicant took Mr Flagg's firearm and ammunition with him.

Trial Court

[25] The trial court convicted the applicant of "counts 2, 3, (theft), 4, 7 and 8." That is five counts. At the

beginning of its judgment, the trial Court did not specify the count numbers but simply stated what charges the applicant was facing. However, when it convicted the applicant, it referred to count numbers without specifying what the charges were to which the count numbers referred.

[26] At the beginning of its judgment, the trial court also mentioned the charges that the applicant faced but it did not mention the charge of attempted murder. However, in his judgment on sentence, the trial Judge began his judgment by specifying the

counts of which he said the applicant had been found guilty. In mentioning them, he included attempted murder. The trial Judge said in the first paragraph of his judgment on sentence:

"The accused is guilty of murder of Metro Police Officer, Flagg Mervin Frederick. He is also guilty of theft of a firearm of the deceased, attempted murder, unlawful possession of a firearm and unlawful possession of ammunition."

The applicant was sentenced to an effective term of fifteen (15) years' imprisonment. Later, the High Court granted the applicant "leave to appeal against CONVICTIONS" to a Full Court of the High Court.

Full Court

[27] The applicant appealed to a Full Court of the High Court against all his convictions. The appeal was heard by Makgoka J, Mphahlele J and Baloyi AJ. Makgoka J wrote a unanimous

judgment.

[28] At the beginning of its judgment, the Full Court pointed out that the applicant's appeal was against his conviction on four

counts which it identified as murder (count 2); attempted murder (count 4); unlawful possession of a firearm (count 7) and unlawful possession of ammunition (count 8)".[7] At the end of the judgment, the conclusion and order read as follows:

"[28] In the result the appeal against the conviction has to fail.

[29] The following order is made:

1. The appeal against the conviction is dismissed."[8]

This is the order against which the applicant must be taken to seek leave to appeal.

In this Court

[29] The applicant contends that the Full Court failed “to take cognisance of the fact that [his] right to ‘human dignity’

and to receive ‘a fair trial’ in terms of sections 10 and 35(3) of the Constitution” had been infringed by the Full Court in that it:

- (a) disregarded his version of events;
- (b) convicted the applicant “based on a single witness’ evidence” when that evidence was contradictory and inconsistent with the objective facts; and
- (c) drew a negative inference from the applicant’s “failure to call the two ‘so called’ unnamed witnesses to testify that they had witnessed the shooting”.

[30] In regard to the Full Court’s decision to dismiss the applicant’s appeal against the murder conviction, the applicant’s Counsel’s attack did not raise any constitutional issue nor did it raise any arguable point of law of general public importance that deserves to be considered by this Court. His submissions were simply directed at persuading this Court that the Full Court was wrong not to interfere with the factual findings that were made by the trial court in regard to the murder charge and to have itself made the factual findings that it made in this regard. For this reason, the applicant’s application for leave to appeal against the Full Court’s dismissal of his appeal concerning the murder conviction falls to be dismissed for lack of jurisdiction.

[31] The applicant’s application also relates to his appeal before the Full Court against his convictions on the other counts. There is a problem with the applicant’s application for leave to appeal against what the applicant calls in his Notice of Motion “the decision of the Full Court of the Gauteng Local Division, Johannesburg . . . dismissing [his] appeal against his conviction” on the other counts. The problem is that, upon a proper reading of the Full Court’s judgment, it is clear that that Court did not make any decisions on the applicant’s appeals in respect of his convictions on the other counts. Since the Full Court did not decide those appeals, there cannot in law be an appeal to this Court. I elaborate below to show that the Full Court only decided the appeal only against the murder conviction and nothing else.

[32] In the first two paragraphs of its judgment the Full Court said:

“[1] This appeal is against the conviction only. Initially, the appellant faced eight counts in this court. However, the trial culminated in his conviction on four of those counts, namely, murder (count 2); attempted murder (count 4); unlawful possession of a firearm (count 7) and unlawful possession of ammunition (count 8).

With the order of concurrency of the sentence, the appellant was sentenced to an effective period of 15 years’ imprisonment.

The appeal is against the conviction on all four counts, with leave of the trial court (Mabesele J).

[12] In the indictment, the appellant was alleged to have murdered Mr Mervin Frederick Flagg (the deceased) by shooting him. The attempted murder count was in respect of Ms Myrna Botha (Ms Botha). The allegation was that after the appellant had shot dead the deceased, he took his firearm, which had ammunition in it. This forms the basis of the counts of unlawful possession of a firearm and of ammunition (counts 7 and 8, respectively)."[9]

[13] It will be seen that in paragraph 1, the Full Court said that the applicant's trial had culminated in his conviction on four

counts. This was incorrect. At the trial the applicant was convicted of five counts. This is spelt out clearly in the last paragraph of Mabesele J's judgment. The applicant had originally faced eight charges but he was acquitted

of three in terms of section 174 of the Criminal Procedure Act. The trial then proceeded in respect of five charges and he was convicted of all of them.

[14] The Full Court said that the appeal before it was an appeal against four convictions. It said that the counts of which the applicant had been convicted were "murder (count 2); attempted murder (count 4); unlawful possession of a firearm (count 7) and

unlawful possession of ammunition (count 8)."[10] In the last sentence of the first paragraph of its judgment, the Full Court said: "The appeal is against the conviction on all four counts, with leave of the trial court (Mabesele J)".[11]

[15] There is one count of which the applicant was convicted in the trial court which the Full Court did not include as one of the counts

for consideration on appeal. That is the count of theft. The applicant's conviction of theft came about in this way. One of the charges that the applicant had faced in the trial court was robbery with aggravating circumstances (read with section 51(2) of the Act 105 of 1997). The trial court concluded that there was not enough evidence to convict the applicant of robbery because no force had been used to take the firearm. It, nevertheless, took the view that there was enough evidence to convict the applicant of the competent verdict of theft. This was the alleged theft by the applicant of the deceased's firearm and ammunition.

[16] A reading of the entire judgment of the Full Court reveals that that Court never considered the applicant's appeal against

his conviction of theft despite the fact that the trial Judge had granted him leave to appeal against his conviction of this count as well. This means that the Full Court failed to carry out its statutory obligation to consider and decide the applicant's

appeal against his conviction of this count. This was prejudicial to the applicant and was a denial of his right to an appeal in terms of section 35(3)(o) of the Constitution.

[17] The judgment of the Full Court consists of 29 paragraphs. Paragraphs 28 and 29 contain, respectively, the conclusion and

the order. I have already quoted paragraphs 1 and 2 of the judgment. They relate to the counts that the Full Court

believed the applicant had been convicted of which were before it on appeal. From paragraphs 3 to the end of the judgment, the judgment is all about the evidence relating to the murder charge, the analysis of the evidence relating to that charge, the conclusion of the Full Court on the appeal against the conviction of murder and the order. Paragraphs 28 and 29 of the

judgment

read:

[29] The following order is made:

1. The appeal against the conviction is dismissed.”

[38] Although at the beginning of its judgment, the Full Court demonstrated that it was alive to the fact that the appeal was not limited to the murder conviction and that there were other counts of which the applicant had been convicted which were on appeal before

it, it focused its judgment on the appeal against the murder conviction. It would seem that, by the time that the Full

Court concluded its consideration of the applicant’s appeal against the murder conviction, it had forgotten that that did not mark the end of the matter and it still had to consider the applicant’s appeals against his convictions on the other counts. The two other members of the Court also did not pick this up. That is the only logical explanation for the Full Court’s failure to discharge its obligation to consider and determine the applicant’s appeals against the other convictions including that of theft. The Full Court’s failure to consider and determine the applicant’s appeals against the other convictions was a denial of the applicant’s right to appeal entrenched in section 35(3)(o) of the Constitution.

[39] Since the Full Court did not decide the applicant’s appeals against the other four convictions, that means that those appeals are still pending in the High Court. They must first be decided before there can be an application for leave to appeal to this Court. The matter must be remitted to the Full Court to enable it to determine the applicant’s appeals against the other convictions including the conviction of theft. To this end the applicant’s attorneys should approach the Judge President of the Gauteng Provincial Division of the High Court or his relevant Deputy to request that arrangements be made for the appeals against the other convictions to be heard by a Full Court.

[40] Because of the cumulation of errors in the trial court and Full Court judgments, the applicant has been very unlucky. The only charge that the trial court dealt with in any serious way was the charge of murder. It dealt with other charges in two or three sentences only. That is when it was convicting him of the other charges. It analysed evidence only in regard to the murder charge and did not do so in respect of the other charges. In fact, in

respect of the other charges it did not even state what his defence was nor did it state his explanation for his conduct.

[41] In the first page and a half or so of the trial court's judgment, the trial court sought to identify the charges that the applicant had faced. It then recorded that: the applicant pleaded not guilty to each one of the charges, did not offer a plea

explanation and, made certain formal admissions in respect of, I think, the murder charge. The Court then stated that it was admitted that the deceased's firearm was found at the applicant's place of residence. The Court also recorded the State witnesses' evidence in regard to count 1 which was the charge of pointing a firearm. It did not refer to the applicant's evidence in regard to that charge. This is one of the charges of which the applicant was acquitted at the end of the State case.

[42] After the trial court had dealt with the matters to which I have referred above, it pointed out that Mr Lawrence Flagg, a cousin

of the deceased, and Ms Myrna Botha testified for the State in respect of counts 2, 3, 4, 7 and 8. From then on up to the last but one paragraph of the judgment, the trial court recorded the evidence of the State witnesses, the only defence witness called and the applicant (who testified in his own defence) and analysed that evidence in respect of the murder charge only and concluded that the applicant should be convicted of murder.

[43] To the extent that the trial court referred to some evidence relating to one or other charge other than the murder charge, it

did so as part of simply recording the sequence of events. It did not do so in the course of considering the question whether the applicant should be convicted or acquitted of those charges. It was only in the last paragraph of the judgment that the trial court said something about the other charges. Even then, it was simply two or three sentences. The last paragraph of the judgment reads:

"The evidence of the state clearly calls for conviction of the accused on counts 2, 3, 4, 7 and 8. However, accused should be guilty of theft on count 3. The reason is that there is no evidence that the deceased's firearm was taken from him by force. In the result, the accused is GUILTY on counts 2, 3, (theft), 4, 7 and 8."

This is about all the trial court said about the other counts.

[44] From this, one can see that the trial court did not state what the applicant's defence was to each one of those charges nor

what his explanation was for this conduct. This was strange because, for example, in regard to the charge of robbery,

the applicant testified to the effect that, when he took the deceased's firearm, he did so because he did not want someone

else to pick it up and shoot him with it. He also said that he intended to hand it over to the Police when he handed himself over. The only basis upon which the public prosecutor sought to challenge the applicant's explanation for why he had taken the deceased's firearm and ammunition was that the applicant never intended to hand himself over to the police. However, the public prosecutor withdrew this challenge after the applicant's Counsel had pointed out that the Investigating Officer had confirmed in the bail application that an arrangement had been made with him for the applicant to hand himself over to the Police but the Metro Police arrested him before the time when he was to hand himself over. Of course, the Full Court did not fare better. It simply dealt with the appeal against the murder conviction only and left out all the other convictions.

[45] It is important that courts should consider all issues or matters before them and decide them properly and give reasons for their conclusions. When they do not do that, they infringe the fair trial rights of accused persons or appellants.

[46] In the result I would have made the following order:

1. Leave to appeal against the Full Court's dismissal of the applicant's appeal against the murder conviction is refused.
2. The application for leave to appeal against the Full Court's alleged decision dismissing the applicant's appeals against the rest of his convictions is struck off the roll.
3. The Registrar of this Court is directed to bring this judgment to the attention of the Registrar of the Gauteng Local Division of the High Court who must in turn bring it to the attention of the Judge President or his Deputy.

For the Applicant: V T Seboko pro deo counsel appointed on behalf of the applicant

For the Respondent: C E Britz and H H P Mkhari instructed by Director of Public Prosecutions, Johannesburg

[1] 51 of 1977.

[2] *Barlow v S* [2015] ZAGPJHC 318 (30 January 2015) at paras 1-2.

[3] See, for example, *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC).

[4] Section 35 of the Constitution provides: "(3) Every accused person has a right to a fair trial, which includes the right— (a) to be informed of the charge with sufficient detail to answer it; (b) to have adequate time and facilities to prepare a defence; (c) to a public trial before an ordinary court; (d) to have their trial begin and conclude without unreasonable delay; (e) to be present when being tried; (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly; (g) to have a legal practitioner assigned to the accused person by the

state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; (h) to be presumed innocent, to remain silent, and not to testify during

the proceedings; (i) to adduce and challenge evidence; (j) not to be compelled to give self-incriminating evidence; (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language; (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted; (m) not to be tried for an offence in respect of an act or omission for

which that person has previously been either acquitted or convicted; (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and (o) of appeal to, or review by, a higher court.”

[4] Section 35 of the Constitution provides:

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

- (a) to be informed of the charge with sufficient detail to answer it;
- (b) to have adequate time and facilities to prepare a defence;
- (c) to a public trial before an ordinary court;
- (d) to have their trial begin and conclude without unreasonable delay;
- (e) to be present when being tried;
- (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
- (g) to have a legal practitioner assigned to the accused person by the

state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

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

- (i) to adduce and challenge evidence;
- (j) not to be compelled to give self-incriminating evidence;
- (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
- (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

- (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
- (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (o) of appeal to, or review by, a higher court.”
- [5] Section 146 of the Criminal Procedure Act provides: “A judge of the proviso to section 145(4) whether any matter constitutes a question of law or a question of fact, give the reasons for his decision.” See also, for example, *Mphahlele v First National Bank of South Africa Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at paras 4 and 12; and *Mokela v The State* [2011] ZASCA 166; 2012 (1) SACR 431 (SCA) at paras 12-3.
- [5] Section 146 of the Criminal Procedure Act provides:
- “A judge of the proviso to section 145(4) whether any matter constitutes a question of law or a question of fact, give the reasons for his decision.”*
- See also, for example, *Mphahlele v First National Bank of South Africa Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at paras 4 and 12; and *Mokela v The State* [2011] ZASCA 166; 2012 (1) SACR 431 (SCA) at paras 12-3.
- [6] Section 35(3)(o) of the Constitution.
- [7] Above n 2 at para 1.
- [8] *Id* at paras 28-9.
- [9] *Id* at paras 1-2.
- [10] Above n 9.
- [11] *Id* at para 1.

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