



CONSTITUTIONAL COURT OF SOUTH AFRICA

The State v Henry Emomotimi Okah

CCT 315/16 and CCT 193/17

Date of hearing: 28 November 2017

Date of judgment: 23 February 2018

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

At 10h00 on 23 February 2018, the Constitutional Court handed down a unanimous judgment in two consolidated applications concerning the conviction of Mr Henry Emomotimi Okah for terrorist acts under the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (Act).

Mr Okah is a Nigerian citizen who since 2007 has been a South African permanent resident. The Gauteng High Court, Johannesburg (High Court) found that he was the leader of the Movement for the Emancipation of the Niger Delta (MEND), an umbrella organisation of militant resistance groups in the south-eastern states of Nigeria. He was charged with 13 counts under the Act stemming from two separate bombings in Nigeria. The first occurred in Warri on 15 March 2010 and the second in Abuja on 1 October 2010. The bombings were intended to inflict maximum carnage and resulted in the death of at least nine people. Many others were seriously injured.

Mr Okah was in Nigeria at the time of the Warri bombings and in South Africa when the Abuja bombings took place.

The High Court convicted him on all 13 counts, embracing both the Warri and Abuja bombings. Mr Okah challenged the Court's jurisdiction under section 15(1) of the Act on the grounds that the Warri bombings took place when he was outside South Africa. The High Court rejected this defence. It also rejected Mr Okah's argument that his actions qualified for exemption under section 1(4) of the Act, which exempts from prosecution acts in pursuance of the legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces.

At the end of his trial, Mr Okah requested the High Court to make three special entries on the record about alleged irregularities in his trial. These were (1) the presence in the trial court of Mr Clifford Osagie, a barrister employed by the Nigerian State Security Services as a prosecutor; (2) the State's admitted failure to inform Mr Okah of his right to consular access under Article 7(3) of the International Convention for the Suppression of Terrorist Bombings; and (3) the trial court's failure to issue a letter of request under section 2(1) of the International Co-operation in Criminal Matters Act to secure evidence from witnesses in proceedings that took place in Nigeria.

The High Court refused to make these special entries.

On appeal, the Supreme Court of Appeal overturned the convictions on the four charges arising from the Warri bombings. It reasoned that section 15(1) of the Act confers extra-territorial jurisdiction only in relation to crimes of *financing* terrorism. Consequently, the Act did not establish jurisdiction for South African courts to convict Mr Okah of any offences committed outside South Africa, bar the financing of terrorism. The result was that the Supreme Court of Appeal replaced the sentence of 24 years' imprisonment the High Court had imposed with a sentence of 20 years.

In the Constitutional Court, in the first application, the State and the National Director of Public Prosecutions sought leave to appeal against the Supreme Court of Appeal's conclusion that the Act has narrow jurisdictional reach. The application sought to reinstate Mr Okah's convictions on all the Warri charges, plus the sentence the High Court imposed.

In the second application, made shortly before the Constitutional Court was to hear the first application on 1 August 2017, Mr Okah sought leave to appeal on four issues. These were the High Court's refusal to exempt him from culpability for the bombings on the basis of section 1(4) of the Act, and its refusal to make three special entries on the record of the proceedings before it under section 317 of the Criminal Procedure Act. The Constitutional Court consolidated the State's and Mr Okah's applications and postponed the hearing to 28 November 2017.

Shortly before the hearing on 28 November 2017, the Constitutional Court directed that the papers be brought to the attention of certain international legal experts. In response, the Institute for Security Studies and the Southern Africa Litigation Centre were admitted as first and second *amici curiae*.

In a unanimous judgment written by Cameron J, the Constitutional Court held that section 15(1) of the Act confers extra-territorial jurisdiction on South African courts to try terrorist offences that occurred outside South Africa – even beyond the financing of an offence. It reasoned that the Supreme Court of Appeal's narrow interpretation of the term "specified offence" created a series of absurd results within other parts of the Act and undermined the Act's purpose to give effect to South Africa's international obligation to prosecute-or-extradite perpetrators of terrorist activities.

The Constitutional Court also rejected Mr Okah's application for exemption under section 1(4) of the Act. The Constitutional Court focussed on the fact that, to qualify for this exemption, acts must be taken in accordance with international law, especially international humanitarian law. The Constitutional Court reasoned that both the Warri and Abuja bombings violated international humanitarian law. Mr Okah therefore could not find protection under section 1(4) of the Act.

Finally, the Constitutional Court held that the High Court rightly dismissed Mr Okah's applications for special entries on Mr Osagie's presence at trial and on the trial court's failure to issue letters of request to the Nigerian government. The Constitutional Court reasoned that even if Mr Osagie's presence could have given rise to an irregularity, admitting the special entry on this ground would constitute an abuse of court process. It further concluded that the High Court's failure to issue letters of request did not amount to an irregularity.

However, the Constitutional Court held that the High Court erred in dismissing one of Mr Okah's applications for a special entry. This was his application regarding his right to be informed of his right to consular access. The Constitutional Court concluded that this special entry should have been made. This, in turn, entitled Mr Okah to a right to appeal his conviction as a whole under section 318 of the Criminal Procedure Act.

In deciding the appeal to his conviction on the basis of this special entry, the Constitutional Court held that the irregularity did not result in a failure of justice.

In consequence, the Constitutional Court set aside the judgment of the Supreme Court of Appeal, with the result that all of the convictions the High Court entered were reinstated, together with the sentence of 24 years that the High Court imposed.