



CONSTITUTIONAL COURT OF SOUTH AFRICA

Boswell John Mhlongo v The State and Alfred Disco Nkosi v The State

CCT 148/14 and CCT 149/14

Date of hearing: 10 March 2015

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.

On Tuesday, 10 March 2015 at 10h00 the Constitutional Court will hear an application for leave to appeal against a decision by the North West High Court, Mahikeng regarding the admissibility of an accused person's statement, classified as an admission, as evidence against his or her co-accused.

The applicants, Mr Boswell John Mhlongo and Mr Alfred Disco Nkosi, together with six others, were accused of shooting and killing a police officer in his house in Mothutlung on 3 August 2002. They were charged with murder, robbery with aggravating circumstances, unlawful possession of a firearm and unlawful possession of ammunition. Prior to the trial, some of the co-accused made out-of-court statements which implicated Mr Mhlongo and Mr Nkosi. At the High Court, all the accused pleaded not guilty. The High Court found that those statements were admissions and not confessions and that they were, therefore, admissible against the individual accused and their co-accused. The Court also found that even though the statements constituted hearsay evidence they could be admitted as evidence under the Law of Evidence Amendment Act because it was in the interests of justice to do so. The Court considered that the evidence before it was credible and, based on this, found all the accused guilty and sentenced them to life imprisonment.

Seven of the accused appealed to the Full Court of the High Court. That Court accepted that evidence of an accused against a co-accused required corroboration and that, in this case, there was corroboration. Additionally, the Full Court found that crucial parts of the out-of-court statements were not hearsay evidence because the co-accused later

confirmed them in court. The Court upheld the convictions. Several of the accused filed applications for leave to appeal to the Supreme Court of Appeal that were dismissed.

Mr Mhlongo and Mr Nkosi were the only ones who appealed to the Constitutional Court for their convictions to be set aside. They argue that admitting out-of-court admissions, but not confessions, by one accused against a co-accused, violates their right to equality before the law. They also contend that this type of evidence should not be admitted and such admission violates their rights to a fair trial because it may preclude an accused from cross-examining the person who made the statement about them. In addition, they argue that this evidence is unreliable because an accused now has an incentive to shift blame onto someone else. Mr Mhlongo and Mr Nkosi submit that at the close of the State's case they should have been released.

The State submits that prior to the enactment of the Law of Evidence Amendment Act, there was a common law prohibition on the admission of out-of-court statements against co-accused. Accordingly, it agrees that the only way this Court could admit these statements is if it finds that the Law of Evidence Amendment Act abolished that prohibition. The State also agrees that the distinction between confessions and admissions is problematic. However, it does not agree that Mr Mhlongo and Mr Nkosi's convictions ought to be set aside because it maintains that there is an exception to the prohibition of this type of evidence: statements made in furtherance of a conspiracy or common purpose. The State argues that a common purpose to commit the crime was established against all of the accused and therefore, on this basis, the statements could be admitted and a conviction secured.