



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

Date of order: 25 March 2015

Date of reasons: 25 June 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.

Today the Constitutional Court handed down reasons for an order it granted on 25 March 2015. The Court overturned the convictions and sentences of Mr Boswell Mhlongo and Mr Alfred Nkosi, the applicants, and directed that they be released from prison immediately. The appeal concerned the constitutional validity of admitting out-of-court statements of an accused as evidence against a co-accused.

The applicants, together with six others, were accused of shooting and killing a warrant officer in his house in Mothutlung in 2002. They were charged with murder, robbery with aggravating circumstances and unlawful possession of firearms and ammunition. Prior to the trial, some of the accused made out-of-court statements which incriminated the applicants. An incriminating statement can either be a confession or an admission. A confession is an unqualified admission of one's own guilt while an admission is any statement which is adverse to the accused's own interests. According to the Criminal Procedure Act, confessions are only admissible against their maker and are inadmissible against other accused.

The accused were tried in the North West High Court, Mafikeng, which found that the out-of-court statements were admissions and not confessions. The Court held that, in terms of the Law of Evidence Amendment Act (Evidence Act), these statements could be admitted as evidence against the other accused, if it was in the interests of justice to do so. The Court found all of the accused guilty and sentenced them to life imprisonment for the murder, and to lesser terms for the other charges.

Seven of the accused appealed to the Full Court of the High Court. The Full Court found that the out-of-court statements were admissible against the other accused in terms of the Evidence Act. The Court acknowledged that the evidence of a co-accused should be treated with caution but ultimately held that there was sufficient evidence implicating the applicants (as well as the other accused) to uphold their convictions and sentences. Several of the accused unsuccessfully applied for leave to appeal to the Supreme Court of Appeal.

Mr Mhlongo and Mr Nkosi appealed to the Constitutional Court for their convictions and sentences to be set aside. They argued that allowing out-of-court admissions, but not confessions, by an accused to be used in evidence against a co-accused infringes the rights to equality before the law and a fair trial. They contended that the out-of-court evidence implicating them should have been declared inadmissible and they ought to have been discharged at the close of the State's case.

The State agreed that the distinction between confessions and admissions, for the purpose of admissibility against a co-accused, was problematic and submitted that both types of out-of-court statements by accused were inadmissible against co-accused in terms of the common law. The State conceded that the convictions of the applicants should be set aside.

This Court issued an order overturning the applicants' convictions and sentences, and directed their immediate release, reserving its reasons. In the reasons for that order, Theron AJ, on behalf of a unanimous Court, found that the common law position prior to the Evidence Act was that both admissions and confessions of an accused were inadmissible against a co-accused. The Evidence Act did not alter this position. Furthermore, the distinction between the admissibility of confessions and admissions used against co-accused was arbitrary and unjustified and thus violated the applicants' rights to equality before the law and equal protection of the law. As a result of this finding, the Court found it unnecessary to deal with the applicants' fair trial argument. The Court concluded that, without the out-of-court admissions, there was insufficient evidence against the applicants to justify their convictions. The appeal was upheld and the orders of the Full Court and High Court were set aside.