CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 86/16

In the matter between:

SAMUEL SAMPIE KHANYE First Applicant

VICTOR ZANDILE MOYO Second Applicant

and

THE STATE Respondent

Neutral citation:	*Khanye and Another v S* [2017] ZACC 29
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J.
Judgment:	Mhlantla J (Unanimous)
Order:	22 March 2017
Reasons on:	10 August 2017
Summary:	Extra-curial admissions of an accused are inadmissible against a co-accused — insufficient evidence to warrant convictions — convictions and sentences set aside.

REASONS FOR ORDER

MHLANTLA J (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring):

Introduction

[1] This case pertains to an application for leave to appeal against a judgment and order of the North West High Court, Mafikeng (Trial Court). That Court had convicted the applicants and their five co-accused[1] based on the doctrine of common purpose on one count of murder of a police officer, robbery with aggravating circumstances and unlawful possession of firearms and ammunition. The Trial Court sentenced the applicants to life imprisonment in respect of the murder count, 15 years' imprisonment for the robbery and six years' imprisonment for possession of firearms and ammunition.[2]

[2] It is apposite at this stage to state that on 22 March 2017, this Court granted the following order:

> "1. Leave to appeal is granted.
> 2. The appeal is upheld.
> 3. The order under case number CAF 08/2012 of the Full Bench of the North West High Court of South Africa, Mafikeng is set aside to the extent set out below:
> (a) The appeal by the sixth and seventh appellants against their convictions and sentences on counts 1, 2, 4 and 5 is upheld.
> (b) Their convictions on those counts are set aside.

[1] In the Trial Court, the accused were Mr Thabo Elekia Matjeke (accused 1); Mr Boswell Mhlongo (accused 2); Mr George Sipho Makhubela (accused 3); Mr Alfred Disco Nkosi (accused 4); Mr Thembekile Molaudzi (accused 5); Mr Samuel Sampie Khanye (accused 6); and Mr Victor Zandile Moyo (accused 7). Three of their co-accused successfully appealed to this Court against their sentences and convictions in: *Molaudzi v S* [2015] ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC) and *Mhlongo v S; Nkosi v S* [2015] ZACC 19; 2015 (2) SACR 323 (CC); 2015 (8) BCLR 887 (CC). The other two, Mr George Sipho Makhubela and Mr Thabo Elekia Matjeke have now applied to this Court seeking the same order that was granted in *Molaudzi.*

[2] *Matjeke v S* [2013] ZANWHC 95 at para 1.

(c) The applicants must be released from prison immediately.

(d) Reasons for this order shall be given at a later date."

[3] The reasons for our order are set out below.

Parties

[4] The first applicant is Mr Samuel Sampie Khanye. He was accused 7 during the trial.[3] The second applicant is Mr Victor Zandile Moyo. He was formerly accused 8 in the Trial Court.[4] The respondent is the State as represented by the National Director of Public Prosecutions, Mmabatho.[5] In order to understand the issues, it is necessary to set out the background.

Background

[5] On 3 August 2002, Warrant Officer Dingaan Makuna (the deceased) arrived at his home at Mothutlung, North West Province with his service pistol tucked in his waist. There were two motor vehicles, a Toyota Camry and a bakkie, parked outside his home. Two men armed with firearms, entered the premises and shot him three times in the presence of his daughter. He was taken to hospital where he died later that night. His service pistol was never recovered.[6] The applicants and their five co-accused were arrested. They were charged in the Trial Court with murder, armed robbery and unlawful possession of firearms and ammunition.

Litigation history

Trial Court

[6] Mr Khanye and Mr Moyo stood trial with their co-accused for murder (count 1), robbery with aggravating circumstances (count 2), unlawful possession of a

[3] Accused 6 in the Trial Court disappeared and Mr Khanye then became accused 6. The erstwhile accused 6 who disappeared will now be referred to as Mphume as it was done in the Trial Court.

[4] Because of the disappearance of accused 6, Mr Moyo then became accused 7.

[5] *Matjeke* above n 2.

[6] Id at para 3.

firearm (count 4), and unlawful possession of ammunition (count 5).[7] They pleaded not guilty to all counts. The State mounted the following evidence against them.

[7] After their arrest, all of the accused made extra-curial statements to the investigating officer and to a magistrate. Some had pointed out the house of the deceased and the tavern where they had gathered before going to the deceased's house. During the trial, they challenged the admissibility of these statements and alleged that the statements had not been made freely and voluntarily. They alleged that the police had assaulted them and promised to give them money and release them on bail if they made the statements. Accordingly, they claimed, they acted under duress when the statements were made and thus these were inadmissible.

[8] As a result, a trial-within-a-trial was held to determine the admissibility of extra-curial statements. The State adduced evidence relating to the procedure adopted by the police and whether certain statements had been made freely and voluntarily or after the assaults and promises of rewards and bail. The Trial Court held that the statements made by the accused and Messrs Matjeke and Makhubela as well as the pointings-out made by Mr Khanye and Mr Matjeke were admissible. All these statements then became part of the evidential material. The Trial Court held that the statements formed the basis of the State's case. The Trial Court relied on *Ndhlovu*[8] to uphold the probative value of the previously admitted statements, despite discrediting their oral testimony. The details of the statement of each applicant as well as his testimony are set out below.

Mr Khanye

[9] Mr Khanye stated that in August 2002, Messrs Matjeke and Mhlongo approached him, and asked if he knew any place where they could acquire an old Isuzu bakkie. They gave him their telephone numbers and told him to contact them when he managed to locate a motor vehicle so they could hijack it. Some days later,

[7] *Mhlongo v S; Nkosi v S* [2015] ZACC 19; 2015 (2) SACR 323 (CC); 2015 (8) BCLR 887 (CC) at para 4.

[8] *S v Ndhlovu & Others* [2002] ZASCA 70; 2002 (2) SACR 325 (SCA) (*Ndhlovu*).

Mr Khanye came upon a bakkie at certain premises in Mothutlung. He telephoned Mr Matjeke and Mr Mhlongo to tell them. They met him at Tshipa's Tavern. They were with Mr Makhubela. He led them to the place where he had seen the bakkie. They were in Mr Mhlongo's motor vehicle and he noticed that Mr Matjeke and Mr Mhlongo carried firearms. However, they could not find the bakkie at the place where he had spotted it. The three men left Mr Khanye at his home and he does not know what happened thereafter.[9] Mr Khanye also pointed out the house of the deceased to the investigator for the case, Inspector Nkosi.

[10] During the defence case, Mr Khanye testified that on 3 August 2002 he worked at a golf course in Brits. He testified that he pointed out the tavern to the police because they had assaulted him and that the pointing out was done under duress and he had to state that he was with Mr Matjeke at the tavern. He showed the police the house of a certain man known as Barrack, in order to inform them that this person was his witness.[10]

Mr Moyo

[11] Mr Moyo made a statement to the Magistrate to the effect that he had no knowledge of the killing of a police officer.[11] The only evidence against him is contained in the extra-curial statements by his co-accused. When he testified, he raised an alibi stating that he was at Seshego in Limpopo during the incident. Furthermore, on 3 August 2002, he had attended the party of a certain Mapapo in Limpopo.[12]

[12] The Trial Court applied the principle in *Ndhlovu*[13] to uphold the probative value of the previously admitted statements. It held that all the accused had a common purpose to commit the robbery in the premises of the deceased. Moreover,

[9] *Matjeke* above n 2 at para 7.

[10] Id at para 15.

[11] *Matjeke* above n 2 at para 8.

[12] Id at para 11.

[13] *Ndhlovu* above n 8.

when they went to Mothutlung and saw the other accused alighting from the vehicle, they were aware of the fact that the accused were armed and that if things did not go according to plan, the firearms would have to be used. The Court then concluded that, as far as the murder charge was concerned, they were all liable for the commission of the offence of murder. The Court accordingly, convicted them on all the charges.

[13] Regarding the sentence, the Trial Court took into account the personal circumstances of the accused and the interests of society. It held that the accused were not young offenders. Moreover, it found that the crime had been pre-meditated and that the victim had been shot multiple times. The Court therefore imposed the prescribed minimum sentences for murder and robbery.

In the Full Bench

[14] An appeal against the convictions and sentences came before a Full Court (Gura J, Hendricks J and Gutta J). The issue on appeal related to the admissibility of the extra-curial statements. After argument, the appeal was dismissed on the basis that the statements were not hearsay evidence but evidence envisaged in section 3(1)(b) of the Law of Evidence Amendment Act.[14] As a result, the statements became "automatically admissible" because the accused confirmed portions of the statements in their oral testimony. The Full Court noted that the evidence of an accused who testified against a co-accused had to be treated on the same basis as that of an accomplice and with caution. It did not accept the explanation of the accused that they were not part of the plan to rob the deceased, especially since they were in the perpetrators' company. Regarding the sentence, the Full Court held that the Trial Court exercised its discretion properly and that there was no reason to justify an interference with the sentence imposed. In the result, the appeals against convictions and sentences were dismissed.

[14] 45 of 1988.

Supreme Court of Appeal

[15] On 6 August 2013, the Supreme Court of Appeal (SCA) dismissed the applicants' applications for leave to appeal.

In this Court

Condonation

[16] The application for leave to appeal was lodged in this Court on 18 April 2016 and is thus late by more than two years. The applicants, in their explanation for the delay, among other things, state that they have been in prison since 2002 and have no legal knowledge. They also have no money to support this litigation. They each state that fellow prisoners who were studying law in prison assisted them in drafting and submitting their applications. The State did not oppose the application for condonation.

[17] The explanation provided by the applicants leaves much to be desired. It is trite that an applicant for condonation of the late filing of a process seeks an indulgence of the Court. It follows that he or she must provide an adequate explanation for the delay. The Court will consider the explanation as well as the question whether it would be in the interests of justice to grant condonation. In this matter, whilst the explanation for the delay is inadequate, there are prospects of success. Moreover, some of the co-accused of the applicants have been released by this Court after their appeals were successful. Furthermore, the State will not suffer any prejudice. It is therefore in the interests of justice that condonation should be granted.

Leave to appeal

[18] This Court, in *Mhlongo* and *Nkosi*,[15] granted leave to appeal to two people convicted of murder in respect of the incident that is the subject of the present

[15] *Mhlongo v S; Nkosi v S* above n 7.

application. In *Molaudzi*,[16] it granted leave to a third co-accused. Their appeals had been upheld and they were released from prison. The applicants in the present matter are their co-accused. Therefore, it was in the interests of justice that leave to appeal had to be granted.

The Appeal

[19] These applications were decided without oral argument. The parties were directed to deliver written submissions. Messrs Khanye and Moyo did not have legal representatives, therefore, this Court requested the Johannesburg Bar to nominate counsel to assist them, consider the record of proceedings and thereafter file written submissions on their behalf. Adv Manaka of the Johannesburg Bar kindly agreed to assist. However, later the applicants appointed their own legal representatives and that led to the replacement of Adv Manaka by Adv Steinberg and Adv Tabata. This Court is grateful to Adv Manaka for her willingness to assist at the request of the Court and for the Bar's continuing provision of pro bono assistance in deserving cases.

Submissions

[20] Messrs Khanye and Moyo challenged the admissibility of the statements admitted as evidence against them. Their defence hinges on *Mhlongo*. They submitted that the principle in *Mhlongo* applies to their case and therefore the extra-curial statements of their co-accused were inadmissible against them. Consequently, they submit that the remaining evidence is insufficient to warrant a conviction on any of the charges against them.

[21] The State agreed that the only direct evidence against the applicants was contained in the statements of their co-accused. It conceded that, in the light of this Court's judgment in *Mhlongo*, the evidence was insufficient to convict. Therefore, the

[16] *Molaudzi* above n 1.

convictions could not be sustained and have to be set aside. The State thus requested the Court to order the immediate release of the applicants.

[22] In my view, the State was correct in its concession. *Mhlongo* concerned two co-accused of the applicants. They were Mr Boswell Mhlongo (accused 2) and Mr Alfred Disco Nkosi (accused 4). Extra-curial statements made by fellow accused had incriminated Messrs Mhlongo and Nkosi who argued that the admission of extra-curial statements against co-accused violated the Constitution. This Court confirmed the common law position that admissions tendered by an accused against his co-accused are not admissible.[17] The Court went on to state that section 219A of the Criminal Procedure Act[18] expressly provides that an admission can be admitted only against its maker and is silent regarding other persons. Therefore, this Court held that the section did not contemplate extra-curial admissions being tendered as evidence against another person.[19] The Court held that extra-curial confessions and admissions by an accused are inadmissible against a co-accused and therefore, the admissions by the applicant's co-accused could not be used against him.

[23] This Court in *Mhlongo* restored the common law position that extra-curial statements by an accused are not admissible against a co-accused. It also said that the only exception at common law was that—

> "if the statement constitutes an 'executive statement' by an accused, it may be admissible against a co-accused if it was made in furtherance of a common purpose or conspiracy. There must be other evidence (*aliunde*) to establish the existence of a common purpose before the statements can be taken into account."[20]

[24] Having regard to the principle in *Mhlongo*, Messrs Khanye and Moyo's applications have to be determined, without any reference to the statements by their co-accused. In doing so, this Court must have regard to the circumstances

[17] Above n 1 at para 27.

[18] 51 of 1977.

[19] *Mhlongo* above n 7 at para 30. *See also S v Litako and Others* [2014] ZASCA 54; 2014 (2) SACR 431 (SCA) at para 54.

[20] *Mhlongo* above n 7 at para 39.

surrounding the commission of the offences, the applicants' exculpatory statement as well as their oral evidence, if any. The application of the principle in *Mhlongo* reveals the following when considering the applicants' cases.

Mr Khanye

[25] The extra-curial statements of Messrs Matjeke and Makhubela implicate Mr Khanye. Mr Matjeke in his statement stated that on the day of the incident, he, along with Mr Makhubela and Messrs Mhlongo, Molaudzi and Moyo had travelled from Soshanguve to Mothutlung in response to Mr Khanye's request for them to visit him. They travelled in a Toyota Cressida motor vehicle owned by Mr Mhlongo. Messrs Molaudzi and Moyo carried firearms. After arriving at Tshipa's Tavern in Mothutlung, Mr Khanye told them about a person, who wanted them to steal a bakkie, and that he had identified a potential victim. At some stage, they drove past the deceased's house, and at Mr Moyo's suggestion, stopped further down that street. Mr Moyo, who was armed, walked to the house with Messrs Makhubela, Molaudzi, Khanye, as well as Mr Mphume (the accused who disappeared). After two shots, they ran back to the car.[21]

[26] Mr Makhubela's evidence was that on the day of the incident, he had travelled with Messrs Matjeke and Mhlongo to Mothutlung, where they found Mr Khanye with three unknown men. They and the three strangers travelled in the Toyota Cressida, driven by Mr Mhlongo. Somewhere along the road, the driver stopped the car and Messrs Matjeke, Mhlongo and Khanye left on foot. The three strangers stood next to the car, while he was in the driver's seat. After about ten minutes, his co-accused came running back to the car. They got in and drove off at high speed.

[27] Therefore, the principle in *Mhlongo* applied to Mr Khanye's case. As a result, the statements by Mr Makhubela and Mr Matjeke were inadmissible against him. The only evidence that remained was Inspector Nkosi's statement that Mr Khanye pointed

[21] *Matjeke* above n 2 at para 5.

out the deceased's house. That statement on its own was not sufficient to prove that he had participated in the commission of the offences or that he had shot the deceased. Even if it were true that Mr Khanye had pointed out the house, it did not follow that it had been sufficiently proven that he had committed or had been involved in an offence or that he had acted in common purpose with the persons who wanted to commit the offences. Consequently, his convictions and sentences had to be set aside.

Mr Moyo

[28] Mr Moyo had at all times denied being involved in the commission of the offences or having any knowledge of the plan to rob and kill the deceased. The only evidence against him was the extra-curial statement by his co-accused. When *Mhlongo* was applied to Mr Moyo's case, the extra-curial statements by his co-accused became inadmissible against him and no reliance could be placed thereon. The effect of this was that there was no evidence against him to warrant a conviction. The fact that he had been present at or near the scene of the crime, in the company of those suspected of having committed the offences, was not sufficient to convict him. It follows that his convictions and sentences had to be set aside as well.

Conclusion

[29] For these reasons, this Court issued the order in which it upheld the appeal, set aside all the convictions and sentences against the applicants and ordered their immediate release.

For the Applicants:	C Steinberg and C Tabata instructed by Egon A. Oswald Attorneys at Law
For the Respondent:	M G Ndimande Director of Public Prosecutions, Mmabatho