



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### Samuel Sampie Khanye and Another v The State

**CCT 86/16**

**Date of order: 22 March 2017**

**Date of Reasons: 10 August 2017**

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### MEDIA SUMMARY

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*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 10 August 2017 the Constitutional Court handed down its reasons for an order that was granted in this matter on 22 March 2017. An application for leave to appeal was brought by Mr Samuel Sampie Khanye and Mr Zandile Moyo (applicants) against their convictions of murder, robbery with aggravating circumstances and unlawful possession of firearms and ammunition. The applicants were convicted on the basis of extra-curial statements (statements made out-of-court) by their co-accused.

The applicants, together with six others, were accused of shooting and killing a police officer in his house in Mothutlung in 2002. Some of the accused persons made out-of-court statements, incriminating the applicants. The applicants were subsequently charged and their case was heard at the North West High Court, Mafikeng (High Court). The applicants' co-accused denied that they made the statements freely and voluntarily. A trial-within-a-trial was held in order to determine the veracity of these statements. At the end of the trial-within-a-trial, the statements were admitted as evidence and were admissible against their makers and the other accused.

There was no direct evidence implicating the applicants, save for the statements by their co-accused. The High Court convicted all the applicants of murder, robbery with aggravating circumstances and unlawful possession of firearms. The applicants and their co-accused were sentenced 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.

The applicants appealed to the Full Court of the High Court. The Full Court held that the out-of-court statements were admissible against the other accused in terms of the Law of Evidence Amendment Act (Amendment Act). It found that the evidence was sufficient to warrant convictions on all charges. Their appeals were dismissed.

The applicants and the five co-accused then applied to the Supreme Court of Appeal for leave to appeal the Full Court decision. The application was also dismissed.

In the Constitutional Court, in an application for leave to appeal against their convictions, the applicants relied on *Mhlongo v S; Nkosi v S (Mhlongo)*. The applicants in that matter were their erstwhile co-accused, whose appeals were considered by the Constitutional Court. That Court held in *Mhlongo* that the common law position before the Amendment Act was that both admissions and confessions of an accused were inadmissible against a co-accused and the Amendment Act had not altered this position. Furthermore, this Court concluded that, without these admissions, there was insufficient evidence against the applicants to justify their convictions. The appeals were upheld on that basis and the convictions of Messrs Nkosi and Mhlongo were set aside. In a later appeal involving another co-accused, Mr Molaudzi, the Constitutional Court adopted that same stance.

The present application was dealt with by the Constitutional Court without oral argument. Counsel for the applicants submitted that the only evidence against them was the statements of their co-accused and that, in light of the decision in *Mhlongo* and *Molaudzi*, the applicants had no case to answer. The respondent, in its written submissions, conceded that no reliance could be placed on the statements of the other accused and these could not be used against the applicants. The respondent further submitted that there was insufficient evidence to warrant the conviction of the applicants and that they should be released.

On 22 March 2017 the Constitutional Court ordered an immediate release of the applicants and indicated that the reasons for its order would follow. In its reasons handed down on 10 August 2017 the Court affirmed the decisions in *Mhlongo* and *Molaudzi*. It stated that, without evidence that is independent from the out-of-court statements, the applicants could not be convicted and consequently had to be released. Therefore, this Court made an order granting leave to appeal and upheld the appeal. The convictions and sentences were set aside and the applicants were released from incarceration.