



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 168/2018

In the matter between:

NTSHAVHENI SAMUEL NNDWAMBI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Nndwambi v S* (168/2018) [2018] ZASCA 99 (14 June 2018)

Coram: Lewis and Saldulker JJA and Mothle AJA

Heard: No oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013

Delivered: 14 June 2018

Summary: An extracurial admission made by a co-accused is not admissible against other co-accused. Conviction set aside.

ORDER

On appeal from: Limpopo Division of the High Court, Thohoyandou (Makgoba AJ sitting as court of first instance):

1 The appeal against the convictions for murder and robbery with aggravating circumstances is upheld, and the convictions and sentences on those counts are set aside.

2 The order of the trial court is replaced with:

‘The fourth accused is found not guilty on the charges of murder and robbery with aggravating circumstances.’

JUDGMENT

Lewis JA (Saldulker JA and Mothle AJA concurring)

[1] This is an appeal against convictions of the appellant for murder and robbery with aggravating circumstances, handed down by the then Limpopo Division of the High Court, Thohoyandou, (Makgoba AJ) on 22 August 2005. The appellant was one of four co-accused, three of whom pleaded not guilty. The first accused made an extra-curial admission exculpating himself to a large degree and incriminating the other three accused, including the appellant. Makgoba J accepted the extra-curial admission and convicted all four of the accused on the strength of that admission alone. The appellant was sentenced to life imprisonment for the murder and 20 years’ imprisonment for the robbery. Makgoba AJ refused the appellant’s application for leave to appeal against conviction and sentence on 16 March 2007.

[2] The appellant has been detained in custody for well over ten years now. This court gave leave to appeal to it in January 2017. The appeal was not timeously prosecuted and lapsed. The appellant seeks condonation for the delay in prosecuting the appeal and its reinstatement on the roll. The explanations proffered for the delay relate in the main to the tardiness of the court processes and the illness

of counsel representing the State. In my view, while the explanations are not particularly compelling, the delay is not the fault of the appellant and there would be a grave miscarriage of justice if the appeal were not to be considered. Condonation is accordingly granted and the appeal reinstated.

[3] As the State has conceded, the admission incriminating the appellant should not have been sufficient to discharge the State's onus of proving the appellant's guilt beyond a reasonable doubt. The appellant denied any involvement in the commission of the offences and no evidence was led by the State other than that of the accused who incriminated his co-accused.

[4] In the seminal decision of *S v Litako* [2014] ZASCA 54; 2015 (3) SA 287, this court (per Navsa and Ponnann JJA) held that s 3(1)(c) of the Law of Evidence Amendment Act (which permits the admission of hearsay evidence in exceptional circumstances) did not prevail over the principles of the common law that admissions made extra-curially were not to be used against a co-accused. This court examined the South African common law, as well as the law of other jurisdictions, in particular England from which our law of evidence derives, and concluded that since any out-of-court statement by a co-accused would compromise the constitutional right to a fair trial, it should not be admissible against an accused. See paras 67 and 68 of *Litako* in particular.

[5] Given the State's concession in this regard, as well as its referral to *Mulaudzi v S* [2016] ZASCA 70, in which this court upheld the appeal of one of the appellant's co-accused in the trial court (on the basis that the evidence adduced by the State before the trial court was not satisfactory in all respects), this court considers it unnecessary to hold an oral hearing for the appeal. Section 19(a) of the Superior Courts Act 10 of 2013 provides that a court may dispose of an appeal without the hearing of oral argument.

[6] Accordingly, despite the fact that the appeal has been set down for hearing on 15 August 2018, we have agreed, having considered counsels' heads of argument and the record of the trial, that the appeal should be upheld, the convictions being bad in law. The Registrar of this court is directed immediately to transmit the order of

this court to the detention centre in which the appellant is being held, so that he can be released from custody immediately.

[7] Accordingly:

1 The appeal against the convictions for murder and robbery with aggravating circumstances is upheld, and the convictions and sentences on those counts are set aside.

2 The order of the trial court is replaced with:

‘The fourth accused is found not guilty on the charges of murder and robbery with aggravating circumstances.’

C H Lewis
Judge of Appeal

APPEARANCES

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