

# CONSTITUTIONAL COURT OF SOUTH AFRICA

**Molimi Richard Ditshele v The State**

**CCT 10/07**

**Medium Neutral Citation [2008] ZACC 2**

**Date of Judgment 4 March 2008**

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## MEDIA SUMMARY

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*The following summary 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 judgment in an application by Mr Richard Molimi to overturn a decision of the Supreme Court of Appeal (SCA), which partly confirmed and partly dismissed the decision of the Johannesburg High Court. The High Court convicted the applicant on counts of robbery with aggravating circumstances, two counts of murder, attempted murder, unlawful possession of firearms, unlawful possession of ammunition and kidnapping, committed in Southgate Mall, Johannesburg. The evidence used against the applicant included written statements allegedly made to the police by his two co-accused, and information contained in cell phone records which revealed a number of calls made by the accused to one another.

The High Court admitted the statements as evidence and found the applicant guilty of having committed the said offences in common purpose with the robbers. The applicant appealed to the SCA, arguing that the use of the statements against him resulted in an unfair trial. The SCA found that the admission of the statements by the High Court was in the interests of justice in terms of section 3 of the Law of Evidence Act, 1988 (the Act).

In this Court, the applicant argued, among other things, that the acceptance of the statements as evidence against him violated his right to be treated equally to similarly situated persons whose co-accused make confessions (as opposed to admissions). Confessions are not admissible against a co-accused, whilst admissions may be. He also complained that the High Court did not make a final ruling on whether the statements were admitted as evidence against him before the state closed its case.

This, he argued, violated his fair trial rights, in particular the right to be informed timeously of the case he is called to meet and the right to adduce and challenge evidence. The state opposed the application on the basis that the applicant's fair trial rights were not violated and that the approach of the SCA was correct.

In a unanimous judgment by Nkabinde J, the Court held that the statements of the applicant's two co-accused were not admissible against him. The Court refrained from expressing any view on the correctness or otherwise of the SCA's decision in *S v Ndhlovu*, and in particular on the question of whether the admission of hearsay evidence in terms of the Act denies the accused the right to cross-examination. The Court held that neither the High Court nor the SCA followed the correct approach in their application of section 3 of the Act and the *Ndhlovu* judgment. The Court held that the admissible evidence of the cell phone records alone was insufficient to prove the applicant's guilt beyond reasonable doubt. The Court upheld the appeal and set aside the applicant's convictions and sentences.

The Court acknowledged the unfortunate circumstances of this case, whereby an accused is strongly suspected of having committed the offences is acquitted. It emphasised however, that in spite of the strong suspicion and tragedy of this case (being the loss of innocent lives), the fundamental importance of the rule of law, the protection of an accused's constitutional rights, and the necessity of fair trial proceedings in the interests of society as a whole cannot be compromised.