CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 07/18

In the matter between:

ISHAQ TARR Applicant

and

THE STATE Respondent

Neutral citation:	*Tarr v S* [2018] ZACC 35
Coram:	Mogoeng CJ, Zondo DCJ, Basson AJ Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J.
Judgments:	Froneman J (unanimous):
Decided on:	27 September 2018
Summary:	Extra-curial statement — Interference with factual findings of a lower court

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ORDER

The following order is made:

1. Condonation is granted.
2. Leave to appeal is refused.

JUDGMENT

FRONEMAN J (Mogoeng CJ, Zondo DCJ, Basson AJ Cameron J, Dlodlo AJ, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J concurring):

[1] The applicant (Mr Tarr) was convicted of murder. This is an application for leave to appeal against his conviction and sentence by Daffue J in the Free State Division of the High Court on 18 October 2013. Mr Tarr's application must be dismissed. However, his case warrants a short judgment because it raises an issue related to the application of this court's judgment in *Nkosi*, which was not addressed in the courts below.[1]

Factual and legal background

[2] Mr Tarr was sentenced to 15 years' imprisonment for the murder of Haremakale Selimo. The murder occurred in November 2010 on the R57 between Heilbron and Petrus Steyn. Mr Lameck Mtagha (Mr Mtagha), a former employee of Mr Tarr, was tried alongside Mr Tarr as accused number 1 and acquitted. Mr Mtagha's evidence is at the heart of the alleged irregularity leading to an unfair trial.

[3] Mr Mtagha gave a statement to a Magistrate in Koppies. However, at trial, Mr Mtagha denied that he had ever given that statement. Nevertheless, the Judge admitted the statement as hearsay evidence ("Exhibit F" in the trial). He was confident that the statement was genuine, in part because it contained true information that anyone fabricating the statement could not have known. He found that there was "an undeniable link between the hearsay evidence contained in Exhibit F and the objective or common cause evidence". His admission of Mr Mtagha's extra-curial statement accorded with

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

the principles set out in the judgment of the Supreme Court of Appeal in *Ndhlovu*.[2] In the disputed extra-curial statement, accused number 1 makes it clear that the applicant shot the deceased. At the trial Mr Mtagha disavowed making the statement or any other statement implicating Mr Tarr. Despite this disavowal the trial judge did not retract his earlier ruling on the admissibility of the extra-curial statement. He nevertheless acquitted accused number 1, "despite his false evidence in this court", on the basis that the extra-curial statement did not implicate himself in the murder. The contents of the extra-curial statement were however relied upon by the judge in convicting Mr Tarr.

[4] About a year and half after Mr Tarr was convicted, this Court decided *Nkosi*. The unanimous judgment was unequivocal: "[t]he common law position before *Ndhlovu*, that extra-curial statements against co-accused are inadmissible, must be restored".[3] The impact on Mr Tarr's case is clear. Exhibit F should not have been admitted as evidence.

Submissions

[5] Mr Tarr applied for leave to appeal both his conviction and his sentence. He advanced a number of grounds. The vast majority of those grounds call into question factual findings or the application of uncontroversial legal principles that have been correctly applied. It is clear that this court does not have jurisdiction to deal with those submissions. Therefore, I address only the two submissions that warrant discussion.

[6] The first concerns the effect of *Nkosi*. Mr Tarr argues that the inclusion of Exhibit F rendered his trial unfair and that without Exhibit F, he could not have been properly convicted.

[7] The second relates to his sentencing. Mr Tarr raises the issue of whether he had to be warned about the application of minimum sentencing legislation.

[2] *S v Ndhlovu* [2002] ZASCA 70; 2002 (2) SA 325 (SCA).

[3] *Nkosi* above n 1 at para 44.

Condonation

[8] In view of the special circumstances, the delay in bringing this application is condoned.

Jurisdiction

[9] Because of the outcome I reach it is not necessary to make a final pronouncement on whether this Court has jurisdiction. I will assume, without deciding, that we may have.

[10] The circumstances of this case are exceptional. Mr Tarr was convicted before *Nkosi*, a case that would have changed the substance of his trial. When he appealed his case after *Nkosi* was handed down, he received no reasons for its dismissal except that the Supreme Court of Appeal said that he had no reasonable prospects of success. He, and potentially others, are in the dark as to why his reliance on *Nkosi* failed.

Leave to appeal

[11] Mr Tarr's application for leave to appeal rests heavily on his prospects of success. As regards his conviction, his prospects rest on one simple question: absent Exhibit F, was the remaining case against him sufficient for his conviction?

[12] That question is entirely factual. We could therefore approach the matter in formalistic terms. The Supreme Court of Appeal was in a position to review the facts. Although it gave no reasoned judgment, we must presume that it did so. Thus, the principle that we will not ordinarily interfere with factual findings of the courts below leads inevitably to the conclusion that the remaining case was sufficient for his conviction.

[13] That is enough to dispose of this case. Close inspection of the trial judgment leads to the same result. The trial judge did not rely solely on Mr Mtagha's extra-curial statement.

[14] The deceased's body was found on 8 November 2010 next to the R57 road between the towns of Heilbron and Petrus Steyn. The cause of death was gunshots to the head and chest. A bullet jacket was found on the body of the deceased. This bullet jacket was examined by a ballistics expert who concluded that the bullet was fired from a .357 revolver. A damaged .357 revolver was later found at the Mr Tarr's house. Despite some difficulty because of its damaged condition, the ballistics expert managed to test the firing of a bullet from this revolver and concluded that both shots were fired from this self-same revolver. Mr Tarr's version was that the .357 revolver found by the police in his safe was damaged in 2009 and kept in the safe ever since then.

[15] There is thus essentially only one argument to be made that establishes Mr Tarr's guilt without reference to the extra-curial statement, namely that (1) the applicant's .357 revolver fired the bullets that killed the deceased; (2) anyone who had killed with that firearm, other than Mr Tarr, would not have returned the firearm to Mr Tarr's safe; and (3) the .357 revolver was found in Mr Tarr's safe. The Judge accepted the argument. Moreover, we have no reason to doubt their truth. Crucially, they necessarily establish beyond reasonable doubt that it was Mr Tarr who murdered the deceased.

[16] The killing was of a brutal execution-type. The sentence of 15 years imprisonment is by no means excessive.

[17] For those reasons, Mr Tarr has no prospects of success in his appeal. His application for leave to appeal must be dismissed.

Order

[18] In the result the following order is made:

1. Condonation is granted.

2. Leave to appeal is refused.

For the Applicant:	Mr P Peyper of Peyper Buitendag Inc Attorneys
For the Respondent:	S Giorgi instructed by Office of the Director of Public Prosecutions: Free State