



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### Klaas Lesetja Phakane v The State

CCT 61/16

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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.*

At 10h00 on Tuesday, 5 December 2017 the Constitutional Court handed down its judgment in an application for leave to appeal against a decision of the High Court of South Africa, Gauteng Division, Pretoria (High Court) in terms of which that Court dismissed an appeal by Mr Klaas Phakane against his conviction for the murder of his girlfriend, Ms Matilda Chuene Boshomane.

Mr Phakane, the applicant, and Ms Boshomane had been involved in a romantic relationship for quite some time by August 2006. The relationship was characterised by frequent arguments. Ms Boshomane was last seen around 20 August 2006. She was found dead in a veld sometime around the end of August 2006. The date and cause of her death could not be determined because of the state of decomposition of the corpse.

In a statement made on 2 September 2006 Ms Manamela, who was also Mr Phakane's girlfriend at the time of Ms Boshomane's death, made a statement to the police. Ms Manamela said that Mr Phakane had visited her home on 20 and 21 August 2006 and on 20 August he told her that he and Ms Boshomane had had a fight. She said that he stated that he had hit Ms Boshomane with a waist belt and had left her in a veld near her home. Ms Manamela said that on 21 August 2006 Mr Phakane told her that he had been to Ms Boshomane's home to look for her but she was not there. According to Ms Manamela Mr Phakane also said that he had been to the veld where he had left Ms Boshomane but she was nowhere to be found. In due course Mr Phakane was arrested and charged with the assault and murder of the deceased. He pleaded not guilty to both charges.

The State's case against Mr Phakane was based on circumstantial evidence and his alleged confession to Ms Manamela. A number of witnesses were called but none had witnessed Ms Boshomane's murder. One of the state witnesses was Mrs Martha Phakane, the applicant's mother. Mrs Phakane said that on or about 21 August 2006 Mr Phakane had called her and asked her to return home because he had fought with and injured his girlfriend.

Mrs Phakane said that she asked Mr Phakane in the conversation how he had injured his girlfriend and told him that, if he had injured her, he should take her to hospital.

Ms Manamela also testified, but there were discrepancies between her evidence in court and the statement she had made to the police on 2 September 2016. Between 2 September 2006 and date of the trial Mr Phakane and Ms Boshomane had broken up. In court Ms Manamela stated that Mr Phakane told her that he had killed Ms Boshomane and wanted to leave her corpse in a pit toilet. Ms Manamela suggested that he rather leave her corpse in the veld where her family could find it. She testified further that Mr Phakane had told her that he would leave the corpse in the veld and that he returned at midnight on 20 or 21 August 2006 carrying a schoolbag that had blood stains. Mr Phakane gave evidence denying any involvement in Ms Boshomane's death. He disputed his mother's evidence that he had injured his girlfriend. The trial court acquitted the applicant of assault but found him guilty of murder. He was sentenced to 20 years imprisonment. Ms Manamela's evidence was critical in the State's case.

Mr Phakane appealed to the Full Court of the High Court against his conviction and sentence. The State failed to deliver a full record. Part of the evidence missing from the record included Ms Manamela's evidence in the trial court. Attempts to reconstruct the record failed. It was argued on Mr Phakane's behalf that the missing evidence was critical. The High Court held that there was enough other evidence to justify the applicant's conviction. It accordingly dismissed his argument that in the absence of the missing evidence he could not have had a fair trial.

Mr Phakane subsequently appealed to this Court for leave to appeal against the decision of the Full Court. In a judgment by Zondo J which was concurred in by Nkabinde ADCJ, Jafta J, Khampepe J, Mhlantla J, Madlanga J and Musi AJ, this Court pointed out that Ms Manamela's evidence in Court was critical to his conviction by the trial Court and without the transcript of that evidence, there could be no fair appeal for Mr Phakane. Zondo J pointed out that there was a vast difference between what Ms Manamela had told the police in her statement on 2 September 2006 and the evidence she gave in court.

Zondo J pointed out that what Ms Manamela told the police on 2 September 2006 when she and Mr Phakane still had a romantic relationship did not implicate him in murder but what she told the Court three years later when they had broken up seriously implicated him in murder. Zondo J said that the trial Court appears not to have considered the discrepancy in her evidence against this background. Zondo J concluded that Mr Phakane's right to a fair appeal had been infringed and, in the circumstances, the trial proceedings should have been set aside and Mr Phakane should be released. It would be up to the National Prosecuting Authority to decide whether or not to recharge Mr Phakane again.

In a dissenting judgment, Cameron J (with Mbha AJ concurring) agreed that Mr Phakane's murder conviction had to be vacated but would have found him guilty on a competent conviction of assault. The judgment reasoned that, while there was no longer sufficient evidence to convict Mr Phakane of murder, there was still key evidence from the testimony of Mrs Phakane that directly implicated Mr Phakane in an assault linked to Ms Boshomane's murder. Cameron J and Mbha AJ would therefore have upheld a competent verdict of assault.

In a concurring judgment, Froneman J considered the crucial point of disagreement between Zondo J and Cameron J to be whether the missing evidence in this matter tainted the record entirely or only partly. He took the view that the missing evidence was crucial to the determination of the applicant's guilt or innocence on all the charges and therefore concurred in granting leave and upholding the appeal. However, he would have additionally ordered that this matter be remitted to the High Court for an investigation into whether a retrial should proceed.