IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 148/14 and CCT 149/14

In the matter between:

BOSWELL JOHN MHLONGO Applicant

and

THE STATE Respondent

And the matter between:

ALFRED DISCO NKOSI Applicant

and

THE STATE Respondent

APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

[1] This case concerns the admission into evidence of extra-curial statements by one co-accused against another co-accused in criminal trials. In these heads of argument, my primary focus is on analysing the human rights dimensions of this subject.

[2] The facts of the case are summarised in the judgements of the courts below. With the exception of the applicants' involvement in the crime, the overall factual construction by the courts below is not disputed. The applicants have consistently insisted that they had nothing to do with the incident. What becomes clear from these judgements is that the only 'evidence' that incriminated the applicants at the close of the prosecution's case was the extra-curial statements by some of the applicants' co-accused that was admitted as evidence against all the accused in the trial. As such, this case is illustrative of the high relevance in our criminal justice system of the subject of the admission into evidence of extra-curial statements by one co-accused against other co-accused.

[3] The trial commenced in 2003 in the North West High Court and lasted into 2004. Eventually, an appeal was heard by the full bench of the North West

High Court in 2012, but dismissed on 18 April 2013. Subsequently the Supreme Court of Appeal (SCA) was petitioned, but the SCA refused leave to appeal on 6 August 2013. Despite not being able to get assistance from Legal Aid South Africa for an appeal to this Court, the applicants eventually lodged this present application with the help of a fellow-inmate who is studying law via correspondence. By now, the applicants have been imprisoned for over a decade, but are still determined to seek justice.

Background regarding the legal issue

[4] At common law, there is a firmly established rule that an extra-curial statement by one co-accused is inadmissible against another co-accused.[1] However, this absolute rule was relaxed by the SCA in the case of *Ndhlovu*,[2] purportedly based on section 3 of the Law of Evidence Amendment Act ('the Act').[3] In *Ndhlovu* the SCA held that an extra-curial admission (but not a confession) by one co-accused is admissible as evidence against another co-accused person, if required by the interests of justice.

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1 *Litako & others v S* [2014] 3 All SA 138 (SCA) [35]–[41]; [64].

2 *S v Ndhlovu & others* 2002 (2) SACR 325 (SCA).

3 Act 45 of 1988. *Cf*: *Litako op cit* note 1 *supra* [42].

[5] In convicting the applicants, the courts below purportedly adhered to *Ndhlovu*. In these heads of argument, I submit that the new legal norm (contrary to the common law rule) introduced by the *Ndhlovu* judgement, namely that an extra-curial admission by one co-accused person *can* in principle be admitted as evidence against another co-accused person ('the *Ndhlovu* legal norm'), is not tenable in our constitutional dispensation. I further submit that the interests of justice cannot be employed to justify such unconstitutional procedural act – in fact, the interests of justice militate against such procedural act. Accordingly, I submit that the conviction of the applicants was accomplished in an unconstitutional fashion, and should be vitiated.

[6] It should be noted that *Ndhlovu* has been subject to increasing criticism in subsequent SCA judgements,[4] culminating in its reconsideration in the recent case of *Litako*.[5] Most noteworthy in the *Litako* judgement, the SCA held that its *Ndhlovu* judgement *inter alia* paid 'no attention at all' to the common law

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4 *Balkwell v S* [2007] 3 All SA 465 (SCA) [32]–[35] (minority judgment); *S v Libazi & another* 2010 (2) SACR 233 (SCA) [14].

5 *Litako*, *op cit* note 1 *supra*.

rule,[6] and essentially ignored the provisions of the Act that limit the application of the Act to exclude the operation of the common law rule.[7]

[7] In *Molimi*,[8] this Court was requested to consider the constitutionality of *Ndhlovu*, but declined given that the human rights arguments were first raised in this Court, and this Court did not wish to act as court of first instance regarding such arguments. In this regard, the present case must be distinguished from *Molimi*: Although the human rights challenge to the *Ndhlovu* legal norm was not considered by the courts below *in casu*,[9] the elements of such human rights challenge have been fully canvassed in *Litako*. As such, this Court will have the benefit of an SCA judgement on this issue.

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6 *Ibid* [50].

7 *Ibid* [51].

8 *S v Molimi* 2008 (2) SACR 76 (CC).

9 From the full bench judgement (at [16] p146, point 8) it appears that an argument was submitted during the appeal to the full bench that the *Ndhlovu* legal norm was infringing on the right to a fair trial, based on *Molimi*. However, the full bench judgement did not directly address this issue.

Structure of these heads of argument

[8] I commence with the human rights analysis. This is followed by an alternative argument: In the event that the Court finds that the *Ndhlovu* legal norm is indeed aligned with our Constitution, I submit that the court below misapplied the *Ndhlovu* judgement to such a degree that the applicants are entitled to have their convictions vitiated. Lastly, I also make submissions in support of the granting of leave to appeal and the condonation of late filing.

THE HUMAN RIGHTS CHALLENGE

[9] In the following, I analyse the question of the whether the admission into evidence of extra-curial statements by one co-accused against another co-accused can ever be constitutionally tenable. In this analysis, I consider two rights enshrined in our Constitution, namely the right to equality and the right to a fair trial. This is followed by a limitation analysis. After concluding the human rights analysis, I apply the outcome of the analysis to the facts of the present case.

Equality

[10] Section 9(1) of the Constitution reads as follows:

> Everyone is equal before the law and has the right to equal protection and benefit of the law.

[11] In considering the admissibility against an accused person of extra-curial statements by co-accused persons, the *Ndhlovu* legal norm demands that a sharp distinction be drawn between extra-curial statements that are 'confessions' and extra-curial statements that are 'admissions'. While the former is categorically inadmissible, *Ndhlovu* in principle opens the door for the latter to be admitted.

[12] This distinction between these kinds of extra-curial statements causes indirect differential treatment of two groups of accused persons:

- *Group A*: Accused persons who are incriminated by extra-curial statements that qualify as 'confessions' by their co-accused; and
- *Group B*: Accused persons who are incriminated by extra-curial statements that qualify as 'admissions' by their co-accused.

[13] According to the *Ndhlovu* legal norm, an incriminating extra-curial statement by a co-accused is not admissible against an accused person who is a member of Group A, but in principle admissible against an accused person who is a member of Group B.

[14] The differential treatment caused by the *Ndhlovu* legal norm between the two groups of accused persons is entirely arbitrary. The SCA held as follows in *Litako*:[10]

> from the perspective of the one accused, who may be implicated in the statement of another, one strains to discern a sound jurisprudential basis for the distinction [between a confession and an admission].

[15] The SCA proceeded to illustrate the arbitrariness of the differential treatment with the following hypothetical example:[11]

> In application of this distinction, let us assume that A makes a statement that implicates his co-accused, B, as well as himself: Whether or not the statement constitutes a confession or merely an admission would no doubt be determined

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[10] *Litako*, *op cit* note 1 *supra* [54].

[11] *Ibid*.

> solely with reference to its maker, A. If it is ruled to be a confession, then irrespective of what it says in respect of B it will not be admissible against B. If, on the other hand, it is held to be an admission, then it would be admissible against B. It thus matters not whether A's confession only touches tangentially upon B or that his admission, although largely exculpatory in respect of himself, is devastating in respect of B.

[16] Accordingly, I submit that the *Ndhlovu* legal norm infringes on the right of accused persons in Group B to equal protection and benefit of the law.

Postscript on the practical effects of the confession–admission dichotomy

[17] The distinction between confessions and admission in *Ndhlovu* opens up a Pandora's Box of possible irregularities. In practice, the SCA in *Litako* observed that the *Ndhlovu* judgement appeared to have the following effect:[12]

> it appears that there has been a concerted effort by prosecutors to have extra-curial statements by co-accused persons categorised as admissions rather than confessions. Conversely, and almost perversely, defence counsel representing co-accused persons are now driven to do the opposite.

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12 *Ibid* [58].

[18] In addition, I submit that the confession–admission dichotomy serves as an incentive to law enforcement agencies to unduly influence co-accused persons to formulate confessions in less self-incriminatory ways as to constitute 'mere' admissions, simply in order to open the door to using such extra-curial statements against other co-accused persons, hence defeating the ends of justice.

[19] The 'anxiety' expressed by the SCA in *Litako*[13] regarding the confession–admission dichotomy is most vividly vindicated by the trial court's judgement *in casu*: The trial court initially characterised the extra-curial statements by Accused 1 and 7 as *confessions*,[14] only to later re-characterise these statements as *admissions*[15] in an attempt to force open the door to these statements' admission as evidence against the applicants. This opportunism displayed in the trial court's judgement is embarrassing to the integrity of the Courts, and fundamentally undermines confidence in the criminal justice system.

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13 *Ibid* [54].

14 Trial court judgement p102 lines 6–9 and lines 18–21 (Accused 1); p104 lines 1–2 (Accused 7); p109 lines 4–6 (Accused 1); p116 lines 16–19 (Accused 1). (All page references in my footnotes are according to the index filed in this Court.)

15 *Ibid* p122 lines 3–11; p124 lines 5–12.

Right to a fair trial

[20] Section 35(3) of the Constitution reads as follows:

> Every accused person has a right to a fair trial, which includes the right –
>
> […]
>
> i. to adduce and challenge evidence;

[21] In cases where one co-accused person is incriminated by an extra-curial statement by another co-accused person, it is always uncertain whether the co-accused person will be able to cross-examine the declarant, given that the declarant is a co-accused who may rely on his or her right to remain silent.[16] The controversial question, however, is whether the accused person's interest in cross-examining the declarant falls within the ambit of the constitutional right to challenge evidence.

[22] In *Ndhlovu* the SCA took the position that the ambit of the right to challenge evidence can vary according to the context, and held that in the context of hearsay the right to challenge evidence does not entail an

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[16] *Vide Litako*, *op cit* note 1 *supra* [51]; [62] (with reference to Canadian case law).

entitlement to cross-examine, but only an entitlement to resist the admissibility of such hearsay evidence and to scrutinise the probative value such hearsay evidence.[17]

[23] In *Libazi* the SCA took a critical stance to the approach adopted in *Ndhlovu* and emphasised the well-established principle that rights must be construed generously to ensure the widest protection possible. It held as follows:[18]

> Rights ought not be cut down by reading implicit restrictions into them. In-roads into the protection that the right affords should in all instances be justified. . . . Cross-examination is integral in the armoury placed at the disposal of an accused person to test, challenge and discredit evidence tendered against him.

[24] In *Litako* the SCA delivered the *coup de grâce* to *Ndhlovu.* The SCA held that the *Ndhlovu* legal norm renders the constitutional right to challenge evidence 'nugatory', given that the accused person does not have the

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17 *Ndhlovu*, *op cit* note 2 *supra* [24].

18 *Libazi*, *op cit* note 4 *supra* [11].

opportunity to 'challenge the truthfulness of the incriminating parts of such a statement'.[19]

[25] I submit that the accused person's interest in cross-examining the declarant of an incriminating extra-curial statement falls squarely within the ambit of the constitutional right to challenge evidence. As held in *Libazi*, cross-examination is integral to the armoury of an accused person to challenge evidence. The appropriate avenue to exclude cross-examination (in exceptional cases) would be to justify such limitation of the accused person's right to challenge evidence as part of a section 36 analysis.

[26] I further submit that the SCA's argument in *Ndhlovu*, namely that the context of hearsay should dictate the ambit of the right to challenge evidence to the exclusion of cross-examination, should be rejected as it confuses the interpretation with the limitation stages of the human rights analysis. The ambit of the right to challenge evidence cannot be held to exclude cross-examination simply because of the hearsay-context, as this would mean that whenever any hearsay evidence is proffered, the entitlement to cross-examination *eo ipso* evaporates from the human rights inquiry. A more correct

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[19] *Litako*, *op cit* note 1 *supra* [65].

construction would be to acknowledge cross-examination as protected by the right to challenge evidence during the interpretation stage of the inquiry, and then to argue for a limitation on cross-examination in appropriate circumstances during the limitation stage.

[27] In conclusion, given that there is no guarantee that co-accused persons will testify, the *Ndhlovu* legal norm in principle deprives an accused person of the opportunity to subject the declarant of an incriminating extra-curial admission to cross-examination, given that such declarant is a co-accused person. Accordingly, the *Ndhlovu* legal norm infringes on the right of accused persons to challenge evidence.

Limitation

[28] The touchstone of the *Ndhlovu* legal norm is the interests of justice. Accordingly, for purposes of this limitation analysis, it is appropriate that the interests of justice be posited as the government interest purportedly served by the *Ndhlovu* legal norm.

[29] First, the concept of 'the interests of justice' requires analysis. I submit that this concept includes a wide range of considerations, *inter alia*, the search

for the truth, society's duty to punish criminals, and upholding the moral and legal rights of all parties involved, ranging from the victims of the crime to the accused persons.

[30] In principle, I concede that the interests of justice can justify the limitation of constitutional rights in an open and democratic society. However, in the *specific* context of the admissibility of an extra-curial admission by a co-accused person against another co-accused person, the interests of justice in fact militate *against* the limitation of the relevant constitutional rights.[20] This is because incriminating extra-curial statements by co-accused persons do not only constitute hearsay evidence – with all its concomitant potential pitfalls to a fair trial – but in addition also entail what the SCA in *Litako* called 'inherent danger', given that the declarant of the hearsay is not an independent observer, but a co-accused person who potentially has conflicts of interest with the other co-accused.[21] In this regard the SCA in *Litako* relied on the *dictum* in *Hlapezula*,[22] the relevant part of which reads as follows:[23]

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[20] *Ibid* [67].

[21] *Ibid* [51].

[22] *S v Hlapezula & others* 1965 4 SA 439 (A) 440D.

[23] *Litako*, *op cit* note 1 *supra* [48].

> various considerations may lead [a co-accused person] falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. [Also], by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit.

[31] The combined dangers of admitting hearsay and of admitting a statement by a co-accused person, position the interests of justice in fundamental opposition to the admissibility against a co-accused person of an extra-curial admission by another co-accused person: Given these combined dangers, I submit that truth-seeking as rationale for ever admitting an extra-curial admission by a co-accused person as evidence against another co-accused person completely ceases to convince and appears tragically ironic. It follows further that the admission of such evidence against an accused person cannot serve the moral rights of victims, and pose a significant threat to other aspects of the interests of justice, such as the fair trial rights of accused persons, who must be presumed as innocent. Accordingly, the SCA in *Litako* concluded as follows:[24]

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[24] *Ibid* [67].

> Considering the rationale at common law for excluding the use of extra-curial admissions by one accused against another, it appears to us that the interests of justice is best served by not invoking the Act for that purpose. Having regard to what is set out above, we are compelled to conclude that our system of criminal justice underpinned by constitutional values and principles which have, as their objective, a fair trial for accused persons, demands that we hold, s 3 of the Act notwithstanding, that the extra-curial admission of one accused does not constitute evidence against a co-accused and is therefore not admissible against such co-accused.

Conclusion on the human rights analysis

[32] The *Ndhlovu* legal norm infringes on two rights enshrined in our constitution, and such infringement cannot be justified. Accordingly, the *Ndhlovu* legal norm, namely that an extra-curial admission by one co-accused person *can* in principle be admitted as evidence against another co-accused person, is not constitutionally tenable.

[33] The SCA judgement in *Litako*, which overturned the *Ndhlovu* legal norm and restored the *status quo ante* – the common law rule that forbids the admission against one co-accused person of an extra-curial statement (confession or admission) by another co-accused person – should be confirmed by this Court.

Notes on comparative law

[34] The SCA in *Ndhlovu* cited case law from Canada and the United States in apparent support of its ruling.[25] In the following, I will briefly analyse these cases.

The Canadian cases

[35] The two Canadian cases[26] cited by the SCA in *Ndhlovu* both deal with hearsay other than the relevant subclass of hearsay, namely extra-curial statements by co-accused persons. Accordingly, these cases provide little if any support for the *Ndhlovu* legal norm.

[36] In contrast, the SCA in *Litako* cited[27] the Canadian case of *Perciballi*[28] that indeed deals with the relevant subject matter of the admissibility of extra-curial statements by co-accused persons. The decision in *Perciballi* supports the

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25 *Ndhlovu*, *op cit* note 2 *supra* [23], [25].

26 *R v Khan* [1990] 2 SCR 531; *R v Smith* [1992] 2 SCR 915.

27 *Litako*, *op cit* note 1 *supra* [62].

28 *R v Perciballi* (2001) 54 OR (3d) 346; upheld by the Canadian Supreme Court in *R v Perciballi* [2002] 2 SCR 761.

SCA's judgement in *Litako*, and confirms the *nexus* between cross-examination and a fair trial.

The American cases

[37] The SCA in *Ndhlovu* cited several United States Supreme Court cases[29] in support of the statement that the American constitutional right to be confronted with the witnesses against him or her has never been interpreted to exclude all kinds of hearsay evidence.[30] It proceeded to state that the US Supreme Court is seeking to find a general basis for the admission of hearsay evidence based on necessity and reliability,[31] citing *Ohio v Roberts*.[32] However, *Ohio v Roberts* has subsequently been overturned by *Crawford v Washington*.[33] In the latter case, the US Supreme Court expressed concern over the inconsistent results reached by courts under *Ohio v Roberts,* and placed renewed emphasis on the importance of cross-examination, holding as follows:

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29 *Mattox v United States* 156 US 237 243–4 (1895); *Dutton v Evans* 400 US 74 80 (1970); *White v Illinois* 502 US 346 356 (1992).

30 *Ndhlovu*, *op cit* note 2 *supra* [25].

31 *Ibid*.

32 *Ohio v Roberts* 448 US 56 (1980).

33 *Crawford v Washington* 541 US 36 (2004). See also: *Whorton v Bockting* 549 US 406 (2007).

> Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. . . . the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

[38] I submit that this development in the law of the United States is aligned with my conclusion in the human rights analysis above.

Application *in casu*

[39] Purportedly following the *Ndhlovu* judgement, the trial court admitted the extra-curial statements by Accused 1, 3, 7, and 8 as evidence against their co-accused (including the applicants, who were Accused 2 and 4).[34] At the close of the prosecution's case during the trial, the *only* incriminating evidence against the applicants was these extra-curial statements.[35] Given that the admission of extra-curial statements by a co-accused person against other co-accused persons is unconstitutional, there was *no* admissible evidence against

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[34] Record p281 lines 19–24; trial court judgement p105 line 25 – p106 line 8.

[35] Trial court judgement p98 lines 9–11; p99 lines 21–23. Note that the evidence by Ms Makuna cannot assist the prosecution's case against the applicants, and was rejected as unreliable to the degree that it implicated Accused 7 and 8 (p129 lines 2–3).

the applicants at the close of the prosecution's case. Accordingly, I submit that the applicants should have been discharged.

[40] However, with reference to the *Shuping*-formulation,[36] the following counter-argument ('the counter-argument') can be formulated: Given that there were co-accused who might implicate the applicants during their testimonies, should they decide to testify, there is a 'reasonable possibility' that the prosecution's case could still be supplemented by the testimony of the applicants' co-accused, and accordingly that the applicants were not entitled to discharge. In the following, I will set out my reasons why it is *constitutionally imperative* to discharge an accused if there is no evidence against him or her at the close of the prosecution's case – irrespective of whether the accused is prosecuted alone or with co-accused – and why the counter-argument should be rejected.

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[36] *S v Shuping* 1983 (2) SA 119 (BSC) 120. 'At the close of the State case, when discharge is considered, the first question is: (i) is there evidence on which a reasonable man might convict; if not (ii) is there a reasonable possibility that the defence evidence might supplement the State case? If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence.' This approach is criticised and rejected in *S v Phuravhatha & others* 1992 (2) SACR 544 (V) 551G–J, and in *S v Mathebula & another* 1997 (1) SACR 10 (W) 31D.

[41] I firstly base my submission on the constitutional rights to dignity and freedom: A person's dignity and freedom demand that he or she only be prosecuted if there is at least a *prima facie* case against him or her – this much was acknowledged by the SCA in *Lubaxa*.[37] However, the SCA then proceeded to distinguish the case of a co-accused person who may be implicated by his or her co-accused from this general rule. The SCA's reasoning is as follows:

> [20] The prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly. While it is true that the caution that is required to be exercised when evaluating the evidence of an accomplice might at times render it futile to continue such a trial . . . that need not always be the case.
>
> [21] Whether, or in what circumstances, a trial court should discharge an accused who might be incriminated by a co-accused, is not a question that can be answered in the abstract, for the circumstances in which the question arises are varied. While there might be cases in which it would be unfair not to do so, one can envisage circumstances in which to do so would compromise the proper administration of justice. What is entailed by a fair trial must necessarily be determined by the particular circumstances.

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[37] *S v Lubaxa* [2002] 2 All SA 107 (A) [19].

[42] I respectfully submit that this *obiter dictum* fails to convince. Why should an accused person's rights to dignity and freedom – and the consequent right to be discharged in the absence of a *prima facie* case – be of less import if the accused person happens to be prosecuted together with other persons?

[43] I submit that the decision to prosecute accused persons together or separately is the prerogative of the prosecution; as such, the prosecution must accept the consequences of its decision. (It should also be noted that the prosecution can of course also apply for the separation of trials.) Accused persons should have equal protection and benefit of the law – irrespective of whether they are prosecuted on their own or with co-accused.

[44] The legal fact on which the SCA builds it argument in *Lubaxa*, namely that the 'prosecution is ordinarily entitled to rely upon the evidence of an accomplice' does not take the counter-argument any further. I submit that the corollary of the presumption of innocence is that the duty to prove the prosecution's case rests exclusively with the prosecution, and not on the defence. In the event that one co-accused incriminates another, the prosecution can rely on such incriminating testimony; however, this happenstance does not mean that the prosecution can shift its duty to any degree to the co-accused to prove the prosecution's case. In this regard, the

Witwatersrand Local Division per Claassen J held as follows in the case of *Mathebula*:[38]

> the duty to prove an accused's guilt rests fairly and squarely on the shoulders of the State. As I said previously, the accused need not assist the State in anyway in discharging this *onus*. If the State cannot prove any evidence against the accused at the end of the State's case, why should the accused be detained any longer and not be afforded his constitutional rights of being regarded as innocent and thus being acquitted and accorded his freedom? Can it be said that he was given a fair trial if, at the close of the State's case wherein no evidence was tendered to implicate him in the alleged crimes, the trial is then continued owing to the exercise of a discretion in the hope that some evidence implicating him might be forthcoming from the accused himself or his co-accused? To my mind such a discretionary power to continue the trial would fly in the face of the accused's right to freedom, his right to be presumed innocent and remain silent, not to testify and not to be a compellable witness. To my mind it would constitute a gross unfairness to take into consideration possible future evidence which may or may not be tendered against the accused either by himself or by other co-accused and for that reason decide not to set him free after the State had failed to prove any evidence against him.

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[38] *Mathebula, op cit* note 36 *supra*, 34J–35D.

[45] Furthermore, the counter-argument undermines the right to remain silent. This is illustrated by the facts in *Mathebula*:[39]

> If the application for discharge were to be dismissed in the present circumstances, it would have the result that accused No 1 is then placed in the invidious position of having to decide whether or not to testify in a matter where there is no case to meet. His decision whether to speak or to remain silent at that stage would then be influenced not by the fairness of the trial, but by the question whether or not accused No 2 will or will not testify. If accused No 1 were to decide not to testify and accused No 2 does, and in so doing implicates him, accused No 1 would have lost the right to contest the allegations made by accused No 2 by testifying himself. He is then in a position where he cannot meet the case which, not the State, but accused No 2 had made against him. In such circumstances the essential contents of his [constitutional rights to personal freedom, a fair trial, etc] would have been negated.

[46] This negation of the co-accused person's right to remain silent is also vividly illustrated *in casu* by the following exchange between counsel for Accused 6 (who was in a similar position to the applicants) and the trial judge:[40]

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39 *Ibid,* 36E–G.

40 Record p284 lines 3–24.

COURT: Yes?

MR MOJUTO: Depending on the evidence of accused 1, we will testify.

COURT: No, do not come with that. It is either he will testify or he will not testify. You make a decision. The state's [case] is closed. Your case does not depend on accused 1. Where do you get this new concept? If accused 1, 2, 3 and 4 were not there, what were you going to say?

MR MOJUTO: M'Lady, the evidence against accused 6 solely depends on the statement made by accused 1.

COURT: Mr Mojuto, I am not here to play games.

MR MOJUTO: That is correct.

COURT: Yes, what do you decide?

MR MOJUTO: May I take instruction?

COURT: Yes. I do not know if also you understand the implication of the hearsay evidence that was just admitted, whether you do understand how it works.

MR MOJUTO: I do, M'Lady.

COURT: So, it was not necessary for you to even make a submission that it will depend on accused 1's evidence or accused 2's evidence. Yes?

MR MOJUTO: M'Lady, the accused will testify.

[47] Even in our pre-constitutional jurisprudence, there is explicit authority against the counter-argument. In *Phuravhatha* the Venda Supreme Court held as follows:[41]

> the interests of the community can in my view not condone a procedure of prosecution and trial by possible self-implication or possible co-accused implication and the community would normally expect of the State or the prosecution to bring citizens to court on *prima facie* cases.

[48] However, the SCA in *Lubaxa* failed to consider the arguments presented in *Mathebula* and elsewhere. In *Nkosi*,[42] the SCA had a second opportunity to properly analyse this issue, but missed the opportunity by uncritically relying on the *Lubaxa obiter dictum*.

[49] In conclusion, I submit that in the absence of any (admissible) evidence against the applicants at the close of the prosecution's case, the applicants' constitutional rights to dignity, freedom, equality, and a fair trial demanded

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41 *Phuravhatha*, *op cit* note 25 *supra*, 551I.

42 *Nkosi & another v S* 2011 (2) SACR 482 (SCA).

their discharge. Claassen J in *Mathebula* summarised his judgement as follows:[43]

> To my mind, the spirit, purport and objects of chap 3 of our [interim] Constitution can lead to no other conclusion but that the concept of a fair trial in these circumstances means that one can justly and fairly say to the State: 'You had your chance to prove the accused's guilt. You failed to prove a *prima facie* case against the accused. You cannot now seek the accused's or the co-accused's assistance to do what you could not do.'

Conclusion

[50] The fact that the trial court admitted the extra-curial statements by some of the applicants' co-accused (Accused 1, 3, 7 and 8) into evidence against the applicants (who were Accused 2 and 4) and subsequently failed to discharge the applicants, renders the remainder of the trial unconstitutional and irregular. Accordingly, the applicants are entitled to have their convictions and sentences set aside.

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[43] *Mathebula*, *op cit* note 36 *supra*, 35E–G.

NDHLOVU NOT APPLIED CORRECTLY

[51] In the event that the Court finds that the *Ndhlovu* legal norm is constitutionally tenable, I submit that the courts below failed to apply *Ndhlovu* correctly. The SCA in *Ndhlovu* cautioned that 'we should tread this path only if there is compelling justification for doing so.'[44] In the following, I respectfully submit that the courts below failed to heed the SCA's admonishment and treaded the path of admitting the extra-curial statements by some of the co-accused persons against the applicants without compelling justification for doing so.

The trial court

The confession–admission dichotomy

[52] *Ndhlovu* is explicitly only applicable to admissions, not confessions. The trial court initially referred to the extra-curial statements by Accused 1[45] and

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[44] *Ndhlovu*, *op cit* note 2 *supra* [39].

[45] Trial court judgement p102 lines 6–9 and lines 18–21; p109 lines 4–6; p116 lines 16–19; see also: p60 line 24 – p61 line 1; p62 line 20 – p63 line 9; p67 lines 7–17 and lines 22–24; p69 lines 18–22; p85 lines 2–5; p86 line 25 – p87 line 2.

Accused 7[46] as *confession* statements. However, in a stunning *volte face*, the trial court re-characterised these very statements as *admissions*, arguing as follows:[47]

> All the statements are admissions, not confessions, given that all contain self-exculpatory statements.

[53] On the contrary, I submit that the extra-curial statement by Accused 1 to the magistrate[48] contains no self-exculpatory statements. In addition, I submit that it amounts to an unequivocal acknowledgment of guilt. As such, said statement is properly characterised as a confession, and was hence inadmissible as evidence against Accused 1's co-accused within the purview of *Ndhlovu*.

[54] Accordingly, from the perspective of the *Ndhlovu* judgement, the trial court erred in admitting Accused 1's extra-curial statement to the magistrate as evidence against Accused 1's co-accused (including the applicants).

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46 *Ibid* p104 lines 1–2; see also: p58 lines 3–8; p72 lines 10–14; p77 lines 13–14; p78 lines 19–21.

47 *Ibid* p122 lines 3–11; p124 lines 5–12.

48 Record p260 line 16 – p261 line18.

The nature of the evidence

[55] In *Ndhlovu*, the extra-curial admission was made 'before [the accused] had any opportunity to fabricate' a story.[49] For instance, one of the accused in *Ndhlovu* was arrested the very evening of the incident and he immediately proceeded to provide the police with information.

[56] In contrast, *in casu* the police investigation yielded no results until about *two months later* when (according to the prosecution's version) Accused 1, who was at that stage incarcerated for another crime, saw a reward notice for information about the crime *in casu* and contacted the investigating officer.[50] By this time, following the *Ndhlovu* reasoning, Accused 1 had ample time to fabricate a version of the events that suited his purposes. Subsequent to Accused 1's extra-curial statements, the rest of the co-accused persons (Accused 2–8) were systematically arrested, with Accused 3, 7 and 8 also making statements.

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[49] *Ndhlovu*, *op cit* note 2 *supra* [40]. I submit that this statement by the SCA in *Ndhlovu* is not aligned with reality: General life experience dictates that people do not need much time to fabricate stories.

[50] Trial court judgement p61 line 16 – p62 line 9. See also the argument on behalf of the prosecution in the trial court in this regard: Record p272 lines 12–19.

[57] I submit that the facts of *Ndhlovu* stand in sharp contrast with the facts *in casu*. However, the trial court failed to appreciate this contrast. For instance, the trial court states:[51]

> that is exactly what is said in *Ndlovu* [sic] that their credibility at the time of their arrest is of essence. . . . at that time [the time of being arrested] it would appear they [presumably Accused 1, 3, and 7] would not have yet met in order to formulate a story.

[58] The trial court ignored the fact that after the incident and prior to Accused 1's arrest for another crime, it is unknown how much time Accused 1, 3, and 7 had at their disposal to collectively concoct a version of events that would suit their interests; the trial court also ignored the fact that Accused 1 was not taken by surprise by a sudden arrest, but that he himself came forward with information (after having had two months to formulate his version of events).

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[51] Trial court judgement p125 lines 4–5 and lines 14–16.

Probative value and independent corroboration

[59] In *Ndhlovu* the SCA found that the hearsay interlinked with the other evidence in an 'undeniably powerful way', and that there was 'strong corroboration in all the other evidence' of the incrimination of the co-accused.[52] In particular, one of the co-accused was found in possession of the murder weapon;[53] the other was identified by an independent witness who was described by the trial court as 'a most impressive witness who gave a clear and coherent account of what he observed'.[54]

[60] In contrast, *in casu* there was <u>no</u> independent corroboration of the involvement of the implicated co-accused (including the applicants) at all. This was highlighted during argument before the trial court by counsel for Accused 2 (one of the applicants) and by counsel for Accused 5.[55] However, the trial court completely failed to consider the import of the complete lack of independent corroboration of the co-accused persons' involvement.

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[52] *Ndhlovu*, *op cit* note 2 *supra* [44].

[53] *Ibid* [37].

[54] *Ibid* [38].

[55] Record p276 line 24 – p279 line 23.

Probative value and the veracity of the extra-curial statements

[61] In *Ndhlovu* the SCA held that the veracity of the extra-curial admissions were practically beyond any doubt:[56]

> The most compelling justification for admitting the hearsay in the present case is the numerous pointers to its truthfulness. The only detail in which anything that either accused 3 or 4 told the police was proved wrong was accused 4's statement that the deceased's vehicle was 'white'. It was, in fact, light yellow. That detail can hardly dent the pile of accurate, reliable information that accused 3 and 4 supplied to the police.

[62] In contrast, the extra-curial statements *in casu* contain numerous material discrepancies relative to one another and relative to other sources. Regarding discrepancies relative to one another, I respectfully refer the Court to *Comparison Table A: The extra-curial statements by Accused 1, 3, 7, and 8*, appended hereto. Regarding discrepancies relative to other sources, the only two independent eyewitness testimonies – Ms Makuna (the deceased person's daughter) and Mr Modikwe (the deceased person's neighbour) – are relevant. Ms Makuna saw *two* assailants in her father's yard;[57] similarly, after the shots

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[56] *Ndhlovu*, *op cit* note 2 *supra* [45].

[57] Trial court judgement p94 line 20 – p95 line 25.

were fired, Mr Modikwe saw *two* persons running away from the deceased's yard.[58] This differs from both Accused 1's version that *five* persons went to the deceased's house, and Accused 3's version that *three* persons went to the deceased's house. Accordingly, the veracity of the extra-curial statements *in casu* is highly suspect.

[63] However, the trial court elected to focus on the similarities between the extra-curial statements, and failed to properly scrutinise and appreciate the material discrepancies between the extra-curial statements relative to one another and relative to the independent eyewitness testimony.

Conclusion

[64] The facts *in casu* can clearly be distinguished from those in *Ndhlovu* in terms of the nature of the evidence, independent corroboration of the co-accused's involvement, and the truthfulness of the extra-curial statements.

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[58] Record p265 lines 18–23. I differ from the trial court's dismissal of Mr Modikwe's statement as incomprehensible, and submit that although it is certainly badly formulated, its meaning is still understandable: 'When I looked around I noticed a black male at my neighbour's house, [– my neighbour being] the deceased in this case, namely Dingaan Makua [–] who [that is the black male that I mentioned] was wearing a white top, running away with a firearm in his hands with another guy.' In other words, Mr Modikwe saw two persons running away.

Accordingly, I submit that the 'compelling justification' required by *Ndhlovu* was not present *in casu*. In the premises the trial court erred in admitting the extra-curial statements as evidence against the co-accused (including the applicants). Also, because Accused 1's statement to the magistrate should in my submission be characterised as a confession, it was for that reason alone inadmissible against his co-accused (including the applicants, who were Accused 2 and 4).

[65] Given that there was no admissible evidence against the applicants at the close of the prosecution's case, it was constitutionally imperative that the trial court discharge the applicants. The Court is respectfully referred to my analysis of this subject in paragraphs [39] to [50] above. Given that the trial court failed to discharge the applicants, the remainder of the trial is irregular and the applicants are entitled to the vitiation of their respective convictions.

Postscript

[66] The trial court eventually based its conviction of all the accused persons (including the applicants) purely on the extra-curial statements. The trial court

explicitly rejected the oral testimony of Accused 1.[59] (Per implication, this also constitutes a rejection of Accused 3's oral testimony, as Accused 3's oral testimony was simply an imitation of Accused 1's last oral testimony.) With reference to the oral testimony of Accused 1 and 3 the trial court observed as follows:[60]

> Now coming to the evidence of accused 1 and 3, they tried now after having perhaps discussed this matter and think that the [writing] was now on the wall, the game was up, they decided then to come with a story wherein they were trying to exonerate themselves from the commission of this offence.

[67] Accordingly, given the inadmissibility of the extra-curial statements against the applicants, it is clear that their convictions should be vitiated.

The full bench

[68] In the following I submit that the full bench judgement misapplied the *Ndhlovu* judgement to an even greater degree than the trial court.

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[59] Trial court judgement p128 lines 19–20. 'I do not believe the version of the accused 1 even though he said he was now telling the truth…'

[60] *Ibid* p127 line 22 – p128 line 1.

Findings on reliability

[69] The full bench correctly, in my submission, found Accused 1 to be an unreliable witness and a 'reckless liar'.[61] The Court is respectfully referred to *Comparison Table B: Accused 1's various versions* appended hereto.

[70] Turning to Accused 3's reliability, the full bench held as follows:[62]

> Appellant 3 [who was Accused 3 in the trial] is a consistent witness because his statement to Inspector Nkosi is not entirely contradictory to his evidence in chief.

[71] This statement, with respect, defies logic: How can a witness be described as 'consistent' because two of his three versions are 'not entirely contradictory'? I submit that the full bench failed to properly scrutinise Accused 3's various versions, which renders him as unreliable as Accused 1. In this regard, the Court is respectfully referred to *Comparison Table C: Accused 3's various versions*, appended hereto.

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61 Full bench judgement [36] p155.

62 *Ibid* [39] p157.

Findings on admissibility

[72] The full bench agreed with the trial court's (eventual) characterisation of Accused 1's statement to the magistrate as an admission.[63] I again submit that this characterisation is incorrect.

[73] The full bench ruled that the extra-curial statements by Accused 1 and Accused 3 became 'automatically admissible' because these accused persons confirmed their extra-statements in their oral testimonies:[64]

> This, in my view is not hearsay evidence but evidence envisaged in section 3(1)(b) of the Act. Once the declarant of the statement confirms it under oath, the evidence becomes automatically admissible. The question of whether the interests of justice require it, has no application here.

[74] This *ratio* by the full bench is contrary to the interpretation of the Act in *Ndhlovu*. In fact, the SCA in *Ndhlovu* was at pains to explain why the admission of extra-curial admissions by one co-accused against the other co-accused must be done in terms of section 3(1)(c) of the Act – with the concomitant

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63 *Ibid* [35] p155.

64 *Ibid* [44] p160.

analysis of the interests of justice – and not in terms of section 3(1)(b).[65] I therefore submit that the full bench's *ratio* quoted above for admitting the extra-curial statements by Accused 1 and 3 into evidence against their co-accused is incorrect.

[75] With regards to Accused 7's extra-curial statement to the magistrate, the full bench did purport to apply the interests-of-justice criterion of section 3(1)(c). The full bench proceeded to hold that Accused 7's incrimination of Accused 2 – one of the applicants *in casu* – is reliable and (per implication) admissible against Accused 2 because Accused 7's placing of Accused 1, 2 and 3 at Mothutlung (but not the crime scene itself) the evening of the incident was corroborated by Accused 1 and 3 during their oral testimonies.[66] I submit that within the purview of *Ndhlovu*, such non-independent corroboration of a single peripheral fact by patently unreliable witnesses is wholly insufficient to constitute compelling justification for the admission of the extra-curial admission against a co-accused.

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65 *Ndhlovu, op cit* note 2 *supra* [27]–[28].

66 Full bench judgement [45] p161.

Evaluation of the evidence against the applicants

[76] Given that the full bench misdirected itself regarding the admissibility of the extra-curial statements, and the reliability of Accused 3, the full bench's evaluation of evidence against the applicants rests on faulty premises.

[77] The full bench accepted the incrimination of the applicants (who were Accused 2 and 4) as reliable given the mutual corroboration by Accused 1, Accused 3, and by Accused 7's extra-curial statement.[67] The full bench failed to recognise that independent corroboration of the involvement of the co-accused was integral to the *Ndhlovu* judgement.

[78] The full bench also remarked about the 'startling similarity' between the oral testimonies of Accused 1 and 3.[68] This is in contrast with the trial court's aversion to these oral testimonies, which the trial court held to be a belated attempt by these two co-accused persons to exonerate themselves on realising that 'the game was up'. The full bench failed to provide any reason why it differs from the trial court's negative assessment of these oral testimonies.

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67 *Ibid* [37] p156.

68 *Ibid* [44] p160.

Moreover, I submit that the full bench failed to scrutinise the various versions of Accused 1 and 3, and accordingly failed to properly consider the material discrepancies between all these versions.

Conclusion

[79] The full bench misapplied the *Ndhlovu* judgement to an even greater degree than the trial court. In particular, the full bench erred in holding that the extra-curial statements by Accused 1, 3, and 7 were admissible as evidence against their co-accused (including the applicants, who were Accused 2 and 4). The judgement by the full bench should be set aside.

LEAVE TO APPEAL

[80] Regarding the applicants' application for leave to appeal, the following considerations are relevant: First, given my submissions on the merits of the case above, I submit that the appeal has a strong chance of success. Secondly, I submit that the issue at the heart of this appeal, namely the constitutional tenability of the *Ndhlovu* legal norm, is a constitutional issue of significant public importance, as it affects the fairness of potentially every criminal trial in our country. As such, it is desirable to have a decision by this Court on this

issue. Thirdly, different from *Molimi*, the elements of the human rights challenge to the *Ndhlovu* legal norm have been fully canvassed in the SCA's judgement in *Litako*. As such, this Court now has the benefit of an SCA judgement on this very issue. Accordingly, I submit that it is in the interests of justice for the Court to grant leave to appeal.

CONDONATION FOR LATE FILING

[81] The applicants have been incarcerated for about a decade[69] and do not have sufficient financial resources to fund an appeal of this nature.[70] The applicants did apply to Legal Aid South Africa for assistance with their intended appeal to this Court, but without success.[71] Eventually a fellow prison inmate who is studying law via correspondence assisted the applicants to draft their application to this Court.[72] I respectfully submit that these facts justify condonation of the late filing of this application.

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69 Mhlongo's founding affidavit [1.1] p4; Nkosi's founding affidavit [1.1] p20

70 Mhlongo's founding affidavit [6.4] p8; Nkosi's founding affidavit [6.5] p24

71 Mhlongo's founding affidavit [6.5] p8; Nkosi's founding affidavit [6.3]–[6.4] pp23–24

72 Mhlongo's founding affidavit [6.6] p8; Nkosi's founding affidavit [6.6] p24

CONCLUSION

[82] In these heads of argument, I submit that the relaxation of the common law rule against the admission of extra-curial statements by one co-accused against another co-accused by the SCA in *Ndhlovu* is not constitutionally tenable, and that the recent reinstatement of the common law rule by the SCA in *Litako* should be confirmed by this Court. Consequently, given that the applicants were convicted based solely on the strength of the extra-curial statements by some of their co-accused, their convictions should be vitiated.

[83] In the alternative, should the Court hold that the relaxation of the common law rule as per *Ndhlovu* was indeed aligned with our constitution, I submit that the courts below misapplied the criteria for admission of extra-curial statements laid down in *Ndhlovu*, and that the relevant extra-curial statements should not have been admitted against the applicants. Accordingly, the applicants' convictions should be vitiated.

Donrich Jordaan, PhD

Counsel for the applicants (at the request of the Court)

2 February 2015

COMPARISON TABLE A: THE EXTRA-CURIAL STATEMENTS BY ACCUSED 1, 3, 7, AND 8

	Accused 1		**Accused 3**	**Accused 7**	**Accused 8**
	Statement to magistrate (pp260–261)	**Pointing out** (pp237–238)	**Statement to police** (pp253–254)	**Statement to magistrate** (pp232–233)	**Statement to magistrate** (p245)
Where did the planning meeting take place?	Tshipa's Tavern	–	–	Tshipa's Tavern	Denies any involvement
Who was seen to have firearms prior to the incident?	Accused 5 and 8	Accused 6 and 8	–	Accused 1 and 2	
Who identified a bakkie to rob?	Accused 7	–	–	Accused 7	
Who travelled together with the intention to rob?	All the accused (eight in total)	–	Accused 1, 2, 3, and 7 and three unknown men (seven in total)	Accused 1, 2, 3, and 7 (four in total)	
Whose car was used?	Accused 2	Accused 2	Accused 2	Accused 2	
After stopping the car, who alighted and proceeded to the deceased's premises?	Accused 3, 5, 6, 7, and 8 ('Toe hulle na daardie huis gaan was hulle vyf')	Accused 3, 5, 6, 7, and 8	Accused 1, 2, and 7	Denies any further involvement	
How many shots were fired?	Two shots	Two shots	Did not hear any shots		
How long after shots were fired did they return to the car?	–	'After the gunshots [they] came running…'	'a few minutes later, less than 10 minutes'		
Who had the firearm taken from the deceased?	Accused 6	Accused 5	–		
Who shot the deceased?	Accused 8	–	–		

COMPARISON TABLE B: ACCUSED 1'S VARIOUS VERSIONS

	Statement to magistrate (pp260–261)	**Pointing out** (pp237–238)	**Testimony: trial-within-a-trial** (pp84–88)	**Testimony: main trial** (pp295–330)	**Testimony: re-opened case** (pp349-455)
Where did the planning meeting take place?	Tshipa's Tavern	–	Denies any involvement. Avers *inter alia* that the police assaulted him and forced him to make the statements.	Denies any involvement.	Accused 6's place; this excluded Accused 1 and 3
Who was seen to have firearms prior to the incident?	Accused 5 and 8	Accused 6 and 8			–
Who identified a bakkie to rob?	Accused 7	–			–
Who travelled together with the intention to rob?	All the accused (eight in total)	–			All the accused (eight in total)
Whose car was used?	Accused 2	Accused 2			Accused 2
After stopping the car, who alighted and proceeded to the deceased's premises?	Accused 3, 5, 6, 7, and 8 ('Toe hulle na daardie huis gaan was hulle vyf')	Accused 3, 5, 6, 7, and 8			Accused 5, 6, 7, and 8 (Accused 3 just alighted to urinate)
How many shots were fired?	Two shots	Two shots			Two shots
How long after shots were fired did they return to the car?	–	'After the gunshots [they] came running…'			'After those gunshots sounded they then came running…'
Who had the firearm taken from the deceased?	Accused 6	Accused 5			Accused 7
Who shot the deceased?	Accused 8	–			Accused 8

COMPARISON TABLE C: ACCUSED 3'S VARIOUS VERSIONS

	Statement to police (pp253–254)	**Testimony: trial-within-a-trial** (pp74–76)*	**Testimony: main trial –** directly following Accused 1's re-opened case (pp455–501)
Where did the planning meeting take place?	–	Denies any involvement. Avers *inter alia* that the police assaulted him and forced him to make the statement. * Note that the transcript incorrectly indicates Accused '2' presented his evidence in the trial-within-a-trial, whereas it is clear from the context that it was in fact Accused 3. For instance, reference is made to Accused 2 in the third person at p75 lines 16–19, and it is clear at p92 line 23 – p93 line 1 that the accused who testified that they were assaulted by the police are Accused 1, 3, 7, and 8 – not Accused 2.	Accused 6's place; this excluded Accused 1 and 3
Who was seen to have firearms prior to the incident?	–		Accused 5, 6, and 8
Who identified a bakkie to rob?	–		–
Who travelled together with the intention to rob?	Accused 1, 2, 3, and 7 and three men who were unknown to Accused 3 (seven in total)		All the accused (eight in total)
Whose car was used?	Accused 2		Accused 2
After stopping the car, who alighted and proceeded to the deceased's premises?	Accused 1, 2, and 7		Accused 5, 6, 7, and 8
How many shots were fired?	Did not hear any shots		Two shots
How long after shots were fired did they return to the car?	'a few minutes later, less than 10 minutes'		'After a while they came running…'
Who had the firearm taken from the deceased?	–		Accused 7
Who shot the deceased?	–		Accused 8