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

Neutral citation:	*Mhlongo v S; Nkosi v S* [2015] ZACC 19
Coram:	Moseneke DCJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ
Judgment:	Theron AJ (unanimous)
Heard on:	10 March 2015
Order on:	25 March 2015
Reasons on:	25 June 2015
Summary:	Extra-curial admissions of an accused inadmissible against a co-accused — not admissible in terms of section 3 of the Law of

Evidence Amendment Act 45 of 1988 — admission of extra-curial admissions but not confessions violates section 9(1) of the Constitution — common law position restored

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REASONS FOR ORDER

THERON AJ (Moseneke DCJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J and Tshiqi AJ concurring):

Introduction

[1] The central issue is the admissibility of extra-curial statements of an accused against a co-accused in a criminal trial. It arises in two applications in which the applicants seek leave to appeal against their convictions and sentences. This Court is called upon to determine the constitutional validity of the admissibility of these statements.

[2] On 25 March 2015 this Court made the following order:

> "1. Condonation is granted for the late filing of the applications for leave to appeal.
> 2. Leave to appeal is granted in respect of both applications.
> 3. The appeals are upheld.
> 4. The order under case number CAF 08/2012 of the Full Court of the North West High Court, Mafikeng, is set aside to the extent set out below:
> (i) The appeals by the second and fourth appellants against their convictions and sentences on counts 1, 2, 4 and 5 are upheld.
> (ii) Their convictions and sentences on those counts are set aside.
> 5. The applicants must be released from prison immediately.
> 6. Reasons for this order shall be given at a later date."

It was in the interests of justice to release the applicants prior to the handing down of these reasons. Paragraph 6 of the order recorded that reasons would be given at a later date. These reasons are set out below.

Factual background

[3] On 3 August 2002 the deceased, Warrant Officer Johannes Dingaan Makuna, was shot at his home. It was alleged that the applicants were part of a group of men who shot Mr Makuna and planned to steal his bakkie. He died later in hospital. At the time, the deceased had been in possession of his service pistol. It was never recovered.

Trial court proceedings

[4] Arising out of this incident, the applicants (accused 2 and 4), together with six co-accused,[1] stood trial before a single judge in the North West High Court, Mafikeng (trial court)[2] on charges of murder (count 1), robbery with aggravating circumstances (count 2), attempted robbery (count 3), unlawful possession of firearms (count 4) and unlawful possession of ammunition (count 5). In the alternative to murder, they were charged with conspiracy to commit robbery in contravention of section 18(2)(a) of the Riotous Assemblies Act.[3] They pleaded not guilty to the charges. The trial commenced in 2003 and continued into 2004.

[5] A trial-within-a-trial was held to determine the admissibility of extra-curial statements made by accused 1, 3, 6 and 7. The admissibility of these statements was contested by the accused on the basis that they were not made freely and voluntarily but under threat of assault or promise of reward. The Court nevertheless ruled that the statements were admissible. It also found that the statements were admissions and not

[1] During the course of the proceedings in the trial court, accused 6 disappeared and failed to attend court.

[2] Known then as the Bophuthatswana Provincial Division of the High Court.

[3] 17 of 1956.

confessions,[4] and admissible against the other accused in terms of section 3(1)(c) of the Law of Evidence Amendment Act[5] (Evidence Amendment Act). In this regard, the High Court relied on *Ndhlovu*, where the Supreme Court of Appeal held that such statements were admissible in terms of the Evidence Amendment Act.[6] The evidence supporting the conviction of the applicants was based almost exclusively on the extra-curial statements made by their co-accused.[7]

[6] The trial court found that the accused had a common purpose to murder and rob the deceased and convicted them of four of the five counts.[8] On 22 July 2004, they were sentenced to life imprisonment for the murder; fifteen years' imprisonment for the robbery; and three years' imprisonment in respect of each of the two remaining charges relating to possession of the firearms and ammunition. The sentences imposed for counts 2, 4 and 5 were ordered to run concurrently with the life sentences. The accused were acquitted of the alternative charge of conspiracy to commit robbery.

Full Court and Supreme Court of Appeal

[7] The accused appealed to the Full Court against their convictions and sentences.[9] The appeal was largely grounded on the inadmissibility of the extra-curial statements.[10] It was dismissed, amongst other reasons, on the ground that the hearsay

[4] The trial court was initially of the view that some of the statements were confessions. See the trial court judgment at 49 and 51. (All page references to the trial court judgment in these footnotes have been referred to, for ease of reference, by this Court's own numbering – starting at page one of the judgment (labelled as 1) and onwards.)

[5] 45 of 1988.

[6] *S v Ndhlovu and Others* [2002] ZASCA 70; 2002 (2) SACR 325 (SCA) (*Ndhlovu).*

[7] This is dealt with later at [41] and below n 65.

[8] Murder (count 1), robbery with aggravating circumstances (count 2), unlawful possession of firearms (count 4) and unlawful possession of ammunition (count 5).

[9] A Full Court is the statutory term for a bench of three High Court judges, usually sitting as an appeal court of that Division, in terms of sections 1 and 17(6)(a) of the Superior Courts Act 10 of 2013. It was defined as a court consisting of two or more judges in terms of section 1(v) of the repealed Supreme Court Act 59 of 1959.

[10] The other grounds upon which the appeal was based in the Full Court, and no longer at issue on appeal before this Court, were: (1) An irregularity in the proceedings in that the State closed its case before the trial court made a ruling on the reception of hearsay evidence against the co-accused; (2) The accused testified out of sequence to the prejudice of their co-accused; (3) Mr Matjeke (accused 1) was allowed to reopen his case without good reason; (4) The extra-curial evidence of Mr Matjeke was given involuntarily, he was not warned of his rights beforehand and his in-court testimony was contradictory and unreliable; (5) The Court failed to

evidence of Mr Thabo Matjeke (accused 1) and Mr George Makhubela (accused 3), which was relied on to convict the applicants, became "automatically admissible" because these accused confirmed portions of the statements in their oral testimony. The Full Court concluded that the statements—

> "[are] not hearsay evidence but evidence envisaged in section 3(1)(b) of the [Evidence Amendment] 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".[11]

[8] The Court ruled that the statement of Mr Samuel Khanye (accused 7)[12] was admissible in the interests of justice, as provided for in section 3(1)(c) of the Evidence Amendment Act, and it was corroborated by aspects of the testimony of Mr Matjeke and Mr Makhubela. The Full Court also found that there was no reason to interfere with the sentences imposed.

[9] A petition to the Supreme Court of Appeal for leave to appeal was dismissed. The applicants then applied for leave to appeal to this Court.

In this Court

[10] Although the applicants submitted two separate applications, their legal submissions are virtually identical. The primary basis of each application is that the admission of extra-curial statements against co-accused violates constitutionally protected rights to equality[13] and to a fair trial.[14]

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apply the cautionary rule to the evidence of Mr Matjeke and Mr Makhubela (accused 3); and (6) The use of hearsay evidence in the form of extra-curial statements by some of the accused against other accused was contrary to the principles laid down in *S v Molimi* [2008] ZACC 2; 2008 (3) SA 608 (CC); 2008 (5) BCLR 451 (CC).

[11] *Matjeke and Others v S* [2013] ZANWHC 95 (Full Court judgment) at para 44.

[12] Appellant 6 before the Full Court.

[13] Section 9(1) of the Constitution provides that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law".

[14] Section 35(3) of the Constitution, in relevant part, provides:

> "Every accused person has a right to a fair trial, which includes the right—

[11] The State concedes that in terms of the common law an accused's extra-curial statement is inadmissible as evidence against a co-accused. It further concedes that the Supreme Court of Appeal in *Litako,*[15] which took a different approach from *Ndhlovu,* was correct in confirming the common law prohibition against the use of extra-curial statements against co-accused. However, the State suggests that section 3 of the Evidence Amendment Act might render such statements admissible provided that the requirements set out in *Ndhlovu* are complied with. The State concedes, however, that both the High Court and Full Court did not properly apply the guidelines set out in *Ndhlovu*.

[12] The State argues that as the applicants were charged, in the alternative, with conspiracy to commit robbery, the common law exception to the inadmissibility of hearsay evidence was relevant. In terms of this exception, vicarious admissions or extra-curial statements made in furtherance of a conspiracy are admissible against a co-accused without violating fair trial rights.[16] While the State ultimately agrees that this exception is not applicable to the facts of this case, it asks the Court to pronounce on the continued existence of this exception.

Condonation

[13] The applicants seek condonation for the late filing of their applications for leave to appeal. Their counsel, Mr Jordaan, appeared at the request of the Court.[17] The Court is indebted to him for his assistance in this matter.

. . .

(i) to adduce and challenge evidence".

[15] *S v Litako and Others* [2014] ZASCA 54; 2014 (2) SACR 431 (SCA); [2014] 3 All SA 138 (SCA) (*Litako*).

[16] *S v Ffrench-Beytagh* 1972 (3) SA 430 (A). See also id at para 65.

[17] This was in accordance with a letter from this Court to the Chairperson of the Pretoria Society of Advocates, dated 11 December 2014.

[14] The petition to the Supreme Court of Appeal was refused on 6 August 2013. Mr Mhlongo filed his application for leave to appeal to this Court on 8 September 2014 and Mr Nkosi on 10 September 2014.

[15] The applicants have been incarcerated for over a decade and do not have sufficient financial resources to fund an appeal of this nature. They applied to Legal Aid South Africa for assistance with their intended appeal to this Court, but without success. Eventually a fellow prison inmate, a law student, assisted the applicants to draft their application to this Court. The explanation advanced for the delay is reasonable and, when measured with the prospects of success, the interests of justice dictate that condonation should be granted.

Leave to appeal

[16] The primary question for consideration, whether the Constitution permits the admission of an extra-curial statement by an accused against a co-accused in a criminal trial, was not directly before the trial court or the Full Court. In *Molimi*, this Court was presented with a similar situation and declined to decide the issue. It was reluctant to act as court of first and last instance on a contentious issue when it had not been fully ventilated.[18] Although the constitutional challenge now before us was not raised or considered by the courts below, we have had the benefit of full argument from counsel and the Supreme Court of Appeal has had an opportunity to consider the same question, albeit in other matters.[19]

[17] This matter engages this Court's jurisdiction as it implicates the rights to equality before the law and to a fair trial. These are fundamental rights protected in the Bill of Rights. The issue at the heart of this appeal, namely the constitutional

[18] *Molimi* above n 10 at para 49.

[19] See *Litako* above n 15 at para 54. See also *S v Libazi and Another* [2010] ZASCA 91; 2010 (2) SACR 233 (SCA) at paras 9-16 and *Balkwell and Another v S* [2007] ZASCA 91; [2007] 3 All SA 465 (SCA) (*Balkwell*) (the judgment of Ponnan JA) at paras 30-6. In these cases the Court found that the principle in *Ndhlovu* that extra-curial admissions were admissible against co-accused while confessions were inadmissible, was inconsistent with the constitutional right to a fair trial and, in *Litako*, the Court also found that the distinction was irrational and implied that it was inconsistent with the right to equality before the law.

tenability of the decision in *Ndhlovu*, which allows extra-curial statements to be admitted against a co-accused if it is in the interests of justice to do so, is a constitutional issue and is of significant public importance. Accordingly, it is in the interests of justice for this Court to grant leave to appeal.

History of the common law prohibition on extra-curial statements against co-accused

[18] At common law the extra-curial statement of an accused was inadmissible against a co-accused.[20] This common law prohibition stemmed from English common law. In 1832 the Court for Crown Cases Reserved in *R v Turner* was called upon to pronounce on a conviction for theft.[21] The conviction was based on the evidence tendered in a confession of a co-accused, who was an employee of the complainant. The Court unanimously held that the confession of an accused was inadmissible against a co-accused and the conviction was thus wrongly made.[22]

[19] In *Barlin*,[23] the Appellate Division confirmed that statements by an accused were admissible against *their makers*:

> "The common law allows no statement made by an accused person to be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made in the sense that it has not been induced by any promise or threat proceeding from a person in authority. See *R v Thompson* and *Ibrahim v R*. That is a principle covering all admissions or statements made by the accused; and apart from

[20] *R v Matsitwane* 1942 AD 213 and *R v Baartman* 1960 (3) SA 535 (A).

[21] *R v Turner* 168 ER 1298. The Court for Crown Cases Reserved was an English Appellate Court which heard criminal cases from 1848 to 1907.

[22] This principle remains a part of English law. In *R v Hayter* [2005] 2 All ER 209; [2005] UKHL 6 at paras 7-8, the House of Lords held that out-of-court confessions made by a defendant are admissible against the maker but as a general rule are not admissible against anyone implicated in the confession. In English law, a confession includes any statement made wholly or partly adverse to its maker – see section 82(1) of the Police and Criminal Evidence Act 1984. See also *Litako* above n 15 at paras 32-7 which cites the following English cases: *R v Moore* (1956) 40 Cr App Rep 50 CCA; *Surujpaul (called Dick) v R* [1958] 3 All ER 300 at 304A-B; *R v George Cecil Rhodes* (1960) 44 Cr App Rep 23 at 28; and *R v Spinks* [1982] 1 All ER 587 (CA) at 589D-E. All these cases find that extra-curial evidence that incriminates a co-accused is inadmissible. See also *Molimi* above n 10 at para 35 and fn 66.

[23] *R v Barlin* 1926 AD 459.

> statute it would govern the admissibility of confessions properly so called." [24] (Citations omitted.)

Then, in *Matsitwane*, the Court made it plain:

> "If the statements contain admissions of fact material to the Crown case such admissions can be used as evidence to prove these facts but only against the accused who made such admissions. Consequently, *in deciding the case against one of the accused the Court can pay no regard to the contents of the statement made by the other*". [25] (Emphasis added.)

[20] This principle was further considered and applied in *Baartman*[26] where the Court cautioned against relying on evidence of a co-accused because its admissibility was precluded under the common law:

> "In so convicting Baartman and Kock the trial Court . . . used the [statements in Honey's] confession to establish an essential part of the chain of inference leading to their conviction, namely, that Honey had taken part in the murder. This was clearly wrong. The general principle is stated in *Wigmore* 3 ed at para 1076. It is illustrated by *R v Turner* 168 ER 1298. In this Court the case of *R v Nkosi and Zulu*, reported only at 1959 PH H 91 (A), is much in point . . . Hoexter JA said—
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> > 'in finding as against the second appellant that the first appellant had administered poison to the deceased, the trial Court fell into the error of relying on the statement of the first appellant, which was not admissible against the second appellant.'"[27]

[24] Id at 462.

[25] *Matsitwane* above n 20 at 220.

[26] *Baartman* above n 20, referring to the Appellate Division judgment in *R v Nkosi and Zulu* 1959 PH H 91 (A).

[27] *Baartman* id at 542.

[21] In *Molimi*, Nkabinde J confirmed this common law rule recognising that an "admission made to a magistrate or a peace officer by one accused is inadmissible against another accused".[28]

Codification of the common law

[22] Before 1918, the common law did not distinguish between statements of an accused as either admissions or confessions.[29] The Criminal Procedure Code Act 31 of 1917 (1917 CPA), which came into force on 1 January 1918, introduced the term "confession". The 1917 CPA specifically prohibited confessions from being admissible against any person other than the maker.[30] There was no provision in respect of admissions. In addition, section 273 of the 1917 CPA introduced different, more stringent requirements for the admission of "confessions" against their maker. It contained a proviso that required a confession made to a peace officer to be confirmed and reduced to writing in the presence of a magistrate or justice of the peace.

[23] In *Hans Veren*,[31] Wessels J concluded that this proviso should be interpreted as strictly as possible and only an absolute confession of guilt (being an admission of every element of the crime) would fall under the proviso. A mere statement which, together with other evidence, may lead to the conviction of an accused would not.[32] This is how the differentiation between admissions and confessions arose. This strict interpretation of the meaning of a confession was approved by the Appellate Division in *Barlin*[33] and *Becker*.[34]

[28] *Molimi* above n 10 at para 33.

[29] *Barlin* above n 23 at 462.

[30] Section 275 provided that "[n]o confession made by any person shall be admissible as evidence against any other person".

[31] *R v Hans Veren and Others* 1918 TPD 218.

[32] Id at 222.

[33] *Barlin* above n 23 at 462 and 465-6.

[34] *R v Becker* 1929 AD 167 at 171-2.

[24] The 1917 CPA was repealed by the Criminal Procedure Act 56 of 1955 (1955 CPA). The distinction between admissions and confessions was retained in this Act, and made even more explicit.[35] Section 273 of the 1917 CPA was virtually re-enacted as section 244 of the 1955 CPA. In terms of section 246 of the 1955 CPA, confessions continued to be inadmissible against "any other person".

[25] The Criminal Procedure Act 51 of 1977 (current CPA) replaced the 1955 CPA. Sections of the current CPA relevant to this enquiry are sections 217, 219 and 219A. Section 217 governs the admissibility of confessions against an accused and sets out the requirements to be complied with in order to render a confession admissible. Section 219 precludes the admissibility of confessions against another person.[36] Section 219A stipulates the requirements relating to the admissibility of an admission and, in relevant part, provides:

> "Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence".

Impact of Ndhlovu on the common law

[26] The common law rule that an extra-curial statement by an accused is inadmissible against a co-accused was relaxed in *Ndhlovu*. In that case, the Supreme Court of Appeal held that an extra-curial admission, but not a confession, by an accused is admissible against a co-accused if: the requirements of section 3 of the Evidence Amendment Act, dealing with the admission of hearsay evidence, are

[35] Section 67 of the 1955 CPA provides:

> "Nothing in this Chapter contained shall prevent any prosecutor from tendering as evidence any *admission or confession* or other statement made or any evidence given by the accused which under Chapter XIV, would be admissible in evidence against him." (Emphasis added.)

[36] This section shares the same wording as its predecessor: section 275 of the 1917 CPA above n 30.

satisfied;[37] no constitutional principles are offended; and it is in the interests of justice to admit such evidence.[38]

[27] The reasoning in *Ndhlovu* cannot be supported for a number of reasons. First, it did not deal with the common law rule against allowing admissions to be tendered against a co-accused.[39] The Court appeared to assume that the hearsay aspect of the evidence was its major pitfall and could be rescued by section 3 of the Evidence Amendment Act.

[28] Second, the Court in *Ndhlovu* did not deal with the provisions of section 3(2) of the Evidence Amendment Act. Extra-curial admissions and confessions are hearsay by nature: their probative value depends on the credibility of a person (the accused) other than the person who gave such evidence. Under the common law, hearsay evidence was generally excluded.[40] Section 3(1) of the Evidence Amendment Act codified this common law principle,[41] providing that hearsay evidence is inadmissible, subject to certain exceptions.[42]

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[37] In terms of section 3(4) of the Evidence Amendment Act, hearsay evidence is defined as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence".

[38] *Ndhlovu* above n 6 at paras 12-6.

[39] Id at para 49.

[40] *Mamushe v S* [2007] ZASCA 58; [2007] 4 All SA 972 (SCA) at para 13. See also id at para 30, which states that the "principal reason for not allowing hearsay evidence is that it may be untrustworthy since it cannot be subjected to cross-examination".

[41] *Mamushe* id. This replaced section 216 of the current CPA which contained a more stringent prohibition on hearsay evidence, subject to limited common law exceptions. See also *Ndhlovu* above n 6 at para 12.

[42] Section 3(1) provides:

> "Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—
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> (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
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> (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
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> (c) the court, having regard to—
>
> (i) the nature of the proceedings;
>
> (ii) the nature of the evidence;
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> (iii) the purpose for which the evidence is tendered;

[29] Section 3(2) of the Evidence Amendment Act provides that section 3(1) "shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence". The statements of co-accused, with which we are confronted in this case, are inadmissible for reasons outside of their hearsay nature.[43]

[30] Third, *Ndhlovu* did not seem to have regard to the provisions of section 219A of the current CPA – which expressly allows an admission to be admitted only against its maker and is silent regarding other persons. The reasoning of the Supreme Court of Appeal in *Litako*, that this section does not contemplate extra-curial admissions being tendered as evidence against anyone else, is sound.[44]

[31] Fourth, the Court in *Ndhlovu* seemed not to have had regard to whether the Evidence Amendment Act altered the common law.[45] In interpreting a statute it cannot be inferred that it alters the common law unless there is a clear intention to do so.[46] A statute must be interpreted in a manner that makes the least inroads into the common law.[47] Together with section 3(2), another indicator that the Evidence

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(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice."

[43] This was noted in *Litako* above n 15 at para 51 and *Balkwell* above n 19 at paras 33-4.

[44] The Court held in *Litako* id at para 54:

> "Quite clearly the 'any person' and 'him' refer to one and the same person – the maker of the statement. Thus, although there is no statutory bar as with a confession, the Legislature, consistent with the common law, albeit less emphatically, has secured the same protection in section 219A for a co-accused in respect of an admission as it did in respect of a confession."

[45] In *Dhanabakium v Subramanian and Another* 1943 AD 160 at 167 the Appellate Division held that the common law position must be borne in mind when interpreting a statute.

[46] *S v Kimberley and Another* [2005] ZASCA 78 at para 13.

[47] *Blom and Another v Brown and Others* [2011] ZASCA 54; [2011] 3 All SA 223 (SCA) at para 21 and *Dhanabakium* above n 45. See also this Court's confirmation of this principle in *S and Another v Acting*

Amendment Act did not alter the common law is to be found in section 3(1) which provides that "*subject to the provisions of any other law* hearsay evidence shall not be admitted as evidence" unless certain stipulated requirements are met.[48] The Evidence Amendment Act altered the common law in relation to hearsay evidence but it did not alter or intend to alter the common law in relation to the admissibility of extra-curial statements made by an accused against a co-accused.

Equality before the law

[32] It was contended by the applicants that the distinction drawn by *Ndhlovu* between admissions and confessions, effectively leads to indirect differential treatment between different groups of accused.[49] Those implicated by an admission, on the one hand, and a confession, on the other. A confession is inadmissible against another person, while, according to *Ndhlovu*, an admission may be admissible. The applicants maintain that the distinction is unjustifiable, rigid and arbitrary. It violates section 9(1) of the Constitution, which provides that everyone is equal before the law and entitled to equal protection and benefit of the law.

[33] The distinction between confessions and admissions is determined solely by the extent to which the statement implicates its maker. This distinction becomes relevant in determining the safeguards that are put in place to ensure the voluntariness of the confession or admission. If a confession can be used, with little more, to secure the conviction of its maker (as opposed to an admission which would still require the State to prove various elements of the crime), then there may be logic in applying more stringent requirements on its admission against that accused. This distinction is

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Regional Magistrate, Boksburg: Venter and Another [2011] ZACC 22; 2011 (2) SACR 274 (CC); 2012 (1) BCLR 5 (CC) at para 19. In *Litako* above n 15 at para 52, the Supreme Court of Appeal, with reference to *Casserley v Stubbs* 1916 TPD 310 at 312 and *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 823, confirmed the well-established canon of interpretation that a statute must be interpreted in conformity with the common law unless a contrary intention is expressed, in the context of the Evidence Amendment Act and its effect on the common law prohibition of the use of extra-curial admissions against co-accused.

[48] Emphasis added.

[49] In *Molimi* above n 10 at para 28, this Court defined confessions as an "unequivocal acknowledgment of guilt, the equivalent of a plea of guilty before a court of law" and defined admissions as a "statement or conduct adverse to the person from whom it emanates".

apparent in the differences between sections 217 and 219A of the current CPA. However, the distinction has nothing to do with a third party. Accordingly, there is no rational reason why, when used against another person, there should be a difference in the admissibility of the two types of statements. The Supreme Court of Appeal in *Litako* said:

> "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."[50]

While this Court, in *Molimi*, declined to pronounce on the issue, it did state that the "argument may be sound".[51]

[34] The differentiation must be evaluated in terms of section 9(1) of the Constitution. This Court has held that a distinction made in the law will contravene section 9(1) if it is irrational.[52] The purpose of this is to ensure that the State functions in a rational manner, in order to enhance the coherence and integrity of the law.[53] This is essential to the rule of law – the fundamental premise of the constitutional state.[54]

[35] It must be ascertained whether the differentiation complained of is rationally connected to the achievement of a legitimate government purpose,[55] as opposed to being arbitrary or capricious.[56] To this end, a legitimate purpose must be identified. It is difficult to conceive of any rational reason why an admission ought to be admissible

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[50] *Litako* above n 15 at para 54.

[51] *Molimi* above n 10 at paras 48-9.

[52] *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at paras 24-6 read with para 56.

[53] Id at para 25.

[54] Id.

[55] *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at paras 42-3.

[56] *Weare and Another v Ndebele NO and Others* [2008] ZACC 20; 2009 (1) SA 600 (CC); 2009 (4) BCLR 370 (CC) at para 46. See also, for example, *Da Silva v Road Accident Fund and Another* [2014] ZACC 21; 2014 (5) SA 573 (CC); 2014 (8) BCLR 917 (CC) at para 7.

against a co-accused but not a confession. The State offered no reasons for this differentiation. The rationale for precluding the admissibility of a confession – the inherent dangers in using statements by co-accused[57] – which is expressly guaranteed in section 219 of the current CPA, applies equally to admissions.

[36] *Litako* expressed concern that the mere characterisation of a statement as a confession or admission could determine its admissibility.[58] That concern became manifest in this matter. The High Court initially characterised the extra-curial statements by Mr Matjeke and Mr Khanye as confessions, only to later re-characterise them as admissions.[59] It was contended by the applicants that this was an attempt to force open the door to the admission of these statements as evidence against them and that this could undermine the integrity of the courts. Even though admissions and confessions are distinctly defined, it is possible for courts to get it wrong with possible prejudicial consequences for an accused.[60]

[37] The differentiation between accused implicated by confessions versus admissions cannot be lawfully sustained. It is not designed to achieve any legitimate purpose. It is an irrational distinction which violates section 9(1). It cannot be saved by the limitations clause contained in section 36 of the Constitution because this limitation on the right to equality before the law is not "reasonable and justifiable in

[57] In *S v Hlapezula and Others* 1965 (4) SA 439 (A) at 440D-E, the Court pointed out the inherent dangers of in-court testimony of an accused implicating a co-accused: an accused may be a self-confessed criminal; she might try to shield or implicate others involved; she might hope for preferential treatment in sentencing; and she may be able to convincingly implicate a co-accused because of her inside knowledge of the crime. See also *Litako* above n 15 at para 65; *Libazi* above n 19 at para 14; and *Balkwell* above n 19 at paras 32-5. These dangers are intensified when the statement was made out-of-court and its maker cannot be subject to cross-examination.

[58] *Balkwell* id at para 54.

[59] Trial court judgment at: 49, lines 6-9 and 18-21 (Mr Matjeke); 51, lines 1-2 (Mr Khanye); 56, lines 4-6 (Mr Matjeke); 63, lines 16-9 (Mr Matjeke), as compared with 69, lines 3-11 and 71, lines 5-12. See also *Litako* above n 15 at para 110.

[60] As in this case and in *Molimi* above n 10 at paras 10 and 19. In *Molimi*, the record of the proceedings at the High Court revealed that the statement of one of the accused was generally understood by the parties as constituting a confession. The Supreme Court of Appeal however decided the accused's case on the basis that the statement was an admission and not a confession.

an open and democratic society based on human dignity, equality and freedom".[61] Nor did the State seek to justify this limitation.

[38] The interpretation adopted in *Ndhlovu*, that extra-curial admissions are admissible against co-accused in terms of section 3(1)(c) of the Evidence Amendment Act, creates a differentiation that unjustifiably limits the section 9(1) right of accused implicated by such statements. The pre-*Ndhlovu* common law position that extra-curial confessions and admissions by an accused are inadmissible against co-accused must be restored. As a result of this finding, it is not necessary to consider the applicants' additional argument that the admission of extra-curial statements of an accused against a co-accused offends against the right to a fair trial.

Common law exception

[39] At common law, there is an exception to the exclusion of extra-curial statements of co-accused: if the statement constitutes an "executive statement"[62] by an accused, it may be admissible against a co-accused if it was made in furtherance of a common purpose[63] or conspiracy.[64] There must be other evidence (*aliunde*) to establish the existence of a common purpose before the statements can be taken into account. The State would have us pronounce on whether this common law exception survives a finding of constitutional invalidity of the admissibility of extra-curial statements of an accused against a co-accused.

[61] Section 36(1) of the Constitution.

[62] Hoffmann and Zeffertt *The South African Law of Evidence* 4 ed (Butterworths, Durban 1988) at 190, explains this by distinguishing between two types of statements that relate to common purpose. These are "executive statements" and "narrative statements". The former are made in furtherance of a common purpose and are admissible evidence against a co-accused while the latter are an account or an admission of a past event. Narrative statements are not admissible against a co-accused because admissions in general are not vicariously admissible but may be admissible against the person making them. In other words in order to be admissible, the statement needs to form part of the acts done in the commission of the crime.

[63] As held in *R v Miller and Another* 1939 AD 106 at 115-6 hearsay evidence, with the exception of confessions, can be used to incriminate a co-accused provided that it is in furtherance of the common purpose and not an account of the alleged past event. See also *Litako* above n 15 at para 65.

[64] *R v Mayet* 1957 (1) SA 492 (A). See also *Ffrench-Beytagh* above n 16; *R v Cilliers* 1937 AD 278; and *R v Levy and Others* 1929 AD 312.

[40] It is not necessary to determine this issue. The facts do not arise. The extra-curial statements here were not "executive" in nature, as conceded by the State, and would not fall under this exception. Determining this matter without any factual matrix to guide our understanding is unnecessary and undesirable. This question was not fully ventilated before us and we thus have insufficient information to make a determination in that regard.

The remaining case against the accused

[41] The extra-curial statements being inadmissible, the question is now: what remains of the case against the applicants? At the close of the State's case, the only evidence against the applicants was the extra-curial statements of the co-accused. If the trial court had correctly declared the evidence inadmissible, the applicants may have been entitled to be discharged at that stage. In any event, at the end of the trial, the evidence as a whole was insufficient to ground the applicants' convictions.[65] Counsel for the State correctly conceded this.

[42] The remainder of the evidence consisted of the oral testimony by two of the applicants' co-accused, Mr Matjeke and Mr Makhubela.[66] Having regard to the cautionary rule, the evidence should have been corroborated by independent evidence.[67] This is due to the fact that both the trial court and the Full Court were of the view that their testimony was inconsistent with their extra-curial statements and

[65] Trial court judgment at 46:

> "Now as I have already stated the evidence of the State in this matter is mainly based on the statements that were made by the accused to the magistrate and the pointing out."

Later at 69, the trial court reiterates that "the State's evidence is dependent on the statements that have been admitted which are not confession statements". In the trial court's critical evaluation of the evidence against the accused at 68-76, the evaluation appears to depend almost exclusively on the extra-curial statements of the co-accused. However, in the Full Court judgment at para 40, the Court only states that *part* of the evidence upon which Mr Mhlongo and Mr Nkosi were convicted are the extra-curial statements of Mr Matjeke, Mr Makhubela and Mr Khanye. However, this does not accord with the emphasis of the trial court judgment.

[66] Mr Matjeke (in his second, drastically different testimony) and Mr Makhubela (who testified straight after this amended version came to light) both testified that Mr Mhlongo was driving the vehicle and placed Mr Nkosi in the car at the scene of the shooting.

[67] See, for example, *Davids v S* [2014] ZASCA 74 at paras 12 and 17 read with para 11 and *S v Khumalo* 1998 (1) SACR 672 (N) at 679B.

previous oral evidence.[68] In addition, the trial court did not believe large portions of their evidence and concluded that they were unreliable witnesses.[69] Both sets of testimony were treated with caution but instead of corroborating these versions with independent evidence, they were used to corroborate each other. The Full Court's conclusion that, because the various inconsistent versions confirmed each other in certain respects, this constituted sufficient evidence to implicate the applicants, must be rejected.[70]

[43] It follows that whatever meagre evidence against the applicants remains after the extra-curial statements are excluded, was unreliable, uncorroborated and cannot justify their convictions.

Conclusion

[44] The common law position before *Ndhlovu*, that extra-curial statements against co-accused are inadmissible, must be restored. Admitting extra-curial admissions against a co-accused unjustifiably offends against the right to equality before the law. If the extra-curial statements here are excluded, there is insufficient evidence to secure convictions against the applicants. For these reasons their convictions and sentences were set aside and their immediate release ordered.

[68] In the trial court judgment at 75, the trial court found that the statements of Mr Matjeke and Mr Makhubela were different in certain respects but that "[a]ll of a sudden the statement of [Mr Matjeke] and that of [Mr Makhubela] here in court now is one, they are actually singing the same song". In the Full Court judgment at para 35, the Court held that Mr Matjeke's testimony in court was "a total contradiction of what he is alleged to have told the magistrate and Captain Ncube". It also found that his first oral testimony was at odds with his second evidence-in-chief and that the magnitude of this difference was significant. The Court concluded at para 36 that he had given three contradictory versions.

Indeed, the Full Court acknowledged at para 34, that where "an accomplice or a single witness or any other witness has made a previous inconsistent statement, he/she must give a convincing account for such different explanations". No such explanation was forthcoming or accepted by the trial court or the Full Court.

[69] The trial court held at 75 that it did not believe Mr Matjeke. From his testimony, the Full Court at para 36, concluded that Mr Matjeke was an "unreliable witness" and "a reckless liar". The Full Court at para 37 considered Mr Makhubela's final version to be "not reasonably possibly true".

[70] In addition, the Full Court acknowledged at para 37 that Mr Nkosi was only vaguely implicated by Mr Makhubela, and Mr Matjeke's statement said nothing about the role Mr Nkosi played.

For the Applicants:	D Jordaan at the request of the Court.
For the Respondent:	N Carpenter instructed by the Office of the Director of Public Prosecutions, North West.