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APPENDIX A: SUMMARY OF FACTS

IN THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SOUTH AFRICA (BRAAMFONTEIN)

CONSTITUTIONAL COURT CASE NUMBERS: CCT 148/14 and 149/14

NORTH WEST HIGH COURT CASE NUMBER: CC 164/03

In the matter between:

BOSWELL JOHN MHLONGO **Applicant**

AND

THE STATE **Respondent**

In the matter between:

ALFRED DISCO NKOSI **Applicant**

AND

THE STATE **Respondent**

RESPONDENT'S HEADS OF ARGUMENT (CORRECTED)

A: INTRODUCTION

1. The 2 applicants, who were accused 2 (hereinafter referred to as applicant 1) and 4 (hereinafter referred to as applicant 2)[1], were indicted and convicted in the then North West High Court, sitting at Ga-Rankuwa on

[1] Although both applicants are applicants in their own cases they have been referred to as applicant 1 and applicant 2 in order to avoid confusion in the respondent's heads of argument.

four counts, namely Murder, Robbery with aggravating circumstances, Unlawful possession of a firearm and Unlawful possession of ammunition. They were acquitted on the alternative charge to the murder count, namely Conspiracy to commit robbery in contravention of section 18(2)(a) of Act 17 of 1956.

2. They were sentenced as follows:

   2.1. Murder – Life Imprisonment,

   2.2. Robbery with aggravating circumstances – 15 years imprisonment,

   2.3. Unlawful possession of a firearm – 3 years imprisonment,

   2.4. Unlawful possession of ammunition – 3 years imprisonment.

3. Their appeal to the Full Court of the North West High Court was dismissed and they subsequently petitioned the Supreme Court of Appeal for leave to appeal to that Court. The application was dismissed on 6 August 2013.

4. Thereafter the applicants petitioned in person this Honourable Court for leave to appeal to this Honourable Court. The application for leave to appeal was granted and Directions by The Chief Justice dated 5 December were then issued.

B. CONSTITUTIONAL ISSUES

5. It is respectfully submitted that the following regarding the accused’s right to a fair trial arise in this matter:

5.1. Whether the applicants were aware of all the admissible evidence tendered against them, including the hearsay evidence, before they testified in the trial court;

5.2. Whether the fact that the accused in the trial court did not testify in the numerical order of the accused as set out in the indictment;

5.3. Whether the hearsay evidence implicating the applicants in their co-accused extra-curial statements was correctly allowed as evidence against them.

C. APPLICANTS POSITION AT THE CLOSE OF THE STATE'S CASE

6. In this case it appears from the record that the State closed its case twice[2].

7. The State Advocate requested the trial court to make a ruling on an application for the admission of hearsay evidence in terms of section 3 of The Law of Evidence Amendment Act 45 of 1988 (Hereinafter referred to as the Hearsay Act) before the State closed its case[3].

8. The application was for the hearsay evidence contained in the extra-curial statements made by the co-accused wherein the other accused were implicated or referred to their co-accused. The application was based on the Supreme Court of Appeal (hereinafter referred to as the SCA) judgment in the case of **S v Ndhlovu and Others** 2002 (2) SACR 325

[2] Record Volume 3 Page 274 Line 6; Record Volume 3 Page 294 Line 1
[3] Record Volume 3 Page 270 Lines 19 – 21

(SCA) (2002 (6) SA 305; [2002] 3 All SA 760; [2002] ZASCA 70). (Hereinafter referred to as **Ndhlovu SCA Judgment**)

9. After the State Advocate finished his application the record reflects that the State's case was closed[4]. Immediately after the State finished arguing the application the legal representatives then addressed the court on whether the hearsay evidence should be admitted[5].

10. Once the argument was finished the trial court gave its ruling and admitted the hearsay evidence.[6]

11. After the trial court gave the ruling applicant 2's legal representative brought an application for his discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as CPA). This application was opposed by the respondent and during the argument it appeared that the respondent had neglected to lead certain evidence concerning applicant 2.

12. The trial court refused the application and allowed the respondent to reopen their case[7].

13. The respondent then called 1 witness who was then cross-examined by

[4] Record Volume 3 Page 274 Line 6
[5] Record Volume 3 Page 274 Line 7 – Page 280 Line 24
[6] Record Volume 3 Page 281
[7] Record Volume 3 Pages 287 - 288

applicant 2's legal representative.

14. Once this evidence was complete the learned Judge in the trial court asked if there were any further submissions regarding an application in terms of section 174 of the CPA.

15. Further submissions were then made on behalf of applicant 2 and the application was once again opposed by the respondent.

16. The trial court once again ruled on the application and refused the discharge of applicant 2[8].

17. During the course of all the above applications and rulings the trial court informed the applicants' and co-accuseds' legal representatives the consequences of the respondent's application to have the evidence admitted in terms of the Hearsay Act[9].

18. As stated by the learned Judge Cameron JA, as he then was, in **Ndhlovu SCA Judgment** at 338 a – c:

"Third, an accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The

[8] Record Volume 3 Page 293
[9] Record Volume 3 Page 274 Line 11 – Page 275 Line 17

prosecution, before closing its case, must clearly signal its intention to invoke the provisions of the Act, and, before the State closes its case, the trial Judge must rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces."

19. It is respectfully submitted that with regard to the hearsay evidence the applicants' right to fair trial was not infringed nor were they ambushed by the admission of the evidence at a late stage for the following reasons:

    19.1. The respondent brought the application before the close of the State's case and requested a ruling on the admissibility of the evidence;

    19.2. The implications of the application was explained by the trial court to the applicants' and co-accuseds' legal representatives;

    19.3. The trial court gave the legal representatives the opportunity to argue in respect of the hearsay admissibility application;

    19.4. The trial court gave a ruling on the hearsay application and ruled the hearsay to be admissible;

    19.5. Reference was made by the respondent to the statements during the opposition to applicant's 2 application for discharge;

    19.6. The trial court allowed further argument on the section 174 application of the CPA after the State witness testified;

    19.7. The trial court in both rulings made reference to the statements that were being admitted in terms of the Hearsay Act[10].

[10] Record Volume 3 Page 281; Record Volume 3 Page 288 Lines 6 - 7

20. It is therefore respectfully submitted that on these facts the applicant's right to a fair trial was not infringed upon and the Full Bench was correct in finding there was no irregularity in this regard[11].

D. APPLICANTS AND CO-ACCUSED'S ORDER OF TESTIFYING

21. In this case the applicants and co-accused testified in the following order:

    21.1. Accused 1[12];

    21.2. Applicant 1 (Accused 2)[13];

    21.3. Accused 8 and his witnesses (No application was brought or reason supplied for the departure)[14];

    21.4. Accused 1 reopened his case (An application was brought on behalf of accused 1 which was only opposed by accused 6)[15];

    21.5. Accused 3[16];

    21.6. Applicant 2 (Accused 4)[17];

    21.7. Accused 5[18];

    21.8. Accused 6 absconded and did not testify[19];

    21.9. Accused 7[20].

22. It is respectfully submitted that from the case law[21] the following principles

[11] Record Volume 2 Page 148
[12] Record Volume 3 Page 295 Line 16
[13] Record Volume 4 Page 330 Line 6
[14] Record Volume 4 Page 348 Lines 12 - 23
[15] Record Volume 4 Page 349 Line – Page 355 Line 15
[16] Record Volume 5 Page 455 Line 22
[17] Record Volume 6 Page 501 Line 15
[18] Record Volume 6 Page 512 Line 25
[19] Record Volume 4 Page 379 Lines 1 – 11
[20] Record Volume 6 Page 520 Line 19

apply:

22.1. There is no section in the CPA or any other legislation which governs the order in which an accused testify in court;

22.2. It is an established and accepted practice that accused present their case in the numerical order they appear on the charge sheet or indictment;

22.3. That should the accused wish to present their cases in a different order an application should be made to court[22];

22.4. The court should decide on such application and consider if it is in the interest of justice and fairness. Furthermore, none of the parties should be prejudiced by the departure from the established practice[23];

22.5. If all the accused's legal representatives are in agreement then the application should be allowed[24];

22.6. If there is no agreement between the legal representatives then the accused should present their cases in the order of the charge sheet or indictment[25];

23. In this case no application was brought for accused 8 to present his case out of sequence. There was also no objection from any of the parties.

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[21] **S v Swanepoel en 'n Ander** 1980 (2) SA 81 (NC); **S v Ngobeni** 1981 (1) SA 506 (B); **S v Mpetha and others** (1) 1983 (1) SA 492(C)
[22] **S v Ngobeni** (supra) at 512H – 513D;
[23] **S v Mpetha** (supra) at 493G – 494A;
[24] **S v Mpetha** (supra) at 495h – 496A
[25] **S v Mpetha** (supra) at 496B – C

24. When accused 1 applied with reasons to reopen his case only accused 6 objected. After the application was granted accused 6 stopped attending court and his trial was separated from the rest of the accused.

25. The respondent at no stage objected to the change in the order of presentation of the accused's cases.

26. It is respectfully submitted that even though, in both cases, where the accused testified out of sequence without substantial applications being presented to the trial court there was no infringement on the applicants right to a fair trial and the Full Bench was correct in finding there was no irregularity in this regard[26].

E. ADMISSION OF CO-ACCUSED'S EXTRA-CURIAL STATEMENTS AS EVIDENCE AGAINST THEIR CO-ACCUSED

27. This ground deals with 2 issues deeply entrenched in the South African common law (and other common law adversarial legal systems) and now statutory law:

    27.1. Extra-curial statements and admissions by conduct which are made by an accused are only admissible when it done freely and voluntarily, in the broad sense of the word, by a person who understands the consequences of his actions. This is due to the

[26] Record Volume 2 Page 150

iniquitous and infamous history of obtaining confessions from an accused;

27.2. Hearsay evidence is generally inadmissible due the fact that it cannot be tested by cross-examination and therefore always has a reliability issue relating to its truthfulness.

28. In South Africa our law of evidence is based on the English law of evidence[27].

F. ACCUSED'S EXTRA-CURIAL STATEMENTS

SOUTH AFRICA

29. It appears that statements of an accused under the common law were not divided into separate categories as they now are[28] and that the term confession, with its admissibility requirements relating to peace officers, magistrates and justice (of peace) was only introduced into our legal system by section 273 of the Criminal Procedure Code Act 31 of 1917 (hereinafter referred to as CPA 1917), which came into force on 1 January 1918[29].

30. Up until the promulgation of this 1917 Act it appears that the only

[27] The South African Law of Evidence,2nd Edition, Zeffert and Paizes, 2009 (hereinafter referred to as Zeffert) at Page 3; Commentary on the Criminal Procedure Act, Du Toit and others, Revision Service 52, 2014 (hereinafter referred to as Du Toit) at 24-41 to 24-42.

[28] Sections 217 – 219A of the CPA

[29] Zeffert at Page 523 fn 532

requirement when admitting statements made by an accused, as stated by Innes CJ in **R v Barlin** 1926 AD 459 at 462, that "[t]he 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 Rex v Thompson (1893, 11 K.B., p. 12); and Ibrahim v Rex (111 L.T., p. 23). That is a principle covering all admissions or statements made by the accused; and apart from statute it would govern the admissibility of confessions properly so called."

31. The introduction of the distinction between peace officer and magistrates and justice of peace was introduced by section 273 of CPA 1917 Act which read as follows: "Provided further that if such confession is shown to have been made to a peace officer other than a magistrate or justice it shall not be admissible in evidence unless it was confirmed and reduced to writing in the presence of a magistrate or justice".

32. In the Full Bench case of **R v Hans Veren and Others** 1918 TPD 218 this additional requirement was criticised by Wessels J when he stated "[i]n order to interpret the proviso we have to inquire into the law as it existed prior to the promulgation of this Act. Now it is clear that no such provision ever existed in the Roman-Dutch law. It certainly did not exist in the English law, and prior to this it was unknown to the law of South Africa. I have endeavoured to ascertain where it came from, but in none of the systems of law with which I am acquainted can I find reference to any such provision. I take it, therefore, that it is an innovation introduced by our legislature to meet the conditions of this country. The conditions of this country, with regard to confessions, must apparently be

different from those of other countries, though it is very difficult for me to see in what respect they do differ.[30]

33. The Full Bench judgment of Wessels J further held that "I find it difficult, therefore, to see what the intention of the legislature was in inserting this proviso…… But it is a proviso which one can see at the first glance is bound to cause a great deal of difficulty and trouble and may lead to justice not being done."[31]

34. Wessels J further held that "[i]t is very difficult to see, if a confession can be conclusively proved to have been made, why it should be rejected. It seems to militate against the principle, which is also to be found in the Criminal Code, that every fact which bears upon the crime is evidence and ought to be tested in the ordinary way as to whether it is true or not. What I have said is sufficient to show that this is an unusual proviso, with very far-reaching consequences, and one which is entirely opposed to the common law and to many of the principles of this very Criminal Procedure Code.

That being so, according to all the canons of interpretation the proviso has to be interpreted very strictly. We have to follow the exact meaning of the words as given in the proviso, and we have to interpret it as strictly as possible and not to give it an extensive or liberal interpretation. The proviso says: "if a confession is shown to have been made to a peace officer other than a magistrate or justice of the peace it shall not be admissible in evidence." It must therefore be a confession,

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[30] At page 219 – 220
[31] At page 220

and it must be made to a peace officer; those two factors are absolute requisites. And the word "confession" here must be taken in its strict sense – that is, a statement by a criminal in which he confesses to the police officer that he is the person who committed the crime. It must be, not a mere statement to a police officer, which, put together with other evidence, may lead to the conviction of the offender, but an absolute confession of guilt; it must be a statement to the effect "I am the man who committed the crime." Short of that it cannot be brought under the proviso of sec.273[32]".

35. Gregorowski J held in the same case that "I take it the object of legislature in this section was to exclude confessions which were made to a policeman by accused before his arrest, unless corroborated and confirmed. If the legislature had said that, I think sec.273 would have been a very wise precaution in favour of liberty. The section, however, provides for the particular kind of confirmatory evidence which is required, namely, that if a confession is made to a police officer it is not admissible in evidence unless confirmed and reduced to writing in the presence of a Magistrate or Justice of the Peace. It seems to me that the purport of the section is that all the materials terms of the confession must appear in the confirmation which is reduced to writing and which really takes the place of the oral statement which has been made to the police officer. I do not think it is a wise piece of legislation. There are certain rules of evidence which I think are golden rules which should always be observed. For instance, there is the rule that a relevant fact must be proved by the best evidence. And that is an excellent rule

[32] At page 221; See also **Admissibility Of Extra-Curial Admissions As Hearsay Evidence Against A Co-Accused**, M Watney, 2008 TSAR 834 at page 838 paragraph 6.1

which excludes hearsay, and makes, for instance, the contents of a document provable only by the production of the document itself. It seems to me it is unwise to exclude the proof of relevant facts, by arbitrary rules. After all, the object in view is to get at the truth, and although precautions are necessary in admitting evidence, it is not desirable to exclude what is relevant merely because circumspection is required. For instance, in this particular-section there is a definition given of the term "peace officer" as used in the Act; it includes (besides a magistrate or justice of the peace), a sheriff or deputy sheriff, and any officer, non-commissioned officer, constable or trooper of the police force. In the case of all those persons, for example, if a confession of the commission of a crime were made to the sheriff, no evidence could be given of that confessions unless it were confirmed in the particular way required by the section. It also includes the superintendent or assistant superintendent or a warder of any prison or gaol, an immigration officer, an inspector of natives or pass officer, or the superintendent of any municipal native location or his assistant. Therefore the section has a very wide compass, and extends to persons whom one would think from the very fact of their occupying the positions they do, would be almost as irreproachable witness as a magistrate or justice of the peace. However, it is a matter for the legislature, and there is the proviso, and it has to be carried out. But I think it should be strictly construed. It does not apply to all statements made by an accused person, but only to confessions of the commission of an offence.[33]

36. It is respectfully submitted that the reasons why the meaning of

[33] At page 223 – 224

confessions was interpreted strictly was to ensure that as little as possible of admissible evidence of extra-curial statements made by an accused were excluded under this section.

37. This strict interpretation of the meaning of a confession was approved by the then Appellate Division in the cases of **R v Barlin** 1926 AD 459[34] and **R v Becker** 1929 AD 167.[35]

38. The CPA 1917 was repealed by the Criminal Procedure Act 56 of 1955 (hereinafter referred to as CPA 1955).

39. Section 67 of the CPA 1955 read as follows:

"Section 67 - Saving as to admissions

"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."

40. Section 244 of CPA 1955 dealt with confessions and basically kept section 273 of CPA 1917 intact and also retained the admissibility distinction with regard to peace officers. Confessions were not admissible against other persons in terms of Section 246 of the CPA 1955.

41. Section 245 of the CPA 1955 dealt with "Admissibility of facts discovered

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[34] At pages 462,465 - 466
[35] At pages 171 – 172

by means of inadmissible confession" and the so called pointing out by the accused.

42. The 1955 CPA was then repealed by the current CPA.

43. The relevant sections are:

43.1. Section 217 Admissibility of confession by accused[36];

43.2. Section 218 Admissibility of facts discovered by means of inadmissible confession[37];

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[36] Section 217: (1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided—

(a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; and

(b) that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question—

(i) be admissible in evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to that of such person and, in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate; and

[Subpara (i) substituted by s 13 of Act 56 of 1979.]

(ii) be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto. If it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto.

(2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under proviso *(b)* to subsection (1).

(3) Any confession which is under subsection (1) inadmissible in evidence against the person who made it, shall become admissible against him—

(a) if he adduces in the relevant proceedings any evidence, either directly or in cross-examining any witness, of any oral or written statement made by him either as part of or in connection with such confession; and

(b) if such evidence, is in the opinion of the judge or the judicial officer presiding at such proceedings, favourable to such person.

[37] Section 218(1) Evidence may be admitted at criminal proceedings of any fact otherwise admissible in evidence, notwithstanding that the witness who gives evidence of such fact, discovered such fact or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in any confession or statement which by law is not admissible in evidence against such accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of such witness against the wish or will of such accused.

43.3. Section 219 Confession not admissible against another[38];

43.4. Section 219A Admissibility of admission by accused[39].

44. Section 217 of the CPA retained the distinction between peace officers and Justice of the Peace. It is respectfully submitted that this section is still subject to the same criticisms expressed in **R v Hans Veren and others** (supra) as this distinction has no basis for its existence. Its application results in relevant evidence being inadmissible in court and in reality makes the non-commissioned policemen an inferior and unreliable witness as regards what an accused might inform them, if the statement is found to be a confession.

45. During any trial when the State leads any of the evidence of an accused's statements or accused's admissions by conduct this evidence is hearsay

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(2) Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings.

[38] Section 219 No confession made by any person shall be admissible as evidence against another person.

[39] Section 219A(1) 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: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained—

(a) be admissible in evidence against such person if it appears from such document that the admission was made by a person whose name corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the admission and any question put to such person by the magistrate; and

(b) be presumed, unless the contrary is proved, to have been voluntarily made by such person if it appears from the document in which the admission is contained that the admission was made voluntarily by such person.

(2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1).

[S 219A inserted by s 14 of Act 56 of 1979.]

evidence, in terms of the definition of hearsay evidence the Hearsay Act, and *prima facie* inadmissible. However, with regards to this evidence, when the State leads as evidence against the author (accused) the State is only required to prove voluntariness (in its widest sense) and that the obtaining of the evidence did not violate the accused's Constitutional rights, if the admissibility of the evidence is in dispute. The State does not also have to satisfy the requirements of section 3 of the Hearsay Act before the evidence is admissible.

46. It is respectfully submitted that all the above sections are relevant in this case:

    46.1. Accused 1: The State tendered his statement as a confession in terms of section 217 of the CPA[40]. The trial court however found it was not a confession and that it was an admission covered by Section 219A of the CPA[41].

    46.2. Accused 1: Made a pointing out and admissions in terms of section 218 of the CPA[42].

    46.3. Accused 3[43] and 8[44]: Made admission covered by Section 219A of the CPA.

    46.4. Accused 7: The State tendered his statement as a confession in terms of section 217 of the CPA[45]. The trial court however found it

[40] Record Volume 2 Page 102 Lines 18 – 19
[41] Page Record Volume 2 Page 124 Lines 5 – 12
[42] Record Volume 2 Page 102 Lines 20 – 21
[43] Record Volume 2 Page 102 Lines 22 – 24
[44] Record Volume 2 Page 105 Lines 4 – 5
[45] Record Volume 2 Page 104 Lines 1 – 2

was not a confession and that it was an admission covered by Section 219A of the CPA[46].

46.5. Accused 7: Made a pointing out and admissions in terms of section 218 of the CPA[47].

47. Once the trial court had found that all the statements and pointing outs were admissions the trial court allowed them as admissible hearsay evidence against the co-accused[48].

48. The admission of the evidence was based on the **Ndhlovu SCA Judgment.** This was a judgment of a bench consisting of 3 SCA Judges.

49. This case emanated from the appeal of the case of **S v Ndhlovu and Others** 2001 (1) SACR 85 (W) where the high court invoked the provisions of section 3(1)(c) of the Hearsay Act and allowed the extra-curial statements of the accused to be used against their co-accused

50. In subsequent judgments of the SCA the principles as set out in the **Ndhlovu SCA Judgment** were upheld[49].

51. In the case of **Balkwell and Another v S** [2007] 3 All SA 465 (SCA) in the

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[46] Page Record Volume 2 Page 124 Lines 5 – 12
[47] Record Volume 2 Page 104 Lines 20 – 22
[48] Page Record Volume 2 Page 123 Line 20 – Page 127 Line 21
[49] **S v Ralukukwe** 2006 (2) SACR 394 (SCA); **Balkwell and another v S** [2007] 3 All SA 465 (SCA); **Mamushe v S** [2007] 4 All SA 972 (SCA)

judgment Ponnan JA, in a *obiter dictum*, questioned the reasoning and validity of the **Ndhlovu SCA Judgment** and stated at paragraph [34] "*Ndhlovu* (*supra*) makes no attempt to reconcile the incongruity between the bar created by section 219 of the Criminal Procedure Act 51 of 1977 and its application of section 3 of the Law of Evidence Amendment Act 45 of 1988. Moreover, in dealing with the constituent parts of section 3, *Ndhlovu* offers no guidance as to how the receipt of the extra-curial admissions which it allows under that section, should be approached given the rationale at common law for their exclusion or what role, if any, the various common-law safeguards should play."

52. In 2014 a SCA bench consisting of 5 Judges overruled the **Ndhlovu SCA Judgment** in the case of **S v Litako And Others** 2014 (2) SACR 431 (SCA)[50].

53. It is respectfully submitted that the *ratio decidendi* for the decision in **S v Litako** are threefold:

    53.1. Firstly, the **Ndhlovu SCA Judgment** was inconsistent with the common law as stated at page 445 h – i "The common-law rule was not only an aversion to the admissibility of hearsay evidence, but it developed because of the inherent dangers of permitting the use of extra-curial statements by one accused against another. It recognised the potential conflicts between the interests of co-accused persons.

[50] At Page 452 f – g

Furthermore, because a co-accused person cannot be compelled to testify, the common-law rule appreciates that fair trial rights, including the right to fully challenge the state's case, may be hampered". The high court had only devoted 4 lines in the judgment to this aspect;

53.2. Secondly, the provisions of section 3(2) of the Hearsay Act were glossed over as stated at page 445 f – g that "[i]n Ndhlovu in the high court the provisions of s 3(2) of the Act were glossed over. That subsection provides:

'The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.'

53.3. Thirdly, and the wording of section 219A of the CPA prohibit the admission of the evidence as stated at 446 h – i that "[m]oreover, s 219A in terms provides that:

'(E)vidence of any admission made extra-judicially by any person in relation to the commission of an offence shall . . . be admissible in evidence against him.' [Our emphasis.]

54. The English law of evidence forms the basis for most Commonwealth countries and the United States of America law of evidence.

UNITED KINGDOM

55. In United Kingdom the admission of these statements is governed by the Police and Criminal Evidence Act 1984 (hereinafter referred to as PACE)

and the Criminal Justice Act 2003 (hereinafter referred to as CJA).

56. In the United Kingdom Acts the term "Confession" is defined in section 82(1) of PACE as follows: "confession, includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise" and therefore it covers all the forms of extra-curial statements made by an accused[51].

57. Section 76 of PACE defines confessions and deals with the requirements for its admissibility[52] and section 78 allows for the exclusion unfair

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51 **R v Hayter** [2005] 2 All ER 209; [2005] UKHL 6 at [67]

52 **76 Confessions.**(E+W+S+N.I.)

(1)In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2)If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—

(a)by oppression of the person who made it; or

(b)in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

(3)In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2) above.

(4)The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence—

(a)of any facts discovered as a result of the confession; or

(b)where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.

evidence[53]. In essence, it is respectfully submitted, the statement must be made voluntarily in order for it to be admissible.[54]

58. An accused extra-curial confession is specifically excluded from hearsay evidence by section 114(1)(a)[55] and 118(1)(5)[56] of the CJA.

59. In House of Lords case **R v Hayter** [2005] 2 All ER 209; [2005] UKHL 6 at

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(5)Evidence that a fact to which this subsection applies was discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf.

(6)Subsection (5) above applies—

(a)to any fact discovered as a result of a confession which is wholly excluded in pursuance of this section; and

(b)to any fact discovered as a result of a confession which is partly so excluded, if the fact is discovered as a result of the excluded part of the confession.

(7)Nothing in Part VII of this Act shall prejudice the admissibility of a confession made by an accused person.

(8)In this section "oppression" includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).

(9)Where the proceedings mentioned in subsection (1) above are proceedings before a magistrates' court inquiring into an offence as examining justices this section shall have effect with the omission of—

(a)in subsection (1) the words "and is not excluded by the court in pursuance of this section", and

(b)subsections (2) to (6) and (8).]

[53] **78 Exclusion of unfair evidence.(E+W+S+N.I.)**

(1)In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2)Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

[54] The Privy Council decision of **Kuruma Son of Kaniu v Reginam** [1955] 1 All ER 236
[55] Section 114(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—
(a)any provision of this Chapter or any other statutory provision makes it admissible,
[56] Section 118 (1) The following rules of law are preserved: Confessions etc
5 Any rule of law relating to the admissibility of confessions or mixed statements in criminal proceedings.

paragraphs [7] and [8] Lord Steyn summed up the legal position as follows: "**[7]** A voluntary out of court confession or admission against interest made by a defendant is an exception to the hearsay rule and is admissible against him. That was so under the common law. That is also the effect of s 76 of the Police and Criminal Evidence Act 1984 (PACE). (Given the wide definition of confession in s 82(1) of PACE, I will simply refer to confessions.) A confession is, however, generally inadmissible against any other person implicated in the confession. The rationale of the rule was stated by Sir James Fitzjames Stephen, *Digest of the Law of Evidence* (12th edn, 1936) p 36 as follows:

> 'A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime. Confessions, if voluntary, are *deemed to be relevant facts as against the persons who make them only*.'(My emphasis.)

In a joint trial the prosecution may not rely on what the maker of a confession said against a co-accused. This is a general rule of law. It is buttressed by a rule of practice requiring a trial judge to direct the jury to ignore a confession made by an accused in considering the case against a co-defendant.

[8] The confession of Ryan was irrelevant and inadmissible in the case against the other defendants. And the judge was bound, in accordance with well-settled principles of criminal practice, to direct the jury accordingly. That is exactly what he did".

60. In the UK the common law regarding admissibility of hearsay evidence has been abolished in civil cases[57] but has been retained in criminal matters, together with its exceptions, as stated by Lord Rodger of Earlsberry in **Hayter** (supra) at paragraphs [55] – [56] that "[w]hether or not it has always been followed religiously, Lord Reid's guidance is particularly apposite in this case where the Law Commission conducted a wide survey of the law and did not support any change in relation to Crown evidence of extrajudicial admissions of co-defendants in criminal trials. In their report on *Evidence in Criminal Proceedings*: *Hearsay and Related Topics* (Law Com No 245 (1997)) (para 8.96) they said:

> 'A hearsay admission is still evidence only against the person who made it, and a jury must be warned accordingly. A number of our respondents thought it extremely important that this principle be retained, and we agree.'

Plainly, like Viscount Birkenhead, the Law Commission considered that, where the consequences of conviction in a criminal trial are so serious, it is essential to adopt a standard of admissibility on this matter which is so cautious as to be meticulous.

[56] Even more importantly, Parliament agreed with, and gave effect to, the Law Commission's conclusion. Section 118(1) of the Criminal Justice Act 2003 specifically preserves any common law 'rule of law relating to the admissibility of confessions or mixed statements in criminal proceedings'.

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[57] R v Hayter (supra) at [54]

61. It is respectfully submitted that in the United Kingdom as a general rule extra-curial statements of an accused are inadmissible against another accused in the same trial.

CANADA

62. The position in Canada is summarised in the **Litako** judgment at 449 d – g "In **R v Perciballi** (2001) 54 OR (3d) 346 the Court of Appeal for Ontario dealt, inter alia, with the question whether the statement of a co-accused, introduced in a joint trial against its maker, can be used to support evidence against another accused in the trial. In para 84 the following is said:

'The statement must nonetheless be excluded from consideration . . . , not because it lacks corroborative value from a logical or a common sense standpoint, but for the same policy considerations that define the scope of admissibility of an accused's out-of-court statement and limit its use as against its maker only. The underlying principle is one of fairness to the party who cannot cross-examine the maker of the statement. While the maker can hardly complain about the inability to cross-examine himself, the same cannot be said of the co-accused.'

This was upheld on appeal by the Supreme Court of Canada in **R v Perciballi** [2002] 2 SCR 761 (2002 SCC 51).

63. This position was confirmed in **R v Rojas** 2008 SCC 56 at paragraph [3] where Charron stated "[a]t no point did the trial judge tell the jury that they could use the statements of Hugo to confirm Miranda's evidence on matters involving Miguel, or vice versa. To the contrary, he repeatedly instructed the jury

not to use the statements of one appellant against the other. In the circumstances, the appellants' reliance on this Court's decision in R. v. Perciballi, [2002] 2 S.C.R. 761, 2002 SCC 51, is misguided, and their argument was properly dismissed in the court below"[58].

UNITED STATES OF AMERICA

64. In the USA a detailed history of the common law was set out in the Supreme Court decision of **Crawford v. Washington**, 541 U.S. 36 (2004) and the majority held that that any out-of-court statement that is "testimonial" in nature is not admissible, unless the declarant is unavailable to testify in court, and the defendant has had a prior opportunity to cross-examine him or her. This decision overruled the decision of **Ohio v. Roberts**, 448 U.S. 56 (1980).

65. The admissibility of evidence is governed by Federal Rules of Evidence.

66. Rule 104 states "**Preliminary Questions**

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege"[59].

67. The admissibility of a confession is determined by the court before a jury

[58] See also paragraphs [9]; [19]; [25]
[59] See "Notes of the Advisory Committee on Proposed Rules" with regard to the rational for this rule

trial is held.[60]

68. Article VIII (Sections 801 – 807) deals with hearsay evidence.

69. Rule 801 contains the following definitions: "The following definitions apply under this article:

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

> (1) the declarant does not make while testifying at the current trial or hearing; and
>
> (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

70. From the above, it is respectfully submitted, that all of an accused extra-curial statements and conduct fall under the "statement" definition.

71. In order the circumvent the inadmissible hearsay evidence of an accused extra-curial statement Rule 804 created Hearsay Exceptions: Declarant Unavailable and Rule 804(b)(3) reads as follows:

"(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the

[60] Rule 104(c)(1)

declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability"[61].

72. Although these rules codify hearsay evidence and its exceptions, which are mostly based on the common law, Rule 807 allows courts to admit hearsay evidence that is not specifically listed in the exceptions.[62]

73. It is respectfully submitted that in the USA extra-curial statements of 1 accused are not allowed as evidence against other accused as they are inadmissible hearsay evidence and such statements were only admissible against their maker in terms of the common law.

NEW ZEALAND

74. In New Zealand the Evidence Act 2006 applies to this type of evidence.

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[61] See Notes of Advisory Committee on Proposed Rules the following explanation is given in respect of this section

[62] Rule 807: (a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:
(1) the statement has equivalent circumstantial guarantees of trustworthiness;
(2) it is offered as evidence of a material fact;
(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
(4) admitting it will best serve the purposes of these rules and the interests of justice.
(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

75. In Section 27 of the Act it states "Defendants' statements offered by prosecution

(1) Evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is admissible against that defendant, but not against a co-defendant in the proceeding.[63]

76. This Act abolished the common law which held hearsay evidence to be inadmissible unless it fell into one of the common law exclusions[64]. A co-defendants statement and was therefore inadmissible evidence against co-defendants.

AUSTRALIA

77. In Australia the position as regards co-accused extra-curial statements being admitted as evidence against their co-accused is the same as the pre-Ndhlovu judgments.[65]

78. It is respectfully submitted that as a general rule our common law and other legal jurisdictions prohibit the use of an accused's extra-curial statement as evidence against his co-accused.[66]

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[63] **R v Barlien** [2008] NZCA 180 at paragraphs [27] and [60]

[64] **Hart v R** [2010] NZSC 91 at paragraph [1] The Evidence Act 2006 is significant legislation which restates the principles upon which evidence is admitted in court proceedings and substantially reforms the pre-existing law. It is the first stop when questions of admissibility arise. And in many cases it will be the last stop. In interpretation of the Act and where the Act is silent on a question of admissibility, ss 10 and 12 permit recourse to the common law, provided the common law is consistent with the purpose and principles of the Act.

[65] **Litako** (supra) at 449 a – c

[66] Du Toit at 24-70C

G. CONSPIRACY

SOUTH AFRICA

79. In the **Litako** judgment the court held at 450 b – c that "[f]urthermore, other than when one is dealing with vicarious admissions or statements made in furtherance of a conspiracy, neither of which is applicable in the present case, it is difficult to see how one accused's extra-curial statement can bind another".

80. Prior to the commencement of the Hearsay Act an accused's extra-curial statements were admissible, as an exception to the hearsay rule, against the co-accused to prove a conspiracy or common purpose. The exception fell under the Vicarious Admissions (Executive Statements) category.

81. Du Toit at 24-50S submits , "for the following reasons, that the common-law exceptions have been abolished: (a) s 216 of the Criminal Procedure Act, which ensured their survival by applying the English common law, has been repealed by s 9 of the Law of Evidence Amendment Act; (b) this was clearly the intention of the legislature; (c) the specific treatment of hearsay in s 3 makes it clear that hearsay cannot be regarded as a 'case not expressly provided for' for the purpose of the residuary provision, s 252. One of these exceptions—that relating to dying declarations—which had, for some reason, been singled out for specific legislative attention in s 223 of the Criminal Procedure Act, has in any event been expressly repealed by s 9 of the new Act; and, (4) in **S v Shaik & others** 2007 (1) SA 240 (SCA) at [169], the Supreme Court of Appeal held that it was unnecessary for it to determine whether, as the trial court had held, the hearsay

evidence in question could be received under a common-law exception (in this case as an executive statement in furtherance of a common purpose) since 'the reception of hearsay evidence is now regulated by s 3 of the Law of Evidence Amendment Act 45 of 1988 '."[67]

82. Du Toit at 24-74 deals with conspirators:

"**Conspirators: A special case**

Our law has adopted the English rule that a statement made by A is admissible against B if A and B were associated in the commission of a crime and the statement was made in furtherance of their common purpose (see for example **R v Levy & others** 1929 AD 312; **R v Cilliers** 1937 AD 278; **R v Mayet** 1957 (1) SA 492 (A); **S v ffrench-Beytagh** 1972 (3) SA 430 (A)).

83. However, these statements cannot be seen in isolation. Du Toit at 24-75 submits "[b]efore such statements may be admitted it must be shown that there was in fact a conspiracy and that the accused participated in it, but unlike the case of agency the court may have recourse to the statements in question in deciding these preliminary issues (see **R v Mayet** (supra) at 494). In **S v**

[67] **Makhathini v Road Accident Fund** 2002 (1) SA 511 (SCA) Navsa JA held (at 520B–E):
'Hearsay evidence is not, as a general rule, admissible. A long recognised exception to the rule occurs when the contested hearsay statement amounts to an admission made by a party to the litigation and, by extension, by someone who has an identity of interest with such a party. The driver of an insured vehicle who had made an admission which, if admitted in evidence, would be held against an insured who is a party to the litigation does *not* have such an identity of interest with the insured. Section 3 of the Act introduced a general statutory exception to the general rule. It follows that an admission by an insured driver, otherwise hearsay, would be admissible in evidence only if it complies with the preconditions prescribed by s 3 of the Act. Before the advent of the Act statements made by strangers to a suit which were construed as admissions were not admissible unless they fell within the exceptions [ie the vicarious admissions principle]. Now such statements are examined to see whether they fall within the statutory definition of hearsay evidence. If they do they are then measured against the requirements set out in s 3(1)*(c)*(i)–(vii) and are admitted if they pass muster. . . '
See also **Giesecke & Devrient Southern Africa (Pty) Ltd V Minister Of Safety And Security** 2012 (2) SA 137 (SCA) at 147 B - E

ffrench-Beytagh (supra) at 455 the Appellate Division adopted the principle stated in Phipson (9 ed at 98) that 'it is immaterial whether the existence of the conspiracy or the participation of the defendants, be proved first, although either element is nugatory without the other', and added that there must, moreover, also be some evidence *aliunde* to establish the existence of a common purpose before the statements in question can be taken into account at the end of the case. The statement does not lose its status of 'executive declaration' by reason of the fact that it refers to past matters as long as those references are an integral part of the executive statement and explain the basis on which the final agreement was made: **S v Shaik & others** 2007 (1) SACR 142 (D) at 213f–h."

84. It is respectively submitted that should the State apply for co-conspirators statements to be admitted as evidence, it will have to do so using the requirements as set out in section 3(1)(c)[68] of the Hearsay Act. In such an application the State will be able to submit that it was previously a common law exception to inadmissible hearsay evidence and that the necessity of the admission of this hearsay evidence is recognised in countries in which the English law of evidence forms the basis of the common law. It will then be in court's discretion whether to admit the evidence or not.

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[68] Section 3(1)(c): (c) the court, having regard to-
(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(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.

UNITED KINGDOM

85. In the UK this principle was recognised in numerous cases.[69]

86. In section118(1)(7) of the CJA the common law exception of "Common enterprise" is found:

7. Any rule of law under which in criminal proceedings a statement made by a party to a common enterprise is admissible against another party to the enterprise as evidence of any matter stated."

87. In **R v Hayter** (supra) at paragraph [25] the following was held "[i]f I am wrong in my approach, I would conclude that only a modest adjustment of the rule about out of court confessions in joint trials is necessary and I would be prepared to make a modification sanctioning the sensible and just procedure adopted by the Recorder of London. It is a principled evolution in keeping with modern developments, statutory and judge-made, which corrected some of the worst absurdities of the law of evidence of a bygone era. This view is reinforced if one stands back and considers the rule in question in a broader legal context. The rule about confessions is subject to exceptions. Keane, *The Modern Law of Evidence* (5th edn, 2000) pp 385–386, explains:

'In two exceptional situations, a confession may be admitted not only as evidence against its maker but also as evidence against a co-accused implicated thereby. The first is where the co-accused by his words or

[69] **R v Governor of Pentonville Prison and another, ex parte Osman** [1989] 3 All ER 701; **R v Khan (Sultan)** [1996] 3 All ER 289

conduct accepts the truth of the statement so as to make all or part of it a confession statement of his own. The second exception, which is perhaps best understood in terms of implied agency, applies in the case of conspiracy: statements (or acts) of one conspirator which the jury is satisfied were said (or done) in the execution or furtherance of the common design are admissible in evidence against another conspirator, even though he was not present at the time, to prove the nature and scope of the conspiracy, provided that there is some independent evidence to show the existence of the conspiracy and that the other conspirator was a party to it … There is also a third exception, in fact an extension of the second: when, although a conspiracy is not charged, two or more people are engaged in a common enterprise, the acts and declarations of one in pursuance of the common purpose are admissible against another. This principle applies to the commission of a substantive offence or series of offences by two or more people acting in concert, but is limited to evidence which shows the involvement of each accused in the commission of the offence or offences. It cannot be extended to cases where individual defendants are charged with a number of separate substantive offences and the terms of a common enterprise are not proved or are ill-defined.'

The second and third exceptions are of interest in regard to the appeal before the House. I am not saying that these exceptions are directly relevant. But the account of roles of the wife determined to kill her husband, the hired gunman, and the middleman, which the jury must have accepted are uncommonly close to those exceptions."

CANADA

88. In Canada in **R v Perciballi** (2001) 54 OR (3d) 346 the Court of Appeal for Ontario held at paragraph [46] that "[t]he appellant does not dispute that Perciballi's statement to Zeoli could be used as evidence against him if it was made in furtherance of the conspiracy. The evidence would be admissible pursuant to the well-established co-conspirators' exception to the hearsay rule whereby the acts and declarations of alleged co-conspirators made in furtherance of the conspiracy are admissible against an accused".[70]

UNITED STATES OF AMERICA

89. The admissibility of conspirator's statements is dealt with in Federal Rules of Evidence by Rule 801(d)(2)(E):

"(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ……..

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

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[70] See also paragraphs [47], [49], [74] – [76], [78], [136]

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E)"[71]

90. Subsequent to these Rules being promulgated the Supreme Court in **Bourjaily v United States** 483 US 171 the court dealt with the above section. Justice Blackmun, with whom Justice Brennan and Justice Marshall, found that "[t]he Court recognizes that, according to the common-law view of the exemption of a co-conspirator's statement from the hearsay definition, an offering party was required to establish, as preliminary factual matters, the existence of a conspiracy and a defendant's participation therein by evidence apart from the co-conspirator's statement. Ante, at 177. In the Court's view, this settled law was changed in 1975 by the adoption of the Federal Rules of Evidence, particularly Rules 104(a) and 1101(d)(1). As the Court explains, the plain language of Rule 104(a) allows a trial court to consider any information, including hearsay, in making preliminary factual determinations relating to Rule 801(d)(2)(E). Ante, at 177-178. Thus, reasons the Court, under the Rule a trial court should be able to examine the co-conspirator's statement itself in resolving

[71] See "Notes of the Advisory Committee on Proposed Rules" with regard to the rational for this rule

the threshold factual question—whether a conspiracy, to which the defendant belonged, existed. According to the Court, in light of Rule 104(a)'s "plain meaning" there is no need to take the "extraordinary" step of looking to legislative history for confirmation of this meaning."[72]

91. It is respectfully submitted that co-conspirators statements are admissible against conspirators.

NEW ZEALAND

92. When the Evidence Act commenced there was no provision in the Act which retained the common law hearsay exception concerning co-conspirators statements.

93. However the Act was amended, within 8 months, to cover the evidentiary rules regarding these statements and section 12A came into operation which states: "**12A Rules of common law relating to statements of co-conspirators, persons involved in joint criminal enterprises, and certain co-defendants preserved**

Nothing in this Act affects the rules of the common law relating to—

(a) the admissibility of statements of co-conspirators or persons involved in joint criminal enterprises; or

(b) the admissibility of a defendant's statement against a co-defendant in circumstances where the defendant's statement is accepted by the co-defendant.

[72] See "Notes of the Advisory Committee on Proposed Rules" with regard to the rational for this rule and the amendments subsequent to this judgment

Section 12A: inserted, on 4 July 2007, by section 5 of the Evidence Amendment Act 2007 (2007 No 24)."

94. In **R v Sullivan and others** [2014] NZHC 1312 Heath J held at paragraph [11] that "Taking that evidence into account with what is said in Mr McLeod's memorandum might well lead to a conclusion that Mr Sullivan accepted the content. But, equally, if there were evidence the other way, a contrary conclusion could be reached. The point is put well by the authors of *The Evidence Act 2006: Act and Analysis*:

> **EV12A.03 Acceptance of co-defendant's statement**
>
> Section 12A(b) preserves the common law exception to the co-accused rule in situations where the co-defendant, by his or her words or conduct, accepts the truth of the out-of-court statement made by the defendant. By accepting the truth of the defendant's statement, the co-defendant has in effect made the statement their own.
>
> What may amount to accepting a defendant's statement (or part of the statement – in which case only that part can be admissible against the co-defendant) will vary according to the circumstances, and such acceptance may take place pre-trial, in the course of police questioning, or when the co- defendant testifies, and directions as to use of the out-of-court statement will follow accordingly."

95. This section has been used in other cases and the evidence led in terms of the section has not been found to be inadmissible.[73]

96. It is respectfully submitted that the admission of co-accused statements as evidence of a conspiracy or common purpose is recognised as an exception to hearsay evidence, either founded in legislation or the common law.

97. South Africa is the exception as the Hearsay Act will have to be utilised to lead such evidence.

98. It is respectfully submitted that all the jurisdictions mentioned above and South Africa require, as stated in Zeffert, that "there has to be *some* evidence *aliunde* to lay the foundation of a common purpose before such statements can, at the end of the case, be taken into account.[74]" It is respectfully submitted that the same principle applies to conspiracy statements.

99. In the case of **Horncastle and Others v. the United Kingdom**, 4184/10, 16 December 2014 heard at the European Court of Human Rights, it is respectfully submitted, that gravamen of the judgment is if the domestic legislation of country provides sufficient guards against the automatic reception of hearsay evidence then the admission of hearsay evidence

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[73] **R v Collins** [2009] NZCA 519; **Waterford v R** [2012] NZCA 58
[74] At page 497

does not affect an accused's right to a fair trial[75].

100. It is respectfully submitted that our Hearsay Act is so well drafted that hearsay evidence allowed under the Act will not infringe on an accused's right to a fair trial.

101. It is respectfully submitted that a court is fully aware that once an application is brought for the admission of hearsay evidence that there will be no cross-examination of the evidence.

102. It is respectfully submitted that the depravation of parties right to cross-examine does not *per se* render a trial unfair and in this regard Rehnquist CJ held in **Bourjaily** that "Petitioner's theory ignores two simple facts of evidentiary life. First, out-of-court statements are only presumed unreliable. The presumption may be rebutted by appropriate proof. See Fed. Rule Evid. 803(24) (otherwise inadmissible hearsay may be admitted if circumstantial guarantees of trustworthiness demonstrated). Second, individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts. Taken together, these two propositions demonstrate that a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence. A per se rule barring consideration of these hearsay statements during preliminary factfinding is not therefore required. Even if out-of-court declarations by co-

[75] Paragraph 90.

conspirators are presumptively unreliable, trial courts must be permitted to evaluate these statements for their evidentiary worth as revealed by the particular circumstances of the case. Courts often act as factfinders, and there is no reason to believe that courts are any less able to properly recognize the probative value of evidence in this particular area. The party opposing admission has an adequate incentive to point out the shortcomings in such evidence before the trial court finds the preliminary facts. If the opposing party is unsuccessful in keeping the evidence from the factfinder, he still has the opportunity to attack the probative value of the evidence as it relates to the substantive issue in the case. See, e.g., Fed.Rule Evid. 806 (allowing attack on credibility of out-of-court declarant).[76]

H. APPLICATION OF THE LEGAL PRINCIPLES

103. It is respectfully submitted that the **Litako** judgment correctly found that the common law did not allow the admission of an accused's extra-curial as evidence against the other co-accused.

104. Section 67 of the CPA 1955 and section 219A of the CPA both refer to admissions be admissible against "him".

105. In **Litako's** judgment the court found that when the wording is interpreted literally and this section is given its ordinary grammatical meaning section 219A of the CPA is line with the common law excluding such statements[77].

[76] Ndhlovu (SCA) at 340b – 341b
[77] Page 446 paragraph [54]

106. It is respectfully submitted that the only way of finding such evidence being admissible is for this Honourable Court to find that the Hearsay Act abolished this common law principle.

107. It is respectfully submitted that if this Honourable Court does not make such a finding and finds that the **Litako** judgment is correct then the statements were incorrectly admitted by the trial court as evidence against the co-accused, unless they were admitted in terms of section 3 of the Hearsay Act.

108. It is respectfully submitted that if this Honourable Court makes such a finding then the equality argument which was raised in **S v Molimi** 2008 (2) SACR 76 (CC) would be resolved as all accused's statements would be on an equal footing[78].

109. It is respectfully submitted that if the **Litako** judgment is incorrect then admissibility of the statements must be determined in terms of the SCA **Ndhlovu** judgment.

110. In a lot a cases the distinction between a confession and an admission is a rather grey area with one court finding a statement a confession whilst another court finds it to be an admission. The case of **Molimi** (supra) is an example of this where both the trial court and the SCA (**S v Molimi and**

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[78] Section 9 of the Constitution

Another 2006 (2) SACR 8 (SCA)) found a statement to be an admission and this Honourable Court found the statement to be a confession.[79]

111. This grey area contains a further minefield in that if a court rules a statement to be an admission then a peace officer can testify as to the contents but another court might rule the same statement to be a confession and then this evidence becomes inadmissible or vice versa. If there is a dispute on the classification of a statement then accused will not know the extent of the case against him until a ruling is made in court.

112. It is respectfully submitted that the **Ndhlovu** judgment of the SCA sets out rather stringent requirements for the admission of this type of hearsay evidence. All the evidence led in the case was considered and all the requirements of section 3(1)(c) were dealt with before a before a decision was made on the admissibility of the evidence.

113. In the present case the application made by the respondent was not fully argued by the respondent using all the principles set out in the **Ndhlovu** judgment.

114. With regard to the 2 applicants the only evidence against them prior to the close of the State's case was their co-accused statements.

115. Applicant 1 was implicated in accused 1's statement and pointing out,

[79] At pages 89g – 92b; **Rojas** (supra) at paragraph [40]

accused 3's statement and accused 7's statement. During the accused's evidence he was implicated by accused 1, on both occasions he testified, and accused 3's evidence.

116. Applicant 2 was implicated in accused 1's statement and pointing out. During the accused's evidence he was implicated by accused 1, on both occasions he testified, accused 3's evidence, accused 5's evidence and accused 7's evidence.

117. It is respectfully submitted that there was even less evidence against accused 5 at the close of the State's case. He was implicated only by his nickname in accused 1's statement and pointing out. He was later implicated by accused 1 when he re-opened his case, accused 4 and accused 7.

118. It is respectfully submitted that the facts of this case the stringent requirements as set out in **Ndhlovu's** case were not met.

119. However, the accused were charged with an alternative charge to the murder count, namely Conspiracy to commit robbery in contravention of section 18(2)(a) of Act 17 of 1956, the charge must be considered.

120. In terms of section 258 of the CPA a conviction of Conspiracy to commit robbery in contravention of section 18(2)(a) of Act 17 of 1956 is not a

competent verdict on a murder charge.

121. In Principles of Criminal Law, Burchell, revised 3rd edition, 2006 (hereinafter referred to as Burchell) the author submits at page 654 that "[a] conspiracy requires an agreement between two or more parties even if only one party is charged, and the conspiratorial agreement continues in operation until it is terminated by completion of the performance, by abandonment or frustration"

122. Burchell at page 656 submits that "[w]here a crime which is the subject of the conspiracy is in fact committed the question of whether a conspirator is liable as a principle offender or only liable for a conspiracy depends upon the degree of his participation in the crime"

123. Zeffert at page 495 submits that "[i]t is respectfully submitted that if it is received merely as a statement in furtherance of a common purpose , its evidentiary nature is that of an act done in furtherance of that purpose giving rise to an appropriate inference. If A, B and C form a common purpose to achieve a particular objective, then evidence of any act or declaration performed by any one of them, say A, will be admissible against any of the others if that act or declaration was performed or made in furtherance of the common purpose".

124. It is respectfully submitted that when regard is had to the facts of this case the crime was committed and from a reading of all the statements of the accused, the pointing outs and evidence of accused 1 and 3 that it shows

that there was a common purpose by the 8 accused to commit the robbery.[80] According to the statements all the accused were present shortly before, during and after the commission of the offences.

125. The Full Court used section 3(1)(c) of the Hearsay Act when evaluating the evidentiary evidence contained in the extra-curial statements and pointing outs and together with the facts find by the trial court to dismiss the appeal[81].

126. It is respectfully submitted that the Full Bench finding was correct when statements were admitted as evidence to show a common purpose.

I. CONCLUSION

127. It is respectfully submitted that the appeal should be dismissed, if the statements are admissible to show common purpose, due to the fact that all the accused participated in the commission of the offences and then they were correctly acquitted on the Conspiracy charge.

128. It is respectfully submitted that it is found that on the facts of this case the statements were not admissible as evidence to show either a conspiracy or common purpose in terms section 3(1)(c) of the Hearsay Act, then:

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[80] Bourjaily case allowed statements to corroborate each other.

[81] Record Volume 2 Pages 157 – 161

128.1. If this Honourable Court finds the **Litako** judgment to be correct then both applicants and accused 5 should have been discharged in terms of section 174 of the CPA;

128.2. If this Honourable Court finds the **Ndhlovu** judgment to be correct, but the stringent requirements as set out in this case were not met or adhered to then both applicants and accused 5 should have been discharged in terms of section 174 of the CPA;

128.3. If this Honourable Court finds the **Ndhlovu** judgment to be correct, and the stringent requirements as set out in this case were met or adhered to, but the *aliunde* evidence is insufficient to corroborate the extra-curial statements then both applicants and accused 5 should have been found not guilty of all the charges.

Dated at Mahikeng on this 19th day of February 2015.

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NJ Carpenter
Counsel for the Respondent

IN THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SOUTH AFRICA (BRAAMFONTEIN)

CONSTITUTIONAL COURT CASE NUMBERS: CCT 148/14 and 149/14

NORTH WEST HIGH COURT CASE NUMBER: CC 164/03

In the matter between:

BOSWELL JOHN MHLONGO **Applicant**

AND

THE STATE **Respondent**

In the matter between:

ALFRED DISCO NKOSI **Applicant**

AND

THE STATE **Respondent**

RESPONDENT'S PRACTICE NOTE

THE NATURE OF PROCEEDINGS

1. This matter is a criminal appeal from a trial by the High Court where there were 8 accused and the applicants were 2 of the accused. The appeal to the Full Bench was dismissed. The Petition to the SCA was refused. The Chief Justice granted leave to appeal to this court after the applicants petitioned the Court in person

THE ISSUES THAT WILL BE ARGUED

2. Whether the applicants received a fair trial when regard is had to the fact that State's case was closed before the ruling on the admission of hearsay evidence had been decided;
3. Whether the applicants received a fair trial when regard is had to the fact the accused testified outside their numerical order in the indictment.
4. Whether the applicants received a fair trial when regard is had to the fact when they were convicted on the basis of the SCA judgment of **Ndhlovu**, which decision has been subsequently overruled by the SCA judgment of **Litako**, which allowed the admission of co-accused's extra-curial statement, in terms of section 3 of The Law of Evidence Amendment Act 45 of 1988, as evidence against the other accused.
5. Whether the applicants received equal treatment, in terms section 9 of the Constitution, as accused in light of the different sections applying to the

admissibility of extra-curial made an in terms of sections 217 – 219A of the CPA.

RELEVANT PORTIONS OF THE RECORD

6. The whole record is relevant.

ESTIMATED DURATION OF ORAL ARGUMENT

7. The estimated duration of oral argument is 2 hours.

SUMMARY OF THE ARGUMENT

8. The applicants were aware of all the evidence admitted against them before they testified and therefore their right to a fair trial were not infringed.
9. The testifying of the accused and applicants different to their numerical order in the indictment did not infringe on their right to a fair trial.
10. The common law allowed the admission as evidence the extra-curial statement as against the maker of the statement.
11. The SCA judgment of **Ndhlovu** changed the position by allowing co-accused statements, in terms of section 3 of The Law of Evidence Amendment Act 45 of 1988, as evidence against the other accused.
12. All hearsay evidence is governed by section 3 of The Law of Evidence Amendment Act 45 of 1988 and the common law exceptions allowing the admission of certain hearsay evidence has been abolished.

13. The old common law exceptions of "executive statements", statements of co-conspirators and statements used to establish a common purpose or conspiracy must now be dealt with in terms section 3 of The Law of Evidence Amendment Act 45 of 1988.

LIST OF AUTHORITIES

Case Law

R v Hans Veren and Others 1918 TPD 218

R v Barlin 1926 AD 459

R v Becker 1929 AD 167

R v Levy & others 1929 AD 312

R v Cilliers 1937 AD 278

R v Mayet 1957 (1) SA 492 (A)

S v ffrench-Beytagh 1972 (3) SA 430 (A)

S v Swanepoel en 'n Ander 1980 (2) SA 81 (NC);

S v Ngobeni 1981 (1) SA 506 (B);

S v Mpetha and others (1) 1983 (1) SA 492(C)

S v Ndhlovu and Others 2001 (1) SACR 85 (W)

Makhathini v Road Accident Fund 2002 (1) SA 511 (SCA)

S v Ndhlovu and Others 2002 (2) SACR 325 (SCA) (2002 (6) SA 305; [2002] 3 All SA 760; [2002] ZASCA 70)

S v Molimi and Another 2006 (2) SACR 8 (SCA)

S v Ralukukwe 2006 (2) SACR 394 (SCA)

Balkwell and another v S [2007] 3 All SA 465 (SCA)

Mamushe v S [2007] 4 All SA 972 (SCA)

S v Shaik & others 2007 (1) SACR 142 (D)

S v Shaik & others 2007 (1) SA 240 (SCA)

S v Molimi 2008 (2) SACR 76 (CC)

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UNITED KINGDOM

Kuruma Son of Kaniu v Reginam [1955] 1 All ER 236

R v Governor of Pentonville Prison and another, ex parte Osman [1989] 3 All ER 701

R v Khan (Sultan) [1996] 3 All ER 289

R v Hayter [2005] 2 All ER 209; [2005] UKHL 6

CANADA

R v Perciballi (2001) 54 OR (3d) 346

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Crawford v. Washington, 541 U.S. 36 (2004)

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R v Barlien [2008] NZCA 180

R v Collins [2009] NZCA 519

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R v Sullivan and others [2014] NZHC 1312

EUROPEAN COURT OF HUMAN RIGHTS

Horncastle and Others v. the United Kingdom, 4184/10, 16 December 2014

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Commentary on the Criminal Procedure Act, Du Toit and others, Revision Service 52, 2014

Principles of Criminal Law, Burchell, revised 3rd edition, 2006

Admissibility Of Extra-Curial Admissions As Hearsay Evidence Against A Co-Accused, M Watney, 2008 TSAR 834

STATUTES

Criminal Procedure Code Act 31 of 1917

Criminal Procedure Act 51 of 1977

The Law of Evidence Amendment Act 45 of 1988

UNITED KINGDOM

Police and Criminal Evidence Act 1984

Criminal Justice Act 2003

UNITED STATES OF AMERICA

Federal Rules of Evidence

NEW ZEALAND

Evidence Act 2006