IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO:584/2013

Reportable

In the matter between:

MOSES MOSHE LITAKO **First Appellant**

THABO MBAOLA **Second Appellant**

PHILEMON GUMEDE **Third Appellant**

GREATERMAN MORONGWA MATHLARE **Fifth Appellant**

NDABUKO DOCUS SIMAMANE **Sixth Appellant**

and

THE STATE **Respondent**

Neutral Citation: *Litako & others v S* (584/2013) [2014] ZASCA 54 (16 April 2014).

Coram: Navsa, Ponnan, Leach & Petse JJA and Swain AJA

Heard: 7 March 2014

Delivered: 16 April 2014

Summary: **Evidence – s 3 of the Law of Evidence Amendment Act 45 of 1988 – extra–curial admission of one accused not admissible against another – discussion of applicable legal principles – *S v Ndhlovu & others* 2002 (2) SACR 325 (SCA) reconsidered.**

ORDER

On appeal from: The North West High Court, sitting at Rustenburg Circuit Court (Hendricks J sitting as court of first instance).

The following order is made:

The appeal is upheld and the convictions and sentences are set aside.

JUDGMENT

Navsa & Ponnan JJA (**Leach & Petse JJA, Swain AJA concurring**):

[1] During the night of 4 February 2007, at Mmatau Village in the district of Madikwe, North West Province, the owner of the White House Tavern and one of her patrons were robbed of R5 000 and their cellular telephones. Another patron, Mr Godfrey Moleta Ngema, was assaulted. During the robbery, shots were fired as a result of which Mr Ben Seretse Motshwaedi (the deceased) was killed. The five appellants and a co-accused (the fourth accused in the court below, who has not prosecuted an appeal)[1] were arrested and, in relation to the events described above, were charged in the North West High Court with murder; two counts of robbery with aggravating circumstances; assault with intent to do grievous bodily harm; four counts of possession of firearms in contravention of s 3 read with ss 1, 103, 117, 120(1)(*a*) and Schedule 4 of the Firearms Control Act 60 of 2000; and finally, one count of unlawful possession of ammunition, in contravention of s 90 read with ss 1, 103, 117, 120(1)(*a*), 121 and Schedule 4 of the

[1] We were assured by counsel for the appellants from the bar in this court that should the appeal succeed an appeal will in due course be prosecuted on behalf of that accused. The appellants were cited in relation to the sequence in which they were accused in the high court.

Firearms Control Act. In the summary of substantial facts attached to the indictment, the State alleged that the appellants had acted in furtherance of a common purpose in perpetrating the offences.

[2] In respect of the robbery charges it was alleged in the indictment that the owner of the tavern, Ms Christinah Sibanda, was robbed at gunpoint of R5 000 in cash and a cellular telephone and that the patron, Mr Bafana Elias Tshose, was assaulted and robbed of his cellular telephone.

[3] The appellants pleaded not guilty to all the charges. At the end of the ensuing trial they and their co-accused were convicted by Hendricks J as follows:

(i) The first, third and sixth appellants as well as their co-accused were convicted on the murder count and on the two counts of robbery.

(ii) The second appellant was convicted on the murder count, the two counts of robbery and the count of unlawful possession of ammunition.

(iii) The fifth appellant was convicted on the murder count, the two counts of robbery and one count of unlawful possession of a firearm.

[4] The accused were convicted principally on the basis of a statement made by the first appellant to a magistrate which, although exculpatory in respect of him, implicated the other appellants to a greater or lesser degree. The first appellant contested the admissibility of the statement, denying the truth of its content and that it had been freely and voluntarily made. Although the first appellant testified during a trial-within-a-trial held to determine the admissibility of his statement, he did not testify in his defence in relation to the merits of the case against him. The other appellants and their co-accused all testified and denied any involvement in the events on which the charges were based.

[5] The appellants and their co-accused were sentenced as follows:

(i) On the murder count, each to life imprisonment.

(ii) On each count of robbery, the appellants were sentenced to 15 years' imprisonment.

(iii) Their co-accused was sentenced to 20 years' imprisonment on each of the robbery counts.

(iv) The second appellant was sentenced to two years' imprisonment in respect of the conviction of unlawful possession of ammunition.

(v) The fourth appellant was sentenced to five years' imprisonment for unlawful possession of a firearm and two years' imprisonment for unlawful possession of ammunition.

[6] The five appellants, with the leave of this court, appeal against their convictions and related sentences.

[7] It is necessary, at this stage, to set out in some detail the evidence adduced in the court below. The first witness to testify was the tavern owner, Ms Sibanda. She testified that the incident in question occurred on Sunday 4 February 2007 at approximately 22h00. One of the robbers approached her wanting to purchase tobacco. After handing it to him, she departed to drink water and then heard the report of a firearm. The door of the tavern was apparently struck. Another bullet hit a window. Two other armed robbers came in through the back door and overpowered her. Her patrons were made to lie down on the floor on the other side of the counter. They threatened her and asked for money which she handed over. It was an amount of approximately R5 000. They also took her cellular telephone.

[8] Ms Sibanda's description of the robbers who had taken the money from her was insubstantial. She described one of them as being tall and dark in complexion. She testified that he had been wearing a cap pulled towards his face so that it could not be seen. She described the second as being light in complexion. Asked whether she could identify them, she answered in the affirmative. It is common cause that subsequent to the robbery Ms Sibanda attended an identification parade at which she identified two persons who were not any of the accused in the court below. Her reason for what she now accepts was a misidentification is that she had suffered a dizzy spell and had been 'over-frightened'. She did not, however, at that time communicate this to the police. In court, she was adamant that the second appellant was one of the two robbers.

[9] Under cross-examination, Ms Sibanda stated that the persons she had identified at the identification parade looked like the robbers who had taken the money from her. Later, she realised that she had identified the wrong people, but insisted in court that 'they' – the accused she saw in the dock – were the people who had robbed her. The following part of her testimony, under cross-examination, is significant:

'I did inform the second policeman that the people that I have pointed out at the parade were not the correct people, now today when I came to court I then saw that they are here.'

[10] Ms Sibanda was unable to explain her earlier contradictory testimony that she had not informed the police about the misidentification at the identity parade. It appears from Ms Sibanda's evidence that the identification parade had been held shortly after the robbery. In a statement to the police Ms Sibanda was emphatic that the first person she had identified at the identification parade was the one that had threatened her with a firearm, demanding money, and that the second person she identified at the identification parade was the one that had both a firearm and a knife and that he was

the person who had taken the money. The reason provided in her statement to the police for identifying two people at the identification parade is as follows:

'I have pointed the two suspects because I spent plus seven minutes with them.'

[11] For the first time, whilst she was under cross-examination, Ms Sibanda included the third appellant as being amongst the robbers. In explaining how she came to this belated awareness she said the following:

'[I] told this court that this thing has happened a long time back but now as I am testifying their faces are now coming clearer to my memory.'

[12] Asked why she had not implicated the third appellant in her evidence in chief, she responded as follows:

'I do not know, My Lord, but as you are rewinding in your mind it then come to you that now this one was also present.'

It appears that she was then identifying the third appellant as the one who had bought the tobacco from her.

[13] Mr Tshose testified about how the robbers had made him and others lie on the ground, had searched them and had taken a cellular telephone from him. He testified that during the incident the robbers had taken the deceased to a separate room. Tshose too attended an identification parade at which he identified two people who had robbed him. However, he looked at the accused in the dock and said the following:

'It is the first time for me to see them today.'

This meant that the people he identified at the identification parade were not amongst the accused.

[14] The next witness to testify in support of the State's case was Inspector Moses Lesenya. He testified that on 19 February 2007 he and two colleagues were tracing a suspect in respect of a house robbery and rape case in a township near Rustenburg. Whilst driving in that vicinity an informer pointed out two persons who they then pursued. During the pursuit he saw one of them throw something onto the grass. They retrieved a Norinco 9 millimetre pistol which had five live rounds of ammunition in its magazine. Inspector Lesenya identified the second appellant as the person from whom the firearm was retrieved.

[15] Inspector Stephen Rantsho testified that he had accompanied Inspector Lesenya to investigate the house robbery and rape case. His evidence was largely in line with Inspector Lesenya's. He confirmed that a Norinco firearm and magazine and bullets were found. He sent them for forensic testing in a specially marked bag.

[16] Captain Dennis Selabele testified that he was the investigating officer and that he had arrested certain suspects, none of whom included the accused. He testified about how he had traced the cellular telephone taken by the robbers from Mr Tshose. Following on reports received from cellular telephone service providers and after preliminary investigations, he ultimately travelled to Phokotweni Section, Malukela Village in the North West Province. There he found the cellular telephone in the possession of a woman who told him that she had obtained it from someone else, presently in Rustenburg. He confronted that person who told him that he had obtained it from yet a further person. When that further person was approached he informed Captain Selabele that he had obtained it from Moses Litako, the first appellant, who it appears had, at that time, already been arrested. None of the other persons in this hearsay chain were called as witnesses.

[17] Captain Selabele testified that when he asked the first appellant about the cellular telephone, he was told by the latter that he was willing to make a clean breast of it and would make a statement about his involvement in the incident in question.

[18] Doctor Sobantu Nkosi testified that he had conducted a post-mortem examination on the deceased and determined the cause of death to be gunshot injuries to the chest. He had recovered a bullet head that was lodged in the deceased's body. Mr Kuduku Huma testified that he had taken the bullet that had been retrieved from the deceased's body by the doctor and placed it in an envelope which he had marked with a distinctive number. Mr Huma was present when the doctor recovered the projectile from the deceased's body.

[19] Captain Selabele also testified that he had received a bullet head that had been removed by the State pathologist during the post mortem examination from the deceased's body and sent for forensic analysis. In this regard, he supplied a laboratory number under which the item had been despatched. He had also sent four firearms that he had received from the South African Police Service's (SAPS) stores to the forensic laboratory. The four firearms were a silver and black Norinco 9 millimetre pistol with four rounds of live ammunition in the magazine, a black Forjas Taurus revolver with two live rounds in the chamber, one black 9 millimetre Llama pistol with three 9 millimetre rounds of live ammunition, and finally, a black Norinco 9 millimetre pistol with a holster and 19 rounds of live ammunition.

[20] Inspector Kleinbooi Ndlovu testified that on 11 February 2007 he was on duty and on standby in respect of serious and violent crime when he received information from a complainant in an attempted murder case concerning a suspect who had allegedly shot at the complainant with a firearm. He acted on that information to trace the suspect who turned out to be the fourth appellant. He travelled to a location where

he met the fourth appellant coming out of a shack in a back yard. According to Inspector Ndlovu the fourth appellant gave him permission to search the shack. Inspector Ndlovu and a colleague lifted a bed in the room and found a firearm. The firearm that was found was a 9 millimetre Norinco from which the serial number had been erased. Its magazine contained nine rounds of live ammunition. They also found an additional magazine and additional rounds of live ammunition. He seized the firearm and the magazines and ammunition and sent it for forensic testing. He could not recall the number allocated to the forensic bag in which the seized items were sent. After a short adjournment, Inspector Ndlovu was able to supply the number.

[21] Inspector Abisai Molelekeng testified that he was called to the tavern where the robbery had occurred and took photos of the scene and drew a sketch plan. Furthermore, he retrieved three bullet casings and one bullet head which he put in an evidence bag and numbered.

[22] Inspector Olebile Sereo, a ballistics specialist, testified about a Norinco firearm which had been handed to him for investigation. It appears that all he had concluded was that the firearm operated normally without any obvious defects. Captain Zachariah Makola, also a ballistics expert, testified concerning firearms and bullets that he had received for ballistics testing. All of the evidence that I have just sketched was intended to link one or more of the accused to the crime scene. But the chain evidence which sought to link the firearms and ammunition recovered to the ballistic tests conducted on them was woefully inadequate. The evidence concerning the ballistics testing is conspicuously unhelpful. There is thus no acceptable ballistics evidence linking any of the appellants to the robbery in respect of which they were charged. Before us, the State was constrained to concede as much.

[23] The State's case therefor rested upon eyewitness evidence, ballistics evidence and the extra-curial statement of the first appellant. The eyewitness and ballistics evidence in and of themselves were inadequate to found a conviction on any of the charges preferred against the appellants. The State's case therefor hinged on the extra-curial statement of the first appellant. We turn now to deal with that statement.

[24] The first appellant adopted the attitude that he had been forced by the police to make the extra-curial statement referred to above and disputed its admissibility. The magistrate who took the statement from the first appellant testified that he meticulously followed the procedure of informing him of his constitutional rights and took care to enquire whether he had been assaulted or in any other way influenced to make a statement. It was only when he was satisfied that this was not the case that he proceeded to take the statement.

[25] The first appellant testified that he had been assaulted by the police and threatened in order to induce the statement upon which the State relied. At the end of a trial-within-a-trial the court ruled the statement by the first appellant to be admissible. In the statement the first appellant describes a robbery that took place at a tavern. According to the statement he had accompanied his co-accused in the belief that they were going to be buying and consuming liquor. When they got to the tavern, and had been there for a while, he realised then that he was caught up in the middle of an armed robbery perpetrated by his companions. According to the statement, several cellular telephones were taken during the robbery. Put simply his statement exonerated him in respect of the charges that had been brought against them.

[26] Hendricks J rejected the first appellant's evidence that he had been assaulted in order to induce the extra-curial statement. He thereafter held the statement to be

admissible against his co-accused, purportedly in terms of s 3 of the Law of Evidence Amendment Act 45 of 1988 (the Act).

[27] The first appellant chose not to testify in his defence. All the other accused testified and denied any involvement in the incident. It appears to us that all the appellants underwent cross-examination unscathed.

[28] In convicting the accused Hendricks J found the extra-curial statement to be corroborative of the evidence of Ms Sibanda, and without properly scrutinising the evidential chain in relation to the forensic evidence, he concluded that the firearms found in possession of the second and fourth appellants were positively linked to the robbery.

[29] In relation to the statement by the first appellant being admitted against the other accused, Hendricks J stated that he could see no prejudice to them, particularly as they had all been provided with a copy of the statement before the trial commenced. In his view, the appellants could not complain about a trial by ambush. He referred to the judgment of this court in *S v Ndhlovu & others* 2002 (2) SACR 325 (SCA) and the judgment of the Constitutional Court in *S v Molimi* 2008 (2) SACR 76 (CC) as authority for admitting the statement by the first appellant as evidence against the others in terms of the provisions of s 3(1)(*c*) the Act. The following part of the judgment is significant:

‘The purpose of this Act is to allow the admission of hearsay evidence in circumstances where the interests of justice dictates its reception. If the interests of justice requires the reception of hearsay evidence the right of an accused person to challenge the admissibility of the evidence does not include the right to cross-examine the declarant.’

[30] Hedricks J accepted that *Molimi* precluded the admission of a confession by one accused against his co-accused. The learned judge emphasised, however, that in the present case, unlike in *Molimi*, the accused all knew in advance the extent of the evidence against them. The court below held against the first appellant his failure to testify, and rejected the evidence of the other accused that they had not been involved in the robbery. In relation to the doctrine of common purpose, the court had regard to the decision of this court in *S v Mgedezi* 1989 (1) SA 687 (A) and concluded that all of the accused had acted in concert in perpetrating the offences listed above.

[31] The judgment in *Ndhlovu* featured prominently in the judgment of the court below. In *Molimi* the Constitutional Court, in dealing with the admissibility of both admissions and confessions, pointedly declined to pronounce on the correctness of *Ndhlovu*. As reflected in the judgment of the court below and in other judgments discussed later, and as has become evident from a number of appeals in this court, the law in this area is not without its complexities. For reasons that will become apparent, it is necessary, in our view, to engage in a three-pronged exercise. First, a look at the development of our law in relation to the acceptance of evidence in the form of confessions and admissions by a co-accused, and consideration of the philosophy underlying certain safeguards and cautions both at common law and by way of statutory regulation is called for. Second, the decision in *Ndhlovu* – its ambit, application and correctness – is subject to closer scrutiny. Finally, we will determine whether the convictions in the present case were well-founded.

[32] It is, in our view, instructive to have regard to the historical position of admissions and confessions in English criminal law, particularly since the English law of procedure and evidence played such an influential role in the development of our own system of criminal justice.[2] Following on from the disaster that was the Star Chamber and the re-

[2] For a useful discussion see 'The History of South African Criminal Procedure' in J Dugard *South African Criminal Law and Procedure* (vol 4, 1977) at 1 to 56.

embracing of a distaste for torture, the English have since regarded the privilege against self-incrimination as fundamental to their system of justice. Concomitant is the rule that before a confession may be admitted, it must be proved to have been freely and voluntarily made.[3] The following dictum will, no doubt, strike a chord with most triers of fact and appeal tribunals in South Africa:

'I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession; - a desire which vanishes as soon as he appears in a court of justice.'[4]

[33] In the case of *R v Moore* (1956) 40 Cr App Rep 50, CCA, Goddard LCJ said the following at 54:

'[T]he fact that he has pleaded Guilty is no evidence against his co-prisoner. That was laid down by both Hale (*Pleas of the Crown*, Vol. I, p. 585n.) and Hawkins (*Pleas of the Crown*, Book 2, c. 46, s. 34) and also in Tonge (1662) 6 St.Tr. 225, the accepted principle being that a man's confession is evidence only against himself and not against his accomplices. If a prisoner pleads Guilty, it does not affect his co-prisoner.'

[34] The decision of the Privy Council in *Surujpaul (called Dick) v R* [1958] 3 All ER 300 at 304A-B is of significance:

'A voluntary statement made by an accused person is admissible as a "confession". He can confess as to his own acts, knowledge or intentions, but he cannot "confess" as to the acts of other persons which he has not seen and of which he can only have knowledge by hearsay. A failure by the prosecution to prove an essential element in the offence cannot be cured by an "admission" of this nature.'

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[3] For the rationale, elegantly stated, see *Queen v Thompson* (1893) QBD 12 at 15 to 18.
[4] *Queen v Thompson* above at 18.

[35] In relation to the admissibility of extra-curial admissions, the Court of Criminal Appeal in the decision of *R v George Cecil Rhodes* (1960) 44 Cr App Rep 23 at 28 spoke as follows:

'This court has accordingly come to the conclusion that, by inviting the jury first to consider the case against Mills in the light of his alleged admission and then, if they convicted Mills, to proceed to deal with the case against Rhodes on the footing that the two men were together throughout the material time, the learned Chairman was, for all practical purposes, negativing and nullifying his previous warning that Mills' alleged admission was not evidence against the appellant. Alternatively, and more simply stated, it was a misdirection to tell the jury that the conviction of Mills could be regarded as forming any part of the case against Rhodes.

Although at first sight it might appear odd that, in the light of the evidence given by the two co-defendants themselves, one should go free while the other is convicted, proof must precede conviction, and in our judgment the offence charged, while proved against Mills, was not proved against Rhodes. For these reasons we thought it right to allow Rhodes' appeal and to quash his conviction.'

[36] The decision in *R v Spinks* [1982] 1 All ER 587 (CA) at 589D-E is similarly instructive:

'In the judgment of this court the offence with which the appellant was charged and the means of establishing it do not provide any exception to the universal rule which excludes out of court admissions being used to provide evidence against a co-accused, whether indicted jointly or separately.'

[37] The English common law, in relation to the admissibility of extra-curial statements, is usefully summarised in the following passage from Lord Hailsham of St. Marylebone *Halsbury's Laws of England* (4 ed, 1990) vol 11(2) para 1131:

'**Confession by one of two or more accused.** Where several persons are accused of an offence, and one of them makes a confession or an admission, that confession or admission is

evidence only against the party making it. Where the statement is admissible, the information in it may be used to extract from an accused, in the form of evidence on oath, all that he has formerly said about a co-accused. Statements made, like acts done, by one of several accomplices or co-conspirators in pursuance of the common design, are evidence against the others, but statements which are not made in pursuance of the common design are evidence only against the makers.'

There have been fairly recent statutory developments in England which appear not to affect these general propositions.[5]

[38] Unsurprisingly, our law relating to the admissibility of admissions and confessions developed along the same lines. The prohibition against the confession of one accused being used against another is captured in s 219 of the Criminal Procedure Act 51 of 1977 (the CPA). Admissions are regulated by s 219A of the CPA. It provides that evidence of an admission made extra-curially 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 in relation to that offence. It does not contemplate such an admission being tendered as evidence against anyone else.

[39] Up until the decision in *Ndhlovu* it had not been suggested that s 3 of the Act was applicable to an admission made by one accused being admitted against his co-accused. It is now necessary to consider decisions of this court leading up to *Ndhlovu*. As far back as *R v Matsitwane* 1942 AD 213, Centlivres JA stated (at 218):

'Mr. *de Villiers*, to whom the Court is indebted for arguing the case on behalf of the accused, took as his first point that the statements made by the accused were not confessions of guilt. It is unnecessary to consider whether this point is sound because, assuming that the statements are not confessions of guilt they contain certain admissions and recitals of facts which are supported by evidence *aliunde* and which in the circumstances of the case are fatal to the accused . . . Now each of the accused admitted in the statement made by him that he was

[5] Lord Mackay of Clashfern *Halsbury's Laws of England* (5ed, 2010) vol 28 paras 659 to 671.

present in the deceased's house taking part in the crime of housebreaking at the time when the deceased was killed but each tried to throw the blame for striking the fatal blow upon the other. As the statement made by the one accused is not evidence against the other accused, it is necessary to consider each statement separately in regard to each accused.'

The learned Judge of Appeal added (at 220):

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 and it follows that conflicts between the two statements are irrelevant for the purpose of coming to a decision.'

[40] In *R v Baartman* 1960 (3) SA 535 (A) this court considered the common law rule that an extra-curial statement of one accused was inadmissible against a co-accused. At 542C-E the following appears:

'It follows that Baartman and Kock were convicted because the trial Court found on his confession that Honey [a co-accused] was one of the murderers, and that they had been in his company not long before and not long after the murder. In so convicting Baartman and Kock the trial Court excluded from its consideration the statements in Honey's confession which directly implicated them, *but it used the 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* 3rd ed., para. 1076. It is illustrated by *Rex v. Turner*, 168 E.R. 1298. In this Court the case of *Rex v. Nkosi and Zulu*, reported only at 1959 P.H. H.91 (A.D.), is much in point.' (Our emphasis.)

[41] The relevant excerpt from the judgment of Hoexter JA in *Nkosi* cited with approval in *Baartman* reads:

'The trial Court did not give any reasons for finding that, *as against the second appellant*, the evidence established that the first appellant had administered poison to the deceased. It appears to have assumed that, because the first appellant had been convicted, it followed that the guilt of the first appellant had been proved also as against the second appellant. The first appellant, however, would never have been convicted but for her statement that she put the

"muti" into the sour milk of the deceased. It follows that, 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.'

[42] As best as we can discern, the first reported case in which the State appears to have invoked the Act in application to the admissions of one accused being tendered against his co-accused was *S v Ndhlovu* 2001 (1) SACR 85 (W) (per Goldstein J) (*Ndhlovu* in the high court). On appeal to this court, Cameron JA identified 'the main question in the appeal' as 'whether an accused's out-of-court statements incriminating a co-accused, if disavowed at the trial, can nevertheless be used in evidence against the latter'. That question, as a perusal of the judgment reveals, was answered, with reference to the Act, in the affirmative. It thus represented a seismic shift in our law.

[43] It is necessary to consider the facts of *Ndhlovu* more closely. In that case four accused were arraigned on charges of murder and armed robbery. At the trial the eyewitnesses were of no assistance in identifying the perpetrators. The high court had regard to extra-curial statements made by accused 3 and 4. Both disavowed the statements but, following a trial-within-a-trial, oral statements attributed to accused 3 and a written statement attributed to accused 4 were ruled admissible. The oral statement by accused 3 was that he had told an arresting officer that he was not alone when they 'shot a white man'. Accused 3 went on to state that there were four of them but that he had not pulled the trigger. Asked who did, he answered 'Vusi', which later turned out to be accused 1. Accused 3 also told the police how the shooting had taken place and how, after accused 1 had shot the man, they had taken his cellular telephone and run away. Accused 3 led the police to his co-accused. A witness testified that he had purchased the cellular telephone of the deceased from accused 2 and 3.

[44] In *Ndhlovu*, the written statement by accused 4 implicated his co-accused as well as himself in the murder and robbery. During the trial before Goldstein J there was a constitutional challenge to the State's reliance on s 3 of the Act in tendering the oral and written statements referred to above against the other co-accused. It is clear that this

court in *Ndhlovu*, without more, proceeded to consider the constitutionality question and ultimately found that the safeguards built into s 3(1) of the Act in permitting the use of hearsay evidence were such that they did not offend against constitutional principles. In this regard reference was made to the law on this aspect in both Canada and the United States of America.

[45] In dealing with the provisions of s 3(1) of the Act, this court in *Ndhlovu* considered that a co-accused witness' disavowal of an extra-curial statement does not change the nature of the essential enquiry, which is whether the administration of justice requires its admission. Moreover, this court held that the probative value of that extra-curial statement did not depend on the credibility of such co-accused at the time of the trial, but on their credibility at the time of the arrest. At para 33 of the judgment the following appears:

'And the admissibility of those statements depended not on the happenstance of whether they chose to testify but on the interests of justice.'

[46] *Ndhlovu* has, however, not found universal favour. Thus in *Balkwell v S* [2007] 3 All SA 465 (SCA) paras 32-35 (albeit in a minority judgment) the following was said:

'My anxiety stems from the seeming absence, in certain instances, of any legal armoury at the disposal of a person who is implicated by an extra-curial statement of which he is not the maker, to counteract the threat posed by it during the course of a subsequent criminal trial. If having made an extra-curial statement that implicates Y, the maker of the statement (X) disputes its admissibility, an admissibility trial would ensue to determine whether or not the contested statement is indeed admissible. To discharge the onus resting upon it, namely to prove the statement admissible against its maker X, the prosecution would have to meet the fairly stringent requirements set respectively by sections 217 and 219A of the Criminal Procedure Act. During the course of the admissibility trial, Y would ordinarily be but a passive bystander. If the statement is ruled admissible but its contents disavowed by X when he testifies, how – it must be asked – does Y even begin to cross-examine X. In those circumstances it may well prove tactically foolhardy for Y to put any questions to X, much less to test by cross-examination the veracity of the statement. The only reason, it seems to me, for having fewer safeguards available to a person who is not the maker of a statement but who for some reason finds himself implicated by its contents, is because it has historically been accepted that such a person is free

of any risk from such a statement. Where, however, a statement might ultimately weigh equally in evidence against the maker who has implicated himself in it, and against another also implicated by it, to grant greater protection to the former than to the latter, would be irrational and indefensible. And yet, that would be the effect of invoking section 3 in this way.

If however, X had confirmed the contents of his statement during his evidence, or not having made an extra-curial statement, had implicated Y during his *viva voce* testimony, then not only could his version be legitimately tested under cross-examination by Y, but the cautionary rules relating to the receipt of such evidence would be invoked by the trier of fact (see *S v Hlapezula* 1965 (4) SA 439 (A) at 440D-H). One would have thought that the cautionary rules relating to the reception of *viva voce* evidence of accomplices should apply even more stringently to their extra-curial statements. But, no such caution applies to an extra-curial statement that implicates a co-accused even though the inherent dangers of fabrication, or substitution, downplaying and exaggerating of roles, are no less real. That, in those circumstances, an extra-curial statement which has to pass a lower threshold of scrutiny than *viva voce* evidence from the same source could be as damning as the latter is, to my mind, incomprehensible.

The approach postulated by my learned Sister is not without precedent. It has its roots in the judgment of this Court in *S v Ndhlovu* 2002 (6) SA 305 (SCA). In my view, *Ndhlovu* (*supra*) too readily dismissed concerns expressed in *S v Ramavhale* 1996 (1) SACR 639 (A), which cautioned (at 649C-D) that a court should hesitate long in admitting hearsay evidence that plays a decisive or even a significant part in convicting an accused person. *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. In effect it is as if a pen has been struck through those well recognised common-law safeguards and they have been summarily jettisoned.

What is envisaged it seems in the case of an accused implicated by the extra-curial statement of another, is that he should go into legal battle without the sword of cross-examination or the shield of the cautionary rules of evidence. That can hardly conduce to a fair trial, as in my view, it impacts in a direct and substantial way on the fairness of the process. Moreover, how is an accused person to regulate his conduct and to make informed choices about the conduct of his defence? For, surely now his decision to apply for a discharge at the close of the prosecution's

case or to close his case without testifying or to enter the witness-box in his defence or to call other evidence in his defence may well have to be informed not just by the evidence implicating him in the commission of the offence charged and the strength or weakness of the prosecution's case but also by what is contained in an extra-curial statement that has in any event been disavowed by its maker in evidence.'

[47] In *S v Mamushe* [2007] 4 All SA 972 (SCA) this court, while professing to approve of *Ndhlovu*, nevertheless recorded in para 16, in accordance with what was stated in *S v Ramavhale* 1996 (1) SACR 639 (A), that it is axiomatic that courts apply considerable restraint in allowing or relying on hearsay evidence against an accused person in criminal proceedings. We are constrained to point out that in *Mamushe* this court, with respect, wrongly concluded that *Ndhlovu* had held that s 3(1)(*b*) only renders an extra-curial statement admissible if it is confirmed by the maker in evidence during the court proceedings.

[48] *S v Libazi & another* 2010 (2) SACR 233 (SCA) appears to have shared some of the reservations expressed in *Balkwell*, in stating (para 14):

'An even more compelling consideration militating against the wholesale application of the rule in *Ndhlovu* is rooted in the injunction to courts to treat co-accused or accomplice evidence with caution. While the prejudice to the accused of admitting the co-accused statement is very high and limits constitutional rights to challenge evidence and remain silent, various cautionary rules operate to make the probative value of the co-accused statement very low. In this regard, it is a widely acknowledged rule that the evidence of an accomplice should be treated with extreme caution, since, as Holmes JA put it:

"First, [the accomplice] is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit."'

[49] Because the challenge in *Ndhlovu* concerned the constitutionality of s 3 of the Act, and because the enquiry focused primarily on that issue, no attention was paid to the earlier decisions of our courts in which the rule against allowing admissions and

confessions to be tendered against a co-accused was stated and restated. A reading of the high court judgment in *Ndhlovu* indicates that there was predictably no submission, on behalf of the accused, that the statements in question amounted to a confession.[6] Goldstein J stated that, because of this stance of the accused, which he accepted, the bar to the admissibility of confessions in s 219 of the CPA did not operate. We have set out above the essence of the oral and written statements and on the face of it they might well constitute confessions to robbery.

[50] In *Ndhlovu* in the high court, no more than four lines of the judgment were devoted to the rule at common law that extra-curial statements by one accused cannot be tendered against another. The high court considered that s 3 of the Act enabled it to disregard the common law rule.[7] In *Ndhlovu* in this court no attention at all was paid to the common law rule.

[51] In *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.'

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. 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. These are aspects that will be discussed more fully later in the judgment, especially in para 62.

[52] It is significant that the introductory words to s 3 of the Act read as follows:

'**Hearsay evidence** – (1) *Subject to the provisions of any other law*, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless – . . . .' (Our emphasis.)

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[6] Defence counsel, for obvious reasons, usually resist having statements made by their clients being characterised as confessions.

[7] Paras 48 and 49.

As it was put in *Dhanabakium v Subramanian & another* 1943 AD 160 at 167:

'[T]he position under the common law must be borne in mind in construing the statute.'

In *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 823 it was stated:

'In considering the question of the extent to which the common law is abrogated by statute, the rule which has been adopted by the English Courts is thus laid down by BYLES, J., in *Reg. v Morris* (1 CCR 95): "It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law."'

In a similar vein *Casserley v Stubbs* 1916 TPD 310 at 312 stated:

'It is a well-known canon of construction that we cannot infer that a statute intends to alter the common law. The statute must either explicitly say that it is the intention of the legislature to alter the common law, or the inference from the Ordinance must be such that we can come to no other conclusion than that the legislature did have such an intention.'

Those dicta were cited with approval in *Stadsraad van Pretoria v Van Wyk* 1973 (2) SA 779 (A) at 784F-H. See also EA Kellaway *Principles of Legal Interpretation* (1995) at 101 and 103 and the authorities there cited, including *Voet*. Significantly, *Ndhlovu* arrived at its conclusion without having embarked upon that exercise.

[53] In *S v Ralukukwe* 2006 (2) SACR 394 (SCA) this court thought it important to draw a distinction between admissions and confessions, reasoning that s 219A, referred to above, did not in express terms bar the use of admissions by an accused against his co-accused. Section 219A was contrasted with s 219 which expressly forbade the use of a confession by one person against another.

[54] It is not immediately apparent on what basis such a distinction can be drawn. As we have shown with reference to the earlier authorities, no such distinction existed at common law. Moreover, 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). 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 s 219A for a

co-accused in respect of an admission as it did in respect of a confession in s 219. Moreover, 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. In application of this distinction, let us assume that A makes a statement that implicates his co-accused, B, as well as himself: Whether or not the statement constitutes a confession or merely an admission would no doubt be determined solely with reference to its maker, A. If it is ruled to be a confession, then irrespective of what it says in respect of B it will not be admissible against B. If, on the other hand, it is held to be an admission, then it would be admissible against B. It thus matters not whether A's confession only touches tangentially upon B or that his admission, although largely exculpatory in respect of himself, is devastating in respect of B. That the characterisation of a statement as a confession or an admission could determine, without more, whether it falls to admitted as evidence against a co-accused in and of itself provokes anxiety. What of where a trial court rules incorrectly that a statement is an admission and admits it into evidence against a co-accused and then a court of appeal subsequently characterises the statement a confession? This appears to have happened in *Molimi* (see paras 26–29). What if the co-accused is cross-examined on a statement that ought not to have been admitted into evidence against him? It is possible to imagine a range of other irregularities that could possibly flow from that incorrect characterisation. But the more important question that those hypothetical postulations provoke is whether, flowing from that, there is a danger of the conviction being vitiated. None of this has hitherto occupied the attention of our courts perhaps because prior to *Ndhlovu* the position was quite straightforward – an extra-curial statement was inadmissible against a co-accused. And that rule applied to both admissions and confessions alike.

[55] It is worth noting that *Ralukukwe* relied, inter alia, on the *Molimi* decision in this court which was overturned by the decision in the Constitutional Court. In *Molimi* the Constitutional Court, in hearing an appeal from this court, was dealing with two extra-curial statements by co-accused persons. One was clearly a confession and the other an admission. The Constitutional Court held that this court had erred in treating both

statements as admissions and admitting the confession as hearsay evidence in terms of s 3 of the Act because of the bar in s 219 of the CPA. In determining whether the admission by the co-accused in that matter could be admitted as hearsay evidence, the Constitutional Court specifically refrained from expressing a view on the correctness of *Ndhlovu*. It nevertheless went on to state that both the trial court and the Supreme Court of Appeal had failed to adhere to the procedure laid down in *Ndhlovu* for the admission of hearsay evidence. The Constitutional Court considered that there had been no timeous and unambiguous ruling on the intended use of the hearsay evidence and that this resulted in prejudice to the accused. It accordingly held that the admission ought to have been excluded. In this reasoning, the Constitutional Court noted that the right to a fair trial requires a substantive approach that has to instil confidence in the criminal justice system.[8] It also stated that in criminal proceedings, fair trial rights must be observed, and the essential adversarial nature thereof should not be undermined and that an accused should not be left in uncertainty as to the case he has to meet.

[56] The Constitutional Court recognised that there might be some force to the argument that there was no justification for the distinction between confessions and admissions. However, because it would be sitting both as a court of first and last instance, it declined to rule on that question, inasmuch as it had been raised for the first time on the basis of an equality challenge.[9]

[57] Since *Ndhlovu*, and on the strength of it, commentators now appear to agree that, despite the common law rule and the concerns expressed in the judgments above, s 3 of the Act nevertheless enables an extra-curial admission by one accused to be admitted against a co-accused. In this regard see inter alia PJ Schwikkard 'Confessions in Criminal Trials' in PJ Schwikkard & SE van der Merwe (eds) *Principles of Evidence* (3 ed, 2010) at 357 and Du Toit, De Jager, Paizes, Skeen and Van der Merwe *Commentary on the Criminal Procedure Act* (2013) from 24-70A to 24-70G. DT Zeffertt

[8] *Molimi* para 42.
[9] *Molimi* paras 48 and 49.

and AP Paizes *The South African Law of Evidence* (2 ed, 2009) at 494, is however, equivocal.

[58] Subsequent to the judgments in *Ndhlovu* and *Molimi,* and unlike in the past, it appears that there has been a concerted effort by prosecutors to have extra-curial statements by co-accused persons categorised as admissions rather than confessions. Conversely, and almost perversely, defence counsel representing co-accused persons are now driven to do the opposite.

[59] In appreciation of the Constitutional Court's concerns about fair trial rights, we took the time to consider the position in countries in which such rights are constitutionally enshrined, in order to determine whether they have followed the *Ndhlovu* path. Put simply, we embarked on an enquiry to see whether those countries, the first two of which have legislation permitting the admission of hearsay evidence, allowed the use of extra-curial admissions made by one accused against another.

[60] In England the current position is set out in C Tapper *Cross & Tapper on Evidence* (12 ed, 2010) at 580 thus:

'Although admissions are often said to be received on account of the unlikelihood of a person saying something to his disadvantage, it can also be argued that the adversarial nature of litigation plays a part and the reason resides rather in the absurdity of a party seeking to assert his own unreliability except when speaking on oath, or the fact that he had no opportunity to cross-examine himself. The exception was extended to include inextricable exculpatory parts, of otherwise inculpatory statements. In general, it operated only against the party making it, and against him only in a representative capacity if so made. If the party had no personal knowledge of the matter admitted, then the admission was worthless.'

[61] In Australia, the state of the law in relation to the admissibility of extra-curial admissions is the same as our common law, pre-*Ndhlovu*. The following appears in A Ligertwood *Australian Evidence* (3 ed, 1998) at 8.94:

'Out-of-court admissions or confessions are, strictly speaking, only admissible in exception to the hearsay rule against the parties making them. Thus, for example, where the nominal

defendant is sued, the out-of-court “admissions” of the driver for whom the nominal defendant is responsible are not admissible by virtue of this exception. Similarly, admissions by co-defendants or co-accused are inadmissible hearsay as against the other parties to the proceedings. The out-of-court admission or confession can operate assertively only against the party making it.’

[62] In *R v Perciballi* (2001), 54 O.R. (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. At 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.This is in line with the comments made in para 51 above.

[63] More recently in this country, in *S v Mangena* 2012 (2) SACR 170 (GSJ) para 70 that court observed that for more than 15 years after the Act came into effect ‘no reported case existed where the state understood the legislation to allow for the utilisation of an admission made by one conspirator against the other. Had the state understood the legislation in this manner then one would have expected the point to be argued from inception of the legislation’.

[64] Any legal practitioner or presiding officer in a criminal trial would readily confirm that, up until *Ndhlovu*, evidence led in a trial-within-a-trial regarding a confession by one accused rarely, if ever, interested legal representatives of his co-accused. This was so because the common law rule against the use of extra-curial statements made by one co-accused against the other was deeply ingrained in our legal psyche.

[65] This rule excluding the use of extra-curial statements made by one accused against another, was not solely based on its hearsay nature, although that in itself would have constituted sound reason for excluding such evidence. It has always been stated that an admission made by one person is normally irrelevant when tendered for use against another. From the State's perspective it would usually be dealing with statements made by co-accused persons which, in itself, ought to bring with it a caution. The shifting of blame from one co-accused to another to avoid conviction is not uncommon in our criminal justice system. Furthermore, other than when one is dealing with vicarious admissions or statements made in furtherance of a conspiracy,[10] neither of which is applicable in the present case, it is difficult to see how one accused's extra-curial statement can bind another. Co-accused, more often than not, disavow extra-curial statements made by them and often choose not to testify. They cannot be compelled to testify, and in the event that an extra-curial statement made by one co-accused and implicating the others is ruled admissible and he or she chooses not to testify, the right of the others to challenge the truthfulness of the incriminating parts of such a statement is effectively nullified. The right to challenge evidence enshrined in s 35(3)(*i*) of the Constitution is thereby rendered nugatory. In this regard, the decision of the Canadian Supreme Court in *Perciballi* is instructive.

[66] We would do well to recall a dictum in *Ramavhale* which was cited with apparent approval in both *Ndhlovu* and *Balkwell*. Schutz JA had this to say:

'Hearsay evidence may be accepted subject to the broad, almost limitless criteria set out in s 3(1). But the facts of life do not simply vanish at the flourish of the legislator's pen. Hearsay evidence was long recognised to tend to be unreliable, and continues to tend to be so. The old

[10] In *R v Mayet* 1957 (1) SA 492 (A) at 494 the following passage from *Phipson's Law of Evidence* was cited:
'[O]n charges of conspiracy, the acts and declarations of each conspirator in furtherance of the common object are admissible against the rest; and it is immaterial whether the *existence* of the conspiracy, or the participation of the defendants be proved first, though either element is nugatory without the other.'
Immediately thereafter Schreiner JA said the following:
'Although this principle may have originated in the English law of criminal conspiracy it applies also where parties are charged with a crime and the case against them is that they acted in concert to commit it; it makes no difference whether the particular trial is of one or some or all of the conspirators. Words that are said as part of the carrying out of a purpose stand on the same footing as acts done; they differ from a mere narrative.'

works are replete with warning, based on the accumulation of the experience of centuries. I take as an example Taylor's *A Treatise on the Law of Evidence* 12th ed (1931) at para 567:
"For it is deemed indispensable to the proper administration of justice, first, that every witness should give his testimony under the sanction of an oath, or its equivalent, a solemn affirmation; and, secondly, that he should be subject to the ordeal of cross-examination by the party against whom he is called, so that it may appear, if necessary, what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth. But testimony from the relation of third persons, even where the informant is known, cannot be subjected to these tests. As Buller J, observes: "If the first speech were without oath, another oath that there was such a speech makes it no more than a mere speaking, and is of no value in a court of justice."""
See also *Hoffmann and Zeffertt (*above at 125) and *Theron v AA Life Assurance Association Ltd* 1995 (4) SA 361 (AD) at 369E-H, 382G-H.

[67] It is clear that the Act was intended to permit hearsay evidence in both civil and criminal proceedings, but is subject to preconditions for the reception of such evidence. It has to be borne in mind that *viva voce* evidence on oath in court is always to be preferred. A logical concomitant is that investigating authorities will be encouraged to present the best possible evidence and not resort to having accused persons themselves supplement a poorly investigated or badly presented case. In respect of criminal trials, the caution enunciated by Schutz JA in *Ramavhale* must be heeded. One can rightly ask how the rights of an accused person to challenge evidence adduced against him can be more circumscribed under our new constitutional order than they were under the old regime. It has been suggested by commentators that s 3(1) has sufficient safeguards to ensure the preservation of fair trial rights, more particularly, that s 3 permits a court to admit hearsay evidence only if it 'is of the opinion that such evidence should be admitted in the interests of justice'. Considering the rationale at common law for excluding the use of extra-curial admissions by one accused against another, it appears to us that the interests of justice is best served by not invoking the Act for that purpose. Having regard to what is set out above, we are compelled to conclude that our system of criminal justice underpinned by constitutional values and principles which have, as their objective, a fair trial for accused persons, demands that

we hold, s 3 of the Act notwithstanding, that the extra-curial admission of one accused does not constitute evidence against a co-accused and is therefore not admissible against such co-accused.

[68] There is no difficulty in respect of the admissibility of the first appellant's statement, which puts him on the scene. However, that statement by itself is wholly inadequate to found convictions on any of the charges preferred against him, including murder and robbery. The difficulty arises in relation to the admissibility of the first appellant's extra-curial statement against the second to fifth appellants. It is clear that the only evidence upon which the convictions of the second to fifth appellants in the high court could have been founded was the extra-curial statement of the first appellant. Before us it was accepted on behalf of the State that absent the evidence contained in the first appellant's statement, their convictions and sentences fall to be set aside. As a result of the conclusions reached above, that result must follow.

[69] In relation to the reception of hearsay evidence in general, the Constitutional Court in *Molimi* referred to the decision of this court in *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA) with apparent approval, stating the following at para 35:

'In comparison to the common law the Act allows a more nuanced approach to the admission of hearsay evidence. As the Supreme Court of Appeal stated in *Makhathini v Road Accident Fund*, in the application of the Act in the context of a civil case, the Act requires the court to take a contextual approach. The court said that the statutory preconditions for the reception of hearsay evidence are now designed to ensure that the evidence is received only if the interests of justice justify its reception. A court making a determination whether it is in the interests of justice to admit hearsay evidence must –

"have regard to every factor that should be taken into account, more specifically, to have regard to the factors mentioned in s3(1)(*c*). Only if, having regard to all these factors cumulatively, it would be in the interests of justice to admit the hearsay evidence, should it be admitted.'"

[70] To a similar effect is the following dictum by Schutz JA in *Ramavhale:*

'The Judge *a quo* then addressed the question whether that part of the statement which depended upon the credibility of the deceased should be admitted, having regard to the considerations set out in s 3(1)(*c*) of the Act. Before setting out those considerations it is necessary to emphasise what has already been mentioned, that s 3(1) is an exclusionary subsection and that the touchstone of admissibility is the interests of justice, as is made clear by the words: ". . . hearsay, evidence shall not be admitted as evidence . . . unless - . . . the court, having regard to (the considerations in ss (*c*)) is of the opinion that such evidence should be admitted in the interests of justice."'

[71] We reaffirm that approach in relation to the reception of hearsay evidence in general just as we are emphatic about the bar on the use of confessions and admissions by one accused against his co-accused.

[72] It follows that for the reasons already stated, the following order is made:
The appeal is upheld and the convictions and related sentences are set aside.

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MS NAVSA

JUDGE OF APPEAL

_____

V PONNAN

JUDGE OF APPEAL

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