

REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO



15 February 2022

DATE

SIGNATURE

CASE NO: A98/2020

In the matter between:

THABANG JACOB RAPOLOTI

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

TLHAPI J**Introduction**

[1] The appellant appeared before the Circuit Court in Vereeniging together with three co-accused. The Trial Judge, Prinsloo J was assisted by two assessors. The appellant pleaded not guilty on all counts and on 9 June 2006 and was acquitted on count 3 – attempted murder. He was convicted of the remaining counts and sentenced in respect thereof as follows:

- Count 1) Robbery with aggravating circumstances and sentenced to 15 years imprisonment;
- Count 2) Murder and sentenced to life imprisonment;
- Count 4) Possession of an unlicensed firearm and sentenced to 2 years Imprisonment;
- Count 5) Possession of ammunition and sentenced to 1 year imprisonment

It was ordered that all the sentences run concurrently.

[2] Leave to appeal was granted by the trial court after it had addressed the appellant's delay in prosecuting the application for leave to appeal. There was no opposition to the application for condonation and it was granted.

[3] It is common cause that there were initially six accused persons. There was a separation of trials in respect of accused 1, one Mandla as a result of his ill health and accused 6, one Queen who died before the trial commenced.

The Facts

[4] It is common cause that Ms Hawa Ebrahim and her husband, both elderly people owned a business known as Adam's Store in Kliprivier, in the district of Meyerton. On 30 November 2003 four young men who were armed entered the Store, assaulted and robbed the occupants of certain items including a Nokia cell phone, cash, cigarettes and groceries. An elderly man, one Zwelinzima Witbooi was shot and died on the scene. The robbers fled the scene in possession of two boxes containing the stolen items.

[5] Ms Florence Mazibuko (Ms Mazibuko) is a resident of Greenville, an informal settlement where Adams Store is situated. On Sunday 30 November 2003 at about 17:00, while in the company of one Abdul and Maria, she attended to the store premises together with her three years old child and stood outside. She saw four young men appear, they entered the store and after a short while exited with a two-litre bottle of cool drink. One of them said he was hungry and

it was suggested among them that he go in to buy bread. Two entered the store while the other two remained outside. One of the men outside approached Ms Mazibuko, lifted his T-shirt, produced a firearm and pointed it at her and her companions. He ordered all three to enter the store. She identified this person, who was present in the dock, as accused number 3. As they entered the store accused number 3 warned them not to make a noise otherwise he would shoot.

- [6] As she entered the store, she observed one of the two men who had remained the store taking money out of the cash register while the other was in possession of a long firearm which was pointed at Ms Ebrahim's head as she lay on the floor. He demanded air time and a cell phone from her and he wanted to know where the safe was kept. He assaulted Ms Ebrahim with the firearm on the side of her face, pulled her hair and bashed her face on the floor. It was a bit dark, visibility was not good. Ms Mazibuko testified that she was afraid and she could not identify this person.
- [7] There was an elderly man, a customer, who came into the store and he was made to lie next to her. The one with the long firearm kept on demanding to know where the safe was, he threatened to shoot Ms Ebrahim. At the time accused number 3 and his accomplice were busy putting stuff into the boxes. She heard something like a shot go off, and one said to the other 'you have shot him'. She heard the elderly man next to her cry, she tried to calm him down and she assured him that help would be summoned as soon as the robbers had left.

- [8] In the meantime, Ms Ebrahim gave in to the demand for the safe keys which she had hidden between her breasts. Ms Ebrahim was taken to the safe by the man with the long fire arm and later returned to where she lay on the floor. Ms Mazibuko noticed a watery fluid from the mouth of the elderly man. The robbers fled and locked them inside the store. Abdul managed to open the door with a screw driver. Ms Mazibuko alerted a security guard who was approaching the store of the incident.
- [9] Mr Mbakaza was employed by National Force Security Company to patrol the railway line running adjacent to the informal settlement. On 30 November 2003 in the late afternoon while on patrol duty and driving a marked vehicle, he went to Adams Store to buy food. A report was made to him of the robbery and he summoned the police. He decided to scout the area in the mean-time. He observed a white Venture vehicle parked under a bridge next to the railway line. He drove past the vehicle which had two occupants. He also observed two individuals making their way across a field as if going towards the white Venture vehicle, He made a U-Turn, drove past the Venture again. The Venture followed him. A Police vehicle appeared and stopped the Venture. He identified accused number 1 as a passenger in the Venture, which was driven by another man who wore a dreadlock hairstyle and who was not present in court when he testified. He also told the police officers of the two men he had seen earlier on. A contingent of policemen were dispatched and this resulted in the arrest of accused numbers 2 and 3.

- [10] It is common cause that the appellant was arrested on 30 December 2003, almost a month after the incident. A warning statement, Exhibit 'N' was taken from him by Inspector Erasmus. The appellant denied making the statement and a trial within-in-a-trial was held to consider the admission of the statement into evidence.
- [11] Only two witnesses testified at the trial-within-a-trial, being Inspector Erasmus and the appellant. Insp. Erasmus took over the investigation of the case a day after the incident and the arrests of accused numbers 1, 2 and 3. He consulted with witnesses including Mr Ebrahim who helped identify the recovered stolen items; he visited the crime scene; a firearm was recovered and sent for ballistic tests. He also arranged for the pointing out by accused number 3, which was conducted by one Captain Majaja. Insp. Erasmus testified that the appellant was implicated in the notes on the pointing-out- by accused 3, Exhibit 'G', and from information he obtained from accused numbers 2 and 3. He was also present at the arrest of the appellant on 30 December 2003. After the arrest of the appellant and before being taken into detention he accompanied the appellant to point out one Queen. Insp. Erasmus testified that the appellant was informed of his rights and the nature of the charges against him on arrest. The following day on 31 December 2003 the appellant's warning statement was taken down during an interview in his office. They conversed with each other in perfect English and there was no need for an interpreter. The appellant's rights which were written on a pro-forma form were again explained and appellant

indicated his willingness to give a statement. Evidence on the questionnaire was led in order for the trial court to determine whether the statement was freely and voluntarily made.

- [12] The appellant denied giving the statement and alleged that he was made to sign a document which had been pre-prepared and which did not have correct details of his name; he understood the English language but not very well. He alleged that his constitutional rights were not explained on arrest and when the statement was produced. There were no records of his reports of an alleged assault by Insp. Erasmus. He sustained an injury on the ankle and he did recall that he made such a report in his bail application. This evidence was recalled and confirmed. The trial court was satisfied that appellant's statement was freely and voluntarily made and that his constitutional rights had been duly explained.

- [13] Further, at the end of the trial-within-a-trial the trial Judge stated the following:

"I have heard argument by all counsel, inter alia, the admissibility of Exhibit N with particular reference to the hearsay evidence regarding the alleged actions of the fellow accused of accused 4 and the admissibility of Exhibit G, also with particular reference to the hearsay evidence against the fellow accused of accused 3, particularly in view of the principle laid down in S v Ndlovu and Others 2002 [2] SACR 325 SCA and without overlooking the provisions of section 219 of Act 51 of 1977. I hold that the contents of Exhibits G and N

constitute admissible evidence and also admissible hearsay evidence regarding the alleged actions of the other accused mentioned. Such hearsay evidence can be allowed in the interests of justice". After the trial-within-a-trial the appellant's statement was read into the record.

[14] The appellant's admitted statement explained that two days before the robbery, Queen and accused numbers 2 and 3 paid him a visit where the robbery of the store was discussed. The following day accused numbers 2 and 3 came to his home and he described the two firearms which were in their possession and which were to be used in the robbery. He was not told where the firearms came from. On the third day, being 30 November 2003, one Mandla's Venture was used to transport them to Kliprivier and there were six occupants in the vehicle. They stopped next to a bridge where some prostitutes stood. Accused number 3 got off and got directions to the store from one of the prostitutes. Four of them, including the appellant entered the store, accused number 3 pointed those lying on the floor with a firearm and accused number 2 went deeper into the store. The third one known to the appellant as Mashumi filled boxes with cigarettes and handed them over to the appellant. Suddenly a shot went off, appellant took the box and ran out of the store. The appellant and Mashumi fled, dropped the boxes at the bridge and proceeded to the appellant's home.

[15] The State closed its case after the statement was read into the record. It is common cause that the appellant who appeared at trial as accused number 4, was arrested at his residence, after being pointed out by accused number 3. It

is also common cause that the appellant pleaded not guilty; he tendered no plea explanation and further, the appellant and accused number 3 declined to testify in their defence.

[16] Accused number 1 testified that he accompanied one Mandla, a neighbour of his to deliver some people at Kliprivier. Mandla's two passengers were already in the vehicle, the Venture, and they were unknown to him. At some point the two men indicated that they wished to make a call and he identified the appellant and accused number 3. They alighted from the vehicle and spoke to a lady who later arrived on the scene. He and Mandla drove off to buy cigarettes at the informal settlement. On their drive back and as they approached the bridge, he saw two men whom he identified as accused numbers 2 and 3. Mandla stopped for them to board and, he heard Mandla order them off the vehicle because he said he saw accused numbers 2 and 3 carrying firearms. Accused number 1 did not see the firearms himself. On their way back home they were stopped by the police and arrested and he did not see the appellant again after the appellant alighted from the vehicle earlier on. However, in cross-examination he testified that on his return from buying cigarettes he saw the appellant standing under the bridge with the others.

[17] Accused number 2 testified that on 30 November 2003 he had an arrangement with the appellant, accused numbers 1 and 3, to proceed to Kliprivier to acquire the services of prostitutes. At Kliprivier under, a bridge he alighted with the appellant where two young women were seen. They approached the women

and he offered R20.00 for the sexual services of one of them and he took her into the bushes in the area around the bridge. When he was done, after about 40 minutes, he walked back to the bridge hoping to board the Venture, only to find that it had left him behind. He was arrested while making his way to the Taxi Rank which was in the vicinity of the Police Station. On arrival he discovered that Mandla, accused numbers 1 and 3 had also been arrested. He testified that he did not know anything about any of the allegations in the appellant's statement, and of his presence and participation at the store during the robbery and, that he was one of the four robbers who entered the store.

Findings of the trial Court

[18] The conviction of the appellant was based on the following:

- (a) the content of his statement, which was found to have been freely and voluntarily made before Insp. Erasmus and therefore admissible;
- (b) that he was implicated by accused numbers 2 and 3 in their evidence and, with regard to accused number 3, that the appellant was mentioned as having been present when the pointing out by accused number 3 was conducted
- (c) that accused numbers 2 and 3 and the appellant acted with common purpose.

Grounds of Appeal

[19] Counsel for the respondent contended that appellant relied in this appeal on grounds which were not included in the initial grounds of appeal penned and filed by the appellant. It is common cause that the appellant had to deal first with his application for condonation, which was not objected to and that the present grounds of appeal, though not in writing, were fully argued and were the result of the grant of leave to appeal. These grounds are articulated in the appellant's heads of argument as follows:

- 1) The trial court erred in accepting a warning statement made by the appellant to a non-commissioned police officer as evidence in circumstances where the statement did not comply with the provisions of section 217(1)(a) of the Criminal Procedure Act 51 of 1977.
- 2) The trial court erred in accepting as evidence against the appellant an extra-curial statement made by a co-accused which it will be argued, is inadmissible as evidence against the appellant
- 3) The trial court omitted to apply the cautionary rule relating to the evidence of the appellant's co-accused.

The Law

Was the appellant's statement an admission or a confession:

[20] It is trite that sections 217, 219 and 219 A of the Criminal Procedure Act 51 of 1977 as amended, are important when dealing with the admissibility of extracurial confessions and admissions made by those who are suspects and accused persons in criminal matters. Section 217 deals with the admissibility of confessions against the accused, section 219 'precludes' the admissibility of the confessions against another person and 219A stipulates that when such an admission is not a confession of the offence, that when proved to have been voluntarily made, it is admissible against the maker in criminal proceedings relating to the offence. The applicability of the latter section was not addressed in the judgement of the trial court.

[21] The trial court stated the following with regard to section 217 and 219 of the Criminal Procedure Act:

"'n Vraag wat deurtasend met die advokate gedebateer is tydens die binneverhoor is of die bepalings van artikel 217 en 219, wet 51, 1977 'n deurslaggewende invloed behoort te he op my besslising. Hierdie artikels het nie te berde gekon in Ndlovu nie. Artikel 219 lees as volg:

"Geen bekentenis deur iemand gemaak is as getuienis teen 'n ander persoon toelaatbaar nie." Dit kom nie voor asof die hoorse-getuiniis in Ndlovu afgele is voor 'n vrederegter, soos bedoel in artikel 217 nie. Gevolglik lyk dit nie asof daar sprake was van 'n toelaalbare bekentenis nie. In hierdie onmstandighede meen ek nie dit is nodig om my uit te lat

oor die vraag of Bewystuk N1 in effek neerkom op 'n bekentenis al dan nie. Dit is nie afgele voor 'n vrederegter soos bedoel in artikel 217, wet 51, 1977. Dit kom egter wesenlike ooreen met wat in Ndlovu toegelaat is onder soortgelyke omstandighede."

It is common cause that Insp. Erasmus was a non-commissioned officer who was precluded from taking a confession as provided in section 217(1)(a). As I see it, the trial court, on the basis of *S v Ndlovu supra*, did not deem it necessary to determine before accepting the appellant's statement into evidence, whether it constituted a confession or not. In my view the trial court confined itself to the Ndlovu case and made cursory mention of section 217 without looking into the rank of Insp. Erasmus and, having regard to the content of the appellant's statement, whether he would have been precluded from taking it down, and the fact that he was intricately involved and directed the investigation. I shall deal with these aspects later.

[22] Section 217 (1)(a) provides as follows:

"Evidence of any confession made by an accused 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 being unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence:

Provided-

(a) *That a confession made to 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 authorised to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed in writing in the presence of a magistrate or a justice"; (my emphasis)*

[23] It is conceded by the respondent that should it be found that the appellant's statement was indeed a confession, it would be inadmissible for lack of compliance with the proviso contained in section 217(1)(a). It was contended however, that the appellant's submission failed to attack the trial court's finding that the statement was freely and voluntarily made, further, that the very broad allegation that the statement was a confession and not an admission was difficult to respond to, in that the appellant had failed to interrogate the contents of Exhibit 'N' and, to advance cogent reasons why the statement amounts to a confession. It was contended for the appellant that since Insp. Erasmus, a non-commissioned officer was the one who took down the warning statement, the contents of which conformed to a definition of a confession, it was therefore inadmissible.

[24] I am of the view that the task now falls upon this court to examine the nature of the statement. Since the Criminal Procedure Act does not define what constitutes a confession', our courts have consistently relied on the trite

definition of what a confession is as stated in *R v Becker* 1929 AD 167 and on what is provided for in the Criminal Procedure Act as qualifying factors; See: *S Ralukukwe v The State* 2006 (2) SACR 394 (SCA). The State must be prove, beyond a reasonable doubt that the confession was “freely and voluntarily made by such person, in his sound and sober senses and without undue influence”; Section 217(1)(b)(ii).

- [25] In *R v Becker supra* at 171 De Villiers ACJ held that a ‘confession could only mean an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty’ and at 172 when ‘the statement although highly incriminating, falls short of a confession where it is made with an exculpatory intent,’ it shall not be regarded as a confession. It is also trite that a person may be convicted on the basis of a confession alone.
- [26] The question to me is, whether there is merit in the argument that as soon as it is perceived that the content of the statement conforms to a confession, the confession should be done before a magistrate. Although these aspects were not fully canvassed by counsel, it is my view that, as and when a police officer, a non-commissioned officer in the position of Insp. Erasmus, becomes aware that the warning statement he is taking down, amounts to a confession, he has a duty to ensure that it complies with section 217(1)(a).
- [27] I say so, because of the role Insp. Erasmus played as investigating officer and as one who took down the statement the court relied on for the conviction of the

appellant. It would have been in the interests of justice to have someone not involved in the investigation to take down the appellant's statement, as provided, a magistrate. Although a confession and admission are extra-curial statements, the implications for suspects or accused persons differ. It is possible that an accused may be convicted on the confession alone when the State has proved beyond a reasonable doubt the requirements in section 217

(1)(b)(ii)

[28] Having perused the pro forma warning statement form used by the police, Exhibit N, I find that it embodies a mixture of the requirements in the Criminal Procedure Act, without distinguishing whether the warning statement relates to a confession or an admission and without explaining to the person impacted thereby, the difference between a confession and an admission, except that it only explained that what is in the statement may be used against him/her. I have doubt that an unrepresented person would appreciate the difference and the impact of making a statement (a confession or admission) at this preliminary stage.

[29] The pro-forma form also mentions the rights of the suspect/ accused person as provided in section 35(1) of the Constitution of the Republic of South Africa of 1996, by stating these in the said form e.g. the right to remain silent; of the consequences of not remaining silent; not to be compelled to make a confession or admission that could be used as evidence against that person,

overall, endorsing an accused person's right to a fair trial. The mixture of requirements is seen in some of the following questions and answers:

"4.4 He/she is not compelled to make a confession or admission which could be used in evidence against him/her

Question: Do you understand

Answer: Yes

The suspect is now informed that I am involved in the investigation of an armed robbery and murder caseand that I am in possession of certain information indicating that he/she might be involved in the commission of the mentioned offence (my emphasis)

Question: Do you understand the allegations against you

Answer: Yes

5. It is my intention to put certain questions to you and by answering the questions You may be able to explain certain points whereby you may prove your innocence. (my emphasis)

Question: What do you wish to do. Make a statement. only answer the questions or exercise your right to remain silent? At this stage I want to bring section 35 of the Constitution.....under your attention.

Answer: I want to make a statement

6. Complete the following only if the suspect wishes to say something. I request the suspect to answer the following questions:

Question: Is it your decision to make a statement answer your questions your own choice

Answer: Yes

Question: Have you been assaulted or threatened in any way

Answer: No

Question: If so by whom, where, and when

Answer: N/A

Question: Has the fact that you were assaulted or threatened had any influence on your making a statement

Answer: N/A

Question: Do you have injuries

Answer: Slightly on right ankle

Question: Are you at this moment under the influence of liquor and or drugs

Answer: NO

- [30] In my view, the fact that the trial judge placed emphasis on the understanding by the appellant of the English language misses the point, (hy het erken dat die handteken on die bewystuk N syne is en al die baldsye ook deur hom parafeer is. In kruisondervrging bevesitg da thy graad 11 geslag het met hoofvak as Engels, 340, volume 3) Firstly, the line of questions confuses the requirements necessary for the admissibility of an admission or a confession. Secondly, it loses sight of the fact that this was the first encounter Insp. Erasmus had with the appellant after the arrest, which was really his first consultation / interrogation, with someone about whom he already had prior knowledge of his participation in the robbery. He already tells the appellant I have information on your participation. Is this not tantamount to an indirect intimidation or persuasion to the appellant tell him the truth. It goes on, if you 'answer my questions you may be able to given answers that will prove your innocence'. The questions have nothing to do with establishing the suspect's innocence nor with establishing that they were freely and voluntarily made if the statement was to be viewed and an admission.
- [31] Then follows the question on the appellant's sobriety, besides the answer given, it is expected that an observation be noted that the suspect does not seem to be under the influence of alcohol or drugs. Insp. Erasmus noted the appellant complained of a sore ankle. In the trial-within-a trial, the appellant testified the he had been assaulted by Insp. Erasmus. The proceedings had to be stopped to listen to his evidence in the bail application and other records were produced that no complaint of the assault was lodged. In my view, it would have been prudent for Insp. Erasmus to have followed up with the question how the

appellant sustained the injury The court rejected the assault version as an afterthought.

- [32] The ambiguity in the above demonstrates the necessity to have those who take down warning statements discerning whether such statements are admissions or confessions and to ensure compliance with the provisions of the Criminal Procedure Act and to stop the taking of the statement when realizing the suspect is incriminating himself in respect of all elements of the crime. This could be followed by an advice that if she still wishes to make a statement he could do one before a magistrate. Thus Insp. Erasmus failed to observe as a non-commissioned officer the provisions of section 217(1)(a). In my view a reflection on section 217(1)(b)(ii) imposes a duty on whoever is taking down a statement and, who poses certain questions to know that he has a duty to interrogate some of the questions or to make observations and note them so that a suspect does not unwittingly incriminate himself and, if he wishes to do so, he does it before a magistrate, otherwise his confession would become inadmissible.
- [33] Counsel for the respondent contends that in exhibit N the appellant 'merely admits to standing at the shop door, unarmed and that he ran away with a box as soon as he heard a shot.' He further contended that if the statement contained no averment of *mens rea* to commit any offence, the statement cannot amount to a confession; *S v Robiyana and Others* 2009 (1) SACR 104 (CK).

[34] This argument has no merit, because, Exhibit N did not amount to a piecing together of bits and pieces of evidence from which no *mens rea* could be deduced in order to make out a coherent confession. It was straight forward. As I see it, the appellant's statement objectively viewed and, having regard to the surrounding circumstance, is a confession, in that it speaks to direct pre-planning to commit an armed robbery two days before the incident at the home of the appellant; the acquisition of firearms which were brought to the appellant's house; his participation and execution of the criminal offence of robbery with his co-accused on the 30 November 2003. The appellant was present in the store when the offences were being perpetrated. Although he mentioned that he was not armed, or that he ran away when the shot went off, that should not be isolated from the entire occurrence. This then led, in addition to a finding by the trial court, that the appellant was also implicated by his co-accused on the basis of *S v Ndlovu supra*, the court found that the appellant by conduct, was part of a common purpose. Even if this statement as narrated did not constitute an 'absolute equivalent of a plea of guilty and not a confession, it had (such) elements of self-incrimination', that it has to have been made before a magistrate to have become admissible.

Is an extra curial statement by an accused inadmissible as evidence against a co-accused.?

[35] It was contended for the appellant that the acceptance of the extra-curial statements made by the appellant's co-accused as evidence against him was unconstitutional and infringed upon his right to a fair trial. It was argued that the

Ndlovu case was overturned by the Constitutional Court in *Mhlongo v S; Nkosi v S* (CCT 148/14) [2015]. Counsel for the respondent contended that the law as at the time the appellant was convicted was that as dealt with in *Ndlovu*, therefore *Mhlongo* could not be retrospectively applied to this matter. The trial court relying on *S v Ndlovu supra*, stated:

“Ek bevind egter date Ndlovu se feit in alle wesenklike opsigte vergelykbaar is met die feit in hierdie saak wat betref die beskrywing van medebeskuIdigdes se optrede in Bewysuk G en N1. In hierdie opsigte meen ek dst ek gebondene is aan die riglyne in Ndlovu. Gevolglik meen ek dat hierdie getuienis in Bewysuk G en N1 toelatlare hoorsee is ten opsigte van die medebeskuIdigdes end us so toelaat is in belang van geregtigheid, soos bedoel in artikel 3, wet 45, 1988.”

[36] It is common cause that when the trial was finalized, the trial court relied on the *Ndlovu* decision of the SCA which was applicable at the time. Subsequent decisions of the Supreme Court of Appeal and the Constitutional Court does not give merit to the argument on retrospectivity as shall be seen below.

[37] The following cases had reservations about the application of the *Ndlovu* judgement; *S v Litako and Others* 2014 (2) SACR 431 (SCA), *S v Libazi* 2010 (2) SACR 233 (SCA); *Balkwell and Another v S* [2007] 3 All SA 465 (SCA). In *S v Litako* for example, the court found that Section 3 of the Law of Evidence Amendment Act did not expressly overrule an existing common law rule, which

prohibited the use of and extra curial statement made by one accused to be used against a co-accused.

[38] As I see it, the common law never changed and what seemed to be an uncertainty as also seen in submissions before Prinsloo J, was settled in *Mhlongo v State, Nkosi v State supra*, at paragraph 27 -29 the following is stated:"

"first, it did not deal with the common law rule against allowing admissions to be tendered against co-accused. Second, it did not deal with the provisions of section 3(2) of the Evidence Amendment Act. Extra-curial admissions and confessions are hearsay by nature: their probative value depends on the credibility of a person (the accused) other than the person who gave the evidence. Under the common law hearsay was generally excluded. Section 3(1) of the Evidence Amendment Act codified this common law principle, providing that hearsay is inadmissible subject to certain exceptions. Third, Ndlovu did not seem to have regard to the provisions of section 219A of the current CPA- which expressly allows an admission be admitted only against the maker and is silent regarding other persons."

[39] In dealing with the rationality of the distinction between admissions and confessions the court continues:

[33] The distinction between confessions and admissions is determined solely by the extent to which the statement implicates its maker. This distinction becomes relevant in determining the safeguards that are put in place to ensure the voluntariness of the confession or admission. If a confession can be used, with little more to secure the conviction of its maker (as opposed to an admission which would still require the State to prove various elements of the crime) then there may be logic in applying more stringent requirements on its admission against an accused. This distinction is apparent in the difference between section 217 and 219A of the current CPA. However, the distinction has nothing to do with a third party. Accordingly, there is no rational reason why, when used against another person, there should be a difference in the admissibility of the two types of statements. The Supreme Court of Appeal in *Litako* said:

“from the perspective of the one accused who maybe be implicated in the statement of another, one strains to discern a sound basis for the distinction.”

[40] In light of the above even as at the time of the trial the acceptance of the extra-curial statements by the appellant’s co-accused as evidence against him was unconstitutional and infringed his right to a fair trial.

- [41] Did the trial court fail to apply the cautionary rule relating to the evidence of the appellant's co-accused?

It was contended for the appellant that the learned Judge erred in not taking into cognizance the application of the cautionary rule to the evidence of the co-accused. Neither of the co-accused placed the appellant at the scene of the crime. It was contended for the respondent that the statement of the appellant as well as that of accused number 3 were admitted and that, that was corroboration for the appellant's presence at the crime scene and that accused numbers 1 and 2 corroborated each other on the appellant being part of the group.

- [42] It is common cause that the appellant was not identified by Ms Mazibuko at the crime scene. Accused number 1 was consistent with his plea explanation that the appellant was present in the Venture up to the bridge where he was dropped off and that he was not seen again. It was only during cross examination where he testified that he had seen the appellant at the bridge after they returned with Mandla from buying cigarettes. In my view, this contradiction points towards the credibility of accused number 1 as a witness, and should have alerted the trial judge to exercise caution.

- [43] In *S v Hlapezulu and Others* 1965 (4) SA 439 (A) Holmes JA stated the following caution on accepting evidence of an accomplice:

"..... 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”.

The headnote in *S v Avon Bottle Store at (Pty) Ltd and Others* 1963 (2) SA 389 (A) reads as follows:

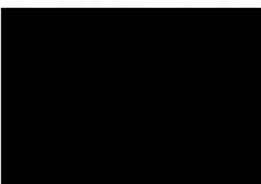
“But this so called “cautionary rule” requires no more than an appreciation by the trier of fact of the risk of false incrimination of an accused by an accomplice a risk which will be reduced by the presence of certain features, such as corroboration of the accomplice implicating the accused. Moreover, the absence of such features will not by itself invalidate a conviction on accomplice evidence if the trier of fact appreciated the peculiar danger inherent in accomplice evidence, and it is clear that he accepted the evidence of the accomplice and rejected that of the accused because the merits of the former as a witness and the demerits of the latter were beyond question.”

[44] I find that the learned trial judge had not adequately applied these cautionary rules and that the evidence of the implication of the appellant fell short of the standard required.

[45] In light of the above I recommend that the appeal on conviction be upheld.

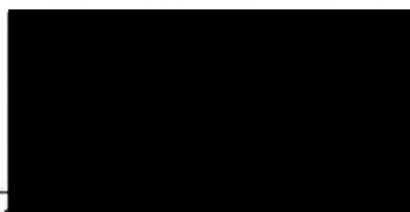
[46] In the result the following order:

1. The appeal on conviction and sentence is upheld and the conviction and sentence is set aside.



TLHAPI V V

(JUDGE OF THE HIGH COURT)



DAVIS N

(JUDGE OF THE HIGH COURT)



MBONGWE M P N

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	17 JANUARY 2022
JUDGMENT RESERVED ON	:	17 JANUARY 2022
COUNSEL FOR THE APPELLANT	:	ADV. F. VAN AS
INSTRUCTED BY	:	LEGAL AID BOARD OF SOUTH AFRICA
COUNSEL FOR THE RESPONDENT	:	ADV. P W COETZER (OFFICE OF THE DPP)