



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: CC08/2018

In the matter between:

THE STATE

And

ELTON LENTING AND 19 OTHERS

ACCUSED

JUDGMENT – 11 AUGUST 2025

LEKHULENI J:

Introduction

[1] This is an application brought by the State in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, (the Hearsay Act) alternatively in terms of section 222 of the Criminal Procedure Act 51 of 1977 (the CPA). In this application, the State seeks the admission of a warning statement made by one Delani Saptoe, who is now deceased, in which he implicates accused 3 and 14 in this matter. The State's application raises a novel question. The pertinent question is whether a warning statement of an accused person who passed away before he

could be charged, together with the twenty accused in the present matter, could be admitted in terms of section 3(1)(c) of the Hearsay Act and be used against the remaining co-accused who are implicated by that statement.

[2] Mr Damon, on behalf of the State, applied for the admission of a warning statement of Delano Saptoe, an accused person who appeared in the lower court with accused 13 and 14 on charges of Murder, Attempted Murder, Possession of a Firearm and Unlawful Possession of Ammunition. These offences constitute counts 75 to 78 in this matter. Delano Saptoe, who is now deceased, is not and has never been an accused person in this trial. Ostensibly, he could have been charged with the other accused before this Court, but he was not charged due to his untimely demise before the twenty accused were charged and transferred to this Court for trial.

[3] The State applied that Delano Saptoe's warning statement be admitted as evidence against accused 3 and 14. Mr De Villiers and Mr Klopper, the legal representatives of accused 3 and 14, respectively, opposed the State's application and submitted that the warning statement of Mr Saptoe is inadmissible against accused 3 and 14, respectively. The two defence counsels submitted that the deceased's statement is inadmissible because it amounts to an admission by an accused, which is inadmissible against a co-accused. Both counsels asserted that in terms of section 3(2) of the Hearsay Act, the warning statement of Mr Saptoe, as an accused at the time of making the statement, would have been inadmissible against accused 3 and 14 as Mr Saptoe's co-accused. To this end, both counsels submitted that the contested statement cannot be rendered admissible in terms of section 3(1)(c) of the Hearsay Act.

Summary of the impugned statement

[4] In the disputed statement, the deceased (Delano Saptoe) implicated accused 3 and 14. Mr Saptoe stated that on a date and time he could not remember, he was with Lorenzo Coetzee, also known as 'Draad' (accused 3), and Wandisile, also known as 'the one' (accused 14), and they went through a footpath that leads to another street. He then remained seated on the poles on the footpath and accused 3

and 14 proceeded further. He then saw two known young men (Denver and Theo) on the opposite side of the footpath. Mr Saptoe stated that he did not know that accused 3 and 14 had a firearm in their possession.

[5] According to him, accused 3 and 14 went down the footpath in the direction of Denver and Theo. After that, he heard several gunshots going off. When he observed, he saw accused 14 holding a black firearm in his hand, which had a brown handle. Thereafter, accused 3 and 14 came back running, passed him and told him to run away as the people they were shooting at would come and shoot him. The witness stated that he also ran away. After that, they separated, and that was the last time he saw accused 3 and 14. Mr Saptoe asserted further that he did not shoot anyone, but it was accused 3 and 14 who were shooting.

Principal submissions by the parties

[6] Mr Damon argued on behalf of the State that the deceased is not an accused person in this matter and further that the deceased was never part of these proceedings at any stage. From the evidence, so the contention proceeded, the charges of Murder, Attempted Murder, Possession of an Unlicensed Firearm and Unlawful Possession of Ammunition that the deceased and accused 3 and 14 faced in the lower court were either withdrawn or struck off the roll. Mr Damon submitted that Mr Saptoe passed away in January 2016, and the indictment regarding this matter was formally served on all twenty accused in 2018, after Mr Saptoe's passing. Simply put, Mr Damon contended that to the extent that the deceased was not charged together with the accused in this matter, his statement can be admitted in terms of section 3(1)(c) of the Hearsay Act.

[7] More pertinently, Mr Damon contended that the deceased's warning statement cannot be admitted in terms of section 219A or section 217 of the CPA because it cannot be admitted into evidence as either a confession or an admission against any accused in these proceedings. However, in his view, nothing in law prevents the deceased's warning statement from being admitted as hearsay evidence against the accused. Mr Damon further contended that if the Court finds that Mr Saptoe's statement was made by a co-accused, it should be regarded as an

executive statement rather than a narrative statement. Consequently, it would be admissible against accused 3 and 14, given that it was made in furtherance of a common purpose or conspiracy.

[8] In augmenting his argument, Mr Damon referred the Court to the Constitutional Court decision in *S v Mhlongo; S v Nkosi*,¹ where it was held that at common law, there is an exception to the exclusion of extra-curial statements of co-accused: if the statement constitutes an 'executive statement' by an accused, it may be admissible against a co-accused if it was made in furtherance of a common purpose or conspiracy. Counsel drew the court's attention to the fact that there must be other evidence (*aliunde*) to establish the existence of a common purpose before the statements can be taken into account. To this end, Mr Damon argued that the deceased, Mr Saptoe, was aware that the shooting was part of a prior agreement between members of the Terrible Josters from Delft South, who were at war with members of the Thug Lifes gang. He pointed out that the victim who was shot was a member of the Thug Lifes gang. Counsel also emphasised that the Terrible Josters were aggressively seeking to expand their territory for selling drugs.

[9] In all circumstances, so the contention proceeded, the evidence *aliunde* indicates that the statement amounts to an 'executive statement' of the three Terrible Josters gang members acting in common purpose. Counsel implored the Court to admit the warning statement in question as evidence in this trial against accused 3 and 14.

[10] Mr De Villiers, on the other hand, counsel for accused 3, opposed the application and submitted that the deceased was an accused at the time when he made the statement. According to Mr De Villiers, the deceased was the co-accused of accused 3 and 14 in Delft Cas 1174/11/2014 (Counts 75-78 in this matter). Notably, counsel questioned the constitutionality of the statement. He asserted that the deceased had a constitutional right in terms of s 35(2)(b) of the Constitution to consult with a legal representative before giving a statement. Mr De Villiers further submitted that Mr Saptoe was duly informed of his rights and that the deceased

¹ 2015 (8) BCLR 887 (CC) para 39.

clearly indicated that he wished to consult with a legal representative before he could decide to give a statement. Despite the deceased's request to first consult with a legal representative, the police official proceeded to take a warning statement from him. Mr De Villiers asserted that the deliberate infringement of Mr Saptoe's constitutional right to first consult with a legal representative should render the warning statement inadmissible. Counsel implored the Court to rule against the admissibility of this statement.

[11] Mr Klopper's argument on behalf of accused 14 was, in substance, aligned with the submissions of Mr De Villiers. However, Mr Klopper also submitted that the fact that Mr Saptoe is deceased does not change his status for the purpose of tendering his warning statement as evidence. Counsel emphasised that at the time of making the statement, the deceased was a suspect or co-accused, and the law applicable to the admission of such a statement should apply. Apart from applying the principles of hearsay evidence, the statement remains that of a co-accused, which the State wants to prove as either direct or corroborative evidence against accused 14. Mr Klopper submitted that the statement of Mr Saptoe, which is mostly exculpatory in nature, is not an executive statement. In Counsel's view, the deceased's warning statement contains several admissions, and it is a narrative statement. It is therefore not admissible against a co-accused. Mr Klopper respectfully prayed the Court not to admit the warning statement as evidence in this matter.

Issues to be decided

[12] The central question to consider is whether a warning statement made by Mr Saptoe who was charged together with accused 3 and 14 in the lower court can be used against them in a subsequent trial in the High Court in an instance where the maker of the warning statement (Mr Saptoe) is not charged together with accused 3 and 14 in this court in respect of the same offence.

Discussion

[13] For the sake of clarity, I recap the facts as they are germane to the order that I make hereunder. It is common cause that the deceased, Delano Saptoe, was charged with accused 3 and 14, and they appeared together in the lower court and applied for bail. The matter was subsequently withdrawn. In January 2016, Delano Saptoe passed away. The indictment in respect of the present matter against all twenty accused was formally served upon them in 2018, after the passing of Delano Saptoe. It is also common cause that Delano Saptoe was never part of these proceedings at any stage.

[14] When the matter was enrolled in this Court under the Prevention of Organised Crime Act 121 of 1998 (POCA), none of the three suspects, namely accused 3, 14 and Delano Sptoe, were co-accused. It is on this basis that the State argues that Delano Saptoe is not an accused person, and as such, the common law prohibition that an extra-curial statement of an accused person is inadmissible against a co-accused is not applicable in this matter, as Delano Saptoe was not an accused person in this matter. For the reasons that follow, I do not agree with the State's proposition.

[15] As a point of departure, it is necessary to emphasise the fact that, at common law, an extra-curial statement of an accused was inadmissible against the co-accused. It is only in two exceptional situations that an extra-curial statement may be admitted not only as evidence against its maker but also as evidence against a co-accused implicated thereby: the first is where the co-accused, by his words or conduct, accepts the truth of the statement to make all or part of it a statement of his own. The second exception applies in extra-curial statements made by a co-accused in the execution or furtherance of a common purpose. Such statements are admissible in evidence against any other party involved in the collusion.²

[16] The common law rule that an extra-curial statement by an accused is inadmissible against a co-accused was relaxed in *S v Ndhlovu and Others*.³ In that case, the Supreme Court of Appeal held that an extra-curial admission, but not a

² *R v Miller and Another* 1939 AD 106 at 115; See also *R v Mayet* 1957 (1) SA 492 (A) at 494F.

³ 2002 (2) SACR 325 (SCA). (*Ndhlovu*)

confession, by an accused is admissible against a co-accused if: the requirements of s 3 of the Hearsay Act, dealing with the admission of hearsay evidence, are satisfied; no constitutional principles are offended; and it is in the interest of justice to admit such evidence. However, in *S v Litako and Others*,⁴ the Supreme Court of Appeal took a different approach from *Ndhlovu* and confirmed the common law prohibition against the use of extra-curial statements against co-accused. The Court held that s 219A of the CPA allows an admission to be admitted against its maker only and is silent regarding other persons.

[17] Subsequently, in *S v Mhlongo; S v Nkosi*,⁵ the Constitutional Court found that the interpretation adopted in *Ndhlovu*, that extra-curial admissions but not a confession, are admissible against co-accused in terms of s 3(1)(c) of the Hearsay Act, created the differentiation that unjustifiably limits the s 9(1) right of accused implicated by such statements. The Court concluded that the pre-*Ndhlovu* common law position, which held that extra-curial confessions and admissions by an accused are inadmissible against a co-accused, must be restored.

[18] Recently, in *Mawanda Makhala and Another v Director of Public Prosecutions, Western Cape*,⁶ the Constitutional Court embraced the reasoning of the Supreme Court of Appeal in *Litako*, holding that s 219A of the CPA allows an admission to be admitted against its maker only and is silent regarding other persons. The Court held that this section does not contemplate extra-curial admissions being tendered as evidence against any other accused and found that such reasoning was sound.

[19] In the present matter, the warning statement was made by the deceased whilst he was an accused person appearing in the lower court with accused 3 and 14. It is correct that he never appeared in this matter or was charged with the twenty accused under POCA. As correctly pointed out by Mr Klopper, the fact that the deponent is deceased does not alter his status for the purpose of tendering his statement as evidence. At the time of making the warning statement, the deceased was a suspect or a co-accused of accused 3 and 14. The law applicable to the

⁴ *S v Litako and Others* 2014 (2) SACR 431 (SCA).

⁵ 2015 (8) BCLR 887 (CC) para 38.

⁶ 2025 (1) SACR 275 (CC) para 74.

admission of such a statement against accused 3 and 14 should apply. Mr Saptoe was charged together with accused 3 and 14 on the same charges as accused 3 and 14 in the lower court. The State now seeks to use his warning statement against the remaining accused. In my view, the statement remains that of a co-accused.

[20] Furthermore, the fact that the deceased did not appear with the twenty accused in this matter is inconsequential. This Court accepted several statements of state witnesses in terms of section 3(1)(c) of the Hearsay Act who are deceased and could not testify in this matter. The status of those witnesses whose statements were admitted in terms of s 3(1)(c) of the Hearsay Act did not change because they did not testify and are now deceased. They are considered as witnesses even though they are deceased and did not testify. Their status is considered and determined by their position at the time of making a witness statement.

[21] Similarly, Delano Saptoe's status as a co-accused of accused 3 and 14 should accordingly be determined at the time he made the statement. The warning statement was clearly made by an accused person or suspect who, in this instance, appeared as a co-accused with accused 3 and 14 in the lower court. Consequently, based on the legal principles discussed above, the impugned statement of Delano Saptoe is inadmissible against accused 3 and 14.

The common law exception - An *Executive* or a *Narrative* Statement?

[22] Mr Damon asserted that if the Court determines that Mr Spatoe was indeed an accused person and that his warning statement should be excluded in accordance with s 219A of the CPA, the State maintains that the statement falls within the common law exception. This exception has been succinctly articulated by the Constitutional Court in *S v Mhlongo; S v Nkosi*,⁷ as follows:

‘At common law, there is an exception to the exclusion of extra-curial statements of co-accused: if the statement constitutes an “executive statement” by an accused, it may be admissible against a co-accused if it was

⁷ 2015 (8) BCLR 887 (CC).

made in furtherance of a common purpose or conspiracy. There must be other evidence (*aliunde*) to establish the existence of a common purpose before the statements can be taken into account. The State would have us pronounce on whether this common law exception survives a finding of constitutional invalidity of the admissibility of extra-curial statements of an accused against a co-accused.⁸

[23] The State asserts that the warning statement by the deceased is an 'executive statement' in that it was made in the furtherance of a common purpose or conspiracy, and as such it is admissible against accused 3 and 14 as an exception to the exclusion of extra-curial statement of co-accused. Mr Damon posited that the statement of Delano Saptoe is not a narrative statement as it was made in furtherance of a common purpose with accused 3 and 14. As it will be demonstrated below, this argument, with respect, is mistaken and does not square up with the legal position on the admission of extra-curial statements made by one accused against another in furtherance of a common purpose or conspiracy.

[24] To give context to the view I take on this issue, it is necessary to draw a distinction between *executive* and *narrative* statements. Executive statements are statements made in furtherance of a common purpose.⁹ In other words, to be an executive statement, the statement must form part of the acts done in the commission of the crime. For example, if A, B and C are engaged in a common purpose, and A makes a statement in furtherance of that common purpose, it will be admissible against B and C.¹⁰ This also extends to verbal declarations made during the commission of an offence where the perpetrators act in cahoots with each other.

[25] For instance, if **A** and **B** burst into a bank and, as agreed by both of them, **A** exclaims 'this is a robbery; we will shoot anyone who resists us or disobeys what we demand', then that incriminating statement, although it was actually uttered by **A**, must be attributed to **B** as well, as it was part of the mandate between them and was

⁸ At para 39. See also *S v Ffrench-Beytagh* 1972 (3) SA 430 (A) at 455F.

⁹ *State v Bondi* 1962 (4) SA 671 (A) at 678D-F.

¹⁰ See Schwikkard PJ and Van Der Merwe SE *Principles of Evidence* (2015) 4 ed at 345. See also *R v Mayet* 1957 (1) SA 492 (A); *S v Ffrench-Beytagh* 1972 (3) SA 430 (A) at 432 and 433.

executed in furtherance of the common purpose to rob.¹¹ Such a statement amounts to an 'executive statement'.

[26] Narrative statements, on the other hand, are statements which are not made in furtherance of the common purpose but, rather, as an account or admission of past events, in which case they are not admissible against anyone other than the maker of that statement.¹² Narrative statements are not admissible against a co-accused because admissions in general are not vicariously admissible but may be admissible against the person making them.

[27] Therefore, acts and declarations in furtherance of a common purpose are receivable when they are relevant. They are regarded as relevant when they are executive statements. However, they are inadmissible when they constitute an account or admission of events past, and not made in furtherance of a common purpose, that is narrative statements.¹³ An admission contained in narrative is inadmissible precisely because admissions are not, in general, vicariously admissible; but they may be received against the persons making them. Notably, before executive statements can be admitted into evidence, the conspiracy and the accused's participation in it must be proved.¹⁴

[28] In deciding these preliminary issues, the Court is allowed to consider the statements of the alleged conspirators.¹⁵ There must be some evidence *aliunde* establishing the existence of the common purpose before the relevant statements can be considered at the end of the case.¹⁶

[29] *R v Blake and Tye*,¹⁷ provides an example of the distinction drawn between executive and narrative statements. The accused were charged with a conspiracy to pass goods through customs without paying duty. Tye had made entries

¹¹ See Zeffertt DT *South African Law of Evidence* (2017) at 534.

¹² *S v Banda and Others* 1990 (3) SA 466 (B) at 503D.

¹³ Zeffertt DT, Paizes AP & Skeen A *The South African Law of Evidence* (2003) at 444.

¹⁴ *S v Sibanda* 1993 (1) SACR 691 (ZS).

¹⁵ *R v Mayet* 1957 (1) SA 492 (A) at 494.

¹⁶ *S v Ffrench-Beytagh* 1972 (3) SA 430 (A).

¹⁷ 1844 6 QB 126 (UK).

incriminating both himself and Blake in two books. The entry in one book was a necessary part of the fraud, whereas the entry in the other book was solely a record for his own private purposes. It was held that the first entry was admissible against Blake as something done in the furtherance of the common purpose (an executive statement). However, the second entry merely constituted evidence against Tye because it did not advance the common purpose (a narrative statement).¹⁸

[30] Significantly, a statement made after arrest does not fall within this exception as the common purpose no longer exists. In *S v Mangena and Another*,¹⁹ the court held that the reception of such evidence is premised upon a rational and logical deduction that depends for its efficacy on the statement being made in furtherance of the common purpose. In addition, the court found that confining the rule in this manner precludes the reception of an extra-curial statement made by one conspirator against the other after his arrest. The court observed that it is a rule that appears to be of general application in other common-law jurisdictions, as evident from the United States Supreme Court cases.²⁰ In the court's view, these cases from the United States Supreme Court confirm the exclusion of a statement made by one conspirator against another at a time when the objectives of the conspiracy are no longer pursued or capable of being pursued.²¹

[31] For the sake of certainty, it is essential to emphasise that this common law exception remains an integral part of our legal system. In *S v Mhlongo; S v Nkosi*,²² the Constitutional Court was invited to determine whether this common law exception that allows for the admission of extra-curial statements made by an accused, in furtherance of a common purpose, would infringe the Constitution when used against a co-accused. The Court declined the invitation and found that it was not necessary to determine this issue as the facts before it in that matter did not arise.

¹⁸ Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 4 ed at 345.

¹⁹ *S v Mangena and Another* 2012 (2) SACR 170 (GSJ) para 54.

²⁰ *Krulewitch v United States* 336 US 440 (1949) (69 S Ct 716; 93 L Ed 790; 1949 US 3006); and *Wong Sun v United States* 371 US 471 (1963) at 490.

²¹ *S v Sibanda* 1993 (1) SACR 691 (ZS).

²² Note 1 above, at paras 39 and 40.

[32] Notwithstanding, from the principles enunciated above, it is precisely evident that the warning statement of Mr Saptoe was made long after the offence was committed. At the time the statement was made, the objectives of the alleged conspiracy as submitted by the State were no longer capable of being pursued. As I see it, the statement of the deceased, which is mostly exculpatory in nature, is not an executive statement. Mr Saptoe stated that he heard and witnessed gunshots and saw a firearm in the possession of a co-accused. According to him, he was not aware that there was a firearm present until he saw it. He further stated that he did not shoot anyone, but the people who were with him did, and he makes no reference to a common goal or common purpose. To my mind, this statement, which contains a number of admissions, is a narrative statement and is therefore not admissible against a co-accused.

[33] Finally, there is, in any event, another reason why the Court must not accept this warning statement. As correctly pointed out by Mr De Villiers, this warning statement was made in conflict with Mr Saptoe's constitutional right to legal representation. At the time of making the statement, Mr Saptoe was duly informed of his constitutional right to legal representation, and he indicated that he wished to consult with a legal representative before he could decide to give a statement. Despite Mr Saptoe's request to first consult with a legal representative, the police official proceeded to take a warning statement from him. To this end, I agree with the views expressed by the defence that the deliberate infringement of Mr Saptoe's right to first consult with a legal representative renders the statement inadmissible.

Order

[34] Consequently, given all these considerations, the State's application for the admission of the warning statement of Delano Saptoe against accused 3 and 14 is hereby dismissed.

LEKHULENI JD
JUDGE OF THE HIGH COURT

APPEARANCES:

For the State: Adv Damon

Instructed by: NPA

For Accused 3: Adv De Villiers

Instructed by: Legal Aid South Africa

For Accused 14: Adv Klopper

Instructed by: Legal Aid South Africa