CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 237/22

In the matter between:

MAWANDA MAKHALA First Applicant

VELILE WAXA Second Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE Respondent

Neutral citation:	*Mawanda Makhala and Another v Director of Public Prosecutions, Western Cape* [2024] ZACC 28
Coram:	Madlanga ADCJ, Bilchitz AJ, Chaskalson AJ, Dodson AJ, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J.
Judgments:	Tshiqi J (majority): [1] to [76] Bilchitz AJ (concurring): [77] to [145]
Heard on:	15 February 2024
Decided on:	20 December 2024
Summary:	Criminal Procedure Act 51 of 1977 — admissibility of recanted section 204 statements without other incriminating evidence — statements inadmissible

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Western Cape Division of the High Court, Cape Town):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and substituted as follows:

   "3.1 The appeal is upheld.

   3.2 The appellants' convictions and sentences are set aside."

JUDGMENT

TSHIQI J (Madlanga ADCJ, Majiedt J, Mathopo J, Mhlantla J and Theron J concurring):

Introduction

[1] This matter concerns an application for leave to appeal against the judgment and order of the Supreme Court of Appeal dated 18 February 2022. The applicants were convicted in 2021 in the High Court, Western Cape, Eastern Circuit Local Division (Knysna), of murder, possession of an unlicensed firearm and unlawful possession of ammunition. The applicants were each sentenced to life imprisonment for the murder, and five years' imprisonment on the remaining counts, which were ordered to run concurrently. The convictions and sentences relate to the murder of Mr Mzukisi Molosi (Mr Molosi) in 2018. At the time of his murder, Mr Molosi was a councillor at the Knysna Municipal Council (Council).

Background

[2] The first applicant, Mr Mawanda Makhala (Mr Makhala), is a former clerk in the housing department in the Knysna Municipality. The second applicant, Mr Velile Waxa (Mr Waxa), is a former independent councillor of the Knysna Municipality. On 23 July 2018, the deceased, Mr Molosi, attended a school governing body meeting at Concordia High School, in his area of residence. After the meeting, he was given a lift and dropped off close to his home. Whilst walking towards his home, he was shot and killed.

[3] The police officers appointed to investigate the murder received information that the first applicant was seen at the Pop Inn Tavern in Concordia, Knysna, on the weekend before the murder, with two other persons, one of whom was his brother, Mr Luzuko Makhala. On 1 August 2018, one of the police officers, Sergeant Wilson, traced Mr Luzuko Makhala and the latter confirmed that he was in the area during the weekend before the murder. Mr Luzuko Makhala said that he had given a lift to an unknown man in the Eastern Cape and that he indeed drove to Knysna over the weekend before the murder. Subsequently, Sergeant Wilson viewed camera footage of the N2 highway, which showed that Mr Luzuko Makhala's vehicle was travelling from Cape Town to Knysna on 22 July 2018, a day before the murder.

[4] Confronted with this evidence, according to Sergeant Wilson, Mr Luzuko Makhala indicated that he wished to recount his part in the murder of Mr Molosi. His constitutional rights were explained to him. He was also informed that the plan was to utilise his evidence as a witness under section 204 of the Criminal Procedure Act[1] (CPA).[2]

[5] On 13 August 2018, Mr Luzuko Makhala gave his first statement to Colonel Ngxaki, a policeman of approximately 25 years' experience. The following

[1] 51 of 1977.

[2] Section 204 of the CPA permits a witness to give incriminating evidence for the prosecution. Upon testifying frankly and honestly, such a witness may be discharged from prosecution by the court.

was recorded in the first statement: the second applicant, Mr Waxa, was an independent councillor of the Council. Mr Waxa sought the services of a hitman to kill Mr Molosi, a councillor representing the ANC. The first applicant, Mr Makhala, asked whether his brother, Mr Luzuko Makhala, knew of a person who could render such services. Mr Luzuko Makhala did. He procured the services of the third accused in the trial, Mr Vela Dumile (Mr Dumile). Mr Luzuko Makhala introduced Mr Dumile to Mr Waxa. He also brought Mr Dumile from Cape Town to Knysna to kill Mr Molosi. In addition, Mr Luzuko Makhala facilitated the killing by ensuring that he pointed out the home of Mr Molosi to Mr Dumile prior to the shooting. Thereafter, Mr Dumile shot Mr Molosi. Mr Luzuko Makhala then transported Mr Dumile back to Cape Town.

[6] Mr Luzuko Makhala gave a second statement to Sergeant Mdokwana. He recounted that on 18 July 2018, he had received a call from Mr Waxa, who said that he would send him (Mr Luzuko Makhala) R1 000 to purchase petrol to transport Mr Dumile to Knysna. On 20 July 2018, Mr Luzuko Makhala withdrew the money, and Mr Waxa called him to confirm whether he had received it. Sergeant Mdokwana then asked Mr Luzuko Makhala whether he would confirm this in a statement. He agreed, and this was done. Mr Luzuko Makhala also handed over his Nokia cell phone to the police.

[7] The first and second statements given by Mr Luzuko Makhala incriminated him, the two applicants and Mr Dumile in the murder of Mr Molosi. As will be apparent herein below, the trial court admitted the first and second statements into evidence and relied upon these statements, along with circumstantial evidence, to convict the applicants of murder and the related counts.

Litigation history

High Court

[8] The applicants appeared in the High Court, Western Cape, Eastern Circuit Local Division. Mr Luzuko Makhala was amongst the witnesses called

by the State to give evidence. Without forewarning to the prosecution, Mr Luzuko Makhala recanted the contents of his first and second statements that incriminated him and the applicants in the murder. The prosecution brought an application to have him declared a hostile witness.

[9] The trial court, after explaining what was required from the witness and the consequences of the application by the State, did so.[3] After he was declared a hostile witness, Mr Luzuko Makhala testified. He said that the incriminating portions of the statements were fabrications that the police forced him to record in the statements. He claimed that he was intimidated by the police and threatened with assault and as a result, made statements that he thought the police wanted from him.

[10] In considering the admissibility and probative value of the statements, the trial court, firstly, considered whether Mr Luzuko Makhala was the principal source of the statements and whether he was forced by the police to make the statements and did not do so freely and voluntarily. The trial court found that the evidence of Colonel Ngxaki and Sergeant Mdokwana, who took down the statements, was overwhelmingly convincing and corroborated by Sergeant Wilson. Mr Luzuko Makhala was found to be the author, originator and principal source of the two statements and that they were made freely and voluntarily.

[11] Secondly, as a result of the fact that Mr Luzuko Makhala had recanted the statements, the trial court considered whether the first and second statements should be admitted into evidence in terms of section 3(1) of the Law of Evidence Amendment Act[4] (Hearsay Act). Upon a consideration of the factors listed in section 3(1)(c) of the Hearsay Act, the trial court admitted the two statements into evidence. Among the factors considered were their probative value and the caution that was warranted before admitting the statements, given Mr Luzuko Makhala's

[3] *S v Makhala* [2019] ZAWCHC 182.

[4] 45 of 1988.

participation in the commission of the crimes. The trial court considered the risk of falsity to be minimal. Furthermore, the trial court reasoned that the contents of the statements included information otherwise unknown to the police.

[12] The trial court further held that aspects of the statements were also confirmed by independent and objective circumstantial evidence, which it held, supported the probative value of the statements.

[13] The trial court also assessed the evidence given by the applicants, then the accused at the trial, and the witness who testified on behalf of the third accused. The evidence of the applicants was found not to be reasonably possibly true and was rejected as false. The trial court convicted the applicants on all three counts. The admission of the first and second statements into evidence by the trial court was central to the convictions.

Supreme Court of Appeal

[14] The central question before the Supreme Court of Appeal was whether the trial court was correct in relying on the first and second statements made by Mr Luzuko Makhala to convict the applicants for Mr Molosi's murder. It was common cause that without recourse to the statements, the applicants' convictions could not stand.

[15] The Supreme Court of Appeal wrote two judgments. In a split of four to one, the majority (per Meyer AJA) concurring with the order of the minority judgment (per Unterhalter AJA), dismissed the appeal.

[16] The Supreme Court of Appeal considered whether the two statements were obtained in violation of Mr Luzuko Makhala's rights under section 35(5) of the Constitution or in breach of the common law. The Supreme Court of Appeal held that the trial was not rendered unfair by the admission of the statements as envisaged in the Constitution, nor was there anything done that was detrimental to the administration of

justice in breach of the common law. It also found that the trial court properly applied the cautionary rule applicable to the evidence of an accomplice, and that there was sufficient corroborative evidence to convict the applicants.

[17] The Supreme Court of Appeal also found that Mr Luzuko Makhala had chosen to assist the police. His position as a potential witness for the prosecution was explained to him, as well as the fact that reliance would be placed on his statement. According to the Supreme Court of Appeal, he made the statement voluntarily. It also found that Mr Luzuko Makhala's testimony that he was coerced by the police into making the statements was not true. It concluded that there was no reason to revise the assessment of this evidence by the trial court.

[18] The Supreme Court of Appeal held that there was no failure on the part of the trial Judge to caution himself against the frailties of the evidence of Mr Luzuko Makhala as an accomplice, nor in his declaration of Mr Luzuko Makhala as a hostile witness. The Supreme Court of Appeal further held that the trial Judge correctly found that there was sufficient evidence to corroborate the statements of Mr Luzuko Makhala and that, upon consideration of all the evidence, the State had discharged its burden of proof.

[19] The Supreme Court of Appeal's approach diverged on the applicants' submission to the effect that the trial court should have considered whether justice would be served by reliance on hearsay evidence, which according to the applicants was the key evidence on which they were convicted. The minority judgment of Unterhalter AJA held that the statements were not hearsay and were, therefore, not subject to the provisions of section 3(1)(c) of the Hearsay Act. This, according to the minority judgment, was because Mr Luzuko Makhala actually testified. He was not an absent declarant. The minority judgment held:

> "Where the witness confirms making the extra–curial statement, [as was the case in this matter] but denies its truthfulness, the witness is available to be cross–examined so as to test that denial. Here the probative value of the statement does depend upon the

witness called to give evidence. The court may then attribute to the statement the evidential value it warrants after the witness who made the statement has been tested under cross–examination. So too, where the witness confirms making the extra–curial statement and its correctness, there seems little reason to exclude the statement if the evidence can then be tested under cross-examination."[5]

[20] The minority judgment continued:

"However, here too, in my view, cross–examination of the witness will ordinarily bring to light the circumstances in which the statement was made and its reliability. Cross-examination is the forensic means by which the evidential value of the statement may be ascertained. Admitting the extra–curial statement does not curtail cross-examination or blunt its value. It is then for the trial court to ascertain the evidential value of the statement made by the witness.

In my view, the correct interpretation of the Hearsay Act is that once a court has determined that an extra–curial statement was made by a witness called to testify, the extra–curial statement is not hearsay, and it may be admitted without determining whether it is in the interests of justice to do so by recourse to section 3(1)(c). Admitting the extra–curial evidence does not render the right to cross–examine nugatory. On the contrary, cross–examination of the witness must be given full rein to permit the trial court to determine whether the extra–curial statement has any value at all and, if so, what weight should be attached to it."[6]

[21] The minority judgment concluded that the evidence was reliable and there were no risks in admitting it.

[22] The majority concurring judgment held that the application of section 3(1)(c) of the Hearsay Act in relation to inconsistent extra–curial statements of a section 204 witness is sound. It reasoned that in this case it was not dealing with the admissibility of extra–curial hearsay admissions against co–accused persons in criminal

[5] *Makhala v The State* [2021] ZASCA 19; 2022 (1) SACR 485 (SCA); [2022] 2 All SA 367 (Makhala SCA) at para 58.

[6] Id at paras 63-4.

cases, but with a situation where a prosecutor calls a section 204 witness to testify on the strength of the extra–curial statement, and the state witness then makes an about turn in the witness box and testifies in favour of the defence, or develops a case of amnesia. The question, according to the majority, was whether a trial court has a discretion in terms of section 3(1)(c) of the Hearsay Act to admit the evidence if it is of the opinion that it is in the interests of justice to do so. It held that the Hearsay Act allows a more flexible discretionary approach to the admissibility of hearsay evidence than the common law. In deciding whether hearsay evidence should be admitted in the interests of justice, so continued the majority, the court is not limited to the factors listed in section 3(1)(c)(i) to (vii) of the Hearsay Act, but may have regard to, any other factor which should in the opinion of the court be taken into account. The Supreme Court of Appeal dismissed the appeal.

This Court

Jurisdiction and leave to appeal

[23] The applicants in this Court continue to challenge their convictions. They base their challenge on the fact that such statements are the only evidence which implicate the applicants. Although the case against the applicants ultimately turned on the facts, the legal question that arises is whether there can be reliance on a section 204 statement to convict an accused, in the absence of sufficient incriminating evidence, where a section 204 witness has recanted. A subsidiary question that both the trial court and the Supreme Court of Appeal grappled with, is whether such a statement is hearsay evidence if the section 204 witness is called to testify, and whether the Hearsay Act is applicable in such circumstances. The High Court held that a court can place reliance on such a statement, and the Supreme Court of Appeal, although split on the reasoning around the application of the Hearsay Act, held that a court can rely on a section 204 statement in these circumstances to convict an accused if it is in the interests of justice to do so.

[24] The question about the admissibility of the section 204 statement transcends the interests of the applicants. It is not controversial that the use of section 204 witnesses serves as an important prosecutorial and crime control tool for putting an end to organised crime and to criminality generally. Its use and the circumstances in which it is accepted in order to convict accused persons will impact other matters. Its use therefore raises an arguable point of law of general public importance.

[25] The admission of a section 204 statement may also affect the fair trial rights of an accused in terms of section 35 of the Constitution, if the accused is convicted on the basis of such a statement, and there is no other sufficient evidence to sustain the conviction.

[26] It is in the interests of justice for this Court to clarify these legal principles. Leave to appeal is thus granted.

Submissions on the merits

The applicants' submissions

[27] The applicants challenge the admissibility of the section 204 statements, which, they argue, constitutes the only evidence relied on by the trial court to convict and sentence them.

[28] The applicants submit that the discretion to admit hearsay evidence, if it is in the interests of justice to do so, should be subject to the common law and section 219 of the CPA which provides:

> "No confession made by any person shall be admissible as evidence against another person."

[29] The applicants further contend that the first section 204 statement made by Mr Luzuko Makhala to Colonel Ngxaki constitutes a confession, which in terms of section 219 of the CPA cannot be used as evidence to incriminate anyone but the maker.

They further contend that the second statement made by Mr Luzuko Makhala to Sergeant Mdokwana amounts to an admission and should also not have been admitted. In support of these contentions, the applicants cite *Mhlongo*[7] which held that extra–curial admissions and confessions are only admissible against the maker.

[30] The applicants further argue that when Mr Luzuko Makhala later recanted his statements, he deprived them of the opportunity to challenge the evidence contained in the statements. They argue that this was a violation of section 35(3)(i) of the Constitution, which provides for the right to challenge and adduce evidence. As such, the applicants submit, their right to a fair trial, envisaged in section 35(3) of the Constitution, was violated.

[31] The applicants support this argument by relying on *Libazi*,[8] which said:

> "The right to challenge adverse evidence is a foundational component of the fair trial rights regime decreed by our Constitution in section 35(3). Cross-examination is integral in the armoury placed at the disposal of an accused person to test, challenge and discredit evidence tendered against him."[9]

[32] The applicants also challenge the declaration of Mr Luzuko Makhala as a hostile witness. They argue that, for a witness to be declared hostile, there must be proven *animus* (intention) to recant and prejudice the State's case. The applicants refer to the Supreme Court of Appeal minority judgment, wherein Unterhalter AJA held:

> "The mere fact that a witness gives evidence that is unfavourable to the party calling the witness does not render the witness hostile."[10]

[7] *Mhlongo v S; Nkosi v S* [2015] ZACC 19; 2015 (2) SACR 323 (CC); 2015 (8) BCLR 887 (CC).

[8] *S v Libazi* [2010] ZASCA 91*;* 2010 (2) SACR 233 (SCA).

[9] Id at para 11.

[10] Id at para 88.

[33] Therefore, the applicants submit that Mr Luzuko Makhala's repudiation of the statements does not suggest that the witness had *animus* to prejudice the State and that his recantation, although unexpected and unfavourable to the State, did not render him a hostile witness.

The State's submissions

[34] The State submits that section 204 statements generally serve as prosecutorial and crime control tools useful for putting an end to organised crime.

[35] In support of this submission, the State refers to *Mahomed*:[11]

> "[T]he intention behind section 204 is plain. There are many cases in which offences are perpetrated by two or more offenders without there being any eyewitnesses. In these cases, there is often no circumstantial evidence on which a sufficiently certain conclusion as to the offenders' guilt can be reached. The section enables the State to use one of the perpetrators as a witness to procure the conviction of the other on a principle akin to that of a bird in the hand being worth two in the bush. To achieve its objective, the State will invariably have to ask the co–perpetrator questions, the answers to which may incriminate him. To allow him to shelter behind his right to refuse to answer such questions would obviously frustrate the whole purpose of calling him to testify. So, the section deprives him of that right, in express terms. The *quid pro quo* for this deprivation is a discharge from prosecution. . ."[12]

[36] The State further submits that the statements made by Mr Luzuko Makhala do not constitute confessions as they are not statements that adversely affect him and therefore fall outside the ambit of section 217 of the CPA. The statements, so argues the State, are also not admissions and therefore fall outside the ambit of section 219A of the CPA.

[11] *Mahomed v Attorney-General of Natal* 1998 (1) SACR 73 (N) (*Mahomed*).

[12] Id at 74D-G.

[37] The State argues that calling Mr Luzuko Makhala to the stand and cross examining him was essential for "the court's assessment of the probative value and reliability of his prior statements". It submits that, without the admissibility of the witness statements, "the convictions of the applicants would not have been sustainable".

Issues

[38] The issues in this application are: a) whether a court can convict an accused on the basis of a section 204 statement, if a section 204 witness has reneged on the statement and there is no other evidence implicating the accused in the commission of the crime; b) a related question that both the trial court and the Supreme Court of Appeal grappled with, and which we have to determine, is whether such a statement is hearsay evidence, if the section 204 witness is called to testify, and whether the Hearsay Act is applicable in such circumstances.

The law relating to section 204 statements

[39] Section 204 of the CPA provides:

> "(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor—
>
> (a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness—
>
> (i) that he is obliged to give evidence at the proceedings in question;
>
> (ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;
>
> (iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;

(iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him—

(a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) the court shall cause such discharge to be entered on the record of the proceedings in question.

(3) The discharge referred to in subsection (2) shall be of no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising out of such preparatory examination, answer, in the opinion of the court, frankly and honestly all questions put to him at such trial, whether by the prosecution, the accused or the court.

(4)(a) Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence.

(b) The provisions of this subsection shall not apply with reference to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 319(3) of the Criminal Procedure Act, 1955 (Act 56 of 1955)."

[40] As argued by the State, section 204 statements generally serve as useful prosecutorial and crime control tools for putting an end to organised crime and criminality generally. As stated in *Mahomed*,[13] in cases where "no circumstantial evidence on which a sufficiently certain conclusion as to the offenders' guilt can be reached", it enables "the State to use one of the perpetrators as a witness to procure the conviction of the other on a principle akin to that of a bird in the hand being worth two in the bush".[14]

[41] The protection afforded to the witness is that he may not be charged with the offence if he testifies honestly and frankly and if he gives evidence and answers any question put to him, whether by the prosecution, the accused or the court, even if the reply to the question may incriminate him with regard to the offence.

[42] In *Kuyler* the Court summed up the relationship between the State and a section 204 witness:

> "The pre-trial agreement is self-serving; the prosecution undertakes to desist in pursuing a criminal sanction against the co-accused and the co-accused offers truthful testimony in the case for the State.
>
> The agreement changes the status of an accused to a witness for the State.
>
> This is where the relationship of the State with the witness ends; the prosecutor does not become the attorney or advocate of the 204-witness itself. The duty of the State is to without fear, favour or prejudice promote successful prosecution of the case with, amongst others, the evidence of this witness."[15]

[43] The Court proceeded to unpack what "frankly and honestly" means, in order for a section 204 witness to qualify for indemnity and said:

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[13] *Mahomed* n 12 above.

[14] Id at 74H.

[15] *S v Kuyler* [2016] ZAFSHC 98; 2016 (2) SACR 563 (FB) at paras 20-1.

> "There is a difference between honestly and frankly; and trustworthy. A witness may answer, subjectively, honestly and frankly but may make a mistake. If he made a bona fide mistake he might not be refused indemnity, but his same evidence must be rejected in the main trial if it is material to the issues. The test for veracity of the evidence in the main trial against the accused is objective against all the evidence adduced. The test for indemnity is subjective; the witness must testify to the best of his ability in the circumstances that prevailed. Circumstances such as personal intellectual and emotional intelligence, fear, perceptions of intimidation, ignorance of the legal system and more may come to play when the indemnity enquiry is held."[16]

[44] Having dealt with the law relating to section 204 witnesses, it is helpful to address the submission by the applicants that the trial court should not have declared the section 204 witness a hostile witness. The declaration as a hostile witness was as a result of an earlier application by the State, after it transpired that the section 204 witness was recanting. In the written submissions to this Court, the applicants submit that Mr Luzuko Makhala's repudiation of the statement does not suggest that he had *animus* to prejudice the State and that his recantation, although unexpected and unfavourable to the State, did not render the witness hostile. During argument, this submission was not pursued with any vigour. Even if the applicants were to have persisted with this argument, there is no basis to find that there was no *animus* when deviating from the previous statements. I say so for the following reasons.

[45] Before the trial court declared the section 204 witness a hostile witness, it explained to him what was expected of him. It went further and explained what would happen if he did not answer the questions frankly and honestly. The court then explained why it had allowed the evidence of the witnesses who took the statement from the section 204 witness and said that this was done to prove that he had indeed made the statements. The court then asked the section 204 witness to reflect on what he was going to do and adjourned until the following day. It was after the court repeated what it had explained to the section 204 witness the previous day that it proceeded to declare him a hostile witness.

[16] Id at paras 45-6.

[46] In making the declaration, the trial court noted that the section 204 witness was a brother to the first applicant and was one of the main participants in the commission of the crime, and that that is why, in all probability, he decided to renege. The court also found that the section 204 witness' evidence could not merely be criticised on the basis that there were contradictions, but that his stance was to deny everything. The court said:

> "The nature and importance of the self–contradictions, the manner in which he contradicted himself will be destructive to the State's case. It is not a situation where you have and we deal with this on a daily basis and most of the legal representatives here would know that you have cases where witnesses would contradict; a witness would contradict him or herself and sometimes even in a substantial manner but that does not justify a declaration of hostility because the Court ultimately would then say but fine, the evidence of this witness cannot be relied upon as the truth beyond reasonable doubt; therefore the Court will then reject this witness' evidence and give the accused the benefit of the doubt or the Court will say notwithstanding these contradictions, having regard to the totality of the evidence I will still accept the version of this witness, but in this case the nature of the contradictions would be destructive to the case of the State."[17]

[47] There is thus no basis to interfere with the conclusion of the trial court in this regard.

Should the trial court have convicted the applicants after the section 204 witness recanted?

[48] The factual background of the case and what occurred at the trial is not complicated. Mr Luzuko Makhala made two statements to the police, in which he implicated himself, and the two applicants. The State decided to make him a section 204 witness. The trial court accepted that he was informed of the responsibility of being a section 204 witness. He had to speak the truth and support the two statements

[17] *S v Makhala* n 3 above at para 10-5.

he had earlier made. He recanted. He was declared a hostile witness by the trial court after an application to this effect was made by the State. Mr Luzuko Makhala lied in court and contradicted his earlier statements. The trial court said:

> "After a day of evidence almost nothing came to the fore that would justify this Court to conclude that this witness would be presenting a case on behalf of the prosecution that would implicate the accused because he was testifying here and he was saying- and the Court was very patient with him; but he was 'obtrusive'. He tried to evade exactly what the Prosecutor wanted him to say, almost the whole of his further evidence that was on 9 October and we tried patiently and we were patient with him, to come to the specific point. At one stage the Court made certain remarks, there is nothing as yet before this Court which would implicate the accused in the commission of the offence coming from this witness. . ."

[49] After the section 204 witness was declared a hostile witness, he was cross-examined by the State and the defence. When he was asked by the court if he had lied to the police he replied in the affirmative. He said, in response to a question by Mr Heyns, the public prosecutor:

> "Mr Heyns: So, you were just lying to us?
>
> Mr Makhala: I didn't have the strength to say whatever I was going to say in court to them, because I didn't feel comfortable. Yes, indeed you said to me that you were my protector, but I knew very well that you were not my protector, but you were my prosecutor."

The Court then interjected and this was the exchange:

> "Court: . . . to get back to the question of the prosecutor. So you were lying to them?
>
> Mr Makhala: Clearly speaking, I was telling lies. So, I just had to answer, so I was saying something based on that, or what was expected of me."

[50] The effect of the section 204 witness' testimony was that he absolved the applicants. There was insufficient evidence in the trial court, proving, beyond a reasonable doubt, that the applicants committed the murder.

[51] However, the trial court decided to convict the applicants. It noted:

> "This is indeed a unique case in the sense that the state's case does not hinge on the evidence of witnesses who would in the ordinary course have confirmed and testified to the charges by giving oral testimony but rather it is based on two statements that a witness, Mr Luzuko Makhala made to the police."

[52] The admission of the first and second statements into evidence by the trial court was thus central to the convictions.

[53] The trial court said that it was not convinced that the section 204 witness was forced and did not freely and voluntarily make the statements to Colonel Ngxaki and Sergeant Mdokwana. It found the evidence of the two policemen as corroborated by Sergeant Wilson overwhelmingly convincing. It rejected as incorrect that the witness was not the author, originator or principal source of the two statements.

[54] The trial court then deemed it prudent to seek recourse to section 3(1)(c) of the Hearsay Act. It is to this that I now turn. This section confers a discretion on a court to allow hearsay evidence if it is in the interests of justice to do so. The trial court reasoned that, in considering whether it in the interests of justice to admit such evidence, one should take into account the factors set out in that subsection.

[55] Upon a consideration of the factors listed in section 3(1)(c) of the Hearsay Act, the trial court admitted the two statements into evidence. Among the factors considered was the nature of the evidence. The court stated:

> "The reasons why this court has to view this evidence with the greatest amount of caution and suspicion are the following. Firstly, as stated earlier it is evidence of a co–

> participant which has to be viewed with the necessary caution. Secondly, it is single evidence which is not corroborated by any other witness. Thirdly, it is a statement made to the police by a person who was shown to be an untruthful and dishonest witness and lastly it is evidence which cannot be relied upon unless it is sufficiently supported and sufficiently corroborated to reduce the risk of a wrongful acceptance thereof to convict the three accused before court and upon which the probative value will depend, to which I will refer at a later stage."[18]

In dealing with this factor the trial court was therefore clearly alive to the risks involved in relying on the statements, specifically the fact that they were statements of an "untruthful and dishonest witness".

[56] The trial court also considered the probative value of the evidence and the caution that was warranted before admitting the statements, given the section 204 witness' participation in the commission of the crimes. The trial court said in this regard:

> "Furthermore, in the assessment of the probative value of the hearsay evidence in this case the court has to in my view have regard to the manner and circumstances under which the statements were made, which in my view plays a crucial role in such an assessment. *When the witness made these statements it was after he had been caught out trying to mislead the police.* This in itself can be a negative factor that should militate against the acceptance of the trustworthiness of these two statements under normal circumstances. This fact was highlighted by all the legal representatives of the accused and that is that this witness was dishonest from the onset and that anything he would say further cannot be regarded as trustworthy, especially in the light of the fact that in court he openly and unashamedly lied. Even if it is so it would be too a simplistic evaluation of the evidence as presented by the statements of this witness. It must be remembered based on the evidence of the police, especially Wilson, Mdokwana and Ngxaki about the circumstances under which these statements were made, which was as I said earlier, where this witness after having been caught out that he misled the

[18] *S v Makhala* n 5 above at paras 10-20.

> police, wanted to play open cards with the police. He was contrite and he wanted to give his cooperation to the police."[19] (Emphasis added).

[57] The trial court accepted that the section 204 witness misled the police when he was first interviewed. The trial court, however, considered the fact that he later assured the police, after being caught, that he was lying, to be a sign that he wanted to co-operate with them.[20] The trial court then considered the risk of falsity to be minimal. I do not know on what basis the court reasoned that because Mr Luzuko Makhala had been caught out lying when he was first interviewed, he told the police the truth on subsequent occasions. Cross-examination on this aspect could have assisted, but the trial did not even go there.

[58] Furthermore, the trial court held that the content of the statements included information otherwise unknown to the police. I accept that certain aspects of the statements were not known to the police and that Mr Luzuko Makhala was probably lying when he suggested that the contents of the statements originated from the police. However, does the fact that he lied about this aspect point to the truthfulness of the contents of his statements?

[59] The trial court also took into account what it referred to as objective circumstantial evidence which, according to it, strengthened the version of the witness as contained in the first statement. It said that there were non-contentious and non-incriminating portions of the statement which were not disputed either by the witness or any of the accused. It took into account the hearsay evidence which was presented to it by another witness, Petros, in respect of the first accused. This evidence was that after Mr Luzuko Makhala made the first statement to the police in Cape Town, he informed the first accused about it by saying that he told everything to the police and that they would come and arrest him. Thereafter the police received information that

[19] Id at page 83-4.

[20] *Makhala* SCA above n 6 at para 12.

the first applicant was busy packing up his house and trying to flee.[21] Can it be concluded that the only reasonable inference to be drawn from the allegation that the first applicant wanted to flee was that he was complicit in the murder? Could he have wanted to flee because he was simply scared that he was implicated in the murder by the section 204 witness and was fearing arrest, even though he had played no role in it? Again, there was no cross-examination on this in order to rule out other possible reasons.

[60] The trial court also reasoned that aspects of the statements were also confirmed by the identification of the third accused, Mr Dumile, by the son and wife of the deceased. They, the trial court held, identified Mr Dumile as the person who had come to Mr Molosi's home to inquire as to his whereabouts before the murder. The court accepted the evidence of Mr Molosi's son that three shots were fired during the time of the assassination of the deceased and said that it was consistent with the fact that the deceased died of two gunshot wounds. The trial court found that this supported the probative value of the statements. The fact that Mr Molosi's son heard gunshots is neutral. They could have been fired by anybody.

[61] It is trite that the guilt of an accused must be proved beyond reasonable doubt. The trial court was alive to the reality that, apart from the section 204 statements, there was no other evidence linking the applicants directly to the offence.[22] It sought recourse to circumstantial evidence. It is not clear on what basis the circumstantial evidence, on which the court placed reliance, could link the applicants to the murder.

[62] In *Maqubela*[23] the accused were charged with the murder of the husband of the first accused. The deceased died of suffocation. There was no direct evidence linking the accused to the murder. The High Court however convicted the accused on the basis of circumstantial evidence. It held that evidence in relation to the use of cell phones

[21] *S v Makhala* above n 3 at para 10.

[22] *S v Makhala* n 3 at para 10.

[23] *S v Maqubela* [2013] JOL 30994B (WCC).

belonging to the accused and the deceased during the relevant period assumed singular importance in the trial, as the cell phone records provided a clear picture of the movements, whereabouts and communication between the various role players at critical moments in time.

[63] The High Court in *Maqubela* also held that further evidence which was significant related to attempts by the first accused to obtain information about a life insurance policy held by the deceased. It took into account the fact that she also made a change to the policy in respect of the financial consequences in the event of her husband's death. The High Court reasoned that this factor raised a reasonable suspicion of a financial motive on the part of the first accused. It also took into account the fact that the first accused had exposed in the public domain, the indiscretions of the deceased. The Court found it to be reasonable to infer from those circumstances that the continuation of the marriage was rendered untenable, if not intolerable; and that it was possible that the deceased said as much to the first accused, which, as the State suggested, brought the relationship to an explosive climax. After the death of the deceased, his cell phone records showed that his phone was used on various occasions. On each of those occasions, the cell phone of the first accused was shown by the record to be in the same vicinity. That led to the inference by the High Court that the deceased's phone was in possession of the first accused and that she used it after his death. The Court found that the deceased had not left his apartment after arriving there with the first accused the day before his death. He was not seen again and failed to make the scheduled appointments after that.

[64] On appeal to the Supreme Court of Appeal, the conviction was overturned. The reasoning in that court was that even on the medical evidence and the circumstantial evidence, the State had failed to prove the guilt of the accused beyond a reasonable doubt. It said:

> "Quite clearly, 'the absence of proof of a probable or certain cause of death', was regarded by the trial court as an essential element in answering 'the pivotal question' in order to justify an inference of proof of murder beyond reasonable doubt being

> drawn, based solely upon the conduct of the appellant 'showing consciousness of guilt'. If the trial court had applied the appropriate judicial measure of proof to the evidence of Professor Saayman, it would have concluded that the deceased probably died of natural causes. Accordingly, the answer to the trial court's 'pivotal question for decision' should have been that proof of natural causes as a probable cause of death, precluded a finding of murder.
>
> I should mention that the trial court in applying the rules of inferential reasoning formulated in *R v Blom* 1939 AD 188 at 202–203, correctly stated that before an inference of murder could be drawn, the proved facts being 'consciousness of guilt' on the part of the appellant, would have to exclude every other reasonable inference save the inference of murder. However, the primary rule of inferential reasoning is that an inference of murder must be consistent with all the proved facts. Even if the mendacity and guilty consciousness of the appellant are taken into account, in the light of Professor Saayman's evidence an unlawful killing is not the only reasonable inference that can be drawn."

[65] The circumstantial evidence in *Maqubela* led to a strong suspicion that the wife of the deceased had murdered him. The High Court clearly found this persuasive. The Supreme Court of Appeal on the other hand, appreciated that a strong suspicion alone is not a reason to find that the State has discharged its onus. Apart from this, the Supreme Court of Appeal also criticised the High Court for its reliance on the medical evidence which it held did not prove that the deceased was murdered.

[66] The section 204 witness in this matter had distanced himself from the statements and had absolved the applicants. The witness in fact testified in the trial court that he was lying to the police when he made the statements.[24] The court then invoked the Hearsay Act in order to consider whether any reliance could be placed on those statements. The question is whether the trial court was correct in doing so. As stated, section 3(1)(c) of the Hearsay Act confers a discretion on a court to admit hearsay evidence if it is in the interests of justice to do so. The question that arose before the trial court could exercise that discretion was whether the statements constituted hearsay.

[24] Id at para 20.

[67] This is what I now consider. Section 3(4) of the Hearsay Act defines hearsay evidence as evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence. The section 204 witness was the author of the two statements. He was called at the trial to testify. His version was that he lied to the police who took his statement. The probative value of the statements depended on his credibility. The trial court could either find that he was a credible witness or not. As Unterhalter AJA noted:

> "*R v U (F.J.)* makes it plain that the availability of the witness who made the prior statements to be cross–examined goes a very long way to ensure that prior statements may be admitted into evidence for the truth of their contents to permit the trier of fact to assess the evidential value of these statements. The court quotes the following from the leading work of J W Strong McCormick on Evidence 4 ed (1992), with approval:
>
> > 'The witness who has told one story aforetime and another today has opened the gates to all the vistas of truth which the common law practice of cross–examination and re–examination was invented to explore. The reasons for the change of face, whether forgetfulness, carelessness, pity, terror, or greed, may be explored by the two questioners in the presence of the trier of fact, under oath, casting light on which is the true story and which the false. It is hard to escape the view that evidence of a prior inconsistent statement, when declarant is on the stand to explain it if he can, has in high degree the safeguards of examined testimony. . .'"[25]

The statements were therefore not hearsay evidence.

[68] Should the trial court have convicted the applicants based on the statements, on the basis of any other ground? The answer is a resounding no. As much as section 204 witnesses are important in the administration of justice, so is the trite criminal law principle that an accused is presumed innocent until proven guilty. Here

[25] *Makhala* SCA above n 6 para 75.

we have the testimony of a witness who openly agreed in court that he lied to the police officers who took his statements and to the prosecutor. His testimony in court contradicted his prior statements. The reason the trial court declared him a hostile witness was because he had the requisite intention to deviate from his two previous statements. As stated, the court relied on the fact that the police were truthful in stating that he made the statements and that the content of the statements included information otherwise unknown to the police. However, whilst this is so, the police had no way of knowing whether the information contained in the statements was in fact truthful without further corroboration. And, of course, the police could relate what he told them, even if what he said was not the truth. And the police had no way of knowing whether what he said was the truth without further corroboration.

[69] It is true that the third accused, Mr Dumile, was identified by the son and wife of the deceased as the person who had come to Mr Molosi's home to inquire as to the whereabouts of the deceased. The question, however, is whether this evidence showed that the applicants were co–perpetrators in the killing of the deceased. Of course, the trial court was correct in regarding the section 204 witness' stance in court with suspicion, specifically as the other accused whom he had incriminated in the statement was his brother, but I am not convinced that we can elevate such a strong suspicion to proof beyond a reasonable doubt that the statements were true. Apart from this factor, how do we know that Mr Luzuko Makhala, whom we know was a self–confessed liar who distanced himself from his prior statements, was truthful when he made the original statements? After all, even at the time the witness had made the statements, he was the brother to one of the applicants. Nothing suddenly changed in court.

[70] Having branded the author of the section 204 statement a liar, how does a court find that circumstantial evidence corroborates the previous statements of a liar, without further corroboration? Does that suggest that yes, he lied, but because there is evidence that shows that he may have been truthful in certain instances, his statements are suddenly reliable in their entirety as the truth of what occurred? How can this be if the other evidence does not link the accused to the commission of the offence?

[71] Sections 219 and 219A of the CPA, have no relevance in this matter. Section 219 of the CPA states that "no confession made by any person shall be admissible as evidence against another person". This section prohibits admission of confessions made by one person against another person. The statements were therefore not confessions.

[72] Section 219A of the CPA deals with admissibility of admissions made by the accused. It provides that:

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

[73] The provisions of section 219A(1) of the CPA are similar to the provisions of section 217 of the CPA to the extent that they provide that such statements are only admissible "against such a person" or in relation to the accused.

[74] Section 219A of the CPA is not applicable here, because the section 204 witness was not one of the accused in the trial court. If for instance, he would be subsequently charged with other accused, the statements would be inadmissible against those accused. In *Litako*, the Supreme Court of Appeal said that section 219A of the CPA allows an admission to be admitted against its maker only and is silent regarding other persons. This Court embraced the reasoning of the Supreme Court of Appeal in *Litako* that this section does not contemplate extra–curial admissions being tendered as evidence against any other accused and found that such reasoning was sound.[26]

[75] For all the above reasons, the State failed to discharge the onus to prove the guilt of the applicants beyond a reasonable doubt. The applicants should have been acquitted.

[26] *Litako v S* [2014] ZASCA 54; 2015 (3) SA 287 (SCA).

Order

[76] I make the following order:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and substituted as follows:

"3.1 The appeal is upheld.

3.2 The appellants' convictions and sentences are set aside."

BILCHITZ AJ (Dodson AJ and Chaskalson AJ concurring):

Introduction

[77] I have had the pleasure of reading the first judgment penned by my Colleague Tshiqi J. Although I agree with the outcome of the first judgment, I do not agree with certain aspects of that judgment. In particular, it is, in my view, necessary to consider and outline the legal framework for determining the admissibility of prior inconsistent extra-curial statements which are *not* hearsay due to the fact that the witness who made those statements testifies. That framework, as will be seen, has both procedural and substantive dimensions.

[78] This case concerns a scenario that, at times, is faced by magistrates and judges in criminal trials. A witness – in this case, Mr Luzuko Makhala – made a statement to the police in which he incriminates both himself and several other people in a murder. The prosecution offers the witness immunity from prosecution if he testifies to this effect at a criminal trial. At the trial, the witness testifies but recants the original statement and gives evidence that exculpates himself and the accused. He is declared a hostile witness and the witness is cross-examined. The judge is left with two versions: the extra-curial statement to the police and the testimony in court.

[79] The question at the heart of this case is whether, and under what conditions, can a judge accept the first extra-curial statement as proof of the truth of its contents. To address this question, I proceed as follows. Initially, I consider whether the statement in question was hearsay and how it relates to section 204 of the CPA and the protections that must be put in place for those giving such statements. I then examine whether section 219 or 219A of the CPA render these statements inadmissible. Having found that they do not, and the statements are not hearsay, I then outline the applicable original common law rule excluding the use of extra-curial prior inconsistent statements as proof of the truth of their contents and its underlying reasons. I then consider the constitutional legal basis for the power of the Constitutional Court, Supreme Court of Appeal and the High Courts of South Africa to develop this rule and then seek to show why the reasons underpinning the original rule no longer support its retention.

[80] I then consider the procedure in terms of which the admissibility of such a statement must be considered – I provide reasons why a trial-within-a-trial must be conducted when determining the admissibility of such statements. I then turn to articulate a legal framework in terms of which extra-curial statements can be admitted as proof of the truth of their contents. That framework focuses on reliability and has both procedural and substantive dimensions.

[81] Finally, I consider the application of the above-mentioned principles to the extra-curial statements in this case. Given these safeguards are relatively new in our law, they were not followed in this case. A trial-within-a-trial was not held which placed the defence in a difficult position in cross-examination. This raises fair trial difficulties. Moreover, even in the event that such a trial-within-a-trial had been conducted, there still remains insufficient evidence before this Court that corroborates the extra-curial statement to justify the convictions – I, therefore, agree with the first judgment that it must be overturned. I will rely on the first judgment's outline of the facts and the parties' submissions.

Hearsay and section 204

[82] There has been some discussion in both our courts[27] and academic writing[28] about whether extra-curial statements such as that made by Mr Luzuko Makhala in this case constitute hearsay or not, given that he testified in court and was available to be cross-examined. I agree with the first judgment's analysis that the probative value of these statements depends upon the credibility of Mr Luzuko Makhala who testified in court. It was common cause that Mr Luzuko Makhala made these statements but denied the truth thereof. As a result, in terms of the definition of hearsay in section 3(4) of the Hearsay Act, such a statement does not constitute hearsay.[29] That finding has important implications and we need to consider the legal position that applies once these statements are found not to be hearsay. As will be seen from the analysis below, some of the concerns relating to the reliability of statements such as this one are similar to concerns that arise in the context of hearsay evidence.

[83] The prior inconsistent extra-curial statement in this case was a step that took place prior to the prosecution offering Mr Luzuko Makhala the opportunity to invoke section 204 of the CPA. Section 204 is an important tool in the arsenal of the prosecution to secure convictions. It enables the prosecution to offer a witness who is implicated in a crime a discharge from prosecution in return for frank and honest testimony that attests to the culpability of one (or more) of the accused persons. The whole purpose of section 204 is thus to solicit testimony against accused persons involved in a crime of which the witness had knowledge and in which they were often involved. For section 204 to have any application, it must be possible for such a witness to testify against accused persons and to be cross-examined on that testimony.

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[27] *S v Rathumbu* [2012] ZASCA 51; 2012 (2) SACR 219 (SCA) (*Rathumbu*); *S v Ndhlovu* [2002] ZASCA 70; 2002 (6) SA 305; and *S v Murphy* 2023 (2) SACR 341 (WCC).

[28] Bellengére and Walker "When the Truth Lies Elsewhere" (2013) 26 *South African Journal of Criminal Justice* 175; Naude "The Substantive Use of a Prior Inconsistent Statement" (2013) 26 *South African Journal of Criminal Justice* 55.

[29] The definition reads—

> "'**hearsay evidence**' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence."

[84] Section 204 largely governs testimony that is given in court. The difficulty in this case relates to two prior extra-curial statements that were taken by police officers in anticipation of the witness becoming a section 204 witness. Section 204 governs the procedure at the trial but it is based on the assumption that there are preliminary stages: there must be some original statement or basis upon which the prosecution would offer such an immunity and an initial investigation.

[85] The prior stages for the application of section 204 raise some constitutional concerns: a police officer could by words or conduct create a subjective expectation that section 204 would be invoked and, on that basis, procure an admission or confession by the witness. The prosecutor, a different actor, decides not to invoke section 204. The witness is then charged on the basis of their admission or confession.[30] Such a situation would implicate a number of constitutionally protected rights, including the privilege against self-incrimination and the right to remain silent.[31] The Constitution includes a range of protections for arrested, accused and detained persons – yet, individuals in the circumstances discussed above, are not yet in any of those categories. There is nevertheless a strong potentiality that they could become part of these categories given that the very goal of the police is to arrest those who perpetrated the crime. Consequently, the police who take statements from individuals implicated in a crime who are prospective witnesses must, at the very least, inform them of their right to remain silent and of the consequences of not doing so; and that they are not compelled to make an admission or confession which may be used against them.[32] They should also be explained the consequences of becoming a section 204 witness. In this case, the relevant warnings were given.

[30] In *S v Ndika* [2001] ZASCA 143; 2002 (1) SACR 250 (SCA) the Supreme Court of Appeal found that a self-induced expectation of becoming a state witness will not render a confession subject to undue influence. In my view, there will no doubt be grey areas where there is a vague mention of section 204 but no concrete commitment to utilise a witness as a state witness.

[31] Section 35(1)(a)-(c) and 35(3)(h)-(j) of the Constitution.

[32] Section 35(1)(a)-(c) of the Constitution.

[86] The statement given prior to the invocation of section 204 is special in the sense that the witness has an incentive to co-operate. It is, however, in many respects no different from other extra-curial statements taken by police. If the witness testifies – whether under section 204 or not – the statements are not hearsay. I cannot agree with the first judgment that, having established that the statements are not hearsay, the next step is simply to evaluate the weight to be afforded to the statement in light of the onus to prove the guilt of the accused beyond a reasonable doubt.

[87] In my view, the first question we must consider is whether such statements are rendered inadmissible by sections 219 or 219A of the CPA. Since I shall find that they are not excluded by these provisions, then what is needed is for this Court to articulate the legal framework applicable to the admissibility of prior inconsistent extra-curial statements and to make its decision on that basis.

The applicability of sections 219 and 219A

[88] Section 217 of the CPA provides for the admissibility of a confession made by an accused person under certain restricted circumstances. Section 219, however, provides that "[n]o confession made by any person shall be admissible as evidence against another person". Section 219A, similarly, allows for the admissibility of an admission (that does not constitute a confession) against its maker under certain circumstances. The provision reads as follows:

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

[89] It has been established by the Supreme Court of Appeal in *Litako*[33] and affirmed by this Court in *Mhlongo*[34] that sections 219 and 219A entail that extra-curial statements that constitute either admissions or confessions are not admissible against co-accused persons.[35] In *Mhlongo*, this Court made it clear that there was no particular reason to differentiate between admissions and confessions in relation to co-accused persons and, as a result, that to do so would violate section 9(1) of the Constitution which protects equality before the law. These judgments do not, however, deal with the circumstances of this case: whether these provisions exclude the extra-curial statements of a witness *who is not an accused person* from being admissible. This requires us to interpret sections 219 and 219A and the circumstances in which these sections apply in light of the applicable considerations of text, context and purpose.[36]

[90] In relation to section 219, the provision refers to a confession made by any "person" and provides that it shall not be admissible in evidence against any other "person". The word "person" must be interpreted in its statutory context and construed harmoniously with other provisions of the CPA.[37] Section 217 is the main provision dealing with the admissibility of confessions and is titled "admissibility of confession by accused". The relevant parts provide the following:

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[33] *Litako* above n 26 at para 38. See the discussion by Du Toit "Evidence" in Du Toit et al (eds) *Commentary on the Criminal Procedure Act* Service 72 (Jutastat e-publications, 2004) (*Du Toit*).

[34] *Mhlongo* above n 7 at para 25.

[35] *Litako* above n 26. This case has attracted some academic critique for departing from the approach in *S v Ndhlovu* 2002 (2) SACR 325 (SCA) and introducing an overly rigid approach to extra-curial admissions by co-accused persons: see Watney "The Clock Turned Back for the Admissibility of Extra Curial Hearsay Admissions Against a Co-Accused in Criminal Cases" (2014) 4 *Journal of South African Law* 855 and Du Toit above n 33at 70E (commentary on section 219). For the reasons given in this judgment, there are good reasons to distinguish statements given by co-accused persons from those of other witnesses. The interpretation given in this judgment to sections 219 and 219A would entail that legislative intervention would be needed to apply the more flexible framework articulated in this judgment to extra-curial statements by co-accused persons.

[36] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) at para 18; and *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

[37] *S v Rens* [1995] ZACC 15; 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC) at para 17; *S v Dlamini, S v Dladla, S v Joubert, S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 84; and *Matatiele Municipality v President of the RSA* [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) at para 51.

> "Evidence of any confession made by *any person in relation to the commission of any offence* shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against *such person at criminal proceedings relating to such offence*." (Emphasis added).

[91] What is apparent from this provision is that the word "person" relates to the commission of an offence by that person and is used in the context of criminal proceedings "against" that person. The word "person" is thus clearly to be understood as an "accused person" against whom criminal charges have been laid and who is facing a criminal trial. The same conclusion emerges from a consideration of section 219A of the CPA which utilises similar wording and connects the person who makes the admission with a person who is facing criminal charges and is standing trial relating to that offence.[38]

[92] This reading also conforms to both the constitutional context and an important purpose behind not admitting the extra-curial statements of co-accused – whether confessions or admissions – against one another. If one is an accused person, the Constitution provides that one has a right to remain silent and one cannot be compelled to testify during proceedings.[39] If a co-accused who made an extra-curial statement chooses not to testify, the statement is clearly hearsay. As was held in *Litako*, if an extra-curial statement by a co-accused is admitted but the co-accused 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 section 35(3)(i) of the Constitution is thereby rendered nugatory".[40]

[38] This judgment thus takes issue with the approach adopted by Davis AJ in *S v Murphy* above n 27 at paras 48-9 which construes the words outside of their statutory context.

[39] Section 35(3)(h) of the Constitution.

[40] *Litako* above n 26 at para 65. There remains the question whether such an infringement of this right can nevertheless be justified as it is in relation to other forms of hearsay.

[93] The same is not true of a witness who made an extra-curial statement and is brought to court to testify. As Unterhalter AJA explained in his minority judgment, that evidence is not hearsay and "the accused has full enjoyment of the right to cross-examine the witness".[41] Section 39(2) of the Constitution does not point towards a different interpretation: given that the accused retains the full right to challenge the evidence, this interpretation of the provision does not negatively implicate the accused's constitutional rights in this regard.[42] It also seeks to attain an appropriate balance between the protection of the accused, their right to cross-examine and ensuring that relevant evidence is admissible in the interests of discovering the truth.

[94] Such a reading is also required by the importance of attaining a harmonious interpretation of these provisions with section 204 of the same Act. The latter provision, as we saw, assumes the existence of prior extra-curial statements by the witness. Section 204 precisely envisages circumstances where the witness will make incriminating statements against themselves and may be discharged from prosecution due to their testimony in relation to others. A central tool in testing the veracity of that testimony is to interrogate its conformity or otherwise with the prior extra-curial statement. That tool would be removed if sections 219 and 219A were understood to render such statements inadmissible if they applied to any witness regardless of whether they are a co-accused or not.

[95] For these reasons, this judgment finds that the prohibitions in sections 219 and 219A do not apply to the admissibility of extra-curial statements by a witness who is not a co-accused and so is distinguishable from the circumstances in *Litako*.[43] There, nevertheless, remain serious concerns relating to the admissibility of such statements. Those concerns led to the development of the traditional common-law rule – based on

[41] *Makhala* SCA above n 5 at para 69.

[42] I thus disagree with the analysis of Davis AJ in *S v Murphy* above n 27 at para 49.

[43] *Litako* above n 26.

English law[44] – that a prior inconsistent extra-curial statement by a witness could be used to impugn their credibility but could not be used as proof of the truth of its contents.[45]

The traditional common law rule and the power of Courts to develop it

[96] Section 252 of the CPA provides the following:

> "The law as to the admissibility of evidence which was in force in respect of criminal proceedings on the thirtieth day of May, 1961, shall apply in any case not expressly provided for by this Act or any other law".[46]

[97] Since the CPA does not expressly regulate the admissibility of the extra-curial statements that are the subject of this case and we have found they do not fall under the Hearsay Act, the English common law rule appears to have been rendered part of the South African law by this provision.[47]

[98] Yet, that section of the CPA predates the Constitution which is now recognised as the ultimate source of law in South Africa including the law of evidence.[48] The Constitution itself clearly enshrines in section 173 of the Constitution the inherent power of the Constitutional Court, the Supreme Court of Appeal and the High Courts of South Africa to "protect and regulate their own process, and to develop the common law, taking into account the interests of justice". Moreover, section 39(2) of the Constitution provides that "when interpreting any legislation, and when developing the

[44] See, for instance, *Wright v Beckett* (1833) 174 ER 143 at 145 and *R v Golder; R v Jones; R v Poritt* [1960] 3 All ER 457 at 459.

[45] *Hoskisson v Rex* 1906 TS 502; *Rex v Deale* 1929 TPD 259; and *Rex v Beukman* 1950 (4) SA 261 (O).

[46] This is a so-called residuary section: see for a recent discussion, De Villiers "Residuary Sections, Stare Decisis, Customary Law and the Development of Common Law – How do these Concepts Affect Decolonisation" in Tshivase et al (eds) *Decolonisation and Africanisation of Legal Education in South Africa* (Juta & Co Ltd, Cape Town 2019).

[47] Schmidt and Rademeyer *Law of Evidence* Service 22 (2024) at 16.16 criticises *S v Mathonsi* [2011] ZAKZPHC 33; 2012 (1) SACR 335 (KZP) (*Mathonsi*) for not engaging with this important issue at.

[48] See Zeffertt et al *Essential Evidence* 2 ed (2020) at 4-7; and Visser "Sources of the Law of Evidence and the Impact of Constitutional Provisions" in Schwikkard and Mosaka *Principles of Evidence* 5 ed (2023) (*Visser*) at 20 and 27.

common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". This Court has understood that provision to require, that "all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution".[49] That, in turn, gives rise to the requirement that "judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section".[50]

[99] In *Visser*,[51] it was held by the Supreme Court of Appeal that "all questions of admissibility of evidence relate to relevance, reliability and the constitutional right of all persons to a fair trial".[52] That dictum applies equally in this case and recognises the direct relevance of the Constitution to the admissibility of evidence. In particular, the admissibility of prior inconsistent extra-curial statements implicate the right to a fair trial in section 35(3) of the Constitution, requiring this court to ensure fairness in the procedures of a criminal trial – and, in doing so, consider the rights of the accused, the ability of the prosecution to perform their duties and the interests of society in ensuring the truth can be ascertained. These provisions clearly indicate that the law of evidence cannot be frozen in time at a date well before the coming into force of the Constitution and must adapt to the provisions of sections 34 and 35 of the Constitution, along with changes in society and technology.

[100] The CPA must be understood to incorporate the common law of England as it stood on 30 May 1961 as the law of South Africa in relation to issues that are not expressly dealt with in that Act.[53] Yet, this provision must itself be read harmoniously

[49] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors: In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) at para 21.

[50] Id at para 23.

[51] *Visser v 1 Life Direct Insurance Ltd* [2014] ZASCA 193; 2015 (3) SA 69 (SCA).

[52] Id at para 48.

[53] Zeffertt and Paizes *The South African Law of Evidence* 3 ed (LexisNexis (Pty) Ltd, 2017) at 18 recognise that this provision grants a *sui generis* (of its own kind) nature to rules of English common law prior to 30 May 1961:

with "any other law" – and, in particular, in accordance with the Constitution's subsequent express conferral on the Superior Courts of—

(a) the inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice, and

(b) the power to interpret legislation and develop the common law in light of the spirit, purport and objects of the Bill of Rights.

[101] Such powers must include the ability to develop the English common law of evidence as it stood on 30 May 1961 if we are to respect the purpose behind section 39(2) which is to ensure all law is influenced by the seismic shift brought about by our Constitution. No segment of our law – least of all that which relates to section 35 rights – can remain untouched by the Constitution. It is particularly absurd – and not in conformity with the constitutional injunctions in sections 39(2) and 173 – to suggest that South African courts are bound to apply, and are prevented from developing, rules that have long since been changed in England either through legislative or judicial intervention – such as in relation to the current matter[54] – where such changes are required to align with the fair trial requirements enshrined in section 35(3) of the Constitution.[55] Section 252 of the CPA must thus be interpreted in conformity with the power of the relevant Courts contained in sections 39(2) and 173 of the Constitution and hence must be understood to permit development of the English common law of evidence in line with those provisions of the Constitution.[56]

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they were rules of the English common law but are applied in South Africa by virtue of statute. As such, such a rule "is analogous to a statutory provision and may even be regarded as one – albeit in an extended sense only".

[54] I reproduce the current English provision at [113] below.

[55] *Zeffertt and Paizes* above n 53 at 18 suggest that section 8(3) of the Constitution may permit the Court to develop the English common law that is brought into our law by virtue of section 252 of the Criminal Procedure Act. Section 8(3) is usually understood to apply in the context of the obligations of a natural or juristic person which is not clearly apposite in this context. As they point out, that approach would also require us to find that the English common law has the status of a South African common law rule even though it is applied by statute. For these reasons, we prefer utilising section 39(2) and 173 as discussed in the judgment.

[56] This approach is in line with *Visser* above n 48 at 24-5 who states that:

> "[t]he Constitutional Court of South Africa is not bound by the residuary rule. All principles of evidence, including English common-law rules and pre-30 May 1961 English decisions, are subject to the provisions of the supreme Constitution and will be overruled if they infringe any constitutional right. In terms of section 39(2) of the Constitution, local courts are obliged to

[102] In approaching the development of the law in this matter, it is necessary first to consider the reasons for the traditional common law rule which, as I have mentioned, applies once we find that the extra-curial statements of a witness who testifies are not hearsay. In recognition of the constitutional context, it is of importance to consider foreign law of comparable jurisdictions.[57] The Canadian Supreme Court has had reason to reconsider a similar traditional common law rule and has outlined a number of principles that govern the admission of such statements.[58] Unterhalter AJA too, in his minority judgment in the Supreme Court of Appeal, considered the traditional rule and adapted the Canadian principles for application in South Africa. In what follows, I build on their work to develop the common law applicable to the admission of such statements.

The rationale behind the traditional common law rule and its difficulties

[103] The rationale for the exclusion of such evidence appears to relate to its reliability. In this respect, it is said to share various features of hearsay evidence in that the witness, whilst confirming that he made the statement, does not confirm in the witness box the contents of those statements. Cameron JA writes about this situation as follows in *Ndhlovu*:

> "[I]f the witness, when called, disavows the statement, or fails to recall making it, or is unable to affirm some detailed aspect of it, . . . the situation under the Act is not in substance materially different from when the declarant does not testify at all. The principal reason for not allowing hearsay evidence is that it may be untrustworthy since it cannot be subjected to cross-examination. When the hearsay declarant is called as a witness, but does not confirm the statement, or repudiates it, the test of cross-examination is similarly absent, and similar safeguards are required."[59]

'promote the spirit, purport and objects of the Bill of Rights when interpreting legislation and developing the common law."

[57] See section 39(1)(c) of the Constitution.

[58] The statements are considered hearsay in Canadian law and admitted as an exception to the general inadmissibility of hearsay.

[59] *Ndhlovu* above n 27 at para 30.

[104] This statement by Cameron JA must be understood in the context of his judgment. He considered the circumstances he described to render the evidence that was given as being hearsay and, indeed, permitted the admission of such evidence in terms of the interests of justice test outlined in section 3 of the Hearsay Act.[60] That was the approach followed as well by the majority of the Supreme Court of Appeal in this case.

[105] In my view, the availability of the witness to testify is significant and entails that the extra-curial statement in question does not conform to the hearsay definition of the Hearsay Act. It is nevertheless correct to recognise that, historically, the concerns relating to such evidence emerge from similar concerns relating to the admission of hearsay evidence.[61]

[106] These concerns are clearly summarised and addressed by the persuasive reasoning in the case of *R v B (KG)*,[62] where the Canadian Supreme Court was faced with a challenge to a similar common law rule in Canada excluding evidence from prior inconsistent statements as proof of the truth of their contents. Lamer CJ summarised the dangers relating to such evidence as follows:

> "[T]he absence of an oath or solemn affirmation when the statement was made, the inability of the trier of fact to assess the demeanour and therefore the credibility of the declarant when the statement was made (as well as the trier's inability to ensure that the witness actually said what is claimed) and the lack of contemporaneous cross-examination by the opponent."[63]

[60] Id at paras 49-52.

[61] Bellengére and Walker above n 28 at 176-7.

[62] *R v B (KG)* 1993 SCC 116; [1993] 1 SCR 740.

[63] Id at 764. The lack of cotemporaneous cross-examination is also a concern expressed in our case law: see *R v Wellers* 1918 TPD 234 at 236.

[107] Each of these rationales no longer justifies the retention of the traditional common law rule – as Lamer CJ convincingly held. In relation to the oath, this plays a much lesser role in modern society given people no longer fear divine retribution in the same way. An oath may contribute to the seriousness with which evidence is given, but its chief value lies in the fact that an individual who lies under oath is exposed to being charged and prosecuted for perjury.

[108] The worry about demeanour is overstated given it is possible to observe the demeanour of the witness when she testifies at the trial about the statement.[64] This concern can also be significantly mitigated when the giving of the statement is videotaped (as in *R v B (KG)*).[65] Given that smartphones are widely available, it is arguably relatively simple for police officers to videotape the making of the statement. That would allow the trial court to assess the witnesses' demeanour at the time the evidence was given.[66] Demeanour should also not be overstated if other indicia of reliability are present. As Lamer CJ writes:

> "The 'milestone' represented by widely available videotape technology and its introduction in the trial process, has gone a long way towards meeting this second hearsay danger. I also believe that demeanour evidence from sources other than a videotape might, in exceptional circumstances, also serve the same purpose to answer this criticism of the orthodox rule."[67]

[109] The worry about the lack of contemporaneous cross-examination is also overstated. The maker of the statement is, in circumstances such as the present case, available to be cross-examined. In *Wigmore on Evidence*, the following is said:

> "But the theory of the hearsay rule is that an extrajudicial statement is rejected because it was made out of court by an absent person not subject to cross-examination. . . .

[64] *R v B (KG)* above n 62 at 765.

[65] Id at 766.

[66] Of course, the authenticity of any such video evidence will have to be proved according to the applicable principles of evidence.

[67] *R v B (KG)* above n 62 at 768.

> Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement."[68]

[110] In the South African context, it is important to consider the right to a fair trial in section 35(3), which includes the right to challenge and adduce evidence in section 35(3)(i). In my view, this right is not infringed in the circumstances discussed given the opportunity to cross-examine the witness in question. As was stated in *Mathonsi*, there is no violation of an accused's right to a fair trial if the accused or defence has been afforded an opportunity to cross-examine the declarant and test the reliability of the statement.[69]

[111] South African courts have, in recent years, been questioning the traditional common law rule. In *Rathumbu*,[70] the Supreme Court of Appeal was faced with a prior inconsistent statement which it classified as hearsay. It proceeded to admit such a statement in terms of section 3(1)(c) of the Hearsay Act. Similarly, in *Mathonsi*,[71] a Full Court of the High Court, KwaZulu-Natal Division, Pietermaritzburg also utilised the hearsay framework to admit a prior extra-curial statement. The Court found there to be a need for a shift in the traditional common law rule and drew on the framework in the Canadian case of *R v B (KG)* to admit the statement in question. I will discuss the facts and reasoning in these cases later in this judgment.

[112] South African academic commentators have also strongly criticised the traditional rule. Bellengére and Walker conclude their discussion of the above two cases, saying that "this development has brought SA law on the subject into line with that applicable in other comparable jurisdictions, and, in so doing, has removed an unnecessary and often nonsensical impediment to the fulfilment of one of the primary

[68] Wigmore *Evidence in Trials at Common Law* (Little Brown and Company, Boston 1970) vol 3A §1018 at 996.

[69] *S v Mathonsi* above n 47 at para 51.

[70] *S v Rathumbu* above n 27 at para 12.

[71] *S v Mathonsi* above n 47 at para 33.

functions of any court; namely the determination of the truth".[72] Naude concludes that "the primary task of the court is to find the truth in the interests of justice and the irrational and unreasonable obstacles to the admission of relevant evidence should not obstruct that quest".[73]

[113] Indeed, the traditional rule has been rejected in many other open and democratic societies which value the right to a fair trial. Apart from Canada, which has been discussed, the rule has been reformed in the United Kingdom, which was the source of the original rule. The relevant provision reads as follows:

> "If in criminal proceedings a person gives oral evidence and—
>
> (a) he admits making a previous inconsistent statement, or
>
> (b) a previous inconsistent statement made by him is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865 (c. 18),
>
> the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible."[74]

[114] The position in Australia is similar and enshrined in section 60 of the Evidence Act 25 of 1995.[75] Though the wording is not entirely clear, it is accepted that the provision allows for prior inconsistent statements by witnesses to be utilised as evidence of the truth of their contents.[76]

[115] In the United States of America, rule 801(d) of the Federal Rules of Evidence allows for the admission of prior inconsistent statements provided the witness testifies,

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[72] Bellengére and Walker above n 28 at 185.

[73] Naude above n 28 at 66.

[74] Section 119(1) of the Criminal Justice Act 2003.

[75] Section 60 of the Evidence Act 25 of 1995 provides that:

> "(1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.
>
> (2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of subsection 62(2))."

[76] *Lee v the Queen* (1998) 195 CLR 594 at paras 28-9 and *Adam v the Queen* [2001] 207 CLR 96 at paras 57-8.

is subjected to cross-examination and the witness gives the prior statement under oath, being thus subject to a penalty of perjury.[77]

[116] There is consequently no good reason to retain the traditional exclusionary common law rule which only serves to exclude relevant evidence and obscure the truth in a criminal trial. At the same time, there remain concerns that underpinned the traditional rule which must be addressed through the development of legal principles to ensure that extra-curial statements are only admitted where they meet certain requirements that address the dangers attaching to such statements.

The procedure for the admission of prior inconsistent extra-curial statements

[117] The first question to address relates to the procedure through which the admissibility of such statements is determined. The applicant submitted that the Constitution itself protects the right to "challenge and adduce evidence".[78] Yet, if cross-examination on the prior extra-curial statement takes place in the midst of the trial itself, the defence's right to challenge and adduce evidence may formally exist but, in substance, be substantially curtailed. That is because cross-examination as part of the ordinary trial, in circumstances where the witness recants an original extra-curial

[77] Rule 801(d) of the Federal Rules of Evidence provides that:

> "(d) Statements that are not hearsay. A statement that meets the following conditions is not hearsay:
>
> (1) Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
>
> (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
>
> (B) is consistent with the declarant's testimony and is offered:
>
> (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
>
> (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
>
> (C) identifies a person as someone the declarant perceived earlier."

The latter condition is restrictive as it limits the use of such statements to those given under oath and in a formal context.

[78] Section 35(3)(i) of the Constitution.

statement, raises a difficult conundrum for the defence. The fact that the witness recants is in itself helpful to the defence and harmful to the case of the prosecution as it renders the prosecution's task of proving their case beyond a reasonable doubt more difficult. Cross-examination of the witness who recants may, however, undermine the defence's case as matters come to light that affirm the truth of the incriminating prior inconsistent statement. On the other hand, there are risks to the defence in failing to probe the witness on their account of the statement, the circumstances in which it was made and why they recanted.

[118] It is important that the right to challenge and adduce evidence is not just a formal right but that the defence can actually exercise it properly. The problem the applicant has raised is similar to the difficulty accused persons may face in challenging whether a confession or admission was voluntarily made. A trial-within-a-trial is utilised in the latter circumstances. As Schwikkard[79] states, the rationale for this procedure is "rooted in a rule of policy that self-incriminating statements should not be coerced and that accused persons be in a position to challenge the voluntariness of their statements without running the risk of further incriminating themselves".[80] A trial-within-a-trial effectively insulates the evidence given by both accused and witnesses at the trial-within-a-trial from the main trial.[81]

[119] The focus of the trial-within-a-trial is not on an accused's guilt but on the admissibility of the admission or confession in question. The same principle would apply in the context of the admissibility of a prior inconsistent extra-curial statement. Both the prosecution and defence can then fully probe the witness about the circumstances in which the statement was given, whether it was given voluntarily, the contents of the statement and the reasons for the change of heart. This procedure will ensure the substantive realisation of the right to challenge and adduce evidence.

[79] Schwikkard "Confessions in Criminal Trials" in Schwikkard and Mosaka *Principles of Evidence* 5 ed (2023).

[80] Id at 371-2.

[81] Id at 372. See also *Zeffertt and Paizes* above n 48 at 608.

[120] A concern was also raised by the applicants' counsel that, in circumstances like the present, the defence may not be able to engage in effective cross-examination as it lacks access to the prosecution's witness and thus information about the circumstances under which the prior extra-curial statement was given. However, rule 55(10) of the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities[82] (Code of Conduct) provides that "[a] legal practitioner may interview a state witness if the prosecution consents, or, failing such consent, if a court grants permission to do so, and if permission is subject to conditions, in strict accordance with those conditions".

[121] There is consequently sufficient flexibility in these rules to enable representatives for the accused to interview the prosecution's witness should that be necessary to ensure the substantive realisation of the right to challenge and adduce evidence. The rule also permits conditions to be placed on the nature and circumstances of the interview to ensure no undue influence occurs. Counsel for the accused ought in this matter to have applied rule 55(10) and sought consent of the prosecution, or failing that, the leave of the Court, to interview Mr Luzuko Makhala if they wished to contest the admissibility of the statement.

[122] The purpose of the trial-within-a-trial would thus be to determine the admissibility of the statement. Given we have found the statement is not hearsay, the Hearsay Act is not applicable. The question then is what principles must a court utilise in determining whether to admit such a statement? I now examine this question.

The legal principles governing the admission of prior extra-curial statements

[123] I agree with the analysis of the minority in the Supreme Court of Appeal judgment which distinguished several scenarios that may arise in relation to extra-curial statements that require different treatment.[83] The first scenario is where a person who

[82] GN 168 *GG* 42337, 29 March 2019 as amended.

[83] The scenarios relate to the quote by Cameron JA from *Ndhlovu* above n 27 at para 18.

made an extra-curial statement does not testify – in those circumstances, the statement clearly meets the hearsay definition and must be dealt with in terms of section 3 of the Hearsay Act.[84]

[124] The second scenario is where the person who made the statement testifies but denies making the statement.[85] Other evidence will be necessary to determine whether the witness made the statement. If it is proved that the witness made the statement, and the witness testifies, it will not be hearsay.

[125] A third scenario is where the witness cannot recall whether they made the statement – like the second scenario, the court must utilise other evidence to determine if the statement was made by the witness.[86] If it determines the statement was made by the witness that testifies, once again that would not be hearsay. In both the second and third scenarios, for the reasons already given relating to protecting the right of the defence to challenge and adduce evidence, in my view, whether the statement was made, its connection to the witness and its admissibility are best determined in a trial-within-a-trial.

[126] The fourth scenario is the one we are confronted with in this case: where the witness admits making the extra-curial statement but claims it does not represent the truth. If the witness testifies, then the statement does not constitute hearsay as its probative value depends upon the credibility of the witness who testifies. If the statement is rendered admissible after a trial-within-a-trial, the witness is available to be cross-examined in the main trial and the probative value to be accorded to the statement can be determined after cross-examination takes place. The principles articulated below apply mainly in this fourth scenario in relation to the admissibility of the extra-curial statement (or once the statement has been proved to have been made by the witness in the second and third scenarios).

[84] *Makhala* SCA n 5 at para 55.

[85] Id at para 56.

[86] Id at para 57.

[127] Prior inconsistent statements of the kind discussed above can only be admitted if they would be eligible to be admitted as testimony. If the witness in a prior statement, for instance, simply repeated the evidence of another person ("Lwandile told me that he saw James fire the gun"), that statement is hearsay, and cannot under the revised approach be admitted as proof that James fired the gun (but only that the witness heard Lwandile say this).[87] The admission of the hearsay evidence could only take place upon the application of the general principles governing hearsay evidence in section 3 of the Hearsay Act. The admission of prior inconsistent statements is also not an opportunity to admit evidence that would be excluded in terms of section 35(5) of the Constitution due to its being improperly obtained in a manner that violates the Bill of Rights and renders the trial unfair or otherwise detrimental to the administration of justice.

[128] The extra-curial statements in cases of this kind are by their nature those where there has been a disavowal thereof at the trial. The central concern for a judicial officer considering the admissibility of such statements given by witnesses relates to establishing their trustworthiness or reliability and, connected with this, that they were made freely and voluntarily. It is necessary for a judicial officer to consider various indicia of reliability. For purposes of analytical clarity, it is helpful to classify these indicia into procedural and substantive dimensions of reliability.[88]

[129] The procedural dimension of reliability involves considering the various circumstances surrounding the taking of the statement and whether they provide adequate safeguards for reaching a conclusion that it was voluntarily made and is a faithful rendition of what the witness said. A court must consider, for instance, whether a witness was subject to any form of duress or undue influence; was warned of the

[87] See the discussion by Lamer CJ in *R v B (KG)* above n 62 at 784-5.

[88] As has been discussed, the Canadian Supreme Court situates the discussion about the admission of extra-curial statements where the witness recants within exceptions to the hearsay rule. In that regard, it distinguishes between procedural and substantive reliability: see *R v Bradshaw* [2017] SCC 35 at paras 28-30 and *R v Charles* [2024] SCC at paras 46-8. That distinction is embroiled within the particular framework of Canadian law in this regard. I adapt the distinction for purposes of South African law and seek also to simplify the discussion somewhat.

consequences of lying; whether the statement was read back to the witness; whether the translation is reliable (if given in a different language) and whether the statement was signed or taken under oath (with the consequence that lying could lead to a conviction for perjury). The presence of a lawyer, relative or friend can provide circumstantial evidence that the individual was supported in the making of a statement and that it was voluntary.

[130] Most importantly, the modern ability to videotape evidence would allow for many of the concerns associated with such evidence to dissipate.[89] As has been indicated above, videotaped evidence allows for demeanour to be assessed as well as the circumstances in which the evidence was given and the relationship between the interviewer and the witness. Such evidence would have many of the characteristics associated with testimony which can be assessed by the trial judge. Given the widespread availability of smartphones, it would, therefore, be desirable for the taking of such witness statements to be videotaped. Nevertheless, this judgment does not hold that videotaping is a necessary condition for the admission of such evidence and other surrounding circumstances – such as those already mentioned and appearing in the cases discussed below – can provide sufficient indications of procedural reliability.

[131] Substantive reliability relates to the content of the statement and whether it can be shown to be trustworthy through evidence that corroborates or contradicts it.[90] Substantive reliability at the trial-within-trial involves demonstrating that the statement is sufficiently trustworthy to warrant admission at the trial and to counteract the dangers associated with such a statement.[91]

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[89] *R v B (KG)* above n 62 at 824-5.

[90] *R v Bradshaw* above n 88 at para 30.

[91] In deciding on the acceptability of corroborating evidence in this regard, the Canadian courts have adopted a strict approach: material aspects of the statement must be corroborated and must show that the only likely explanation is that the maker of the statement was being truthful when it was given. That requires alternative explanations for the contents of the statement to be considered and rejected. See *R v Charles* above n 88 at para 49. As Karakatsanis J writes in *R v Bradshaw* above n 88 at para 47:

> "Corroborative evidence does so if its combined effect, when considered in the circumstances of the case, shows that the *only likely explanation* for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement." (Emphasis added).

[132] It follows from the reasoning for why statements of this kind are not hearsay, that the witness who gave the statement must testify and there must be an opportunity for the accused's counsel (and the prosecution if the witness has been declared hostile) to cross-examine the witness about the statement in both the trial-within-a-trial and at the main trial. Even though the witness may recant, the cross-examination can probe the reasons for the change in version and whether those reasons are persuasive. They can indicate whether the relationship between the accused and the witness, coercion, amnesia or some other reason exists for departing from the previous statement. Given the witness testifies in court under oath, it should be drawn to the attention of the witness, where they recant, that failure to tell the truth, can result in forfeiture of the benefits of section 204 (if applicable) and a conviction for perjury – that, in some cases, may succeed in focusing the mind of the witness. Such testimony at the trial-within-a-trial may also assist in determining both procedural and substantive reliability.

[133] When determining the admissibility of an extra-curial statement which the witness recants in the witness box, the test for reliability is not mechanical and a judge must assess all the surrounding circumstances to determine reliability. Strong substantive grounds for reliability may help reinforce procedural reliability and vice versa – and thus enable a determination that the statement should (or should not) be admitted. The cases that follow provide some examples of the factors courts have utilised to determine reliability.

[134] In *R v B (KG)*, the Supreme Court of Canada was concerned with the murder of a young man. Two weeks later, three young men were interviewed separately by the police in the presence of a parent and, in one case, a lawyer. They were informed that they did not have to answer the questions put to them and the interviews were

Such a strict approach can risk conflating a determination of the admissibility of the statement with evaluating the probative value thereof. Future casuistic application of the framework articulated in this judgment will determine whether South Africa should develop a more flexible approach.

videotaped. They therefore had considerable procedural reliability. The accounts also overlapped in many respects, thus contributing to an impression of substantive reliability. The Supreme Court of Canada overturned the prior rule preventing the admission of a prior extra-curial inconsistent statement as evidence of the proof of its contents. Despite the witnesses recanting their prior statements in court, the Court found that, in these circumstances, the prior statements might have had sufficient indicia of reliability. It ordered a new trial to commence in which the reformed rule would be applied.

[135] In a subsequent case, *R v U (FJ)*,[92] the matter concerned a charge of incest between a father and his daughter. The daughter was interviewed shortly after the arrest of the father in the presence of her grandmother and another police officer who could speak Spanish. In that interview, the daughter stated that the father had, on several occasions, had sexual intercourse with her and had in fact done so the previous night. The father, interviewed separately by two police officers, admitted to having sexual intercourse with his daughter, the most recent occasion being the previous night. Both effectively recanted in the witness box. Lamer J, writing for the majority, held that a striking similarity between two statements in circumstances where the witnesses could not have colluded, could in rare circumstances provide sufficient indicia of reliability. The overlap in the accounts thus provided clear substantive reliability and the circumstances in which the statements were taken – with the grandmother and more than one officer present – gave sufficient indications of procedural reliability (despite the fact that the testimony was not taped).

[136] Closer to home, in *Rathumbu*,[93] the Supreme Court of Appeal – although using the principles relating to hearsay – allowed the admission of a prior inconsistent extra-curial statement which was central to the conviction of the accused. The sister of the accused had given a statement to the police in which she said she saw the accused

[92] *R v U (FJ)* [1995] 3 SCR 764.

[93] *S v Rathumbu* above n 27.

stabbing the deceased – yet, she recanted in the witness box. On procedural reliability, the prior statement was taken in Tshivenda and translated into English – it was read back to the witness and she appended her signature to it. The Court found the following indicia of substantive reliability: the lack of protestation by the accused when the witness made incriminating allegations at the scene; the spontaneity of her initial oral responses to the police; the fact that she was the sister of the accused provided an explanation for recanting; the existence of a photograph with piles of clothing outside the home confirming the deceased was leaving her husband (the accused); and the overlap in the testimony of three different police officers concerning what she had told them.

[137] In *Mathonsi*,[94] a Full Court of the KwaZulu-Natal High Court was also concerned with a murder. In an extra-curial statement, a witness, who was a general worker at the bar where the murder occurred, mentioned that he had been given two guns by the co-accused. He later showed the police where the weapons were buried and they were recovered. Ballistics tests were done on them and the weapons were linked to the murder. The witness, though, changed his testimony in court and was declared a hostile witness.

[138] The police testified that the statement was taken down in English. It was read back to the witness who signed it and it was then commissioned. In court, the witness contested the voluntariness with which the statement was given. Yet, the Full Court found that the statement contained much information and detail which the police could not have known – for instance, the witness could not have been forced to disclose that he knew where the weapons were. When digging up the weapons, his aunt was also invited by the police to be present which would have been unlikely if the police had utilised coercive means on the witness. This case demonstrates how substantive reliability can, at times, confirm procedural reliability: the disclosure of information purely within the knowledge of the witness helped to confirm that the statement was

[94] Above n 47.

both voluntary and accurate. The substantive reliability of the statement was also corroborated by another witness placing the accused at the scene of the crime as well as objective ballistics evidence. Consequently, the Full Court found that the prior statement was admissible and sufficiently reliable.

[139] The purpose of examining these judgments is to indicate the range of circumstances that can confirm the reliability of an extra-curial statement – there is no closed list of specific requirements. Videotaping is highly desirable for procedural reliability but not absolutely necessary if there are other indicia of reliability such as those present in some of these judgments. It is useful analytically to separate out considerations of procedural and substantive reliability but there is clearly an interplay between them. Overall, a court concerned with the admissibility of a prior extra-curial statement at a trial-within-a-trial must consider whether all the available evidence confirms the trustworthiness of the statement sufficiently to guard against the dangers associated with such statements. These cases also highlight that there are a range of circumstances in which extra-curial statements which are disavowed may yet be found reliable, aid in the discovery of the truth and, consequently, support a conviction.

[140] It is important here to distinguish between the admissibility of these statements at the trial-within-a-trial and the ultimate probative value of the statement in determining the guilt of the accused within the actual trial. At a trial-within-a-trial, the focus is only on whether the statement is trustworthy. To establish that, it must cross a threshold of being sufficiently reliable to counteract the dangers attached to such statements: the lack of an oath, the ability of the judicial officer to assess demeanour and contemporaneous cross-examination.[95] If this threshold is crossed, the admission of these statements does not determine the guilt of any of the accused. Such a conclusion can only be reached after an assessment of the ultimate reliability of the statement in light of the totality of evidence and whether all the evidence taken together

[95] See *R v Bradshaw* n 88 at para 32.

proves guilt beyond a reasonable doubt. I now turn to discuss the approach to be adopted to resolving this particular case.

Application to this case

[141] Given that this judgment finds for the first time that a trial-within-a-trial must be held to consider the admission of prior inconsistent statements, that was not done in this case. The applicants thus justifiably raise questions about the substantive effect that had on their right to challenge and adduce evidence. The applicant's lawyers did not interview the witness and thus had no proper basis upon which to cross-examine as to its admissibility. As pointed out earlier, this was a problem of their own making by not following rule 55(1) of the Code of Conduct. But given the unfamiliar territory in which counsel and the court found themselves, that should not on this occasion be held against the accused. Since no trial-within-a-trial took place, the procedural reliability of the statement was not adequately probed. Mr Luzuko Makhala was also not cross-examined on the incriminating elements of his statement. Understandably, counsel confined their cross-examination, such as it was, to his oral evidence, which was exculpatory of their clients. Had the trial court admitted the statement pursuant to a trial-within-a-trial, counsel would no doubt have cross-examined Mr Luzuko Makhala on its incriminating content. All these facts point to an infringement of the applicants' right to challenge and adduce evidence in section 35(3)(i) of the Constitution and thus preclude a finding that the trial was fair.

[142] These concerns would naturally lead to the conclusion that we should refer the matter back to the High Court for a retrial in which a trial-within-a-trial could be conducted and apply the relevant principles concerning procedural and substantive reliability to the statement. In considering this possibility, we must be mindful as an appellate court to ensure a just and equitable outcome in this particular case. We must take into account the fact that the applicants are currently incarcerated and this case has already taken several years to work its way through the court system. Referring the matter back for a retrial would only be justifiable if we are convinced that, in the event that the statement were to be admitted after a trial-within-a-trial, the corroborative

evidence is sufficient to sustain an ultimate convictions of the two applicants before this Court. In my view, the corroborative evidence before us is too weak to support such a conclusion in respect of the applicants.

[143] In making a finding in this regard, we need to consider the facts that corroborate or conflict with the statement and thus affirm its probative value. There are only a few pieces of evidence that corroborate the statement: the son of the deceased testified that the third accused, came to the home of the deceased the night before the crime was committed. The wife of the deceased, Ms Molosi, testified that the third accused came to their home on the day of the crime. Both witnesses pointed him out at a photographic identification parade. Ms Molosi's testimony, particularly, corroborates one element of Mr Luzuko Makhala's statement that the third accused – who is not part of this appeal – had gone to the home of the deceased and seen her. A witness – a certain Ms Kameni – heard three shots which corroborates the account in Mr Luzuko Makhala's statement in this regard. She also overheard a phone call between Mr Luzuko Makhala and another person immediately after the shooting in which he asked "Are you finished, boss?".

[144] These pieces of evidence suggest Mr Luzuko Makhala knew information about the crime – yet, a crime of this nature may well have been discussed extensively within the community. His knowledge of these facts does not rule out the explanation that he was simply repeating what he heard from others and did not have first-hand knowledge of the crime or who committed it. There is also evidence that Mr Luzuko Makhala was in Knysna at the time and cell-phone records indicate engagement between Mr Luzuko Makhala and the other accused around the time of the crime. There are, however, alternative explanations for this evidence: Mr Luzuko Makhala could have been visiting his brother in Knysna (as he claimed) and the cell-phone contact alone does not prove what that contact was about.

[145] The other evidence that exists simply does not provide sufficient corroboration of the extra-curial statement to warrant the conclusion that, even if it were to be admitted

after a trial-within-a-trial, the state would be able to prove the guilt of the accused beyond a reasonable doubt. There is, consequently, no good reason to order a retrial. As a result, I agree with the order proposed in the first judgment that the convictions of the applicants must be overturned.

For the Applicants:	J Van Der Berg instructed by Dercksens Incorporated Attorneys
For the Respondent:	MNC Menigo instructed by Director of Public Prosecutions Cape Town