CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 10/07
[2008] ZACC 2

RICHARD DITSHELE MOLIMI Applicant

versus

THE STATE Respondent

Heard on : 23 August 2007

Decided on : 4 March 2008

JUDGMENT

NKABINDE J:

Introduction

[1] This case raises issues of considerable importance regarding the admissibility of extra-curial statements of an accused against a co-accused in a criminal trial. More specifically, we are asked to consider the rules governing the admissibility of hearsay evidence under the provisions of the Law of Evidence Amendment Act[1] (the Act) in the context of the right to a fair trial and the need to prevent, among other things, procedural abuse.

[1] Act 45 of 1988, which came into effect on 3 October 1988. The relevant provisions are contained in section 3.

[2] It is convenient to state the relevant provisions of the Act from the outset. Section 3 of the Act reads:

> "(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—
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> (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
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> (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
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> (c) the court, having regard to—
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> (i) the nature of the proceedings;
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> (ii) the nature of the evidence;
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> (iii) the purpose for which the evidence is tendered;
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> (iv) the probative value of the evidence;
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> (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
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> (vi) any prejudice to a party which the admission of such evidence might entail; and
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> (vii) any other factor which should in the opinion of the court be taken into account,
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> is of the opinion that such evidence should be admitted in the interests of justice.
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> (2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
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> (3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of the account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.
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> (4) For the purpose of this section—

> '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;
> 'party' means the accused or a party against whom hearsay evidence is to be adduced, including the prosecution."

[3] This case comes before us by way of an application for leave to appeal against the judgment and order of Cachalia AJA with Zulman JA and Van Heerden JA concurring, in the Supreme Court of Appeal.[2] That court dismissed the appeal by the appellants against their convictions by Makgoba AJ in the Johannesburg High Court[3] on the counts of robbery with aggravating circumstances,[4] murder and attempted murder and upheld the appeal against their convictions on counts of murder, unlawful possession of firearms,[5] unlawful possession of ammunition[6] and kidnapping. The applicant also seeks condonation for the late filing of the application for leave to appeal.

Factual background

[2] *S v Molimi and Another* 2006 (2) SACR 8 (SCA).

[3] *S v Mbambo Sifiso and Others* CC165/01, 9 October 2003, unreported.

[4] 'Aggravating circumstances' is described in section 1(1) of the Criminal Procedure Act 51 of 1977, which provides:

> "(1) In this Act, unless the context otherwise indicates—
> 'aggravating circumstances,' in relation to—
> . . .
> (b) robbery or attempted robbery, means—
> (i) the wielding of a fire-arm or any other dangerous weapon;
> (ii) the infliction of grievous bodily harm; or
> (iii) the threat to inflict grievous bodily harm,
> by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence;"

[5] In contravention of section 2 read with sections 1 and 39 of the Arms and Ammunition Act 75 of 1969.

[6] In contravention of section 36 read with sections 1 and 39 of the Arms and Ammunition Act 75 of 1969.

[4] The facts have been summarised in the judgment of the Supreme Court of Appeal. The applicant, Mr Molimi, was accused 2 at the trial. He was indicted and convicted of various counts[7] with two other accused in the High Court. He was the manager of Clicks Store (Clicks) in Southgate Mall, Johannesburg, when it was robbed during a routine money collection by Fidelity Guards (Fidelity) on 30 October 2007. It is common cause that accused 1 was caught red-handed. Accused 3 was a former employee of Fidelity. The applicant and his co-accused had communicated with one another using their cell phones prior to and on the day of the robbery.

[5] A security officer employed by Fidelity arrived at Clicks at approximately 11:00am to collect money. He entered the cash office and found the applicant and his co-employee who handed the money to him. He then transferred the money into a container. As the officer left the store in possession of the container, two of the four armed men who had just entered the store confronted him and ordered him back into the cash office. They instructed him to empty the contents of the container into a black bag, which he did. The robbers fled with an amount of R45 737,40 and a revolver was taken from the Fidelity security officer.

[6] As the robbers fled the scene, there was a barrage of gun fire between one of the robbers and a security guard in the employ of Clicks who fatally wounded each other.[8] The remaining three robbers fled and were confronted by a bystander who

[7] Namely: robbery, two counts of murder, attempted murder, unlawful possession of firearms, unlawful possession of ammunition and kidnapping.

[8] The death of the security guard formed the basis of the murder in count 2.

drew his firearm upon being pointed at with firearms by the fleeing robbers. The bystander warned them to stop. When the robbers ignored his warning, he pursued accused 1 who then dropped the black bag and took shelter in a store near the exit of the mall. Accused 1 pointed his firearm at the bystander and the latter reacted by discharging one shot in the direction of accused 1 and accidentally shot and wounded an employee in the store.[9] Accused 1 then took a young man in the store hostage.[10] The bystander fired another shot towards accused 1, this time accidentally killing the hostage.[11] Accused 1 ultimately surrendered and was arrested immediately. The applicant was arrested a day after the robbery and accused 3 some two months later.

[7] On the date of his arrest and after being cautioned by the police, accused 1 made a statement to a senior police officer incriminating himself, the applicant, accused 3 and several other alleged members of the group involved in the robbery. The statement gives his version of how the robbery was orchestrated and the manner in which the cell phones of the applicant and accused 1 were to be used to alert the men when the Fidelity officer arrived at and left the store. The statement further tells of a meeting that took place between accused 3 and two other perpetrators, where accused 3 allegedly informed the members of the party about a tip-off concerning money that could be "taken" from Clicks.[12]

[9] The accidental wounding of the employee formed the basis of the attempted murder in count 4.

[10] The taking of the young man hostage formed the basis of the kidnapping in count 7.

[11] The accidental fatal shooting formed the basis of the murder in count 3.

[12] The statement is set out in full in note 54 below.

[8] Accused 3 also made a statement to a senior police officer implicating himself, the applicant and accused 1. The statement describes the planning of the robbery including how accused 3 recruited accused 1 to rob Clicks, the subsequent meetings between him, accused 1 and the applicant, and the communication he had with accused 1 on the morning of the robbery before he left the mall and before the robbery took place.[13] The applicant made no statement to the police. Thus, this case is about the admissibility of the statements made by accused 1 and accused 3 against the applicant.

High Court Proceedings

[9] The accused pleaded not guilty to all counts, made formal admissions[14] and elected to remain silent.

[10] When the statement of accused 1 was tendered at the trial, an objection was taken to its admission. The admissibility of this statement was challenged on the ground that it had not been proved to have been made freely, voluntarily and without undue influence, within the meaning of section 217 of the Criminal Procedure Act 51 of 1977[15] (CPA). The record of the proceedings at the High Court reveals that the

[13] The statement is set out in full in note 58 below.

[14] In terms of section 220 of the CPA. These admissions included the following: that firearms were recovered by the police at the scene on the day of the robbery; the identities of the deceased in counts 2 and 3; the post-mortem reports in counts 2 and 3; photographs of the deceased in counts 2 and 3; and the photo album, the key and sketch plan of the scene of the crime.

[15] Section 217 provides:

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

statement of accused 1 was generally understood by the parties as constituting a confession. The High Court conducted a trial-within-a-trial[16] and heard evidence

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

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

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

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

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

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

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

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

[16] Zeffert et al *The South African Law of Evidence* 4ed (LexisNexis Butterworths, Durban 2003) 506 describe a trial-within-a-trial as a:

> "…procedural device which is essential to prevent the collision or attenuation of two important rights of the accused, both of which have now found constitutional expression: the right to elect not to testify at the close of the prosecution's case and the right to challenge evidence adduced against him or her and, thus, to prevent inadmissible evidence from being received against the accused."

regarding the admissibility of the statement of accused 1. The Court admitted the statement against accused 1 and a copy was handed in.[17]

[11] An objection was raised to the admissibility of the statement of accused 3 on the basis that the police fabricated his version. Accused 3 said that he was threatened and assaulted by the police before signing the statement.[18] The High Court, relying on *S v Khuzwayo*[19] and *S v Lebone*,[20] allowed the state to cross-examine accused 3 on the contents of the statement to test its reliability. At the conclusion of the trial-within-a-trial, the court admitted the statement provisionally against accused 3 and reserved reasons for its ruling.

[12] At the close of the state's case, counsel for the applicant and accused 3 unsuccessfully applied for discharge in terms of section 174 of the CPA.[21] In the course of making a ruling the Judge remarked—

> "at this stage of the proceedings [the statements] are part of the record and I admit [them]. The two statements by accused 1 and [3] implicate [the applicant]."[22]

[17] The original statement of accused 1 went missing at the trial. Counsel for accused 1 argued that the copy was not reliable and that it should not be admitted. The state argued however that there was nothing wrong on the face of the document to suggest that it had been interfered with more so that accused 1 had testified and confirmed the writing.

[18] The police, according to him, promised him that he would be released if he signed the statement.

[19] 1990 (1) SACR 365 (A).

[20] 1965 (2) SA 837 (A).

[21] Section 174 provides:

> "If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

[22] Above n 3, Application for Discharge at 6.

The case continued against the three accused who all testified in their own defence. Accused 1 denied complicity in the robbery and all allegations against him and disavowed the contents of his statement. Counsel for the applicant and accused 3 did not cross-examine accused 1.

[13] Accused 3's testimony was to the effect that upon his arrest and on arrival at the police station, he informed the police officers that he was only prepared to make a statement to a magistrate but was told that the magistrate was not available. He said that he signed the statement under duress. He denied involvement in the robbery.

[14] The applicant testified that he was on duty the day of the robbery. He explained that he had an appointment with accused 3 to discuss a "deal" to buy the rims of his vehicle. After the robbery he contacted accused 3 and arranged another appointment. He made several cell phone calls to accused 3 allegedly pleading with him not to cancel the "deal". He also denied complicity in the robbery.

[15] It became apparent during the proceedings and in the context of the admissibility of the statements by accused 1 and 3 against the applicant that counsel and the prosecutor were aware of the decision in *S v Ndhlovu and Others.*[23] The admissibility of the statements by accused 1 and 3 against the applicant was considered for the first time and as a "critical issue" only in the course of the judgment on the merits and after the applicant testified. The trial court admitted the statements

[23] 2002 (6) SA 305 (SCA); 2002 (2) SACR 325 (SCA); [2002] 3 All SA 760 (SCA).

against him on the basis of the probative value of the evidence and that the interests of justice required its admission.

[16] Although the statement of accused 1 was generally understood as amounting to a confession,[24] the trial Judge, when delivering judgment on the merits, said that both statements remained hearsay evidence against the applicant irrespective of whether accused 1 and 3 testified.[25] He rejected the evidence tendered for and on behalf of the defence of all three accused as being devoid of credence. On the strength of the evidence contained in the statements, coupled with the information contained in the cell phone records, the court convicted the applicant and his co-accused on all counts and sentenced each to imprisonment on each of the seven counts.[26] The applicant and accused 3 applied for and were granted leave by the High Court to appeal to the Supreme Court of Appeal against their convictions.

Supreme Court of Appeal proceedings

[17] On appeal the applicant challenged his convictions on the basis that, inter alia, the two statements were inadmissible against him because of their hearsay character. In the same proceedings, accused 3 also sought an appeal to this extent about the statement of accused 1, arguing that he had not made the statement voluntarily. The correctness of *Ndhlovu* was not challenged on appeal. The contention was that the

[24] The parties seemed to have laboured under an impression that *Ndhlovu* applies to confessions.

[25] Above n 3 at 29.

[26] Count 1 (robbery) 15 years; Count 2 (murder of the Clicks security guard) life imprisonment; Count 3 (murder of the hostage) 15 years; Count 4 (attempted murder of the injured employee) three years; Count 5 (unlawful possession of firearm) four years; Count 6 (unlawful possession of ammunition) one year; and Count 7 (kidnapping of the hostage) three years. Effectively, each accused was to undergo imprisonment for life.

trial court disregarded the rule governing the admissibility of hearsay evidence under section 3 of the Act, and the approach as laid down in *Ndhlovu.* The effect of the rule in *Ndhlovu* is basically that (1) the reception of the hearsay evidence must not surprise the accused; (2) the reception should not come at the end of the trial when the accused is unable to deal with it; and (3) that the accused must understand the full evidentiary ambit of the case against him or her.

[18] The Supreme Court of Appeal dismissed the appeal in respect of the convictions on counts 1, 2 and 4, and upheld it in respect of counts 3, 5, 6 and 7.

[19] The Supreme Court of Appeal decided the applicant's case on the basis that the statements were admissions and not confessions. The court recognised the effect of the rule formulated in *Ndhlovu.* It nevertheless found that the court in *Ndhlovu* was "clearly not laying down an inflexible rule."[27] Relying on *Key v Attorney General, Cape Provincial Division and Another,*[28] the court said that the question is whether, in the circumstances of the case, the reception of the hearsay evidence was unfair to the appellants and therefore not in the interests of justice and not whether the rule formulated in *Ndhlovu* had not been "strictly complied with".[29] The court then

[27] Above n 2 at para 13.

[28] 1996 (2) SACR 113 (CC); 1996 (6) BCLR 788 (CC) at para 13. Notably, the case was not concerned with the admissibility of hearsay evidence but with section 25(3) of the interim Constitution. It concerned the search of the residence and offices of the applicant and seizure of documents. The question was whether the evidence obtained as a result of the search and seizure was admissible in the criminal proceedings against the applicant. The search and seizure had taken place before the commencement of the interim Constitution. The complaint was that the admission of the evidence obtained consequent to the search and seizure infringed the applicant's fair trial rights.

[29] Above n 2 at para 14.

analysed the way in which the trial court dealt with the admissibility of the two statements and concluded that—

> "[d]espite it being unclear from the Judge's ruling whether the extra-curial statements by accused 1 and the second appellant were admissible against their co-accused, there could have been no doubt in the minds of counsel for the appellants, in the light of what had transpired during the 'trial-within-a-trial' of accused 1 and the discharge application, that the extra-curial statement by accused 1 was not only part of the state case against him, but also against them. They should, if there was doubt, have asked the Judge to clarify the position before deciding whether or not their clients would testify in their defence. For [the applicant], he had the added problem that he would have to deal with the second appellant's incriminating statement."[30]

[20] The Supreme Court of Appeal found that a "vague provisional ruling, as was made in this case, is not conducive to . . . an appreciation [of the full evidentiary ambit the accused may face] and may be prejudicial to an accused . . . " and "may leave an accused unfairly in a state of uncertainty."[31] It nonetheless concluded that (a) the applicant was able to cross-examine the accused;[32] (b) accused 1's subsequent disavowal of the statement was correctly found by the trial court to have been untruthful;[33] (c) the corroboration of important aspects of the statement by the cell phone records confirmed its probative value;[34] (d) there was no prejudice to the applicant;[35] (e) the fairness of the trial was not compromised;[36] and (f) the admission

[30] Id at para 20.

[31] Id at para 27.

[32] Id at para 24.

[33] Id.

[34] Id.

[35] Id.

[36] Id.

of the hearsay evidence was in the interests of justice having regard to the factors listed in section 3(1)(c) of the Act.[37] The Court found that the prosecutor's and the Judge's failures did not render the trial of the applicant unfair.[38]

In this Court

[21] The applicant sought leave to appeal and condonation[39] for the late filing of the application for leave to appeal. His counsel, Advocate CE Thompson, was requested by this Court to appear and argue the case on his behalf.[40] The Court is indebted to Advocate Thompson for acceding to the request. Accused 3 has not sought leave to appeal to this Court. Nothing more need be said about him. The applicant's first constitutional challenge was that *Ndhlovu* had the effect of generally discriminating against accused persons because of the differentiation accorded between confessions and admissions. It was argued that the differentiation violates section 9 of the Constitution. Secondly, the applicant contended that the statements should have been recognised as confessions and that a confession of an accused cannot be used as evidence against a co-accused. Accordingly, the two statements should not have been used as evidence against him. This submission was made in response to the question raised in the directions issued out of this Court by the Chief Justice.[41] Thirdly, the

[37] Id.

[38] Id at para 28.

[39] The state did not oppose the application for condonation.

[40] This was in accordance with the directions issued out of this Court by the Chief Justice on 5 April 2007.

[41] The parties were directed to lodge written argument on the merits of the appeal including the following issues:

> "(a) Whether the statements by accused 1 and 3 constituted confessions on any of the offences disclosed in the charge sheet or on any offence that constituted a competent verdict on any of the charges in the charge sheet; and

applicant challenged the timing of the ruling on the admissibility of the statements as evidence against him and argued that his right to adduce and challenge evidence, enshrined in section 35(3)(i) of the Constitution, was violated. If the evidence of the statements was inadmissible against the applicant, it was argued, the admissible evidence could not sustain his conviction.

[22] The amicus curiae (the amicus), appointed pursuant to the further directions, not only generally supported the contentions raised by the applicant but also contributed a different perspective, for which this Court is grateful. In essence, he contended that the approach by the Supreme Court of Appeal, following *Ndhlovu*, in admitting hearsay was incorrect and at odds with the applicant's fair trial rights, including his right to challenge evidence particularly in circumstances where the declarants disavowed their statements under oath.[42] In the alternative, the amicus challenged the timing of the determination of admissibility of the extra-curial admission against the co-accused. He argued that a proper consideration should have been given to all of the factors in section 3(1)(c) of the Act.[43] Regarding the merits, the amicus also submitted that the admissible evidence could not sustain a conviction.

[23] The state opposed the application for leave to appeal and maintained that extra-curial admissions against a co-accused are not excluded from admissibility, provided

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(b) Whether vicarious admissions by co-accused ought to be admitted in terms of section 3 of [the Act] (in this regard counsel's attention is drawn to the decision in *S v Ndhlovu* 2002 (6) SA 305 (SCA)).''

[42] The rights to be presumed innocent, to remain silent and not to testify during proceedings, enshrined in section 35(3)(h) of the Constitution, were also invoked by the amicus.

[43] Above n 1.

the admissions were in terms of section 3(1) of the Act. Accordingly, the state defended the approach in *Ndhlovu*. Relying on the factors set out by Moseneke J in *S v Thebus and Another*[44] regarding whether accused 3 actively acted in association with the group, the state argued that the perusal of his statement revealed that it constituted an admission because when the robbery took place, he had left the mall. In response to the section 9 challenge, the state argued that there is no differentiation between persons who make confessions and those who make extra-curial admissions. Regarding the accused's fair trial rights the state contended that the applicant's fair trial rights were not violated. The state submitted that the merits favoured the conviction on the basis of common purpose.

[24] Before I consider the issues raised for determination in this matter, it is necessary to deal with preliminary issues: whether applications for condonation and leave to appeal, respectively, should be granted.

Condonation

[25] The applicant sought condonation for the late filing of the application for leave to appeal.[45] There is no gainsaying that the indulgence should be granted. Having had regard to the explanation advanced for the delay, the absence of apparent prejudice to and opposition by the state, as well as the fact that reasonable prospects of success do exist, condonation should be granted.

[44] 2003 (2) SACR 319 (CC); 2003 (10) BCLR 1100 (CC) at para 45.

[45] The application for leave to appeal was lodged just under a year late, the judgment in the Supreme Court of Appeal having been delivered on 29 March 2006. The reason given for the delay was that the applicant was refused legal assistance by the Legal Aid Board. He then, seemingly without a legal practitioner, lodged this application.

Leave to appeal

[26] This Court may decide only constitutional matters and issues connected with decisions on constitutional matters.[46] A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.[47] The substantive issues raised for determination do raise constitutional issues of great public importance. One of the issues relates broadly to the admissibility of extra-curial admissions[48] under the provisions of the Act which impacts significantly on the right of every accused to a fair trial.[49] In particular, the issues are (a) whether the

[46] See section 167(3)(b) of the Constitution.

[47] See section 167(7) of the Constitution. See also *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) SACR 1 (CC); 2001 (1) BCLR 36 (CC) at paras 13-14.

[48] The state conceded in oral argument that the case raises constitutional matters and that this case is not similar to the case of *Boesak*, above n 47.

[49] Section 35(3) of the Constitution provides:

> "Every accused person has a right to a fair trial, which includes the right—
>
> (a) to be informed of the charge with sufficient detail to answer it;
>
> (b) to have adequate time and facilities to prepare a defence;
>
> (c) to a public trial before an ordinary court;
>
> (d) to have their trial begin and conclude without unreasonable delay;
>
> (e) to be present when being tried;
>
> (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
>
> (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
>
> (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
>
> (i) to adduce and challenge evidence;
>
> (j) not to be compelled to give self-incriminating evidence;
>
> (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
>
> (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
>
> (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

statements by accused 1 and 3 are confessions or admissions; (b) whether the statements are admissible against the applicant; (c) whether the High Court and the Supreme Court of Appeal complied with section 3(1)(c) of the Act and the approach set out in *Ndhlovu*; and (d) the appropriate consequence.

[27] As I have indicated above, reasonable prospects of success exist. Accordingly, it is in the interests of justice that leave to appeal should be granted.[50]

[28] There is no definition of "confession" in the statute. However, courts define "confession" narrowly as "an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law."[51] Du Toit et al[52] describe an admission "as a statement or conduct adverse to the person from whom it emanates." Such admissions are made out of court and tendered in evidence against their maker. If made to a magistrate and reduced to writing, they are admissible upon their mere production provided the legal requirements are met.[53]

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court."

[50] In *S v Bierman* 2002 (5) SA 243 (CC); 2002 (10) BCLR 1078 (CC) at para 9, this Court considered the ambit of prospects of success as including the prospects that the Court will overturn the result in the court *a quo* (as this Court is minded to do in this case) rather than merely finding for the applicant on a particular point of law.

[51] *R v Becker* 1929 AD 167 at 171. It is, according to Du Toit et al *Commentary on the Criminal Procedure Act* Service issue 37, 2007 (Juta, Cape Town) at 24-51, an extra-curial admission of all the elements of the offence charged.

[52] Id, Service issue 38, 2007 at 24-74.

[53] See section 217(1)(b) of the CPA, above n 15.

[29] The statement of accused 1[54] was understood at the trial[55] as constituting a confession. The Supreme Court of Appeal labelled and dealt with both statements under the Act as extra-curial admissions. I do not agree that the statement of accused 1 is an admission. A perusal of that statement, read in conjunction with accused 1's warning statement, establishes an admission of the elements of the robbery with aggravating circumstances and thus an unequivocal acknowledgment of guilt. This much was conceded during argument in this Court by counsel for the applicant and the state as well as by the amicus. A question thus arises whether the trial court and the

[54] The pertinent parts of the statement of accused 1 incriminating the applicant and accused 3 reads:

> "Verlede week Dinsdag het Ishmael vir my, Ngcobo en Xolani gebel op my selfoon. Ons het hom ontmoet by die Shell Garage te Ormondi.
> Daar het ek vir Ishmael ontmoet. Dit was ek, Xolani, Mabutho Ngcobo, Ishmael het gese dat hy 'n tip van die manager van Clicks South Gate gekry het en dat ons die geld moes kom vat daar by Clicks.
> Laasweek Donderdag het ons die bestuurder Limela ontmoet by FNB. Sy van is moontlik Molime. Hy het gese daar is geld wat ons moet gaan vat by Clicks. Hy het gese FG sal die geld kom haal en hy sal ons bel en dan moes ons die geld by FG vat binne in sy die manager se kantoor.
> Hy het gese as FG inkom sal hy ons bel. As FG uitgaan sal hy ons weer bel.
> Gister weer by FNB Stadium het ons weer die manager ontmoet. Ons het weer gepraat oor die ding en het klaargepraat.
> Vandag Maandag 2000-10-30 om 07:30 het ons ontmoet by die k/v Edith Cavelle en Peterson Strate, Hillbrow. Dit was ek, Xolani, Ishmael, Mzwethu Ngcobo, Mokwelani Mbabmo, Mabutha, Mkize en nog een was saam met Ishmael gekom het. Ek ken hom nie. Ons het almal vuurwapens gehad. Ons het met my broer se Conquest, BMW wit van kleur en 'n Honda gery na South Gate Shopping Centre.
> Die manager het eers vir Ishmael op sy selfoon gebel en het my toe op my selfoon gebel my sel no is 082 866 4344. Dit was tussen ons en die manager afgespreek dat hy ons net sal skakel. Ons moes nie praat nie. Die 1ste oproep was die teken dat FG gekom het en die 2de oproep 'n teken dat FG uit die winkel gegaan.
> Ons het gegan na Clicks. Xolani het sy vuurwapen op die sekuriteitswag gerig. Dit is FG se Sekuriteiswag. Xolani, Mdwaleni, Mbambo en ek is in by die kantoor. Xolani het die geld in a swartsak gesit en die ander geld ook in 'n ander swart sak gesit. Xolani het die een sak vir Ncobe gegooi en die ander sak vir Mkize. Die manager was ook in die kantoor.
> Ons is uit die kantoor. Skote het begin klap en ek het gesien dat Mkize en die sekuritetswag op mekaar skiet. Ek het ook 'n sak geld by my gehad. Ons het weggehardloop. Ek het die geld neergegooi.
> 'n Kleurlingman het op my begin skiet. Daar was 'n ander man ek het agter hom gaan wegkruip. Die kleurlingman het die persoon geskiet. Ek is daar gevang deur die sekuriteit. Ek het my vuurwapen op die grond neergesit en hulle het dit gevat. Die sekuriteitswagte het my toe aangerand. Die Polisie het my later gevat by hulle."

[55] Save for counsel for accused 3 who did not accept that the statement of accused 1 amounted to a confession.

Supreme Court of Appeal were entitled to use that confession as part of the evidence to establish the guilt of the applicant.

[30] Section 219 of the CPA provides that "[n]o confession made by any person shall be admissible as evidence against another person."[56] It is noteworthy that section 3 of the Act, at the outset, places itself "[s]ubject to the provisions of any other law." The prohibition regarding the admission of confessions of one accused against another therefore remains in force. It follows that the confession of accused 1 should have been excluded by the trial court and the Supreme Court of Appeal when determining the guilt or otherwise of the applicant.[57] The Supreme Court of Appeal and the trial court, therefore, erred in admitting the confession of accused 1 as evidence against the applicant.

[31] The status of the statement of accused 3,[58] the subject of section 219A of the CPA,[59] is controversial. It was labelled an extra-curial admission and was admitted as

[56] The ban was in recognition of the prejudice to the accused presented by the admission of such evidence. That is now fortified by the right to fair trial enshrined in the Constitution.

[57] See *R v Baartman and Others* 1960 (3) SA 535 (A) at 542D; [1960] 3 All SA at 542 , quoted with approval in *S v Banda and Others* 1990 (3) SA 466 (BG); 1991 (2) SA 352 (B) at 506. See also *S v Makeba and Another* 2003 (2) SACR 128 (SCA) at para 14.

[58] The statement reads thus:

> "Molemi came to about a week before October. Molemi works at Clicks and I knew him from the time I use to work for FG. I picked up money when I was working for FG (Fidelity Guards). He asked me who I know or if I can find people to come and take some money from Clicks. So I promised him that I will get some people who is naughty who will do this job. I then approached Sifiso who I knew used to rob some stores in JHB. Then I took Sifiso to meet Molemi at Nando's. There we spoke about organising a robbery at Clicks. Sifiso told us that he will bring some other guys to help with the job . . . On the day of the robbery I was by myself and I went to Southgate to see if everything was going as planned. I knew what time they were supposed to rob Clicks . . . . I was in contact with Sifiso by cellphone.
>
> He phone me that morning and confirmed that everything was still on for the day and that they planned to rob between 08:00 and 09:00 am. I went to Southgate at 08:00 am and waited in the car where I could see the entrance. Whilst I was waiting I phoned Sifiso just to be sure

such at the trial, albeit provisionally and without any indication whether it was admitted against the applicant. The labelling was confirmed on appeal. It was contended on behalf of the applicant that the trial court disregarded the rules governing the admission of hearsay evidence under section 3(1) of the Act.

[32] Objectively viewed, the statement of accused 3 amounts to an admission. That was the view taken by the parties in argument. The statement, as correctly contended by the state, shows that accused 3 did not play any active part in the robbery. It was still open to accused 3 to raise a defence of dissociation from the common design to

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> that everything was going smoothly I waited for a long time and nothing happened. I phoned Sifiso and told him it is getting late, it was after 10:00 already. He assured me that everything was still fine. I then left and Molemi phoned me that same day after 11:00 am and told me that Sifiso came to Clicks and tried to rob, but that they failed. He was very angry that the planned robbery did not succeed. I just left it alone. I never spoke to Sifiso or Molemi again . . . The last time I spoke to Sifiso was before the robbery when he phoned me on my private cellphone. I never spoke to any of them again up to now . . . . "

[59] Section 219A provides:

> "(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained—
>
> (a) be admissible in evidence against such person if it appears from such document that the admission was made by a person whose name corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the admission and any question put to such person by the magistrate; and
>
> (b) be presumed, unless the contrary is proved, to have been voluntarily made by such person if it appears from the documents in which the admission is contained that the admission was made voluntarily by such person.
>
> (2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1)."

rob Clicks.[60] What is critical is that accused 3 left the scene after an assurance by accused 1 that everything was still fine and even before the robbery took place. The statement, coupled with his sudden departure, cannot be said to amount to an unequivocal acknowledgement that accused 3 participated in the robbery under a common purpose with those who actually committed the robbery. On the contrary, it is quite consistent with the defence of dissociation.[61] It is immaterial that it might have turned out to be untenable.[62] It is for these reasons that I consider the statement of accused 3 to be an admission rather than a confession. Accordingly, I am satisfied that the High Court and the Supreme Court of Appeal correctly accepted the statement of accused 3 as an admission. This then heralds the determination of a cardinal issue: whether an admission by accused 3 ought to have been admitted in terms of section 3 of the Act against the applicant.

Did the High Court and the Supreme Court of Appeal comply with section 3(1)(c) and the approach in Ndhlovu*?*

[33] Two fundamental principles of criminal law lie at the heart of this appeal. The first is the rule against the admission of inadmissible hearsay and the second is the principle that evidence which is admissible only against one accused cannot be taken into account when assessing the guilt of another accused. Under the common law, an

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[60] In his statement accused 3 said—

> "[T]hey planned to rob between 08:00 and 09:00 am. I went to Southgate at 08:00 and waited in the car . . . for a long time and nothing happened. I phone Sifiso and told him it is getting late, it was after 10:00 already. He assured me that everything was still fine. I then left."

[61] See in this regard *S v Nzo and Another* 1990 (3) SA 1 (A); [1990] 2 All SA 181 (A); *S v Nomakhala and Others* 1990 (1) SACR 300 (A); [1990] 3 All SA 985 (A); *S v Singo* 1993 (2) SA 765 (A); [1993] 1 All SA 465 (A); and *S v Nduli and Others* 1993 (2) SACR 501 (A); [1993] 2 All SA 612 (A).

[62] See in this regard *S v Grove-Mitchell* 1975 (3) SA 417 (A); [1975] 3 All SA 423 (A) at 419.

admission made to a magistrate or a peace officer by one accused is inadmissible against another accused.[63]

[34] Prior to the advent of the Act, the rule was that evidence of an extra-judicial admission by an accused that incriminates a person other than its maker remained hearsay and was governed by section 216 of the CPA.[64] Such hearsay was excluded subject to the recognised common law and statutory exceptions which need not be discussed for the purpose of this judgment.[65] The admissibility of extra-judicial admissions is subject to section 219 of the CPA.

[35] In comparison to the common law the Act allows a more nuanced approach to the admission of hearsay evidence.[66] As the Supreme Court of Appeal stated in

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[63] See above n 57 at 542.

[64] Section 216 (repealed by section 9 of the Act), reads:

> "Except where this Act provides otherwise, no evidence which is of the nature of hearsay evidence shall be admissible if such evidence would have been inadmissible on the thirtieth day of May 1961."

[65] The rationale of excluding hearsay as inadmissible is a recognition of the unreliability and unfairness emanating from such evidence. Its unreliability and susceptibility is said to be based on the so-called 'hearsay damages' of insincerity and defective memory, perceptive powers and narrative capacity.

[66] Comparatively, other jurisdictions, such as the United States and Canada, have grappled with the proper approach to use when evaluating the admissibility of hearsay. In *Ohio v Roberts* 448 US56 (1980) at 64-66, the Supreme Court held that the Confrontation Clause in the Sixth Amendment to the Constitution would not be violated, thus allowing the admission of hearsay where the maker of the statement was unavailable and where the evidence bears adequate "indicia of reliability". Interestingly, that Court has, since *Crawford v Washington* 541 US 36 (2004), departed from the approach in *Roberts* requiring that hearsay evidence be admitted where there are sufficient "indicia of reliability", stating that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."

The Canadian Supreme Court's approach moves away from the rigid and inflexible application of the rule against the admission of hearsay evidence. The Court has the power to develop the common law, thus creating new exceptions when the need arises. Such power is subject to safeguards described in the dissenting judgment of Lord Pearce in *Myers v Director of Public Prosecutions* [1965] AC 1001 at 1040-41. Briefly, the safeguards include the following: (1) the case must be one in which it is difficult to obtain other evidence; (2) the declarant must be disinterested – disinterested in the sense that the declaration was not made in favour of his interest; (3) the declaration must be made before the litigation or dispute so that it was made without bias. This approach has been adopted in *Ares v Venner* [1970] SCR 608 at 618 and in *R v Khan* [1990] 2 SCR531.

Makhathini v Road Accident Fund,[67] in the application of the Act in the context of a civil case, the Act requires the court to take a contextual approach. The court said that the statutory preconditions for the reception of hearsay evidence are now designed to ensure that the evidence is received only if the interests of justice justify its reception. A court making a determination whether it is in the interests of justice to admit hearsay evidence must—

> "have regard to every factor that should be taken into account, more specifically, to have regard to the factors mentioned in s 3(1)(c). Only if, having regard to all these factors cumulatively, it would be in the interests of justice to admit the hearsay evidence, should it be admitted."[68]

[36] When addressing the safeguards that must be adhered to when receiving hearsay evidence under the Act, the Supreme Court of Appeal in *Ndhlovu* said that courts must be careful to ensure respect for the fair trial rights in section 35(3) of the Constitution. It said—

> "First, a presiding judicial officer is generally under a duty to prevent a witness heedlessly giving vent to hearsay evidence. More specifically under the Act, '[it] is the duty of a trial Judge to keep inadmissible evidence out, [and] not listen passively as the record is turned into a papery sump of "evidence".'
>
> . . .
>
> Third, an accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in

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In the latter case the Court introduced an exception for the admission of hearsay evidence of children in sexual abuse cases. It described Lord Pearce's safeguards as resulting in two general requirements of "necessity and reliability". The Court retains a discretion to exclude evidence that meets the criteria of reliability and necessity if its admission would result in a Charter violation.

[67] 2002 (1) SA 511 (SCA); [2002] 1 All SA 413 (SCA) at paras 21-22.

[68] *S v Shaik and Others* 2007 (1) SA 240 (SCA); [2007] 2 All SA 9 (SCA) at para 170.

> argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of the Act, and, before the State closes its case, the trial Judge must rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces."[69] (Footnote omitted.)

[37] The admissibility of the statements has been criticised on various grounds. It was contended that the vague and late ruling on the admissibility of the statements against the applicant was prejudicial to him and thus rendered the trial unfair. Section 3 indeed permits the provisional admission of hearsay evidence subject to the conditions set out in subsection (3). However, the provisional admission of hearsay evidence is not, in my view, without problems. This case clearly exemplifies the prejudice created by not having a clear and timeous ruling on the admission of hearsay evidence that plays a significant part in convicting the accused and is admitted only at the end of the case. The Supreme Court of Appeal, in *S v Ramavhale,*[70] cautioned that in such a situation a judge should hesitate in admitting such evidence.

[38] The Supreme Court of Appeal hardly dealt with the numerated factors in section 3(1)(c) and paid attention only to the first and third safeguards mentioned in *Ndhlovu*. It paid insufficient regard to the applicant's fair trial rights and did not ensure that he knew what the evidence against him was at the end of the state's case or that inadmissible evidence was left out of account at that stage. The Supreme Court of Appeal correctly acknowledged that vague provisional rulings "may be prejudicial to

[69] Above n 23 at paras 17-18.

[70] 1996 (1) SACR 639 (A) at 649d-e.

an accused and conflate the admissibility of the evidence with its weight and may leave an accused unfairly in a state of uncertainty."[71] The Court nevertheless found that the inexplicit and late admission of the hearsay evidence was not prejudicial to the applicant.

[39] What compounds the problem is that even though the Supreme Court of Appeal expressed regret about the manner in which the trial court discharged its judicial obligation when determining the admissibility of the hearsay evidence, it opined that counsel for the applicant should have requested the trial Judge to clarify the position before deciding whether his clients should testify in their defence. I cannot agree. The statement had not been admitted against the applicant and counsel had no duty to ask for clarification.

[40] As the Supreme Court of Appeal correctly observed, both the prosecutor and the trial Judge failed to discharge their legal duties. There is no obligation on the defence to assist the prosecution in the execution of its duties and the advancement of its case. If that were so, an unwarranted burden would be imposed on the accused who has to contend with the allegations levelled against him or her. That might also have the potential of increasing the risk of convictions which are likely not to be in accordance with justice.

[71] Above n 2 at para 27.

[41] A timeous and unambiguous ruling on the admissibility of evidence in criminal proceedings is, as correctly contended by the amicus, a procedural safeguard. I do not share the views expressed by the Supreme Court of Appeal that, despite the late ruling by the trial Judge,

> "there could have been no doubt in the minds of counsel for [the applicant], in the light of what had transpired during the 'trial-within-a-trial' of accused 1 and the discharge application, that the extra-curial statement by accused 1 was not only part of the state case against him, but also against [the applicant]."[72]

That is not the point, however. The only question is whether the evidence should have been admitted against the applicant.

[42] This Court has said that the right to a fair trial requires a substantive rather than a formal or textual approach[73] and that "it has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime."[74] It is not open to question that a ruling on the admissibility of evidence after the accused has testified is likely to have an adverse effect on the accused's right to a fair trial. It may also have a chilling effect on the public discourse in respect of critical issues regarding criminal proceedings. More importantly, proceedings in which little or no respect is accorded to the fair trial rights of the accused have the potential to undermine the fundamental

[72] Above n 2 at para 20.

[73] See *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (1) SACR 568 (CC); 1995 (4) BCLR 401 (CC) at para 16, applied in *S v Legoa* 2003 (1) SACR 13 (SCA); [2002] 4 All SA 373 (SCA) at para 21. See also S v Shaik and Others 2008 (1) SACR 1 (CC).

[74] See *S v Jaipal* 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC) at para 29.

adversarial nature of judicial proceedings and may threaten their legitimacy. There are further adverse consequences. For example, when a ruling on admissibility is made at the end of the case, the accused will be left in a state of uncertainty as to the case he is expected to meet and may be placed in a precarious situation of having to choose whether to adduce or challenge evidence.[75]

[43] In the circumstances, I do not agree that the late admission of hearsay evidence against the applicant was not prejudicial to him and in the interests of justice. The reliance on *Key* by the Supreme Court of Appeal is misconceived as the case was not concerned with the admissibility of hearsay evidence. In order for it to be said that the applicant had a fair trial, he must first have known what the case against him was. Second, he must have been able to cross-examine the authors of the statements to test their credibility and truthfulness of their testimonies. The applicant cannot be expected to have been able to challenge hearsay evidence that was not only inadmissible against him but had also been disavowed under oath by the makers.

[44] Without expressing any view on the correctness or otherwise of *Ndhlovu,* I conclude that neither the trial court nor the Supreme Court of Appeal complied with

[75] In *Ramavhale* above n 70 at 651c-d, the Supreme Court of Appeal correctly remarked:

> "[t]he frequent practice of admitting evidence provisionally, though appropriate in some situations, often works most unfortunately. Instead of forcing practitioners to prove relevant facts by admissible evidence it may allow them to range around vaguely, which is not good for the administration of justice or for anybody, except perhaps the beneficiaries of costs unnecessarily incurred."

the approach enunciated in that case[76] and the provisions under section 3(1) of the Act, thereby resulting in an improper admission of inadmissible evidence against the applicant. Needless to say, that resulted in fundamental prejudice to the applicant, thus not affording him a fair trial. Accordingly, everything said out of court by accused 3 incriminating the applicant ought to have been and must be disregarded entirely.

[45] There is one matter relating to *Ndhlovu* which requires some attention. In that case, the Supreme Court of Appeal remarked—

> "[T]he admission of hearsay evidence 'by definition denies an accused the right to cross-examine' since the declarant is not in court and cannot be examined. The Court did not, however, accept that the 'use of hearsay evidence by the State violates the accused's right to challenge evidence by cross-examination', if it is meant that inability to cross-examine the source of a statement in itself violates the right to 'challenge' evidence."[77] (Footnotes omitted.)

The Court went on to say—

> "The Bill of Rights does not guarantee entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of s 36) to challenge evidence. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative values, including its reliability. The provisions enshrine these entitlements. *But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to 'challenge evidence' does not*

[76] Among others, that (1) the reception of the hearsay evidence should not come at the end of the trial when the accused is unable to deal with it and that (2) the accused must understand the full evidentiary ambit of the case against him.

[77] Above n 23 at para 24.

> *encompass the right to cross-examine the original declarant.*"[78] (Emphasis added.) (Footnotes omitted.)

[46] The amicus criticised the approach in *Ndhlovu.* He argued that allowing hearsay evidence in the interests of justice under section 3(1)(c), as envisaged in the preceding quoted passage, infringed the right to challenge hearsay evidence because there is no opportunity to cross-examine.

[47] While this approach may be understood as narrowing the ambit of the right to challenge evidence as guaranteed in section 35(3)(i) of the Constitution, I refrain from making a determination on the correctness or otherwise of the approach adopted in *Ndhlovu* regarding the accused's right to challenge hearsay evidence admitted under section 3(1)(c). As I indicated earlier, the correctness of the approach in *Ndhlovu* was not challenged in the Supreme Court of Appeal.

Equality argument

[48] During argument, the amicus sought to persist with the equality argument. He invited this Court to adopt an interpretation of section 3(1)(c) read with section 219A of the CPA as having the effect that extra-judicial admissions are generally not admissible against a co-accused or against their maker. He urged this Court to read section 219A narrowly so as to exclude admissions being used against a co-accused in precisely the same way section 219 prohibits the admission of a confession against another accused. This challenge boils down to the fact that section 3(1)(c) and the

[78] Id.

approach in *Ndhlovu* have the effect of generally discriminating against accused persons because of the alleged irrational declarations of differentiation between confessions and admissions.[79] The amicus contended that the ban on admitting confessions against an accused was enacted in recognition of the inherent prejudice against the accused that admission of such evidence would present and yet there is no similar ban in relation to admissions.

[49] The equality challenge is raised for the first time in this Court. Although the argument may be sound, it would not be in the interests of justice to make a determination on such a potentially contentious issue as the Court of first and final instance,[80] particularly when the issue was not well ventilated in argument before us.

Appropriate consequence

[50] It is a cardinal principle of our criminal law that when the state tries a person for allegedly committing an offence, it is required, where the incidence of proof is not altered by statute (and it is not in this case), as is the case in this matter, to prove the guilt of the accused beyond reasonable doubt.[81] That standard of proof, "universally required in civilised systems of criminal justice,"[82] is a core component of the

[79] They argued that the discrimination is at odds with section 9(1) of the Constitution which provides: "everyone is equal before the law and has the right to equal protection and benefit of the law".

[80] This is a practice repeatedly found wanting by this Court. See in this regard *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2007 (5) BCLR 453 (CC); *Du Toit v Seria* 2006 (8) BCLR 869 (CC); *Phenithi v Minister of Education and Others* 2003 (11) BCLR 1217 (CC); *Lane NO and Another v Dabelstein and Others* 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) at para 5; *Dormehl v Minister of Justice* 2000 (2) SA 987 (CC); 2000 (5) BCLR 471 (CC) at para 5; *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 8; *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC).

[81] The standard does not vary according to the extent of the seriousness of the crime.

[82] *S v T* 2005 (2) SACR 318 (E) at para 37.

fundamental fair trial right that every person enjoys under section 35(3) of the Constitution. In *S v Zuma and Others*,[83] this Court, per Kentridge AJ, held that it is always for the prosecution to prove the guilt of the accused person, and that the proof must be beyond reasonable doubt. The standard, borrowing the words used by Plasket J in *S v T*, "is not part of a charter for criminals and neither is it a mere technicality."[84] When the state fails to discharge the onus at the end of the case against the accused, the latter is entitled to an acquittal.

[51] Having concluded that the evidence of the confession and hearsay remains inadmissible against the applicant, the question remains whether his conviction ought to be upheld on the remaining admissible evidence comprising the information in the cell phone records and other evidence that does not directly implicate him. The answer is in the negative. The evidence does not amount to a complete mosaic justifying the applicant's conviction. The Supreme Court of Appeal correctly found that the evidence contained in the cell phone records, while incriminating, would not, without further evidence, have created a sufficient basis upon which to convict the applicant.

[52] When all is said and done, the evidence contained in the statements by accused 1 and 3 indeed raise a strong suspicion of the applicant's complicity in the commission of the robbery. Sad to say, innocent people lost their lives during the botched robbery. Crimes of this nature, resulting in loss of life in the quest for money,

[83] Above n 73 at para 25.

[84] Above n 82.

not only touch every one of us because they offend our deepest principles of human rights – the right to life and the right to freedom and security of the person - but also, understandably, evoke exceptionally strong emotions from many quarters in society. Be that as it may, the applicant cannot, in these circumstances, be convicted merely because the Court finds his story devoid of credence.

[53] It must be stressed that there is no onus on the applicant to prove his innocence. A mere suspicion, strong as it might be, is not adequate to confirm his conviction. Convictions based on suspicion or speculation, as the court stated in *S v T*, are "the hallmark of a tyrannical system of law" and "South Africans have a bitter experience of such a system and where it leads to."[85] That system cannot and ought not, in our constitutional democracy, be countenanced.

[54] Indeed, the adherence to the accepted principles regarding the admissibility of hearsay evidence and confessions may well result in the acquittal of an accused against whom the evidence, if admitted, would make a strong case for his guilt. However, if the only admissible evidence which the accused knew he had to meet cannot on its own sustain a conviction, the conviction must be set aside. This result must follow however strong the suspicion of his complicity in the commission of the crime might be. The right of the accused at all important stages to know the ambit of the case he or she has to meet goes to the heart of a fair trial.

[85] Id.

[55] The record in this matter reveals a number of material misdirections by the trial court which resulted in the proceedings not being in accordance with justice. On a conspectus of all the admissible evidence, I conclude that the state failed to discharge its onus in respect of the applicant. Consequently, the conviction of the applicant should be set aside. It follows that the order of the Supreme Court of Appeal should be set aside in its entirety to the extent that it relates to the applicant.

Order

[56] In the result, the following order is made:

1. Condonation for the late filing of the application for leave to appeal is granted.
2. Leave to appeal is granted.
3. The appeal is upheld.
4. The order of the Supreme Court of Appeal is set aside to the extent set out below:

   "The appeal by the first appellant against his convictions and sentences on counts 1, 2, 3, 4, 5, 6 and 7 is upheld. His convictions and sentences on those counts are set aside."

Langa CJ, Moseneke DCJ, Madala J, Mpati AJ, Ngcobo J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J all concur in the judgment of Nkabinde J.

Counsel for Applicant:	Advocate CE Thompson instructed by the Johannesburg Justice Centre
Counsel for Respondents:	Advocate GL Roberts, Advocate R Vos instructed by State Attorney, Witwatersrand Local Division
Amicus Curiae:	Advocate S Budlender appointed by the Johannesburg Bar Council