

SOUTH AFRICA / JUDGMENT

S v Lekhwareni and Others (SS 073/2015) [2016] ZAGPJHC 155 (16 May 2016)

[2016] ZAGPJHC 155**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Spilg

CASE / FILE NUMBER

SS 073/2015

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO: SS 073/2015****DATE:**

16 MAY 2016

In the matter

between:

STATE

And

LEKHWARENI,

THIFHULUFHELWI

SANTY.....Accused

no 1

MUENDA,

OLWETHU.....Accused

no 2

KHOROMBI,

LUFUNO.....Accused

no 3

MAKHUVHA,

RAMBANI

ERICK.....Accused

no 4

MOKGABUDI,

TSHEPO.....Accused

no 5

LETSOELA,

TEME.....Fourth

Respondent

RULING

ADMISSABILITY OF STATEMENT AGAINST ACCUSED NO 4

SPILG, J:

INTRODUCTION

1. The State sought to introduce a written statement made by the accused to the investigation officer, Sergeant Magoro, on 24 March
2015. Both Adv Sinthumule for the State and Adv Cindi on behalf of Mr Makhuvha, who is accused number four, informed the court that the contents of the statement were neither a confession nor admission but were exculpatory. Adv Cindi however claimed that his client had not made the statement freely and voluntarily.
2. The prosecution argued that since the statement did not amount to an admission it could simply be introduced as evidence once the accused admitted to his signature and that he signed it either because he had read the statement or because it was read back to him. The relevance of the statement was to demonstrate that the accused gave a different alibi to the one put on his behalf to the State witnesses. The State also contended that the onus was on the accused to demonstrate on a balance of probabilities that the statement was not obtained freely and voluntarily.
3. I was of the prima facie view that the mere fact that the statement was alleged not to be freely and voluntarily made was sufficient to require a separate hearing to first determine whether these foundational requirements for the admission of an extracurial statement were satisfied before the statement itself could be used as evidential material.
4. A court cannot be bound by the view of the litigants as to whether the contents of a statement amount to a confession, an admission or something else. In the present case it was unnecessary to have sight of the statement since both parties were agreed that the statement was exculpatory but, according to the State, contained an alibi defence which differed to that put by the accused's counsel to the State witnesses.
5. Prior to dealing with the evidence led it appears preferable to consider whether the statement amounts to an admission for purposes of section 219A of the Criminal Procedure Act 51 of 1977 ('CPA') and if not whether there would be any a priori requirements for its admissibility where the defence relies on absence of free volition. The position taken by the State also requires the question of onus to be considered.

CLASSIFICATION OF THE STATEMENT

6. An exculpatory statement obviously cannot amount to a confession. This is clear from the definition in *R v Becker* 1929 AD 167 at 171 of a confession, which is an:

‘unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law’[1]

7. Less clear is whether it constitutes an admission. The standard definition of an admission is that it is ‘a statement or conduct that is adverse to the person from whom it emanates’.[2] A statement which does not admit a material fact in the State’s case would nonetheless be adverse to an accused if it contradicted

his testimony in court.

8. It is therefore necessary to turn to section 219A of the CPA which was introduced in June 1979[3]. The provision reads:

219A Admissibility of admission by accused

- (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 document 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).

9. It is evident that the State seeks to introduce the statement, not as to truth of content or as to an admission of one of the factual allegations relied on by the State as to the time or place or acts committed by the accused but rather as a prior inconsistent statement going to credibility in respect of the alibi defence put to the State witnesses in cross-examination.

10. In my view *R v Valachia and Another* 1945 AD 826 is dispositive of the point. The case determined that once an admission is contained in an extracurial statement then the entire document becomes evidence before the court, the Appellate Division in the course of its judgment distinguishing between an admission contained in the statement and the balance of the document which may contain exculpatory statements[4]. The distinction between an admission and an exculpatory statement was also made by Grosskopf JA in *S v Cloete* 1994 (1) SACR 420 (A) at 425C-E.

See also *S v Mhlongo*; *S v Nkosi* 2015 (2) SACR 323 (CC) at para 33 where the court said:

“The distinction between confessions and admissions is determined solely by the extent to which the statement implicates its maker. This distinction becomes relevant in determining the safeguards that are put in place to ensure the voluntariness of the confession or admission.”

11. Moreover our case law history regarding the admissibility of confessions and admissions and the legislative provisions now set out in section 217 and later 219A would suggest that an admission under section 219A is limited to a statement which admits to one or more of the facts relied upon by the State in the indictment. See as to case law *R v Burton* 1946 AD 773 at 779-80[5] and see generally *S v Litako* 2014 (2) SACR 431 (SCA) at paras 32-39. This may be contrasted with *Wigmore on Evidence* (1972) which at para 1048 at the end of subpara
- (2) and the commencement of (3) explains why the subject of an admission “is not limited to facts against the party-opponent’s interests at the time of making it” and is in this sense to be contrasted with an assertion offered in that person’s favour (which is not termed an admission).
12. Within the limited time available I have not been able to research the position further and therefore will assume that section 219A was introduced to deal with extracurial admissions of one or more facts relied upon in the State’s case. I will also assume that the section was not intended to afford broad protection to any statement that would ordinarily be admissible but which is not made freely and voluntarily. It may well be that whatever the intention of the legislature in 1977 when section 219A was introduced its scope is now extended by the constitutional protections afforded under the Bill of Rights.
13. It is therefore out of caution that I assume that the requirements of section 219A do not come to the assistance of the accused where his extracurial statement is sought to be introduced in cases where it does not contain an admission of one of the facts relied upon by the State. If section 219A applied then the following examination of the hearsay rule would be superfluous.

THE HEARSAY RULE

14. The accused’s statement which the State wishes to use would ordinarily be introduced during his cross-examination on the basis that it amounts to a prior inconsistent statement affecting credibility.

15. However the State seeks to introduce the written statement through the investigating officer to whom it was made. This may be as a result of the view taken by the prosecution that the accused may not give evidence, or possibly that he may apply for a discharge at the end of the State case.
16. On basic principles the statement is one which at this stage of the proceedings is hearsay because it was allegedly made to the person who is testifying about what was said to him, that he reduced it to writing and that the accused signed it. The accused has yet to admit that he said the words alleged; even if, as occurred here, he admitted subsequently under cross-examination during the trial within a trial that he signed the document.
17. The statement is intended to be used against the accused on the basis that it amounts to a prior contradictory statement, the version put to the State witnesses by the accused's counsel in the presence of the accused amounting, in my view, to a statement made by the accused's representative on his behalf, and not extracurially, but in his presence before court.
18. Admissibility cannot be tested by reference to whether an accused will testify during a trial within a trial or that he will admit to his signature or to the circumstances under which it was appended; bearing in mind that the accused retains his right to silence and may simply rely on an effective cross-examination of the State's witnesses.
19. Accordingly the two considerations for the reception of evidence based on their probative value arise. The first is the obviously strong probative value to the other party of a statement made by a person against his interest "provided it exhibits the quality of inconsistency with the facts now asserted by him" irrespective of whether it amounts to an admission or because it "exhibits an inconsistency with his present claim, thus tending to throw doubt upon it, whether he was at the time speaking apparently in his own favour or against his own interest". [6]
20. The other consideration is the hearsay rule of admissibility which is a rule of law[7] as reinforced by our constitutionally protected rights.
21. At the stage the prosecution seeks to introduce the statement into evidence prior to closing its case the accused will not as yet have testified and it cannot be assumed that he will. Accordingly the statement cannot be admitted under section 3(1) (b) of the Law of Evidence Amendment Act 45 of 1988. It would therefore have to meet the requirements of section 3(1) (c) in order to qualify for admission into evidence, making it necessary to consider the requirements of this provision.
22. It is preferable to set out the entire text of section 3, which reads:

3 Hearsay evidence

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to-
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.
- (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.
- (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 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.
- (4) For the purposes 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 party against whom hearsay evidence is to be adduced, including the prosecution.

23. In *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) at paras 27-34 Cameron JA (at the time) dealt comprehensively with the dangers of trying to apply section 3(1)(b) and allow an accused's statement in provisionally on the basis that he may testify later. Although the judgment was overturned on appeal in respect of an extracurial statement of an accused not being admissible against his co-accused it appears that the dictum in these passages remains unaffected. At para 33 the court said:

“The 'probative value' of the accused's statements to the police did not depend on their credibility at the time of the trial - which the Court rightly found totally lacking - but on their credibility at the time of their arrest. And the admissibility of those statements depended not on the happenstance of whether they chose to testify but on the interests of justice.”

24. In order to be admissible the statement would have to qualify under section 3(1) (c); the essential consideration for its reception as evidentiary material (ie; without considering its weight) under this subsection is whether the interests of justice require it.

I proceed to consider whether the statement should be received into evidence under this subsection.

25. The nature of the evidence is an extracurial statement purportedly made by the accused to the investigating officer the contents of which are sought to be used against the accused.
26. Under common law such a statement was excluded. However through statutory intervention confessions came to be admitted provided they were made freely and voluntarily^[8] and legislative measures were later introduced under section 219A to deal with admissions provided they were freely made.
27. Nonetheless the starting point in our law remains the following statement by Innes CJ in *Rex v Barlin*^{1926 AD 459 at 462}:

"The common law allows no statement made by an accused person to be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made --- in the sense that it has not been induced by any promise or threat proceeding from a person in authority. See Rex v Thompson (1893, 2 K.B at p. 12), and Ibrahim v Rex (111. L.T. 23)."

28. In *Burton* this statement was applied where the State sought to introduce an exculpatory statement made by the accused in order to discredit his alibi- a case therefore very much in point. At 778 the court set out the basis upon which the Crown sought to rely on the accused's statement:

“This statement by the appellant was intended to be completely exculpatory. He was obviously trying to account for the fact of his having suddenly left his employment, by showing that this did not occur because he had stolen money, but by reason of something of an entirely different character, so that no inference of guilt could be drawn from his disappearance, such as might ordinarily well have been drawn. But, in effect, it proved a most damaging statement, for the learned Judge a quo drew from it the inference that the appellant, feeling an urgent necessity to get away, took the money in order to pay his railway fare. It was prejudicial to him in another way also, because it contradicted the statement made in evidence by the appellant that he only left to attend to some private affairs and that he had told his employer that he was leaving; it thus corroborated the evidence of the employer that he had in fact not done so.”

29. Despite being an exculpatory statement the Appellate Division admitted the statement into evidence after it was satisfied that it had been made freely and voluntarily. In *Barlin* at 463 Innes CJ had said as much as a general proposition in our law after finding that any statement made by an accused to a person in authority was only admissible if made freely and voluntarily:

“Statements which, though not confessions of the commission of an offence, are prejudicial to the accused fall to be dealt with under the common law, and not under the statute. The matter before us affords an excellent example of such a statement.”

30. It must therefore be accepted that where a statement made by the accused is sought to be introduced into evidence, at least in the case where it is made to someone in authority, it must be made freely and voluntarily. The Law of Evidence Amendment Act did not allow all hearsay statements (as defined by section 3(4)) into evidence if the requirements of either section 3(1) (b) or (c) were met. Section 3(2) still expressly excludes the admission of evidence that would otherwise have been inadmissibly but for the section 3(1) provisions[9].
31. It therefore appears that even if the extracurial statement was to satisfy the other requirements of section 3(1) (c) it would still have to be freely and voluntarily made before it could be admitted.
32. The requirement that an extracurial statement to someone in authority (and it is unnecessary to consider the position if made to someone not in authority but who could exert pressure) must be made freely and voluntarily is reinforced by two provisions in the Constitution; most obviously section 35(3) under subsections (h) and (j) which guarantee an accused the right to a fair trial by which is also included the right to remain silent (which would be undermined if there is, for instance, coercion) and

the right not to be compelled to give self-incriminating evidence; which I would understand from the passages referenced in *Wigmore* and the cases of *Barlin* and *Burton* to include evidence that may damage the accused’s credibility.

33. Moreover section 9(1) of the Constitution provides that: “Everyone is equal before the law and has the right to equal protection and benefit of the law.”
34. In *Mhlongo* the Constitutional Court dealt in depth with the equality provision in relation to confessions and admissions. In my respectful view the same considerations apply to any extracurial statement made (at least to someone in authority) which, for whatever reason, may damage the accused’s case.

The reason is that our common law draws no distinction between such extracurial statements, as is evident from a reading of *Barlin* and *Burton*. The essential safeguard to allowing such statements into evidence is the requirement of free volition on the part of the maker. See *Mhlongo* at para 35. The Constitutional Court found that there was no rational basis for distinguishing a confession from an admission in the case of a co-accused against whom the statement was sought to be tendered in evidence. The same considerations apply to an

extracurial exculpatory statement sought to be used to challenge the accused's testimony on the basis of credibility as the consequences are as damaging.

35. It appears to me that the purpose for which the evidence is tendered, namely not as truth of content but to challenge credibility, would justify the introduction of the evidence, since a prior inconsistent statement (for reasons given earlier) can be used against an accused.
36. In one sense the probative value of the evidence is high since it goes directly to credibility. On the other it is dependent on the court being satisfied that the inherent dangers of receiving an extracurial statement made to a person in authority can be safeguarded against.
37. At this stage it must be assumed that the accused might not testify and if he does then it is unlikely that he will give the same evidence as contained in his statement if his version remains that which was put by Adv Cindi to the State witnesses.
38. It is evident that the evidence will be prejudicial to the accused and therefore it is essential to ensure that if admitted, it was freely and voluntarily made.

In this regard in *S v Mangena and Another* 2012 (2) SACR 170 (GSJ) at paras 31-33 I sought to demonstrate that the word "voluntarily" in section 219A was broad enough to encompass that the statement had to also be made freely. It also accords with our common law requirements in relation to any extra-judicial statement made to a person in authority.

39. In the result I am satisfied, provided the statement was made freely and voluntarily, that it would otherwise be in the interests of justice to admit it into evidence.
40. Before considering the evidence it is necessary to deal briefly with the State's contention that the accused bears the onus of demonstrating, on a balance of probabilities, that the statement was made freely and voluntarily.

ONUS

41. Adv Sinthumule submitted that the rule of "he who asserts must prove" applies and that the accused claimed that he had been coerced to make the statement.
42. Even if it is possible for the rule to find application in an instances where the State does not have to prove each element of its case beyond a reasonable doubt when dealing with the admission of extracurial statements our law was clearly stated in *Burton* at 779; the Appellate Division expressly holding that in regard to onus to prove that a statement was freely and voluntarily made no distinction can be drawn between admissions and exculpatory statements[10]. Compare *S v Zuma and others* 1995(2) SA 642 (CC) in relation to the presumptions contained in section 217(1)(b)(ii) and *Zeffertt & Paizes* at 520-521 under the heading 'Onus of proof'
43. In my view it is trite that the State must prove beyond a reasonable doubt that an extracurial exculpatory statement was freely and voluntarily made.

THE EVIDENCE

44. The trial within a trial commenced with Sgt Magoro confirming that he advised accused number four (who I will simply refer to as the accused) of his constitutional rights when he was arrested and whether the accused wished to make a statement. The accused then freely and voluntarily elected to make the statement.
45. The sergeant testified that whatever the accused said was reduced to writing and signed. As appears later this is incorrect.
46. Under cross examination the sergeant was asked about the events after the accused was arrested. He replied that the accused was asked whether he wished to make a statement to the sergeant, or in court or to a lawyer of choice.
47. After electing to make a statement to the sergeant the latter posed questions about where the accused was on the day of the incident and whether he knew anything about the death of the deceased or participated in his killing. The sergeant also asked whether he knew the other accused. The statement was taken down in the sergeant's office.
48. Magoro testified that he asked the accused about the other offence, which was apparently then described as assaulting a Mr D Dlomo with the intent to do grievous bodily harm (although the charges before the court are of attempted murder and kidnapping). Magoro conceded that this was part of the same investigation with which he was entrusted and confirmed that the accused had denied assaulting Dlomo.

The sergeant when asked whether the accused's denial was reduced to writing answered that it was not. Magoro offered as the only explanation that he was more concerned about the murder charge despite the docket already including charges relating to Dlomo and in respect of which the other accused had already been charged, together with that of murder, and been brought before court to answer. As Magoro put it; "the assault was important but not more important than the killing".

49. The sergeant also could not explain why he took down the statement when it was a simple matter of arranging for the accused to be taken to a ranking officer at another police station unconnected with the investigation. Although the witness said that he was aware of the standing orders and judges rules regarding the taking down of statements he testified that this is the usual way he takes statements of suspects in cases he is investigating.
50. It also turned out that the accused was arrested after his co-accused had appeared in court on four earlier occasions and after the Director of Public Prosecutions had directed that the outstanding suspects be traced and arrested; such instructions were noted as early as 20 January 2015. The sergeant could not dispute that he had received an instruction to obtain a statement from the accused in relation to the case.

51. It also turned out from the sergeant's evidence that he knew the accused's cellphone number as he had called the accused prior to the arrest to arrange a meeting although no exact date was set. The sergeant however disputed that he had visited the accused's shack on four earlier occasions to interview him.
52. The sergeant denied that he wanted the accused to implicate three suspects (who are accused 1, 2 and 3 before the court) in the killing of the deceased and the assault on Dlomo. The sergeant also denied that he threatened to arrest and detain the accused if the latter did not make a statement or that the accused would not be able to obtain bail (presumably because of the charges to be proffered and that bail would be vigorously opposed). It was however admitted that the sergeant wrote down the statement after questioning the accused and, as already mentioned, did not write down every key thing that was said.
53. The accused then testified and related how the sergeant had visited him on four earlier occasions to ask whether he had any knowledge of the burning of the deceased and the assault. The sergeant did not make notes during these interviews. The accused claimed that when he was asked to go to the police station on 24 March 2015 the sergeant said that he need not lock the shack or take his crutches as he would be returning soon. The accused also alleged that he was not yet under arrest or charged when he accompanied them to the police station. He was then told that the judge needed the statement regarding the other three suspects who had already been arrested. The accused refused to make a statement and it was then that the sergeant allegedly threatened him with arrest and detention. Under cross-examination the accused said that he made the statement to avoid arrest and detention. He later said that he would not otherwise have made it. The accused also said that he was just told to sign the statement but did not have it read back to him nor was he given it to read.
54. When asked why the sergeant would visit him on four previous occasions the accused said it was because the police wanted him to be a witness for the State against the other three suspects.

WEIGHING THE EVIDENCE

55. The court cannot gain an impression of the credibility of those who testified having regard to the brief nature of their examination and cross examination. Both come across as credible witnesses.
56. As stated earlier the test for accepting evidence is not on a balance of probabilities but on whether the State has proven beyond a reasonable doubt that the statement was not made freely and voluntarily.
57. In this regard the court has the following concerns which have not been dispelled;

- a. The fact that the accused's whereabouts and cellphone number was known to the police but despite an instruction already on 20 January 2015 to trace and arrest the outstanding suspects the accused was not arrested until two months later. This objectively speaking would be consistent with an attempt to use the accused as a witness against the other three who had been arrested some time earlier;
 - b. The explanation that a statement of this nature is usually taken down by the investigating officer poses problems if the suspect then makes a confession since under section 217 it cannot be introduced into evidence. There are enough cases that have come before this court where an accused reconsiders his position. It occurs where a legal representative has been appointed or the accused receives advice from other sources. The dangers of not being able to use a confession genuinely made at the time which is not "technically" compliant with section 217 raises sufficient concern for the court to question whether the police appreciated that the accused would have been unwilling to make a statement if exposed to someone who was not part of the police team which objectively heightens the risk of a threat.
 - c. The selective nature with which the statement was taken down which objectively is inconsistent with the purpose of a warning statement in respect of a person who allegedly was already facing two charges.
58. In my view the risk of the statement being made in the circumstances described by the accused is too great for the State to have satisfied the court that it was in fact made freely and voluntarily, rendering it unnecessary to decide the extent to which its probative value precludes it being in the interests of justice to receive the statement into evidence under section 3(1)(c).
59. I accordingly exclude the statement of the accused on that ground, as preserved by section 3(2) of the Law of Evidence Amendment Act.

DATES OF HEARING: 10, 11, 12 and 13 May 2016

DATE OF RULING: 16 May 2016

LEGAL REPRESENTATIVES:

FOR THE STATE: Adv VS Sinthumule

FOR ACCUSED no. 4: Adv L Cindi

[1] See also *S v Molimi* 2008(2) SACR 76 (CC) at para 28 The term 'unequivocal', at least in crimes where mens rea is an element, means unequivocal if regard is had to the statement as a whole and the surrounding circumstances from which the necessary implication can be drawn that the accused has confessed. See *S v Yende* 1987(3) SA 367 (A) at 374H. See also *The South African Law of Evidence* (2nd) Zefferdt & Paizes at 525-6

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[2] Zefferdt & Paizes (*supra*) at 475; *Principles of Evidence* (3rd) Schwikkard & van der Merwe at para 16 p 305

[3] Section 14 of the Criminal Procedure Amendment Act 56 of 1979

[4] See at 837: ". . . the rule is that when proof of an admission made by a party is admitted, such party is entitled to have the whole statement put before the Court and the judicial officer or jury must take into consideration everything contained in the statement relating to the matter in issue. . . . Naturally, the fact that the statement is not made under oath, and is not subject to cross-examination, detracts very much from the weight to be given to those portions of the statement favourable to its author as compared with the weight which would be given to them if he had made them under oath, but he is entitled to have them taken into consideration, to be accepted or rejected according to the Court's view of their cogency.'

[4] See at 837:

". . . the rule is that when proof of an admission made by a party is admitted, such party is entitled to have the whole statement put before the Court and the judicial officer or jury must take into consideration everything contained in the statement relating to the matter in issue. . . . Naturally, the fact that the statement is not made under oath, and is not subject to cross-examination, detracts very much from the weight to be given to those portions of the statement favourable to its author as compared with the weight which would be given to them if he had made them under oath, but he is entitled to have them taken into consideration, to be accepted or rejected according to the Court's view of their cogency.'

[5] Burton at 779-80: ". But it sought to limit the statements to which the rule applied to such statements as are in the nature of admissions and it sought particularly to exclude exculpatory statements; Wigmore par. 821 was relied on. But it seems to me that there are weighty reasons for rejecting this contention. As was pointed out by INNES, C.J., in *Barlin's* case, the statement by the accused in that case, which was that "the goods had been bought from various firms" was intended to be purely exculpatory, but it "undoubtedly

prejudiced him because it was manifestly false"... I can see no ground for reconsidering the decisions in *Rex v Barlin* and *Rex v Dunga* which, as I have said, both definitely decided that even a statement by an accused person which was intended to be, and was on the face of it, exculpatory, must be shown to have been made freely and voluntarily."

[5] Burton at 779-80:

“But it sought to limit the statements to which the rule applied to such statements as are in the nature of admissions and it sought particularly to exclude exculpatory statements; Wigmore par. 821 was relied on. But it seems to me that there are weighty reasons for rejecting this contention. As was pointed out by INNES, C.J., in Barlin's case, the statement by the accused in that case, which was that "the goods had been bought from various firms" was intended to be purely exculpatory, but it "undoubtedly

prejudiced him because it was manifestly false".... I can see no ground for reconsidering the decisions in Rex v Barlin and Rex v Dunga which, as I have said, both definitely decided that even a statement by an accused person which was intended to be, and was on the face of it, exculpatory, must be shown to have been made freely and voluntarily.”

[6] Both extracts from Wigmore para 1048 subpara (1) (b) and (3).

[7] Wigmore at para 1048 subpara (1)(a) and (2)

[8] Currently section 217 of the CPA

[9] S v Mhlongo; S v Nkosi 2015 (2) SACR 323 (CC) at paras 28, 29 and 31

[10] Burton at 779: ‘That the onus was on the prosecution, wherever it is necessary to prove that the statement was freely and voluntarily made, to establish this fact, was admitted by the Crown --- and rightly so. But it sought to limit the statements to which the rule applied to such statements as are in the nature of admissions and it sought particularly to exclude exculpatory statements; Wigmore par. 821 was relied on. But it seems to me that there are weighty reasons for rejecting this contention.’

[10] Burton at 779:

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