

SOUTH AFRICA / JUDGMENT

S v Mangena and Another (2012 (2) SACR 170 (GSJ)) [2011] ZAGPJHC 255; [2011] ZAGPJHC 8 (28 February 2011) [2011] ZAGPJHC 255

COURT

South Gauteng High Court, Johannesburg

BEFORE

Spilg

CASE / FILE NUMBER

32/2009

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SOUTH GAUTENG HIGH COURT, JOHANNESBURG CASE NO: 32/2009DPP REF NO: JPV
2008/0249 DATE: 28/02/2011 In the matter between: THE STATE and MANGENA, BONGANI
LAURENCE..... Accused No. 1 LAMBANE, HANNIES
MASHAMBA..... Accused No. 2 _____ REASONS FOR DECISION:
TRIAL WITHIN A TRIAL AND ADMISSIONS AGAINST A CO-ACCUSED _____ SPILG,
J: INTRODUCTION [1] Accused no. 1 was originally cited as Lawrence Bongani Mgeni. His correct
names are Bongani Laurence Mangena. He and accused no. 2 stand charged with the murder of
Raymond Khoza and the attempted murder of David Jack Khoza on Saturday 9 August 2008.
Accused no. 1 is also charged with the unlawful possession of an unlicensed firearm and
ammunition. [2] The trial commenced on 11 March 2010 and was remanded on 25 March 2010.
When the State resumed leading its evidence on 2 November 2010 Ms Persad indicated that her
next witness, Captain Nobela would be led in regard to a written admission allegedly made to her
by accused no. 1. Mr Potwana on behalf of accused no. 1 objected to the testimony being
admitted on the grounds that the alleged admission was not freely and voluntarily made in that
the statement was made under duress, and also on the ground that accused no 1 had not been
informed of his constitutional rights. [3] In support of the admission having been voluntarily
made and that the accused was properly informed of his constitutional rights the State led the
evidence of a number of witnesses. They were Captain Nobela before whom the admission was
taken on 10 September 2008, Warrant-Officer Rapetsoa who was the investigating officer and
effectively responsible for accused no. 1 on that day, Constable Machete who accompanied
Warrant-Officer Rapetsoa and accused no. 1 from Rabie Ridge to Sandringham Police Station in
order for the statement to be taken down by Captain Nobela, Constable Morige whom accused
no. 1 alleged had been involved in assaulting him on 10 September 2008 and Constable Kabe who
had arrested accused no. 1 in the early hours of 10 September 2008. The State also produced a
number of documents that were admitted into evidence during the trial within a trial. One of
these documents comprised a confession and admission taken down before Captain Nobela. It

consisted of the standard form preamble setting out that the accused was informed of his constitutional rights and was asked a number of prescribed questions. This document was signed by the accused on the last page and initialled by him on all the preceding pages (Exhibit “J”). The document tendered in evidence obviously excluded the actual statement made by accused no. 1 to Captain Nobela. Also admitted into evidence was the relevant occurrence book for the period 9 and 10 September 2008. Extracts were produced and handed up as Exhibits “K1” to “K4”. Finally the State produced a certified copy of the court proceedings of 11 September 2008 when accused no. 1 was first brought before the Magistrate (Exhibit “L”). This was admitted without objection under the provisions of section 235 of the Criminal Procedure Act 51 of 1977 (the CPA).[4] Accused no. 1 also gave evidence. The only exhibit handed up during his testimony was a sketch plan that was relevant to his arrest (Exhibit “M”).[5] There appear to be a number of key features that ought to be taken into account when considering the testimony of the State and of accused no. 1. They relate firstly to the chronology of events which I believe assists in the objective determination of the facts. Secondly, they relate to the veracity of evidence presented with regard to the whereabouts of accused no. 1 on the morning of 10 September 2008 before he was taken to Captain Nobela. It is during this period that accused no. 1 claimed to have been threatened and assaulted. Finally, there are the events that were alleged to have occurred when accused no. 1 was brought before Captain Nobela at the Sandringham Police Station.

CHRONOLOGY OF EVENTS AND THEIR RELEVANCE[6] The evidence presented by the State and supported by the Occurrence Book reflects the following: At 09h15 on the morning of 10 September 2008 accused no. 1 was detained at Rabie Ridge Police Station by Constable Kabe under Rabie Ridge Case No. 127/08/2008. The Occurrence Book also reflects the cell register entry in the SAP14 as 91/09/2008 and records that the accused was “free from injuries”. At 09h20 accused no. 1 was booked out by Warrant Officer Rapetsoa. This entry was signed by him. W/O Rapetsoa also requisitioned a pair of leg irons at 09h22. At 09h50 Const. Morige booked out a firearm and magazine with 20 rounds. He personally signed against this entry. At 11h15 Rapetsoa returned with accused no. 1 to Rabie Ridge Police Station. At 11h25 Rapetsoa again booked out accused no. 1. He also signed this entry and recorded that the accused was free from injuries. Rapetsoa also signed the entry recording that he again requisitioned leg irons at 11h30. (f) An entry in the Occurrence Book records that at 18h42 Rapetsoa had booked back the leg irons. The entry was however made at 18h55. At 18h56 Rapetsoa booked accused no. 1 back in at Rabie Ridge. The entry again records that accused no. 1 was free from injuries. At 19h43 W/O Rapetsoa charged accused no. 1 with murder. Once again it is recorded that accused no. 1 had no injuries.[7] One other aspect that appears from the Rabie Ridge occurrence book is that police reservists were on duty during the day. This appears from entry no. 9988 recorded at 18h45, although the reservists had been inspected at 18h00 according to the entry.[8] It became evident during the course of the State’s evidence that the time recorded in the appropriate column of the occurrence book was not necessarily the time of the actual event but rather the time when it was recorded. This is evident from two of the entries to which reference has already been made. However Rapetsoa’s evidence was that the times recorded of when he booked out and booked back accused no. 1 correctly reflect when these events actually occurred.[9] W/O Rapetsoa also testified that the purpose of taking accused no. 1 into his custody and booking him out of the Police Station at 09h20 was to

further his investigations in an attempt to locate the firearm that the accused was alleged to have used. Since accused no. 1 was booked back at 11h15, he effectively was in the custody of W/O Rapetsoa for just short of two hours.[10] On the second occasion, Rapetsoa booked the accused out at 11h25 so that the accused could make a statement before Captain Nobela. Rapetsoa said that this had been pre-arranged with the Captain. Chronologically it means that accused no. 1 was in Rapetsoa's custody for some 7½ hours (bearing in mind that the leg irons used to restrain the accused were booked out at 11h30 and were booked back at 18h55).[11] By contrast the evidence of accused no. 1 was to the effect that: He was brought to Rabie Ridge Police Station by Const Kabe at 04h00 on the morning of 10 September 2008. It is common cause that the accused was arrested at 02h00 that morning. Between 06h00 to 07h00 he spoke to W/O Rapetsoa for the first time. This estimate was based on his observation that during this period there was a change of police shifts. Either before or at about 09h00 Rapetsoa took him to Tembisa. He estimated the time by reference to the sun's position. Some 25 minutes later he was brought back to Rabie Ridge. Accused no. 1 said that he did not enter through the charge office but via a back door. He remained there for another 20 to 25 minutes. At about 10h00 several policemen (but excluding W/O Rapetsoa) took him to the Mooifontein Cemetery where he was assaulted. The policemen were in plain clothes. Accused no. 1 believes that he was brought back to Rabie Ridge at some time after 11h00. He made this assessment because visitors were still present and visiting time was at 11h00. He also estimated that some 50 minutes had elapsed since he had left Rabie Ridge for the graveyard and until his return. He then remained at Rabie Ridge for another 30 minutes or less during which period he was taken to the Station Captain in order to make a statement. He refused to make a statement. He was then taken out again to the Mooifontein Cemetery where he was threatened and once more assaulted. W/O Rapetsoa did not accompany him on this occasion either. Some 40 minutes elapsed from the time he left Rabie Ridge on this second occasion for the cemetery until his return to the Police Station. He was not taken back into the police station but remained in a vehicle for another 20 to 25 minutes before Rapetsoa took him from that vehicle into another vehicle and departed for Sandringham, a route which was familiar to the accused. The journey from Rabie Ridge to the Sandringham Police Station took about 20 to 25 minutes as, according to accused no. 1, there was no traffic obstruction and they did not stop on way. ACCOUNTING FOR TIME[12] It is evident that unless W/O Rapetsoa stopped en route from Rabie Ridge to the meeting with Capt Nobela at Sandringham a period of some 2¾ hours requires to be accounted for. Rapetsoa was able to account for some 30 odd minutes because when he arrived at Sandringham Police Station he had difficulty locating Capt Nobela. He claimed that the missing time was accounted for because they had stopped at a shopping centre as the policemen accompanying him wanted to buy something.[13] Accused no. 1's testimony based on his time estimates does account for his movements and whereabouts from about 10h00 until arriving, according to him at about 13h40, at the Sandringham Police Station. Based on his estimates of time; He was taken from Rabie Ridge to the graveyard for the first time at about 10h00 and came back at about 10h55. He remained at the Police Station for some 30 minutes or less, which would then take the time to between 11h10 and 11h30. This reasonably coincides with the Occurrence Book entry recording that W/O Rapetsoa booked the accused out at 11h25 and requisitioned the leg irons at 11h30. If that time is correct then one can estimate that some 10 to 15 minutes would

have been taken up with the other policemen again putting leg irons on accused no. 1 and placing him in their vehicle. He would have been brought back to Rabie Ridge at about 12h20 after being taken to the graveyard on the second occasion. He then remained in the vehicle for some 25 minutes, taking the time to about 12h45. It took another 30 minutes to arrive at Sandringham Police Station (versus W/O Rapetsoa's evidence that it was some 35 minutes). This would result in the accused arriving at Sandringham Police Station somewhere between 13h15 to 13h20.[14] By contrast, on W/O Rapetsoa's version he had taken the accused into his custody from 11h25 and could only account for the 2 hours that it took to reach Sandringham Police Station by claiming that he had diverted to buy food for a colleague at a shopping centre.[15] Const Machete gave evidence to the effect that he was the only other police officer accompanying W/O Rapetsoa with accused no. 1 from Rabie Ridge to Sandringham Police Station. He claimed to be unfamiliar with the route, said that there was some traffic but denied that they had stopped anywhere en route. Since Const Machete was the only person who could have requested to stop for food, W/O Rapetsoa's explanation as to the unaccounted 2 hours must be rejected. Furthermore W/O Rapetsoa's claim that he had stopped for food is inconsistent with his evidence that, before he left Rabie Ridge, his Station Commander had arranged for Capt Nobela to take down the accused's statement at Sandringham Police Station. It is unlikely that Rapetsoa would have delayed his arrival at Sandringham by stopping for a considerable period of time at a shopping centre. Moreover it is surprising that Rapetsoa would have allowed an accused, who by his account wanted to make a statement, to sit in a motor vehicle outside a shopping centre for such a considerable period of time. Finally an hour or so appears to be excessive simply to purchase food.[16] Since W/O Rapetsoa's explanation can be safely rejected, the remaining question is whether or not accused 1 made up the story that he was taken for a second time to the graveyard. I should have added that the State also refutes accused no. 1's evidence that he had also been taken earlier that day to the same graveyard.[17] Accused no. 1's responses to questions posed by the prosecutrix strengthened rather than weakened the accused's version. He answered spontaneously with regard to who was present and the basis for his identification, including their appearance. His detail of how he was assaulted on each of the two occasions remained consistent. [18] The State was invited to provide a rational explanation for the conflict between the testimony of Rapetsoa and Machete. For reasons already given no rational innocuous explanation exists. It would not be justified to excuse the contradictions and improbabilities on the basis simply of unreliability. Accordingly the attempt to explain the whereabouts of accused no. 1, who was at all times supposedly in the custody of Rapetsoa, is rejected as untruthful.[19] The accused's evidence that he was assaulted before he was taken to Capt Nobela is supported, again *prima facie*, by the fact that no injuries were observed on him when he was first detained, yet Capt Nobela recorded in the *pro forma* questions contained in the confession and admission form that she observed that he not only had handcuff marks on the right hand but also a "swollen round mark on the head". During evidence Capt Nobela described this as a 2 cm diameter mark on the right side of the accused's forehead. She said that it was clearly visible as it was swollen and protruded from his forehead.[20] None of the police officers called to testify observed any such injury. Kabe, who was called to testify on whether the accused had sustained any injuries at the time of his arrest, claimed that he had not observed any. According to Kabe the only injury that the accused

sustained from the time of his arrest until Kabe brought him to the cells could have been to the accused's wrist as Kabe tugged at the handcuffs restraining the accused when the accused had tried to remain at his father's house.[21] The accused described not only being taken to the cemetery at some time after 11h00 but also being taken to there earlier in the morning. He claimed that Const Morige was at the graveyard after he had arrived. Both Rapetsoa and Morige denied that the accused had been taken there on either of the two occasions. Moreover, they denied any knowledge of the two other persons identified by the accused, namely a person who was called Poplap and another who was referred to as Mlahlane. The accused consistently separated the two occasions when he was taken to the graveyard. He was consistent with regard to who took him on each occasion, how he was restrained on each occasion (on the first occasion with leg irons only and on the second, with handcuffs and leg irons) and the extent of the assault. He was closely questioned by Ms Persad and his responses were consistent and spontaneous in respect of all the events, save in respect of the extent of the assaults (as opposed to the nature of the assaults).[22] No attempt was made by the State to explain the length of time taken on the first occasion when Rapetsoa had booked out the accused. Nor was the accused challenged with regard to the short period of time he said it took for Rapetsoa to take him to look for the firearm and return to the Police Station via a side entrance.[23] The glaring failure on the part of the State to account for the lengthy period of time during which the accused had been booked out on both occasions on 10 September is strong evidence supporting the appellant's allegations that he was taken for a purpose other than just to locate a firearm in Tembisa and to make a statement at Sandringham Police Station.[24] The final aspect concerns the extent of the assaults. It appears to me that the accused has embellished, particular with regard to their sequelae. While it is clear that Capt Nobela did observe that his forehead was swollen on the right-hand side, the accused in addition claimed that he had been struck on the top of his head and that later the wound was opened during the further assault on him with consequential bleeding. He said that the blood dripped onto the collar and splattered onto the front of his T-shirt. He claimed that he had used the cloth with which he was blindfolded, when taken to the graveyard on the first occasion, to wipe the blood. Capt Nobela only noted the clothing worn by the accused and did not observe any blood stains.[25] Even though the accused exaggerated the extent of his injuries, it does not affect the general credibility of the key elements of his testimony, namely that he was assaulted by the police. The reason is that the fact of an assault on him is supported not only by Capt Nobela's observation of the forehead injury but also her failure to perform her duty and ask the accused how and when the injury occurred and failed in her duty to write down his responses. I have already referred to Rapetsoa's failure to give an adequate account for the inordinate lapse of time after booking the accused out on the second occasion, and which in any event was materially contradicted by Machete.[26] The exaggeration of the injuries may be accounted for because, as confirmed by Rapetsoa, the accused had informed Rapetsoa that he had been assaulted but Rapetsoa claimed that he could not see any marks. The accused also claimed to have informed Capt Nobela that he had been assaulted and that Capt Nobela's response was to enquire whether the assaults had been perpetrated by those who had brought him to Sandringham. When he answered in the negative she indicated that it did not matter since they had not been the ones he said were responsible. Although Capt Nobela denied this, her credibility as a witness was

compromised by her unconvincing replies with regard to her failure to perform the duty entrusted to her to make enquiries and note responses on the

standard form in relation to the injury which the accused identified and which she had observed, particularly bearing in mind her evidence that she was experienced in taking down written confessions and admissions.[27] Accordingly, not only by reason of the State being obliged to prove beyond a reasonable doubt that the accused was not assaulted before making the written statement but even on a balance of probabilities, this court is satisfied that accused no 1 was assaulted shortly prior to being taken by Rapetsoa from Rabie Ridge Police Station to the Sandringham Police Station.CAUSAL LINK BETWEEN ASSAULT AND STATEMENT TO POLICE[28] The next question is whether, as a consequence of the assaults the admissions were voluntarily made as required by section 219A of the Criminal Procedure Act 51 of 1977 (the CPA).[29] Although Mr Potwana on behalf of the accused dealt extensively during evidence in chief, and when putting his client's version to the state witnesses with regard to the nature and extent of the assaults and where they were perpetrated he did not in leading the accused causally link the assault to the statement being allegedly signed under duress as foreshadowed when the admissibility of the statement was challenged by him on behalf of the accused.[30] Nonetheless, I am satisfied that this was an oversight. Mr Potwana is not an experienced criminal lawyer. It was during cross-examination that the accused, in reply to a direct question, stated that after the assaults he was threatened that if he did not make a statement he would be assaulted again. This occurred on the second occasion he was taken to the cemetery, and after he had declined to make a statement when he had been brought back to the Police Station from the cemetery earlier that morning. The probabilities again work in the accused's favour in respect of providing an explanation as to why he should have been taken out again to the cemetery and assaulted before being driven to Sandringham.[31] Although section 219A provides only that the admission is voluntarily made as opposed to section 217 which, in relation to confessions, requires that the statement be freely and voluntarily made without the person having been unduly influenced to make it, it is evident that on reflection the term "voluntarily" has a sufficiently broad meaning to cover the other exigencies. In any event it would be absurd to suggest that a written admission is inadmissible if not voluntarily made, but admissible if not made freely, a result that would arise if the word under consideration was given a restrictive meaning. The provisions of section 219A in relation to admissions was introduced in 1979 (section 14 of Act No 56 of 1979). A persistent criticism regarding amendments to the Criminal Procedure Act is their lack of consistency and lack of cohesiveness to the main statutory instrument (e.g. section 51 of Act 105 of 1997 with regard to so called minimum sentences).[32] The natural meaning of the word "voluntarily" (the Concise Oxford English Dictionary sufficing for such elementary purposes, is "done, given, or acting of one's own free will"). Since the provision is also an exception to the common law hearsay rule and risks impacting on protected constitutional rights, particularly under section 35(1)(c), full effect must be given to the broadness of the concept encompassed by the word. Moreover section 35(1)(c) of the Constitution provides that a suspect has the right "... not to be compelled to make any confession or admission that could be used in evidence against that person". This provision is complimented and reinforced by section 12(1)(c),

(d) and (2) (personal freedom and security) as well section 35(1)(a) and (3)(h) and (j) (arrested and detained persons).[33] Accordingly I am satisfied that the State has failed to establish beyond a reasonable doubt that the written statement of the accused, taken down before Capt Nobela and which is alleged to contain admissions as contemplated in section 219A, was voluntarily made.[34] The purpose of a trial within a trial is twofold. In the first place it is intended to ensure as far as possible that the statement relied upon by the State is not introduced until it is first established to have been voluntarily made, in the extended sense which covers those specific illustrations dealing with confessions and extra-curial statements made to persons other than police officers or justices of the peace. Secondly, and perhaps more profoundly, a trial within a trial is intended, where possible, to secure the determination of whether or not the statement is admissible before the accused elects whether or not to testify. He is entitled to know at the close of the State case, in those instances where this is possible, what admissible evidence stands against him and to which he must answer.[35] It is however clear that this objective cannot always be achieved. The provisional admission of extra-curial (extrajudicial) statements may only be finally resolved once the totality of evidence has been presented, including that of the accused. This is particularly evident where the test for admissibility in the particular case is based on the circumspection of the fairness of the proceedings and whether there has been an equality of arms.

TRIAL WITHIN A TRIAL – THE CO-ACCUSED’S POSITION[36] The State contended that the statement made by accused no. 1 which it sought to admit constituted an admission under section 219A and not a confession under section 217.[37] Mr Davids on behalf of accused no. 2 indicated that he wished to present argument on behalf of his client in respect of the admissibility of the evidence sought to be introduced by the State against accused no. 1. I indicated my difficulty in appreciating the basis upon which I should allow him to do so. [38] On the following day Ms Persad on behalf of the State indicated that she supported Mr Davids’ request. She also indicated for the first time (which was after all the evidence in relation to the trial within a trial had been heard) that, should the statement be admitted, the State intended to rely on a portion of it against accused no. 2 on the basis that such evidence was admissible against him under the exception to the hearsay rule. Again I expressed difficulty in appreciating the basis upon which an extra-curial statement made by accused 1, after he had been arrested for the offences with which he has been charged, could be admissible against his co-accused in relation to the same offence. I requested argument supported by authority from both Ms Persad and Mr Davids on

the point.[39] On the following morning Ms Persad indicated that she would be relying on both Constitutional Court and Supreme Court of Appeal authority, namely that she contended could be extracted from *S v Molimi*[2008] ZACC 2;2008 (2) SACR 76(CC), the application of a test set out in *S v Ndhlovu and Others*2002 (2) SACR 325(SCA), that in the court a quo per Goldstein J in *S v Ndhlovu and Others*2001 (1) SACR 85(W) and the more recent case of *S v Rodiyana and Others*2009 (1) SACR 104(CkHC). My research indicates that the most recent case on the subject is *S v Libazi and ano*[2010] JOL 25611(SCA).[40] In my respectful view the SCA decision was obiter and the Constitutional Court decision has no direct bearing on the issue. With the

greatest respect to the High Court decisions to which reference has been made, including the decision of this Court, I believe that they are clearly wrong. In my respectful view the conclusions reached by the High Court decisions are wrong because the courts were not invited to consider, and therefore did not address, what I believe are thea priorquestions; namely, on what basis is the testimony sought to be admitted and whether properly characterised there is a fundamental objection to its reception which precedes an enquiry as to whether or not such evidence is hearsay, and if so whether it may nonetheless be admitted under the statutory exceptions permitted undersection 3of theLawof Evidence Amendment Act 45 of 1988or any residual common law exception. It therefore appears advisable to approach the matter by considering applicable general principles.

GENERAL PRINCIPLES REGARDING ADMISSIBILITY OF EVIDENCE[41] The admissibility of an extrajudicial statement is determined by reference to relevance. If the principles of relevancy are not satisfied then the evidence will be excluded, otherwise not. The rules relating to hearsay evidence are not concerned with relevancy but, as stated byWigmore On Evidence(Chadbourn Revision 1972) Vol. 4 para 1171, "... assume relevancy, and then under special circumstances apply an extra safeguard designed to meet special dangers. They may be said to be artificial as distinguished from natural rules; that is, they do not, as to the rules of relevancy, simply analyze the natural process of inference and belief; but they contrive a specific safeguard to be applied where experience has shown it desirable."

[42] Perhaps most critically for the purposes of the analysis: Unlike the admissibility of extrajudicial statements which is determined by reference to what is termed,principles of relevancy(seePart 1of Wigmore particularly atsection 12), the hearsay rule falls under the auxiliary rules under which evidence may or may not be admitted. It is referred to as theanalytic rulebecause it "...accomplishes the desired aim by subjecting the offered evidence to a scrutiny or analysis calculated to discover and expose in detail its possible weakness, and thus to enable the Tribunal to estimate it at no more than its actual value". (Wigmore (3rdEdition) Vol 5section 1360).

[43] Later I will examine whether or not theLaw of Evidence Amendment Act confineditself to auxiliary rules concerned with probative value or whether it extended them to rules of relevancy. The distinction is demonstrated by Wigmore insection 1171where an extra-curial statement made by a testator expressing his intention to execute a will in a particular manner is always relevant in regard to determining the terms of the last will, but the letter itself can only be proved by reference to the auxiliary rules allowing evidence that the letter was written by the person concerned. Accordingly if the letter itself is lost then circumstantial evidence of its contents would be excluded by the auxiliary rule. See also generally Wigmore at para 1171.

[44] Wigmore identifies five main classes of auxiliary rules, each characterised by the actual operation of the rule in question. They are the preferential, the analytic (or "scrutinative"), prophylactic, "simplificative"and quantitative (or synthetic) classes (at para 1172).

[45] Wigmore proceeds to state the following in para 1171:"These auxiliary rules have nothing to do with relevancy as such, i.e., regarded as the minimum requirement for admissibility. Theyassume relevancy, and then under special circumstances apply an extra safeguard designed to meet special dangers. They may be said to be artificial as distinguished from natural rules; that is, they do not, as do the rules of relevancy, simply analyze the natural process of inference and belief; but they contrive a specific safeguard to be applied where experience has shown it desirable. Moreover, their

operation is on lines distinct from those of relevancy; for the same fact, it is always relevant to prove the same proposition, may or may not come under the ban of one of these auxiliary rules, according to circumstances having no connection with relevancy.....These rules of auxiliary probative policy, then, form a set of rules, over and above and independent of the rules of relevancy. They are distinguished from the rules of relevancy (Part 1) in resting not upon an analysis of the process of inference, but upon artificial expedients designed to avoid special dangers that are irrespective of the nature of the inference and affect in common various kinds of evidence.” (emphasis added)[46] In the following paragraphs I proceed to set out some general propositions regarding extrajudicial statements which seek to highlight the narrow distinction between a confession and an admission.[47] Extrajudicial or extra-curial statements are those made outside a witness box by a party to court proceedings. Such statements may be used against him save where they amount to an admission or confession in a criminal case.[48] No statement by an accused may be used in evidence against him unless it is proved beyond reasonable doubt that it was freely and voluntarily made. See *S v Cele* 1965 (1) SA 82 (AD). It is irrelevant whether the extrajudicial statement was intended to be incriminatory or not. The statement must be freely and voluntarily made “... in the sense that it has not been induced by any threat or promise proceeding from a person in authority” (see *R v Barlin* 1929 AD 459 at 462).[49] In order for a confession to be admitted, the statement must be freely and voluntarily made, and it cannot be made to a peace-officer save in the case of a magistrate or justice of the peace.[50] A confession is “... an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law”. See *R v Becker* 1929 AD 167 at 171.[51] If the requisite element of intention (*mens rea*) is not evident from the statement then it does not amount to a confession, but rather an admission. See also *Schreiner JA in R v Debele* 1956 (4) SA 570 (AD) at 572 C to G who considered that the formula did not take into account a number of issues. Accordingly anything short of an

unequivocal admission of guilt including both the elements of the act and of the requisite intent will amount to an admission of the facts contained in the statement and may be as damning evidentially as a confession.[52] Moreover, under the rules of relevancy a statement, even if only verbal, made to a person who is not a police officer can constitute an admission. This common law principle finds expression in section 219 A of the CPA. An admission of a fact relating to the accused by another person can only be admitted under the rules of relevancy if there is an identity of interest. This arises where there is a privity of obligation., such as in cases of parties who sue or are sued in a representative capacity or in cases of principal and surety. So too where there is privity in title as in the case of an insured.[53] In a case of more than one accused acting with a common purpose each is a conspirator “liable under the criminal law for the acts of every other conspirator done in pursuance of the conspiracy” (emphasis added). See *Wigmore* at para 1079. See also *R v Mayet* 1957 (1) SA 492 (AD).[54] The reception of such evidence is premised upon a rational and logical deduction that depends for its efficacy on the statement being made in furtherance of the common purpose. Confining the rule in this manner precludes the reception of an extra-curial statement made by one conspirator against the other after his arrest. A fortiori the statement cannot be in furtherance of the commission of the offence, not even in the case of an accessory after the fact. This has been the position under our common law. See

Schreiner JA in *R v Mayet* at p 494A to H (supra).^[55] It is also a rule that appears to be of general application in other common law jurisdictions as evident from the United States Supreme Court cases. These cases confirm the exclusion of a statement made by one conspirator against another at a time when the objectives of the conspiracy are no longer pursued or capable of being pursued. See *Krulewitch v United States* [1949] USSC 33; 336 US 440 (1949) and *Wong Sun v United States* [1963] USSC 15; 371 US 471 at 490 (1963). See also *Wigmore Vol 4* supra para 1079 fn 1.^[56] In *Fiswick v United States* [1946] USSC 134; 329 US 211 (1946) at 217 the Supreme Court stated: "A confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it. If, as the circuit court of appeal sought, the maintenance of the plot to deceive the government was the objective of this conspiracy, the admissions made to the officers ended it. So far as each conspirator who confessed was concerned, the plot was then terminated. He thereupon ceased to act in a role of a conspirator. His admissions were therefore not admissible against his erstwhile fellow-conspirators."^[57] It appears useful to contextualise the reach of the rule of relevancy in relation to extrajudicial admissions made by an accused insofar as it concerns him and also insofar as it concerns his alleged co-conspirator: An extrajudicial statement in the form of an admission or confession made by an accused before a judicial officer other than a peace officer and provided it was voluntarily made and satisfies such other requirements of the common law or statute law (in this case sections 217(1)(a) and 219A(1) of the CPA) is admissible against the accused. An admission, short of a confession made to a person who is not a peace officer by an accused, is admissible against him. Any other statement not amounting to a confession or admission made by an accused extra-curially is admissible against him. A confession by an accused is not admissible against his co-accused. See section 219 of the CPA. A statement made by an accused which falls short of a confession but amounts to an admission or other statement by the accused concerning his co-conspirator is admissible against the latter provided it was made in furtherance of the common purpose.^[58] Accordingly it is evident that a confession made by an accused which refers to his co-accused is per se inadmissible by reason of section 219, and if it falls short of a confession will only be admissible under common law against his co-accused if uttered or written in furtherance of their common purpose but not otherwise.^[59] It is therefore difficult to appreciate how evidence of an extrajudicial admission concerning a co-accused made otherwise than in furtherance of their common purpose can be allowed in when it can, as many cases illustrate, amount to a confession of all the facts or elements necessary to convict save for one. It certainly is not so under the common law.^[60] The question therefore is whether the Law of Evidence Amendment Act allowed its introduction and if it did whether it is constitutionally sound. If so, a further question arises regarding when the admissibility of such testimony is to be determined.^[61] Firstly, the Law of Evidence Amendment Act did not in its terms purport to change the substantive rules of relevance. As demonstrated earlier, this rule determines the class of evidence that is inadmissible by reason of lack of relevance, in contrast to inadmissibility by reason of probity. While in many cases there may be a fine line between the two, *Wigmore* (supra) identifies the historic distinction and draws attention to the English Civil Evidence Act 64 of 1968 which the author notes makes "... substantial changes in the law of hearsay but leaves the preexisting law respecting admissions intact" (Vol 4 para 1048 fn 1).^[62] In

1979 section 219A of the CPA was amended by Act No 56 of that year. It allowed into evidence admissions provided they were made voluntarily. Most importantly, at that time under our common law the admissions of one conspirator could be used against the other provided it was made in furtherance of their common purpose. In my view the amendment was intended to do no more than codify the law regarding informal admissions whether by conduct or by statement. The mere fact that it did not expressly exclude the admissibility of such admission against a co-accused is of no consequence for reasons that I proceed to set out.[63] At the time of the amendment, the common law adequately catered for allowing an admission against a co-conspirator if made in furtherance of the common purpose but would exclude it if not made for such purpose. The legislature at the time would have known that this had been well settled in cases such as *R v Mayet* (supra) and the earlier cases cited in that judgment including *Rex v Levy & Others* 1929 AD 312 at p 327. Accordingly while section 219 expressly excludes all confessions made by one accused against the other, section 219A did not purport to alter the principles of relevancy in relation to admissions. An admission of a fact by one conspirator against the other would be admissible provided it was uttered in the furtherance of the conspiracy, but not otherwise.[64] Since the principle of relevancy did not include or exclude outright such an admission being used against the co-conspirator, there would have been no need to spell out in legislation the well recognised nuanced position of the common law. This is because aids to interpretation would be understood to have adequately preserved the common law unless altered expressly or by necessary implication. A similar situation did not prevail in the case of confessions, where admissibility was not dependent on circumstances delineated by the common law but where there existed an outright prohibition of it being admissible against the co-conspirator- a concept capable of ready and straightforward translation into legislation as appears from section 219. .

[65] There was also a further anomaly that would result in absurdity if it was not intended to preserve the common law. A confession by an accused which implicates his co-accused does not necessarily amount to a confession against his co-accused but only an admission of certain facts indicating the co-accused's involvement. Accordingly to prohibit the admissibility of evidence contained in a statement, on the basis that it amounts to a confession as against its author, does not indicate that the legislature intended that those parts of the confession which amount to an admission by him against his co-conspirator would be receivable in evidence against the latter. Yet the State's interpretation of section 219A as read with the Law of Evidence Act would allow it to argue that the section is wide enough to allow it to extract and use against a co-accused those parts of the confession of the one conspirator which contained admissions (but not a confession) concerning the involvement of the other.[66] Furthermore, at the level of application: It is difficult to pragmatically conduct a single trial within a trial in relation to both accused where the admissibility is challenged and equally so if two separate trials within a trial were held.[67] If a single trial within a trial is postulated then the court would already be appraised that there is a statement made in the written admission sought to be introduced against the one conspirator which associates the other in the commission of the offence. This immediately alerts the court to the contents of the admission before its admissibility is determined where the author objects to its introduction. Pragmatically it would also be difficult for a presiding officer, whether a judge or a district magistrate, to disabuse his or her mind from already associating both accused with the

events to which the charge relates. If there are two trials within a trial then it is only after the evidence against the accused author has been admitted that the co-conspirator will object to the evidence being admissible against him. He would then be entitled to remain silent throughout the first trial within a trial and then argue for a repetition of the evidence.[68] Moreover, the potential for abuse cannot be overlooked. In *Molima* the SCA accepted that the statement made by the one conspirator amounted only to an admission thereby allowing the evidence in, whereas the Constitutional Court on an overview of the conspirator's statement found that it amounted to a confession thereby rendering it inadmissible against the co-accused under the express exclusion provided for in section 219. Prosecutors may be tempted to argue that the statement, albeit a confession, should be admitted as an admission. Similarly where more than one person is suspected of committing an offence, a voluntary statement admitting guilt may be couched by a police officer who is also a judicial officer in a way that amounts to an admission and not a confession so as to use the statement against a co-accused who insists on his right to remain silent.[69] The extensive utilisation of confessions and admissions particularly during the State of Emergency era cautions us, unless there is an express intention to the contrary in amending legislation, against eroding those common law principles that were responsible, in numerous cases, for securing the rule of law despite the absence of a Bill of Rights.[70] The Law of Evidence Act came into effect in 1988. For more than 15 years no reported case existed where the State understood the legislation to allow for the utilisation of an admission made by one conspirator against the other. Had the State understood the legislation in this manner then one would have expected the point to be argued from inception of the legislation. There was no lack of opportunity to do so. In my view this demonstrates that at the time of the introduction of the Law of Evidence Act it was not contemplated that its reach would go to the principles of relevance, so as to allow admissions against a co-conspirator in circumstances other than where the statement was made during the furtherance of their common purpose.[71] I mentioned earlier the interpretational aid that a statute is intended to interfere as little as possible with existing common law, unless the intention to do so is plain (see *Cornelissen N.O. v Universal Caravan Sales (Pty) Ltd* 1971 (3) SA 158(AD), p 175C to D). Moreover where a right or protection is taken away from an individual, as is contended in this case, it must be done expressly or by necessary implication (See *Dadoo Ltd & others v Krugersdorp Municipality* 1920 AD 530 at 552). The Law of Evidence Act in its terms does not expressly remove the protection by providing for admissibility in circumstances other than those recognised by the common law, nor did it do so by necessary implication. The latter may be tested by the length of time it took for the State to first raise the possibility.[72] It is now accepted that the minority judgment by Schreiner JA in *Collins v Minister of the Interior and Another* 1957

- (1) SA 552(AD) at p 575D correctly expresses our law that the legislature may not through two separate pieces of legislation achieve an objective which neither piece of legislation contemplated on its own. In much the same way in my view, it is not possible to bring together s 219A and the Law of Evidence Act to achieve what neither set out to do whether by amending procedural rules or the substantive law.[73] In my view the historic rule of relevance that has excluded the admissibility of an admission by one conspirator against the

other in all cases other than when it is made in the furtherance of their common purpose remains a sound principle based on centuries of judicial experience regarding the fairness of the adversarial trial system.[74] The unreliability of a statement made by one conspirator which contains an admission against the other at the time of arrest is fraught with danger. The conspirator may attempt to exculpate himself or the extent of his involvement by transferring blame. The opportunity for inducement by the authorities is great. Another rule that comes into contention is the auxiliary rule relating to the possible inability to cross-examine for want of "equality of arms" in establishing precisely what occurred to induce the accused to implicate his co-accused. These factors effectively destroy the reliability of the extra-curial statement. Moreover a court should not be obliged to undertake an exercise of determining whether or not the accused will receive a fair trial where it is likely that such evidence would be provisionally admitted.[75] There is the further consideration that a co-accused may insist on a separation of trials because of the potential prejudice of not being able to cross-examine the other accused nor be able to compel him to enter the witness box during the trial within a trial.[76] In my respectful view experience in criminal courts reveals the risks that are inherent where an accused attempts to reduce his blameworthiness by asserting that the final and critical act in the chain of events leading to the commission of the crime was implemented by someone other than himself (and thereby reducing his statement to an admission). This is also aptly demonstrated when the State leads the evidence of a co-conspirator in respect of whom it has accepted a plea of guilty and where in both the section 112 statement and before the trial of his accomplices the co-conspirator seeks to untruthfully minimise the extent of his own participation.[77] Turning to case law. In my respectful view *S v Robiyana* (supra) is authority only for the application of the principle that where an accused elects to introduce the statement made by a witness then he is bound by the answers given even if they tend to incriminate him in the commission of the offence. In *Ndhlovu* (supra) the SCA concerned itself exclusively with the application of the Law of Evidence Amendment Act and found that there was sufficient extraneous evidence to ensure the reliability of the extra-curial statement. The court was not asked to consider whether the Law of Evidence Act expressly or by necessary implication extended the rule of reliability which excluded any admission made by one conspirator against the other beyond the case where the statement was made in furtherance of their common purpose. In *Molimi* (supra) the Constitutional Court held that the statement amounted to a confession and therefore was to be excluded. It is respectfully submitted that the Constitutional Court was not asked to, nor did it consider the issue regarding the interpretation of the Law of Evidence Amendment Act in regard to its impact on the common law exclusion of extrajudicial statements made against a co-accused which is not in furtherance of their common purpose. This further appears to be indicated by the list of annotated cases that do not appear to include cases which form the basis of this decision. **ALLOWING CROSS-EXAMINATION BY ACCUSED NO 2 AND PREJUDICE**[78] During the trial within a trial Mr Davids requested and was permitted to cross-examine all the witnesses who were called. At that time the court was not apprised of any evidence regarding the arrest or detention of his client. When the trial within a trial commenced Mr Davids indicated that his client intended to challenge the

contents of a statement his client had made. Only much later during the hearing did evidence surface that accused no. 2 had been arrested a considerable time later. Moreover, Ms Persad at no stage during the hearing of evidence in the trial within a trial indicated that she would also rely on the admission (should it be received) of accused no. 1 against accused no. 2. There was accordingly no reason for Mr Davids to cross-examine with any vigour on the issue of whether or not the alleged admission had been freely and voluntarily made.[79] The court was taken by surprise with Ms Persad's belated revelation that, if admitted, the admission of accused no. 1 would be used as evidence against accused no. 2. That being so, Mr Davids could not have been expected to anticipate this possibility.[80] In my view the considerations adopted by the Constitutional Court in *Molimi* apply in the present case. Accused no. 2 was not pre-cognised that if accused no. 1's admissions were received that they would be used as evidence against his client.[81] Accordingly, and to adopt a concept from civil law, there is no *lis* between the State and accused no. 2 in regard to the trial within a trial, since from inception the trial within a trial was predicated on the State seeking only to introduce admissions against accused no. 1 allegedly made by him and to which objection was taken on the grounds that they were made under duress and in breach of his constitutional rights.[82] If this Court were to have held that the statement made by accused no. 1 before Capt Nobela was admissible against him then the next step would have been for the State to produce the statement and indicate that it intended using such parts as may constitute an admission by accused no. 1 against accused no. 2 (see *Molimi* (supra)) leaving it then open for accused no. 2 to elect whether or not to object to such testimony being received against him.[83] The situation that arose in this case further indicates the advantage of ensuring that the proper procedure is adopted when the State indicates that it is necessary to hold a trial within a trial. I indicated that the proper course was for the State to indicate that it wished to introduce admissions made by accused no. 1 in a document and that it was then for accused no. 1 to indicate not only that he objected to the admissibility of such evidence but to set out the grounds for doing so; i.e. to indicate whether it was limited to the voluntariness of the statement or whether it also included a failure to respect the accused's constitutional rights. Had the State intended to use the same statement also against accused no. 1 then it should have indicated so at that stage and without elaboration (so as to avoid revealing prematurely the contents of the statement sought to be relied upon). [84] One of the practical difficulties a trial court would face, if the extra-curial statement by one conspirator against the other is contained in a statement made to the police after arrest, is that it would be extremely difficult for the co-accused to cross-examine (should the accused who made the statement elect to enter the witness box), on the basis of inducement or the expectation of a more lenient sentence by incriminating his co-accused without entering the merits in order to demonstrate such motive.[85] While it was sufficient to preclude Mr Davids from presenting argument simply on a ground that there was no "*lis*" at that stage in respect of the trial within a trial that was concerned only with the admissibility of the statement made before Capt Nobela against accused no. 1 only, I have as best I as I can now set out my view as to why the Law of Evidence Amendment Act expressly or by necessary implication does not alter the common law in relation to extra-

curial statements made by one conspirator against

the other in circumstances other than where the statement was made in furtherance of the common purpose.[86] It is for these reasons that I refused to admit any extra-curial admission that might have been made in his statement by accused no 1 after his arrest against accused no 2 since on the facts it could not have been made in furtherance of their conspiracy. SPILG JLEGAL REPRESENTATIVES: The State: Adv Persad Accused no 1: Adv Potwana Accused no 2: Adv Davids

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 32/2009

CASE NO

: 32/2009

DPP REF NO: JPV 2008/0249

DATE: 28/02/2011

In the matter between:

THE STATE

and

MANGENA, BONGANI LAURENCE.....Accused No. 1

MANGENA, BONGANI LAURENCE

.....

Accused No. 1

LAMBANE, HANNIES MASHAMBA.....Accused No. 2

LAMBANE, HANNIES MASHAMBA

Accused No. 2

REASONS FOR DECISION: TRIAL WITHIN A TRIAL AND ADMISSIONS AGAINST A CO-ACCUSED

REASONS FOR DECISION

: TRIAL WITHIN A TRIAL AND ADMISSIONS AGAINST A CO-ACCUSED

SPILG, J:

SPILG, J

:

INTRODUCTION

- [1] Accused no. 1 was originally cited as Lawrence Bongani Mgeni. His correct names are Bongani Laurence Mangena. He and accused no. 2 stand charged with the murder of Raymond Khoza and the attempted murder of David Jack Khoza on Saturday 9 August 2008. Accused no. 1 is also charged with the unlawful possession of an unlicensed firearm and ammunition.
- [2] The trial commenced on 11 March 2010 and was remanded on 25 March 2010. When the State resumed leading its evidence on 2 November 2010 Ms Persad indicated that her next witness, Captain Nobela would be led in regard to a written admission allegedly made to her by accused no. 1. Mr Potwana on behalf of accused no. 1 objected to the testimony being admitted on the grounds that the alleged admission was not freely and voluntarily made in that the statement was made under duress, and also on the ground that accused no 1 had not been informed of his constitutional rights.
- [3] In support of the admission having been voluntarily made and that the accused was properly informed of his constitutional rights the State led the evidence of a number of witnesses. They were Captain Nobela before whom the admission was taken on 10 September 2008, Warrant-Officer Rapetsoa who was the investigating officer and effectively responsible for accused no. 1 on that day, Constable Machete who accompanied Warrant-Officer Rapetsoa and accused no. 1 from Rabie Ridge to Sandringham Police Station in order for the statement to be taken down by Captain Nobela, Constable Morige whom accused no. 1 alleged had been involved in assaulting him on 10 September 2008 and Constable Kabe who had arrested accused no. 1 in the early hours of 10 September 2008.

The State also produced a number of documents that were admitted into evidence during the trial within a trial. One of these documents comprised a confession and admission taken down before Captain Nobela. It consisted of the standard form preamble setting out that the accused was informed of his constitutional rights and was asked a number of prescribed questions. This document was signed by the accused on the last page and initialled by him on all the preceding pages (Exhibit “J”). The document tendered in evidence obviously excluded the actual statement made by accused no. 1 to Captain Nobela. Also admitted into evidence was the relevant occurrence book for the period 9 and 10 September 2008. Extracts were produced and handed up as Exhibits “K1” to “K4”. Finally the State produced a certified copy of the court proceedings of 11 September 2008 when accused no. 1 was first brought before the Magistrate (Exhibit “L”). This was admitted without objection under the provisions of section 235 of the Criminal Procedure Act 51 of 1977 (the CPA).

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pages (Exhibit “J”). The document tendered in evidence obviously excluded the actual statement made by accused no. 1 to Captain Nobela. Also admitted into evidence was the relevant occurrence book for the period 9 and 10 September 2008. Extracts were produced and handed up as Exhibits “K1” to “K4”. Finally the State produced a certified copy of the court proceedings of 11 September 2008 when accused no. 1 was first brought before the Magistrate (Exhibit “L”). This was admitted without objection under the provisions of section 235 of the Criminal Procedure Act 51 of 1977 (

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- [4] Accused no. 1 also gave evidence. The only exhibit handed up during his testimony was a sketch plan that was relevant to his arrest (Exhibit “M”).
- [5] There appear to be are a number of key features that ought to be taken into account when considering the testimony of the State and of accused no 1. They relate firstly to the chronology of events which I believe assists in the objective determination of the facts. Secondly, they relate to the veracity of evidence presented with regard to the whereabouts of accused no. 1 on the morning of 10 September 2008 before he was taken to Captain Nobela. It is during this period that accused no. 1 claimed to have been threatened and assaulted. Finally, there are the events that were alleged to have occurred when accused no. 1 was brought before Captain Nobela at the Sandringham Police Station.

CHRONOLOGY OF EVENTS AND THEIR RELEVANCE

- [6] The evidence presented by the State and supported by the Occurrence Book reflects the following:

At 09h15 on the morning of 10 September 2008 accused no. 1 was detained at Rabie Ridge Police Station by Constable Kabe under Rabie Ridge Case No. 127/08/2008. The Occurrence Book also reflects the cell register entry in the SAP14 as 91/09/2008 and records that the accused was “free from injuries”.

At 09h15 on the morning of 10 September 2008 accused no. 1 was detained at Rabie Ridge Police Station by Constable Kabe under Rabie Ridge Case No. 127/08/2008. The Occurrence Book also reflects the cell register entry in the SAP14 as 91/09/2008 and records that the accused was “

free from injuries

”.

At 09h20 accused no. 1 was booked out by Warrant Officer Rapetsoa. This entry was signed by him.

W/O Rapetsoa also requisitioned a pair of leg irons at 09h22.

At 09h50 Const. Morige booked out a firearm and magazine with 20 rounds. He personally signed against this entry.

At 11h15 Rapetsoa returned with accused no. 1 to Rabie Ridge Police Station.

At 11h25 Rapetsoa again booked out accused no. 1. He also signed this entry and recorded that the accused was free from injuries.

Rapetsoa also signed the entry recording that he again requisitioned leg irons at 11h30.

(f) An entry in the Occurrence Book records that at 18h42 Rapetsoa had booked back the leg irons. The entry was however made at 18h55.

At 18h56 Rapetsoa booked accused no. 1 back in at Rabie Ridge. The entry again records that accused no. 1 was free from injuries.

At 19h43 W/O Rapetsoa charged accused no. 1 with murder. Once again it is recorded that accused no. 1 had no injuries.

[7] One other aspect that appears from the Rabie Ridge occurrence book is that police reservists were on duty during the day. This appears from entry no. 9988 recorded at 18h45, although the reservists had been inspected at 18h00 according to the entry.

[8] It became evident during the course of the State's evidence that the time recorded in the appropriate column of the occurrence book was not necessarily the time of the actual event but rather the time when it was recorded. This is evident from two of the entries to which reference has already been made. However Rapetsoa's evidence was that the times recorded of when he booked out and booked back accused no. 1 correctly reflect when these events actually occurred.

[9] W/O Rapetsoa also testified that the purpose of taking accused no. 1 into his custody and booking him out of the Police Station at 09h20 was to further his investigations in an attempt to locate the firearm that the accused was alleged to have used. Since accused no. 1 was booked back at 11h15, he effectively was in the custody of W/O Rapetsoa for just short of two hours.

[10] On the second occasion, Rapetsoa booked the accused out at 11h25 so that the accused could make a statement before Captain Nobela. Rapetsoa said that this had been pre-arranged with the Captain. Chronologically it means that accused no. 1 was in Rapetsoa's custody for some 7½ hours (bearing in mind that the leg irons used to restrain the accused were booked out at 11h30 and were booked back at 18h55).

[11] By contrast the evidence of accused no. 1 was to the effect that:

He was brought to Rabie Ridge Police Station by Const Kabe at 04h00 on the morning of 10 September 2008.

It is common cause that the accused was arrested at 02h00 that morning.

Between 06h00 to 07h00 he spoke to W/O Rapetsoa for the first time.

This estimate was based on his observation that during this period there was a change of police shifts.

Either before or at about 09h00 Rapetsoa took him to Tembisa.

He estimated the time by reference to the sun's position.

Some 25 minutes later he was brought back to Rabie Ridge. Accused no1 said that he did not enter through the charge office but via a back door.

Some 25 minutes later he was brought back to Rabie Ridge. Accused no1 said that he did not enter through the charge office but

via

a back door.

He remained there for another 20 to 25 minutes.

At about 10h00 several policemen (but excluding W/O Rapetsoa) took him to the Mooifontein Cemetery where he was assaulted. The policemen were in plain clothes.

Accused no. 1 believes that he was brought back to Rabie Ridge at some time after 11h00. He made this assessment because visitors were still present and visiting time was at 11h00. He also estimated that some 50 minutes had elapsed since he had left Rabie Ridge for the graveyard and until his return.

He then remained at Rabie Ridge for another 30 minutes or less during which period he was taken to the Station Captain in order to make a statement. He refused to make a statement.

He was then taken out again to the Mooifontein Cemetery where he was threatened and once more assaulted. W/O Rapetsoa did not accompany him on this occasion either.

Some 40 minutes elapsed from the time he left Rabie Ridge on this second occasion for the cemetery until his return to the Police Station.

He was not taken back into the police station but remained in a vehicle for another 20 to 25 minutes before Rapetsoa took him from that vehicle into another vehicle and departed for Sandringham, a route which was familiar to the accused.

The journey from Rabie Ridge to the Sandringham Police Station took about 20 to 25 minutes as, according to accused no 1, there was no traffic obstruction and they did not stop on way.

ACCOUNTING FOR TIME

[12] It is evident that unless W/O Rapetsoa stopped en route from Rabie Ridge to the meeting with Capt Nobela at Sandringham a period of some 2¾ hours requires to be accounted for. Rapetsoa was able to account for some 30 odd minutes because when he arrived at Sandringham Police Station he had difficulty locating Capt Nobela. He claimed that the missing time was accounted for because they had stopped at a shopping centre as the policemen accompanying him wanted to buy something.

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from Rabie Ridge to the meeting with Capt Nobela at Sandringham a period of some 2¾ hours requires to be accounted for. Rapetsoa was able to account for some 30 odd minutes because when he arrived at Sandringham Police Station he had difficulty locating Capt Nobela. He claimed that the missing time was accounted for because they had stopped at a shopping centre as the policemen accompanying him wanted to buy something.

[13] Accused no. 1's testimony based on his time estimates does account for his movements and whereabouts from about 10h00 until arriving, according to him at about 13h40, at the Sandringham Police Station. Based on his estimates of time;

He was taken from Rabie Ridge to the graveyard for the first time at about 10h00 and came back at about 10h55. He remained at the Police Station for some 30 minutes or less, which would then take the time to between 11h10 and 11h30. This reasonably coincides with the Occurrence Book entry recording that W/O Rapetsoa booked the accused out at 11h25 and requisitioned the leg irons at 11h30. If that time is correct then one can estimate that some 10 to 15 minutes would have been taken up with the other policemen again putting leg irons on accused no. 1 and placing him in their vehicle. He would have been brought back to Rabie Ridge at about 12h20 after being taken to the graveyard on the second occasion. He then remained in the vehicle for some 25 minutes, taking the time to about 12h45. It took another 30 minutes to arrive at Sandringham Police Station (versus W/O Rapetsoa's evidence that it was some 35 minutes). This would result in the accused arriving at Sandringham Police Station somewhere between 13h15 to 13h20.

He was taken from Rabie Ridge to the graveyard for the first time at about 10h00 and came back at about 10h55.

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W/O Rapetsoa's evidence that it was some 35 minutes). This would result in the accused arriving at Sandringham Police Station somewhere between 13h15 to 13h20.

[14] By contrast, on W/O Rapetsoa's version he had taken the accused into his custody from 11h25 and could only account for the 2 hours that it took to reach Sandringham Police Station by claiming that he had diverted to buy food for a colleague at a shopping centre.

[15] Const Machete gave evidence to the effect that he was the only other police officer accompanying W/O Rapetsoa with accused no. 1 from Rabie Ridge to Sandringham Police Station. He claimed to be unfamiliar with the route, said that there was some traffic but denied that they had stopped anywhere en route. Since Const Machete was the only person who could have requested to stop for food, W/O Rapetsoa's explanation as to the unaccounted 2 hours must be rejected.

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Furthermore W/O Rapetsoa's claim that he had stopped for food is inconsistent with his evidence that, before he left Rabie Ridge, his Station Commander had arranged for Capt Nobela to take down the accused's statement at Sandringham Police Station. It is unlikely that Rapetsoa would have delayed his arrival at Sandringham by stopping for a considerable period of time at a shopping centre. Moreover it is surprising that Rapetsoa would have allowed an accused, who by his account wanted to make a statement, to sit in a motor vehicle outside a shopping centre for such a considerable period of time. Finally an hour or so appears to be excessive simply to purchase food.

[16] Since W/O Rapetsoa's explanation can be safely rejected, the remaining question is whether or not accused 1 made up the story that he was taken for a second time to the graveyard. I should have added that the State also refutes accused no. 1's evidence that he had also been taken earlier that day to the same graveyard.

[17] Accused no. 1's responses to questions posed by the prosecutrix strengthened rather than weakened the accused's version. He answered spontaneously with regard to who was present and the basis for his identification, including their appearance. His detail of how he was assaulted on each of the two occasions remained consistent.

[18] The State was invited to provide a rational explanation for the conflict between the testimony of Rapetsoa and Machete. For reasons already given no rational innocuous explanation exists. It would not be justified to excuse the contradictions and improbabilities on the basis simply of unreliability. Accordingly the attempt to explain the whereabouts of accused no. 1, who was at all times supposedly in the custody of Rapetsoa, is rejected as untruthful.

[19] The accused's evidence that he was assaulted before he was taken to Capt Nobela is supported, again *prima facie*, by the fact that no injuries were observed on him when he was first detained, yet Capt Nobela recorded in the *pro forma* questions contained in the confession and admission form that she observed that he not only had handcuff marks on the right hand but also a "swollen round mark on the head". During evidence Capt Nobela described this as a 2 cm diameter mark on the right side of the accused's forehead. She said that it was clearly visible as it was swollen and protruded from his forehead.

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- [20] None of the police officers called to testify observed any such injury. Kabe, who was called to testify on whether the accused had sustained any injuries at the time of his arrest, claimed that he had not observed any. According to Kabe the only injury that the accused sustained from the time of his arrest until Kabe brought him to the cells could have been to the accused’s wrist as Kabe tugged at the handcuffs restraining the accused when the accused had tried to remain at his father’s house.
- [21] The accused described not only being taken to the cemetery at some time after 11h00 but also being taken to there earlier in the morning. He claimed that Const Morige was at the graveyard after he had arrived. Both Rapetsoa and Morige denied that the accused had been taken there on either of the two occasions. Moreover, they denied any knowledge of the two other persons identified by the accused, namely a person who was called Poplap and another who was referred to as Mlahlane. The accused consistently separated the two occasions when he was taken to the graveyard. He was consistent with regard to who took him on each occasion, how he was restrained on each occasion (on the first occasion with leg irons only and on the second, with handcuffs and leg irons) and the extent of the assault. He was closely questioned by Ms Persad and his responses were consistent and spontaneous in respect of all the events, save in respect of the extent of the assaults (as opposed to the nature of the assaults).
- [22] No attempt was made by the State to explain the length of time taken on the first occasion when Rapetsoa had booked out the accused. Nor was the accused challenged with regard to the short period of time he said it took for Rapetsoa to take him to look for the firearm and return to the Police Station via a side entrance.
- [23] The glaring failure on the part of the State to account for the lengthy period of time during which the accused had been booked out on both occasions on 10 September is strong evidence supporting the appellant’s allegations that he was taken for a purpose other than just to locate a firearm in Tembisa and to make a statement at Sandringham Police Station.
- [24] The final aspect concerns the extent of the assaults. It appears to me that the accused has embellished, particular with regard to their sequelae. While it is clear that Capt Nobela did observe that his forehead was swollen on the right-hand side, the accused in addition claimed that he had been struck on the top of his head and that later the wound was opened during the further assault on him with consequential bleeding. He said that the blood

dripped onto the collar and spattered onto the front of his T-shirt. He claimed that he had used the cloth with which he was blindfolded, when taken to the graveyard on the first occasion, to wipe the blood. Capt Nobela only noted the clothing worn by the accused and did not observe any blood stains.

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[25] Even though the accused exaggerated the extent of his injuries, it does not affect the general credibility of the key elements of his testimony, namely that he was assaulted by the police. The reason is that the fact of an assault on him is supported not only by Capt Nobela's observation of the forehead injury but also her failure to perform her duty and ask the accused how and when the injury occurred and failed in her duty to write down his responses. I have already referred to Rapetsoa's failure to give an adequate account for the inordinate lapse of time after booking the accused out on the second occasion, and which in any event was materially contradicted by Machete.

[26] The exaggeration of the injuries may be accounted for because, as confirmed by Rapetsoa, the accused had informed Rapetsoa that he had been assaulted but Rapetsoa claimed that he could not see any marks. The accused also claimed to have informed Capt Nobela that he had been assaulted and that Capt Nobela's response was to enquire whether the assaults had been perpetrated by those who had brought him to Sandringham. When he answered in the negative she indicated that it did not matter since they had not been the ones he said were responsible. Although Capt Nobela denied this, her credibility as a witness was compromised by her unconvincing replies with regard to her failure to perform the duty entrusted to her to make enquiries and note responses on the

standard form in relation to the injury which the accused identified and which she had observed, particularly bearing in mind her evidence that she was experienced in taking down written confessions and admissions.

- [27] Accordingly, not only by reason of the State being obliged to prove beyond a reasonable doubt that the accused was not assaulted before making the written statement but even on a balance of probabilities, this court is satisfied that accused no 1 was assaulted shortly prior to being taken by Rapetsoa from Rabie Ridge Police Station to the Sandringham Police Station.

CAUSAL LINK BETWEEN ASSAULT AND STATEMENT TO POLICE

- [28] The next question is whether, as a consequence of the assaults the admissions were voluntarily made as required by section 219A of the Criminal Procedure Act 51 of 1977 (the CPA).
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- [29] Although Mr Potwana on behalf of the accused dealt extensively during evidence in chief, and when putting his client's version to the state witnesses with regard to the nature and extent of the assaults and where they were perpetrated he did not in leading the accused causally link the assault to the statement being allegedly signed under duress as foreshadowed when the admissibility of the statement was challenged by him on behalf of the accused.
- [30] Nonetheless, I am satisfied that this was an oversight. Mr Potwana is not an experienced criminal lawyer. It was during cross-examination that the accused, in reply to a direct question, stated that after the assaults he was threatened that if he did not make a statement he would be assaulted again. This occurred on the second occasion he was taken to the cemetery, and after he had declined to make a statement when he had been brought back to the Police Station from the cemetery earlier that morning. The probabilities again work in the accused's favour in respect of providing an explanation as to why he should have been taken out again to the cemetery and assaulted before being driven to Sandringham.
- [31] Although section 219A provides only that the admission is voluntarily made as opposed to section 217 which, in relation to confessions, requires that the statement be freely and voluntarily made without the person having been unduly influenced to make it, it is evident that on reflection the term "voluntarily" has a sufficiently broad meaning to cover the other exigencies. In any event it would be absurd to suggest that a written admission is inadmissible if not voluntarily made, but admissible if not made freely, a result that would arise if the word under consideration was given a restrictive meaning. The provisions of section 219A in relation to admissions was introduced in 1979 (section 14 of Act No 56 of 1979). A persistent criticism regarding amendments to the Criminal Procedure Act is their lack of consistency and lack of cohesiveness to the main statutory instrument (e.g. section 51 of Act 105 of 1997 with regard to so called minimum sentences).
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Criminal Procedure Act is

section 51

[32] The natural meaning of the word “voluntarily” (the Concise Oxford English Dictionary sufficing for such elementary purposes, is “done, given, or acting of one’s own free will”). Since the provision is also an exception to the common law hearsay rule and risks impacting on protected constitutional rights, particularly under section 35(1)(c), full effect must be given to the broadness of the concept encompassed by the word. Moreover section 35(1)(c) of the Constitution provides that a suspect has the right “... not to be compelled to make any confession or admission that could be used in evidence against that person”. This provision is complimented and reinforced by section 12(1)(c),

(d) and (2) (personal freedom and security) as well section 35(1)(a) and (3)(h) and (j) (arrested and detained persons).

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(d) and (2) (personal freedom and security) as well section 35(1)(a) and (3)(h) and (j) (arrested and detained persons).

- [33] Accordingly I am satisfied that the State has failed to establish beyond a reasonable doubt that the written statement of the accused, taken down before Capt Nobela and which is alleged to contain admissions as contemplated in section 219A, was voluntarily made.
- [34] The purpose of a trial within a trial is twofold. In the first place it is intended to ensure as far as possible that the statement relied upon by the State is not introduced until it is first established to have been voluntarily made, in the extended sense which covers those specific illustrations dealing with confessions and extra-curial statements made to persons other than police officers or justices of the peace. Secondly, and perhaps more profoundly, a trial within a trial is intended, where possible, to secure the determination of whether or not the statement is admissible before the accused elects whether or not to testify. He is entitled to know at the close of the State case, in those instances where this is possible, what admissible evidence stands against him and to which he must answer.
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- [35] It is however clear that this objective cannot always be achieved. The provisional admission of extra-curial (extrajudicial) statements may only be finally resolved once the totality of evidence has been presented, including that of the accused. This is particularly evident where the test for admissibility in the particular case is based on the circumspection of the fairness of the proceedings and whether there has been an equality of arms.

TRIAL WITHIN A TRIAL – THE CO-ACCUSED’S POSITION

- [36] The State contended that the statement made by accused no. 1 which it sought to admit constituted an admission under section 219A and not a confession under section 217.
- [37] Mr Davids on behalf of accused no. 2 indicated that he wished to present argument on behalf of his client in respect of the admissibility of the evidence sought to be introduced by the State against accused no. 1. I indicated my difficulty in appreciating the basis upon which I should allow him to do so.

[38] On the following day Ms Persad on behalf of the State indicated that she supported Mr Davids' request. She also indicated for the first time (which was after all the evidence in relation to the trial within a trial had been heard) that, should the statement be admitted, the State intended to rely on a portion of it against accused no. 2 on the basis that such evidence was admissible against him under the exception to the hearsay rule. Again I expressed difficulty in appreciating the basis upon which an extra-curial statement made by accused 1, after he had been arrested for the offences with which he has been charged, could be admissible against his co-accused in relation to the same offence. I requested argument supported by authority from both Ms Persad and Mr Davids on

the point.

[39] On the following morning Ms Persad indicated that she would be relying on both Constitutional Court and Supreme Court of Appeal authority, namely the ratio that she contended could be extracted from *S v Molimi* [2008] ZACC 2; 2008 (2) SACR 76(CC), the application of a test set out in *S v Ndhlovu and Others* 2002 (2) SACR 325(SCA), the ratio in the court a quo per Goldstein J in *S v Ndhlovu and Others* 2001 (1) SACR 85(W) and the more recent case of *S v Rodiyana and Others* 2009 (1) SACR 104(CkHC). My research indicates that the most recent case on the subject is *S v Libazi and ano* [2010] JOL 25611(SCA).

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[40] In my respectful view the SCA decision was obiter and the Constitutional Court decision has no direct bearing on the issue. With the greatest respect to the High Court decisions to which reference has been made, including the decision of this Court, I believe that they are clearly wrong. In my respectful view the conclusions reached by the High Court decisions are wrong because the courts were not invited to consider, and therefore did not address, what I believe are the *a priori* questions; namely, on what basis is the testimony sought to be admitted and whether properly characterised there is a fundamental objection to its reception which precedes an enquiry as to whether or not such evidence is hearsay, and if so whether it may nonetheless be admitted under the statutory exceptions permitted under section 3 of the Law of Evidence Amendment Act 45 of 1988 or any residual common law exception. It therefore appears advisable to approach the matter by considering applicable general principles.

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section 3

Law

of Evidence Amendment Act 45 of 1988

GENERAL PRINCIPLES REGARDING ADMISSIBILITY OF EVIDENCE

[41] The admissibility of an extrajudicial statement is determined by reference to relevance. If the principles of relevancy are not satisfied then the evidence will be excluded, otherwise not. The rules relating to hearsay evidence are not concerned with relevancy but, as stated by Wigmore On Evidence (Chadbourn Revision 1972) Vol. 4 para 1171, "... assume relevancy, and then under special circumstances apply an extra safeguard designed to meet special dangers. They may be said to be artificial as distinguished from natural rules; that is, they do not, as to the rules of relevancy, simply analyze the natural process of inference and belief; but they contrive a specific safeguard to be applied where experience has shown it desirable."

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[42] Perhaps most critically for the purposes of the analysis: Unlike the admissibility of extrajudicial statements which is determined by reference to what is termed, principles of relevancy (see Part 1 of Wigmore particularly at section 12), the hearsay rule falls under the auxiliary rules under which evidence may or may not be admitted. It is referred to as the analytic rule because it "... accomplishes the desired aim by subjecting the offered evidence to a scrutiny or analysis calculated to discover and expose in detail its possible weakness, and thus to enable the Tribunal to estimate it at no more than its actual value". (Wigmore (3rd Edition) Vol 5 section 1360).

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[43] Later I will examine whether or not the Law of Evidence Amendment Act confined itself to auxiliary rules concerned with probative value or whether it extended them to rules of relevancy. The distinction is demonstrated by Wigmore in section 1171 where an extra-curial statement made by a testator expressing his intention to execute a will in a particular manner is always relevant in regard to determining the terms of the last will, but the letter itself can only be proved by reference to the auxiliary rules allowing evidence that the letter was written by the person concerned. Accordingly if the letter itself is lost then circumstantial evidence of its contents would be excluded by the auxiliary rule. See also generally Wigmore at para 1171.

Law of Evidence Amendment Act confined

section 1171

[44] Wigmore identifies five main classes of auxiliary rules, each characterised by the actual operation of the rule in question. They are the preferential, the analytic (or “scrutinative”), prophylactic, “simplificative” and quantitative (or synthetic) classes (at para 1172).

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[45] Wigmore proceeds to state the following in para 1171:

“These auxiliary rules have nothing to do with relevancy as such, i.e., regarded as the minimum requirement for admissibility. They assume relevancy, and then under special circumstances apply an extra safeguard designed to meet special dangers. They may be said to be artificial as distinguished from natural rules; that is, they do not, as do the rules of relevancy, simply analyze the natural process of inference and belief; but they contrive a specific safeguard to be applied where experience has shown it desirable.

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, and then under special circumstances apply an extra safeguard designed to meet special dangers. They may be said to be artificial as distinguished from natural rules; that is, they do not, as do the rules of relevancy, simply analyze the natural process of inference and belief; but they contrive a specific safeguard to be applied where experience has shown it desirable.

Moreover, their operation is on lines distinct from those of relevancy; for the same fact, it is always relevant to prove the same proposition, may or may not come under the ban of one of these auxiliary rules, according to circumstances having no connection with relevancy.

.....

These rules of auxiliary probative policy, then, form a set of rules, over and above and independent of the rules of relevancy. They are distinguished from the rules of relevancy (Part 1) in resting not upon an analysis of the process of inference, but upon artificial expedients designed to avoid special dangers that are irrespective of the nature of the inference and affect in common various kinds of evidence.” (emphasis added)

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(Part 1)

” (emphasis added)

- [46] In the following paragraphs I proceed to set out some general propositions regarding extrajudicial statements which seek to highlight the narrow distinction between a confession and an admission.
- [47] Extrajudicial or extra-curial statements are those made outside a witness box by a party to court proceedings. Such statements may be used against him save where they amount to an admission or confession in a criminal case.
- [48] No statement by an accused may be used in evidence against him unless it is proved beyond reasonable doubt that it was freely and voluntarily made. See *S v Cele* 1965 (1) SA 82(AD). It is irrelevant whether the extrajudicial statement was intended to be incriminatory or not. The statement must be freely and voluntarily made “... in the sense that it has not been induced by any threat or promise proceeding from a person in authority” (see *R v Barlin* 1929 AD 459 at 462).
- [48] No statement by an accused may be used in evidence against him unless it is proved beyond reasonable doubt that it was freely and voluntarily made. See

S v Cele

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1929 AD 459

- [49] In order for a confession to be admitted, the statement must be freely and voluntarily made, and it cannot be made to a peace-officer save in the case of a magistrate or justice of the peace.
- [50] A confession is “... an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law”. See *R v Becker* 1929 AD 167 at 171.
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1929 AD 167

[51] If the requisite element of intention (mens rea) is not evident from the statement then it does not amount to a confession, but rather an admission. See also Schreiner JA in R v Debele 1956 (4) SA 570 (AD) at 572C to G who considered that the formula did not take into account a number of issues. Accordingly anything short of an

unequivocal admission of guilt including both the elements of the act and of the requisite intent will amount to an admission of the facts contained in the statement and may be as damning evidentially as a confession.

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1956 (4) SA 570

[52] Moreover, under the rules of relevancy a statement, even if only verbal, made to a person who is not a police officer can constitute an admission. This common law principle finds expression in section 219A of the CPA. An admission of a fact relating to the accused by another person can only be admitted under the rules of relevancy if there is an identity of interest. This arises where there is a privity of obligation, such as in cases of parties who sue or are sued in a representative capacity or in cases of principal and surety. So too where there is privity in title as in the case of an insured.

section 219A

[53] In a case of more than one accused acting with a common purpose each is a conspirator “liable under the criminal law for the acts of every other conspirator done in pursuance of the conspiracy” (emphasis added). See Wigmore at para 1079. See also R v Mayet 1957 (1) SA 492 (AD).

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[54] The reception of such evidence is premised upon a rational and logical deduction that depends for its efficacy on the statement being made in furtherance of the common purpose. Confining the rule in this manner precludes the reception of an extra-curial statement made by one conspirator against the other after his arrest. A fortiori the statement cannot be in furtherance of the commission of the offence, not even in the case of an accessory after the fact. This has been the position under our common law. See Schreiner JA in R v Mayet at p 494A to H (supra).

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[55] It is also a rule that appears to be of general application in other common law jurisdictions as evident from the United States Supreme Court cases. These cases confirm the exclusion of a statement made by one conspirator against another at a time when the objectives of the conspiracy are no longer pursued or capable of being pursued. See *Krulewitch v United States* [1949] USSC 33; 336 US 440 (1949) and *Wong Sun v United States* [1963] USSC 15; 371 US 471 at 490 (1963). See also Wigmore Vol 4 supra para 1079 ft n 1.

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“A confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it. If, as the circuit court of appeal sought, the maintenance of the plot to deceive the government was the objective of this conspiracy, the admissions made to the officers ended it. So far as each conspirator who confessed was concerned, the plot was then terminated. He thereupon ceased to act in a role of a conspirator. His admissions were therefore not admissible against his erstwhile fellow-conspirators.”

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[57] It appears useful to contextualise the reach of the rule of relevancy in relation to extrajudicial admissions made by an accused insofar as it concerns him and also insofar as it concerns his alleged co-conspirator:

An extrajudicial statement in the form of an admission or confession made by an accused before a judicial officer other than a peace officer and provided it was voluntarily made and satisfies such other requirements of the common law or statute law (in this case sections 217(1)(a) and 219A(1) of the CPA) is admissible against the accused.

sections 217(1)(a)

219A

An admission, short of a confession made to a person who is not a peace officer by an accused, is admissible against him.

Any other statement not amounting to a confession or admission made by an accused extrajudicially is admissible against him.

A confession by an accused is not admissible against his co-accused. See section 219 of the CPA.
section 219

A statement made by an accused which falls short of a confession but amounts to an admission or other statement by the accused concerning his co-conspirator is admissible against the latter provided it was made in furtherance of the common purpose.

[58] Accordingly it is evident that a confession made by an accused which refers to his co-accused is *per se* inadmissible by reason of section 219, and if it falls short of a confession will only be admissible under common law against his co-accused if uttered or written in furtherance of their common purpose but not otherwise.

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[59] It is therefore difficult to appreciate how evidence of an extrajudicial admission concerning a co-accused made otherwise than in furtherance of their common purpose can be allowed in when it can, as many cases illustrate, amount to a confession of all the facts or elements necessary to convict save for one. It certainly is not so under the common law.

[60] The question therefore is whether the Law of Evidence Amendment Act allowed its introduction and if it did whether it is constitutionally sound. If so, a further question arises regarding when the admissibility of such testimony is to be determined.

Law of Evidence Amendment Act allowed

[61] Firstly, the Law of Evidence Amendment Act did not in its terms purport to change the substantive rules of relevance. As demonstrated earlier, this rule determines the class of evidence that is inadmissible by reason of lack of relevance, in contrast to inadmissibility by reason of probity. While in many cases there may be a fine line between the two, Wigmore (supra) identifies the historic distinction and draws attention to the English Civil Evidence Act 64 of 1968 which the author notes makes "... substantial changes in the law of hearsay but leaves the preexisting law respecting admissions intact" (Vol 4 para 1048 fn 1).

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[62] In 1979 section 219A of the CPA was amended by Act No 56 of that year. It allowed into evidence admissions provided they were made voluntarily. Most importantly, at that time under our common law the admissions of one conspirator could be used against the other provided it was made in furtherance of their common purpose.

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In my view the amendment was intended to do no more than codify the law regarding informal admissions whether by conduct or by statement. The mere fact that it did not expressly exclude the admissibility of such admission against a co-accused is of no consequence for reasons that I proceed to set out.

[63] At the time of the amendment, the common law adequately catered for allowing an admission against a co-conspirator if made in furtherance of the common purpose but would exclude it if not made for such purpose. The legislature at the time would have known

that this had been well settled in cases such as *R v Mayet* (supra) and the earlier cases cited in that judgment including *Rex v Levy & Others* 1929 AD 312 at p 327. Accordingly while section 219 expressly excludes all confessions made by one accused against the other, section 219A did not purport to alter the principles of relevancy in relation to admissions. An admission of a fact by one conspirator against the other would be admissible provided it was uttered in the furtherance of the conspiracy, but not otherwise.

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- [64] Since the principle of relevancy did not include or exclude outright such an admission being used against the co-conspirator, there would have been no need to spell out in legislation the well recognised nuanced position of the common law. This is because aids to interpretation would be understood to have adequately preserved the common law unless altered expressly or by necessary implication. A similar situation did not prevail in the case of confessions, where admissibility was not dependent on circumstances delineated by the common law but where there existed an outright prohibition of it being admissible against the co-conspirator- a concept capable of ready and straightforward translation into legislation as appears from section 219. .

- [65] There was also a further anomaly that would result in absurdity if it was not intended to preserve the common law. A confession by an accused which implicates his co-accused does not necessarily amount to a confession against his co-accused but only an admission of certain facts indicating the co-accused's involvement. Accordingly to prohibit the admissibility of evidence contained in a statement, on the basis that it amounts to a confession as against its author, does not indicate that the legislature intended that those parts of the confession which amount to an admission by him against his co-conspirator would be receivable in evidence against the latter. Yet the State's interpretation of section 219A as read with the Law of Evidence Act would allow it to argue that the section is wide

enough to allow it to extract and use against a co-accused those parts of the confession of the one conspirator which contained admissions (but not a confession) concerning the involvement of the other.

- [66] Furthermore, at the level of application: It is difficult to pragmatically conduct a single trial within a trial in relation to both accused where the admissibility is challenged and equally so if two separate trials within a trial were held.
- [67] If a single trial within a trial is postulated then the court would already be appraised that there is a statement made in the written admission sought to be introduced against the one conspirator which associates the other in the commission of the offence. This immediately alerts the court to the contents of the admission before its admissibility is determined where the author objects to its introduction. Pragmatically it would also be difficult for a presiding officer, whether a judge or a district magistrate, to disabuse his or her mind from already associating both accused with the events to which the charge relates. If there are two trials within a trial then it is only after the evidence against the accused author has been admitted that the co-conspirator will object to the evidence being admissible against him. He would then be entitled to remain silent throughout the first trial within a trial and then argue for a repetition of the evidence.
- [68] Moreover, the potential for abuse cannot be overlooked. In *Molimi* the SCA accepted that the statement made by the one conspirator amounted only to an admission thereby allowing the evidence in, whereas the Constitutional Court on an overview of the conspirator's statement found that it amounted to a confession thereby rendering it inadmissible against the co-accused under the express exclusion provided for in section 219. Prosecutors may be tempted to argue that the statement, albeit a confession, should be admitted as an admission. Similarly where more than one person is suspected of committing an offence, a voluntary statement admitting guilt may be couched by a police officer who is also a judicial officer in a way that amounts to an admission and not a confession so as to use the statement against a co-accused who insists on his right to remain silent.

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- [69] The extensive utilisation of confessions and admissions particularly during the State of Emergency era cautions us, unless there is an express intention to the contrary in amending legislation, against eroding those common law principles that were responsible, in numerous cases, for securing the rule of law despite the absence of a Bill of Rights.
- [70] The Law of Evidence Act came into effect in 1988. For more than 15 years no reported case existed where the State understood the legislation to allow for the utilisation of an admission made by one conspirator against the other. Had the State understood the legislation in this manner then one would have expected the point to be argued from inception of the legislation. There was no lack of opportunity to do so. In my view this demonstrates that at the time of the introduction of the Law of Evidence Act it was not contemplated that its reach would go to the principles of relevance, so as to allow admissions against a co-conspirator in circumstances other than where the statement was made during the furtherance of their common purpose.
- [71] I mentioned earlier the interpretational aid that a statute is intended to interfere as little as possible with existing common law, unless the intention to do so is plain (see *Cornelissen N.O. v Universal Caravan Sales (Pty) Ltd* 1971 (3) SA 158(AD), p 175C to D). Moreover where a right or protection is taken away from an individual, as is contended in this case, it must be done expressly or by necessary implication (See *Dadoo Ltd & others v Krugersdorp Municipality* 1920 AD 530 at 552). The Law of Evidence Act in its terms does not expressly remove the protection by providing for admissibility in circumstances other than those recognised by the common law, nor did it do so by necessary implication. The latter may be tested by the length of time it took for the State to first raise the possibility.
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1920 AD 530

[72] It is now accepted that the minority judgment by Schreiner JA in *Collins v Minister of the Interior and Another* 1957

- (1) SA 552(AD) at p 575D correctly expresses our law that the legislature may not through two separate pieces of legislation achieve an objective which neither piece of legislation contemplated on its own. In much the same way in my view, it is not possible to bring together s 219A and the Law of Evidence Act to achieve what neither set out to do whether by amending procedural rules or the substantive law .

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[73] In my view the historic rule of relevance that has excluded the admissibility of an admission by one conspirator against the other in all cases other than when it is made in the furtherance of their common purpose remains a sound principle based on centuries of judicial experience regarding the fairness of the adversarial trial system.

[74] The unreliability of a statement made by one conspirator which contains an admission against the other at the time of arrest is fraught with danger. The conspirator may attempt to exculpate himself or the extent of his involvement by transferring blame. The opportunity for inducement by the authorities is great. Another rule that comes into contention is the auxiliary rule relating to the possible inability to cross-examine for want of “equality of arms” in establishing precisely what occurred to induce the accused to implicate his co-accused. These factors effectively destroy the reliability of the extra-curial statement. Moreover a court should not be obliged to undertake an exercise of determining whether or not the accused will receive a fair trial where it is likely that such evidence would be provisionally admitted.

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[75] There is the further consideration that a co-accused may insist on a separation of trials because of the potential prejudice of not being able to cross-examine the other accused nor be able to compel him to enter the witness box during the trial within a trial.

[76] In my respectful view experience in criminal courts reveals the risks that are inherent where an accused attempts to reduce his blameworthiness by asserting that the final and critical act in the chain of events leading to the commission of the crime was implemented by someone other than himself (and thereby reducing his statement to an admission). This is also aptly demonstrated when the State leads the evidence of a co-conspirator in respect of whom it has accepted a plea of guilty and where in both the section 112 statement and before the trial of his accomplices the co-conspirator seeks to untruthfully minimise the extent of his own participation.

[77] Turning to case law.

In my respectful view *S v Robiyana* (supra) is authority only for the application of the principle that where an accused elects to introduce the statement made by a witness then he is bound by the answers given even if they tend to incriminate him in the commission of the offence.

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In *Ndhlovu* (supra) the SCA concerned itself exclusively with the application of the Law of Evidence Amendment Act and found that there was sufficient extraneous evidence to ensure the reliability of the extra-curial statement. The court was not asked to consider whether the Law of Evidence Act expressly or by necessary implication extended the rule of reliability which excluded any admission made by one conspirator against the other beyond the case where the statement was made in furtherance of their common purpose.

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Evidence Amendment Act and

In *Molimi* (supra) the Constitutional Court held that the statement amounted to a confession and therefore was to be excluded. It is respectfully submitted that the Constitutional Court was not asked to, nor did it consider the issue regarding the interpretation of the Law of Evidence Amendment Act in regard to its impact on the common law exclusion of extrajudicial statements made against a co-accused which is not in furtherance of their common purpose. This further appears to be indicated by the list of annotated cases that do not appear to include cases which form the basis of this decision.

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Law of Evidence Amendment

Act in

ALLOWING CROSS-EXAMINATION BY ACCUSED NO 2 AND PREJUDICE

[78] During the trial within a trial Mr Davids requested and was permitted to cross-examine all the witnesses who were called. At that time the court was not apprised of any evidence regarding the arrest or detention of his client. When the trial within a trial commenced Mr Davids indicated that his client intended to challenge the contents of a statement his client had made. Only much later during the hearing did evidence surface that accused no. 2 had been arrested a considerable time later. Moreover, Ms Persad at no stage during the hearing of evidence in the trial within a trial indicated that she would also rely on the admission (should it be received) of accused no. 1 against accused no. 2. There was accordingly no reason for Mr Davids to cross-examine with any vigour on the issue of whether or not the alleged admission had been freely and voluntarily made.

[79] The court was taken by surprise with Ms Persad's belated revelation that, if admitted, the admission of accused no. 1 would be used as evidence against accused no. 2. That being so, Mr Davids could not have been expected to anticipate this possibility.

[80] In my view the considerations adopted by the Constitutional Court in *Molimi* apply in the present case. Accused no. 2 was not pre-cognised that if accused no. 1's admissions were received that they would be used as evidence against his client.

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apply in the present case. Accused no. 2 was not pre-cognised that if accused no. 1's admissions were received that they would be used as evidence against his client.

[81] Accordingly, and to adopt a concept from civil law, there is no *lis* between the State and accused no. 2 in regard to the trial within a trial, since from inception the trial within a trial was predicated on the State seeking only to introduce admissions against accused no. 1 allegedly made by him and to which objection was taken on the grounds that they were made under duress and in breach of his constitutional rights.

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[82] If this Court were to have held that the statement made by accused no. 1 before Capt Nobela was admissible against him then the next step would have been for the State to produce the statement and indicate that it intended using such parts as may constitute an admission by accused no. 1 against accused no. 2 (see *Molimi* (supra)) leaving it then open for accused no. 2 to elect whether or not to object to such testimony being received against him.

[82] If this Court were to have held that the statement made by accused no. 1 before Capt Nobela was admissible against him then the next step would have been for the State to produce the statement and indicate that it intended using such parts as may constitute an admission by accused no. 1 against accused no. 2 (see

)) leaving it then open for accused no. 2 to elect whether or not to object to such testimony being received against him.

[83] The situation that arose in this case further indicates the advantage of ensuring that the proper procedure is adopted when the State indicates that it is necessary to hold a trial within a trial.

I indicated that the proper course was for the State to indicate that it wished to introduce admissions made by accused no. 1 in a document and that it was then for accused no. 1 to indicate not only that he objected to the admissibility of such evidence but to set out the grounds for doing so; i.e. to indicate whether it was limited to the voluntariness of the statement or whether it also included a failure to respect the accused's constitutional rights. Had the State

intended to use the same statement also against accused no. 1 then it should have indicated so at that stage and without elaboration (so as to avoid revealing prematurely the contents of the statement sought to be relied upon).

[84] One of the practical difficulties a trial court would face, if the extra-curial statement by one conspirator against the other is contained in a statement made to the police after arrest, is that it would be extremely difficult for the co-accused to cross-examine (should the accused who made the statement elect to enter the witness box), on the basis of inducement or the expectation of a more lenient sentence by incriminating his co-accused without entering the merits in order to demonstrate such motive.

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[85] While it was sufficient to preclude Mr Davids from presenting argument simply on a ground that there was no “lis” at that stage in respect of the trial within a trial that was concerned only with the admissibility of the statement made before Capt Nobela against accused no. 1 only, I have as best I as I can now set out my view as to why the Law of Evidence Amendment Act expressly or by necessary implication does not alter the common law in relation to extra-curial statements made by one conspirator against

the other in circumstances other than where the statement was made in furtherance of the common purpose.

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Law of Evidence Amendment Act expressly

[86] It is for these reasons that I refused to admit any extra-curial admission that might have been made in his statement by accused no 1 after his arrest against accused no 2 since on the facts it could not have been made in furtherance of their conspiracy.

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SPILG J

LEGAL REPRESENTATIVES:

The State: Adv Persad

Accused no 1: Adv Potwana

Accused no 2: Adv Davids

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