REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 315 / 06

In the matter between

STEVEN BALKWELL — **FIRST APPELLANT**
CLINTON ALAN BARENDSE — **SECOND APPELLANT**

and

THE STATE — **RESPONDENT**

Coram : **CLOETE, PONNAN et MAYA JJA**

Date of hearing : **14 MAY 2007**

Date of delivery : **20 JUNE 2007**

Summary: **Culpable homicide – appellants assaulting and causing the death of the deceased – appellants ought reasonably to have foreseen that death might ensue from their assault – sentences of seven years imprisonment appropriate in the circumstances.**

Neutral citation: **This judgment may be referred to as : *Balkwell* v *The State* [2007] SCA 91 (RSA)**

J U D G M E N T

MAYA JA /

MAYA JA:

[1] The Appellants and the first appellant's wife (Mrs Lindse Balkwell), who subsequently divorced him, were charged with murder and kidnapping in the Regional Court, Durban. The magistrate acquitted them on both counts but convicted the appellants of culpable homicide and sentenced them to each undergo seven years imprisonment. The appellants appealed against the convictions and the sentences to the Pietermaritzburg High Court. That court (Patel J, Radebe AJ concurring) dismissed the appeals in a judgment which has since been reported as *S v Balkwell and another* 2006 (1) SACR 60 (N). This appeal is with the leave of the court below.

[2] Much of the evidence is either common cause or undisputed. Mr Michael Burke (the deceased) disappeared on the night of 2 November 1999 after leaving a friend's flat in the company of the appellants and Lindse. His body was found in a gorge about a week later, pursuant to a pointing out made by the first appellant. Prior to his death, the deceased, who had a drug dependency, was employed by the Balkwells as a sales representative at their photo-lab in Westville. On 1 November 1999 he misappropriated a sum of R17 000, 00 from the photo-lab and disappeared with the business keys. The next day he did not report for work. The first appellant conducted a search for him and was that afternoon put in touch by his *au pair*, Kirsty Henderson, with Mr Lance Mather who allegedly knew the whereabouts of the deceased. Mather accompanied the first appellant to Mr Mark Ashmore's flat in Paradise Valley. Ashmore denied the deceased's presence in the flat. The first appellant gained the impression that Ashmore was lying and returned to the flat

that evening with Lindse and the second appellant, a bouncer at a local night club. Ashmore once more denied knowledge of the deceased's whereabouts. The second appellant demanded entry into the premises to search for the deceased and the latter came out and handed over the keys. The appellants assaulted him and demanded the missing money. Consequently, the deceased called his brother-in-law, Mr Claude West, from Lindse's cellular phone and asked him for the money. This apparently so upset Lindse that she called Kirsty and told her that the deceased was being assaulted and was 'crying like a baby'. The deceased and West agreed to meet at the residence of the deceased's mother shortly to make arrangements for payment. The appellants, Lindse and the deceased left the flat and walked to the parking lot. There, the appellants once more assaulted the deceased, who thereafter lost consciousness. The appellants loaded him into Lindse's car with the intention of taking him to hospital. On the way, the deceased defecated in the car and it appeared that he had died. His body was thrown down a gorge in Botha's Hill, Camperdown. A post mortem examination conducted on his body could not establish the cause of death by reason of the advanced state of decomposition in which it was found.

[3] The nature and severity of the assault were in dispute. Several witnesses were called to adduce evidence on behalf of the State and Lindse and the appellants testified on their own behalf. A pathologist, Professor Botha, also testified on the second appellant's behalf in support of the appellants' defence that the assault inflicted on the deceased was not of a serious nature and could not have caused his death.

[4] Only two of the State witnesses, Ashmore and Mr Nkqubeko Jinineka, a security guard posted at the entrance of Ashmore's apartment complex on the night

of 2 November, claimed to have witnessed the assault which, as indicated above, occurred in two stages – on the veranda of Ashmore's flat and, thereafter, in the parking lot. According to Ashmore, the deceased had arrived at his flat on 1 November. He complained that he was having domestic problems and needed time and space to think. As was their wont, they indulged in drugs - ecstasy and dagga and the deceased also consumed cocaine. The deceased slept at the flat and remained there until the following day. On Ashmore's return from work that afternoon, they shared a dagga cigarette. It was on the instructions of the deceased, who seemed scared by the visit, that he told Mather that the deceased was not present. The deceased readily cooperated with the appellants on their arrival and handed the keys over. They demanded money. The second appellant grabbed the deceased and shoved him against a wall at the veranda and told him that the Balkwells had 'paid him good money to beat him up and get their money'. As Ashmore went into the lounge, he heard a slap. The deceased cried out in pain. Ashmore returned to the door and saw the first appellant kick the deceased above the right hip. He went to talk to his girlfriend in the bedroom and on his return to the doorway he heard a hard, dull noise. Again, the deceased cried out in pain. He saw him lying against the wall talking on a cellular phone which did not belong to him. He had a swollen eye and was bleeding from his lip. A nearby pot plant was broken and there were blood spots on the floor. At his request, the first appellant and his companions left with the deceased. That was the last time he saw the deceased alive.

[5] Jinineka's version was to the following effect. He observed two men and a woman (identified in the proceedings as the appellants and Lindse) enter the premises, having left their vehicle outside the entrance, about 20 metres from his post. In accordance with the rules of the complex, the first appellant, as the driver,

entered their vehicle's registration numbers and appended his signature in the access control register - both entries later turned out to be false - to gain access to the premises. About 20 minutes later, they reappeared in the company of a man whom he had seen in the complex from the previous day (the deceased). Upon reaching their vehicle, the first appellant punched the deceased several times whilst the hefty second appellant also tried to assault the deceased but was impeded by the first appellant. The deceased tried to ward off the blows. He fell to the ground and the second appellant started kicking him all over his body. The first appellant also kicked him several times at this stage. During this assault, the deceased merely turned over on his side and was kicked on the back. The appellants raised the deceased to a sitting position and he noticed that he was bleeding on his face. The first appellant approached Jinineka with a bucket and asked for water which the latter provided. The first appellant washed the deceased's face. The appellants loaded the deceased in their vehicle and they left. Lighting was good in that area and his visibility was not impaired in any way. He did not intervene because the incident occurred outside his premises.

[6] Two inspections *in loco* were subsequently conducted at the scene, the first one during the day and the second at night in an attempt to recreate conditions similar to those which prevailed on the night in question. The inspections established, even though one of the lights in the vicinity no longer worked and the weather was cloudy, that Jinineka's view would not have been impeded from his post. In the altered conditions, however, colour perception was not possible and could be distinguished only in terms of 'light' and 'dark'. Only arm and leg movements of people could be perceived and nothing at all could be seen on the left rear end of the vehicle where he said the assault started.

[7] Four pathologists, including Prof. Botha, prepared post mortem reports in the matter although only two of them, Dr Naidoo and Dr Aiyer attended the two post mortem examinations which were conducted on the deceased's body. Prof. Botha and Dr Perumal, who was called by the State, actually testified and both relied on Dr Naidoo's report for their opinions. According to his report, Dr Naidoo observed the following injuries on the deceased's body - subcutaneous and intramuscular bruising at (a) the dorso-ventral aspect of posterior left mid-forearm, (b) the medial aspect of the left upper arm, and (c) the right chest wall laterally; and (d) a fractured bony nasal aperture. There was also a deep red or purple discolouration on the scalp tissue over the vertex of the skull, but it could not be conclusively determined if it 'represented deep bruising of the scalp or deep haemolytic staining from decomposition other than that the naked eye examination is suggestive of bruising'. He further recorded heavy maggot infestation with skeletonisation of the face and neck. His conclusion was that the cause of death could not be ascertained from the autopsy alone due to advanced decomposition.

[8] Dr Perumal endorsed Dr Naidoo's observations and conclusion but added, similarly to Dr Aiyer, that '…however closed head injury must be strongly considered as the cause of death'. In his opinion, the bruises indicated blunt force injury; the bruises on the arm, by reason of their location, were consistent with defensive injuries sustained usually in an attempt to protect the face and head and the discoloration on the scalp, because it was focal, was suggestive of a bruise. He conceded that he relied substantially on the witness statements made available to him (among which was an affidavit to which the first appellant had deposed for purposes of bail in the lower court, to which I will return later in the judgment) to reach these conclusions.

[9] The appellants' account of the assault in the flat did not differ from Ashmore's version. The first appellant said that he punched the deceased only twice in the chest and nudged him on his knee with his foot at the flat to make him realise the seriousness of the situation. He denied that the deceased had a swollen eye or bled at any stage, even when they left the flat, an aspect which both his co-accused however conceded. On his version, he fetched the water for the deceased to clean himself up as he was perspiring heavily. He threw the water over the deceased's head because he made a flippant remark. He disavowed the contents of his bail affidavit in which he blamed his co-appellant for the deceased's death. He said that he did not see the second appellant (whom he took along only as a precaution because that area was 'notorious') assault the deceased in the parking lot. He merely heard a scuffle as he was busy talking to Lindse and, on turning, saw the deceased on his knees. Thereafter, when he was putting the bucket back in the car boot, he heard a thud and assumed from the deceased's subsequent fall, the guttural noise he made and his subsequent loss of consciousness that the second appellant had kicked him on the head. The second appellant checked the deceased's pulse and said he should be taken to hospital. Along the way, when it appeared that the deceased may have died, he and Lindse called the second appellant. He met them on the roadside and gave them cocaine. He advised them to wash it down the deceased's throat and dump his body down Kloof Gorge. Thereafter, he established that the deceased had died by shining a torch in his eyes and threw the body down a gorge out of panic.

[10] The second appellant admitted that he grabbed the deceased by his clothing and, without letting him go, pushed him against the wall. He slapped him on the face. He slapped him again but the deceased anticipated the blow and ducked. The deceased lost his balance and fell, hitting the pot plant in the process. At the

parking lot, he slapped the deceased twice and kicked him on the thigh to make him rise from his haunches. The deceased instead flopped back into a sitting position. He ‘shoved’ him on the shoulder with his foot. That is when the deceased made the strange noise and fell on his back. He felt for his pulse and found that it was unusually rapid. He told the Balkwells to take him to hospital and drove home. He assaulted the deceased only because of his nonchalant attitude. The Balkwells had not paid him any money. He denied meeting them after leaving the scene; this despite a version put to the first appellant by his attorney that he did meet them but only suggested that they should dump the deceased at a hospital and concoct a story for the hospital staff that he was suffering from a drug overdose.

[11] The last defence witness, Prof. Botha, concluded that in view of the deceased’s history of drug abuse he died ‘as a result of the interaction between substances of abuse and physical and psychological stress, and not as a result of the assault alone’. Significantly, however, he conceded under cross-examination that the deceased would not have died had he not been assaulted. This portion of the evidence may be given short shrift. The difficulty it presents, without even delving into its merits, is that it was adduced at very short notice, at a late stage of the proceedings, towards the conclusion of the defence case. It was not put to any of the relevant State witnesses, in particular Dr Perumal. It is apparent on the record that the State prosecutor was unable to effectively cross-examine the relevant defence witnesses on the factual basis of the report because she had not even had an opportunity to consult with her witness. The duty to recall such State witnesses, in order for this late version to be put to them, clearly rested on the defence at this stage. This was not done. The State was thus deprived of an opportunity to properly challenge the factual basis of his report.

[12] Trial by ambush is to be frowned upon no less when it occurs at the instance of the defence. In those circumstances ordinarily one very rightly would hesitate to have regard to such evidence. In this case, however, it is perhaps unnecessary to adopt such a stance. This is so because on Prof. Botha's evidence it must be accepted that but for the assault, the deceased would not have died. Furthermore, his thesis is not supported by the evidence viz. Ashmore's undisputed version that the only recreational drug the deceased had consumed on 2 November was the dagga cigarette which they shared. It ignores as well the first appellant's evidence that the deceased, whom he had previously seen under the influence of narcotics, appeared sober. The toxicology test which was run on samples taken from the deceased's body registered no trace of narcotics. Of course, one says this mindful of the fact that the purpose of the test is not entirely clear on the record and it is also uncertain whether it could yield any reliable results in view of the state of decomposition.

[13] In convicting the appellants, the magistrate made adverse credibility findings against the appellants and rejected the defence version. She accepted Jinineka's evidence, despite a finding that he was not 'the most satisfactory or reliable of witnesses', on the reasoning that 'the gist of his evidence regarding the actual assault did not falter materially and corroborates to a large extent what [the first appellant] said in his bail application about what transpired at the parking lot'. She found that the appellants had a prior agreement to assault the deceased and concluded that they not only caused the deceased's death but ought reasonably to have foreseen that death might ensue from their assault.

[14] The court below upheld the magistrate's findings. It further found that the contents of the bail affidavit, although not directly admissible against the second

appellant, provided corroboration for Jinineka's evidence relating to the nature and extent of the assault; that the presence of the nose fracture corroborated the serious assault to the face and head and that the conclusion reached by Drs Aiyer and Perumal regarding the cause of death and the intense maggot infestation in the head were facts consistent with Jinineka's version and the bail affidavit.[1]

[15] I deal first with the first appellant's contentions concerning the bail affidavit. Before us, it was contended on his behalf that the trial court and the court below erred in relying on the contents of the affidavit - which was tendered into evidence by his legal representative as an admission in terms of sec 220 of the Criminal Procedure Act 51 of 1977 (the Act) - in deciding the appellants' guilt. The admission of the affidavit constituted a misdirection, so the argument went, because the first appellant had not been warned either by his counsel or the magistrate that the affidavit might be used at the subsequent trial in accordance with sec 60(11B)(c) of the Act.[2]

[16] In the bail affidavit, the first appellant set out the facts leading to the deceased's death and the role played by the second appellant (who was accused no. 3 in the trial) in the assault, saying, *inter alia*:

'Accused No. 3…assaulted [the deceased] both at the flat and near the parking area downstairs, by punching him and kicking him repeatedly. During that evening I only punched the deceased twice in the area of his chest…accused No. 3 kicked the deceased on the head…I noticed the deceased perspiring heavily…Accused No. 3

[1] *S v Balkwell* 2006 (1) SACR 60 (N) at para 43.

[2] Section 60(11B)(c) provides:

'The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.'

rushed at the deceased and started kicking him in a most violent manner on the head. The deceased then fell backward and made a strange sound. I feared that the deceased was either very severely injured or he had died.'

Referring to these allegations in his statement in terms of sec 220 of the Act, the first appellant said that '[w]hile the events…are not as such in dispute, the order of the events and the actual events are in need of some clarification and explanation which I shall do during the trial'. As indicated, he disavowed these allegations in evidence albeit stating in his cross-examination that only the chronology of the events was in dispute.

[17] The voluntary tender of this affidavit into evidence is most perplexing in view of the disavowal of its contents by its maker. The first appellant's counsel was unable to satisfactorily explain this step on his part which, in my view, was wholly unnecessary and rather imprudent in the circumstances. Once the affidavit was introduced in terms of sec 220 of the Act, the State was relieved of proving the allegations so admitted by the first appellant and it thus constituted sufficient proof against him of those facts subject, of course, to the clarification referred to by him in his plea explanation. The affidavit was thus properly admitted into evidence against the first appellant. Section 60(11B)(c) has no application where the affidavit is tendered, not by the State, but by the accused.

[18] Nevertheless, in view of the first appellant's stance relating to the affidavit's contents at the trial regarding his co-appellant and the State's failure to have it admitted against the second appellant in terms of s 3(1) of the Law of Evidence

Amendment Act of 45 of 1988[3] (the 1988 Act) to bring it within one of the recognised exceptions, it remained hearsay, and is not evidence against the second appellant. It must thus be wholly left out of account in evaluating his guilt.[4] The court below erred in taking it into account against him by finding that it corroborated Jinineka's version.

[19] The appellants further challenged their convictions as follows. It was argued, first, that the magistrate misdirected herself in convicting them on the evidence of an unreliable, single witness, Jinineka, in the absence of any corroboration (particularly medical evidence supporting the assault he described and establishing the cause of death) and second, that the appellants could not have foreseen the possibility of death from what they described as a trivial assault.

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[3] Section 3 of the 1988 Act provides:
'(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –
(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
(c) the court, having regard to -
(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.
…
(4) For the purposes of this section –

"hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;
"party" means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.'
[4] See *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 (3) SA 285 (A) at 296F; *S v Ralulukwe* 2006 (2) SACR 394 (SCA) at 400a.

[20] In addition to finding that the bail affidavit provided corroboration for Jinineka's evidence (and the disavowed affidavit), the court below said that '[t]he opinion of both Dr Aiyer and Dr Perumal that a head injury was the likely cause of the death and, further, that the maggot infestation was concentrated in the area of the head because of possible open wounds on the head is consistent …with the evidence of Jinineka'. This finding is not supported by the evidence. According to Prof. Botha, maggots are ordinarily attracted to moist areas such as the nostrils, the eyes and the mouth and develop eggs in those areas within a few hours of death. As he put it, the brain is 'their food store' so it is not unusual that they were concentrated in the deceased's head, especially in the presence of the bleeding wounds on his face. Dr Perumal himself conceded that the bleeding lip would attract the flies and account for the concentrated infestation in that area. Accordingly, the court below misdirected itself in this regard.

[21] Be that as it may, the court below was, in my view, correct in upholding the magistrate's rejection of the appellants' version. They were both appalling witnesses and their entire account of the events was riddled with contradictions. The second appellant went so far as to dispute versions put to witnesses by his own attorney.

[22] It is apparent from the magistrate's judgment that she was alive to fact that Jinineka was a single witness and would thus have approached his evidence with the necessary caution. It is so that contradictions arose in his evidence on the fine detail of the events, but he, clearly was not a dishonest witness, as Ms Hemraj, the second appellant's counsel, properly acknowledged. Importantly, he was not swayed on the essence of his account of the assault – that the deceased was punched and kicked by both appellants. This much he would have been able to

distinguish even with lighting poorer than that available on the night in question and regardless of the position of the parties in relation to the vehicle. As the inspection *in loco* established, he would, at the very least, have been able to perceive the vehicle and distinguish between the two appellants and their motions in relation to the deceased. It is further well to bear in mind that no contrary version was put to him on the first appellants' behalf in this regard.

[23] Most crucial in this enquiry is the fact that when the group left the flat the deceased was, save for a split lip and bruised eye, in good health and walked to the car unaided. This begs the question what could have happened to suddenly render him unconscious and lead to his death shortly afterwards. The answer to this question, in my view, emerges from the evidence of Jinineka corroborated by the further injuries which must have been inflicted on the deceased at the parking lot (as counsel properly conceded in argument) and which were found at the post mortem, namely the fractured nose, bruising to the left upper and lower arm and bruising to the right side of the chest.

[24] It is beyond question on the evidence that the assault was the *sine qua non* of the death. As the magistrate correctly pointed out, this finding is, above everything else, supported by no less than the concession made by the defence's own pathologist. There is no reason why it should not also be treated as the legal cause of death. I am, thus, unpersuaded that the magistrate erred in this regard.

[25] It remains to consider whether the appellants ought reasonably to have foreseen the possibility of death resulting from their conduct. In addition to the deceased' sudden collapse at the parking lot, a number of factors, when viewed cumulatively, overwhelmingly support the inference that the assault was anything

but trivial (and unplanned) - Mather's testimony that a visibly angry first appellant had repeatedly threatened to teach the deceased a lesson and 'fuck him up' such that he feared for the deceased's welfare but had no means of contacting him; the first appellant's conduct of entering false information in the complex's access control register (clearly to avoid identification); Ashmore's version that the second appellant told the deceased that the first appellant and Lindse had paid him good money to beat him up; Ashmore's evidence about the deceased's cries of pain, viewed with Lindse' emotional report to Kirsty; Jinineka's evidence of an assault of punches and kicks perpetrated by two men, bearing in mind the second appellant's 'imposing build' as he was described by his co-appellant and the fact that he was shod in shoes; the fact that the first appellant was obliged to fetch water which points to a condition more serious than the sweating he suggested.

[26] I am of the firm view, in all the circumstances, that the appellants ought reasonably to have foreseen that the deceased could die from the assault. The finding on their guilt cannot, therefore, be disturbed.

[27] Regarding sentence, no specific misdirection was relied on. It was contended on behalf of both appellants that the sentences imposed by the magistrate are too harsh in view of the 'fairly minor assault' inflicted on the deceased as evidenced by the injuries observed on his body. As I have said, the evidence shows that the assault was not trivial. Sentences of correctional supervision or other non-custodial options were suggested in respect of both appellants. I do not agree with these suggestions. There are undoubtedly mitigating factors emanating from the appellants' personal circumstances which are set out in the comprehensive pre-sentence assessment reports tendered in evidence on their behalf in mitigation of sentence and the magistrate's judgment on sentence. These include the facts that

the first appellant has two minor children and both appellants are first offenders who pose no danger to society and are in gainful, steady employment. As the magistrate correctly pointed out, it is indeed so that the deceased, who had previously stolen a large sum of money from the Balkwells and was forgiven, had set off the chain of unfortunate events. The first appellant's anger and panic at losing a substantial sum of money is understandable. This, however, gave the appellants no right to take the law into their own hands.

[28] Notwithstanding these mitigating circumstances, the offence of which the appellants were convicted is a serious one and there are in my view, particularly aggravating features which must be taken into account in the determination of appropriate sentences – the premeditated and purely gratuitous assault on the deceased who offered no resistance at all and co-operated fully, readily handing over the business keys and arranging promptly to repay the money; the second appellant's ruthless suggestion to disguise the cause of death by forcing cocaine down his throat and 'dump' his body; the callous disposal of the deceased's body; the first appellant's unyielding refusal to reveal the deceased's whereabouts to the latter's mother despite her repeated entreaties and their brazen lack of candour in court. Having regard to the totality of the circumstances, sentences of correctional supervision or any other non-custodial alternatives would be grossly lenient. In my view, although the sentences imposed by the magistrate are rather robust, it cannot be said that they are so inappropriate as to justify interference by a higher court.

[29] In the result, the appeals are dismissed.

M.M.L. MAYA

JUDGE OF APPEAL

CONCUR: CLOETE JA

PONNAN JA:

[30] I have had the benefit of reading the judgment of Maya JA and feel constrained to comment on an aspect alluded to in her judgment. My learned Sister would have the prosecution invoke s 3 of the Law of Evidence Amendment Act 45 of 1988 in a matter such as this. Although offered as no more than a theoretical possibility, it nonetheless evokes strong feelings of disquiet in me sufficient to warrant my expressing myself, albeit briefly, on the issue.

[31] At common law an extra-curial statement of one accused was inadmissible against a co-accused. (See *S v Baartman* 1960 (3) SA 535 (A).) This rule applied to both admissions and confessions and was given statutory force in respect of the latter by s 219 of the Criminal Procedure Act. The reason for this rule was not solely the hearsay nature of such an extra-curial statement, although that in itself would constitute sound reason. It has always been stated that an admission made by one person is normally irrelevant when tendered for use against another. Against the backdrop of the Constitution it perhaps can now be argued that the receipt of such evidence may well have fair trial implications as well.

[32] My anxiety stems from the seeming absence, in certain instances, of any legal armoury at the disposal of a person who is implicated by an extra-curial statement of which he is not the maker, to counteract the threat posed by it during

the course of a subsequent criminal trial. If having made an extra-curial statement that implicates Y, the maker of the statement (X) disputes its admissibility, an admissibility trial would ensue to determine whether or not the contested statement is indeed admissible. To discharge the onus resting upon it, namely to prove the statement admissible against its maker X, the prosecution would have to meet the fairly stringent requirements set respectively by sections 217 and 219A of the Criminal Procedure Act. During the course of the admissibility trial, Y would ordinarily be but a passive bystander. If the statement is ruled admissible but its contents disavowed by X when he testifies, how - it must be asked - does Y even begin to cross-examine X. In those circumstances it may well prove tactically foolhardy for Y to put any questions to X, much less to test by cross-examination the veracity of the statement. The only reason, it seems to me, for having fewer safeguards available to a person who is not the maker of a statement but who for some reason finds himself implicated by its contents, is because it has historically been accepted that such a person is free of any risk from such a statement. Where, however, a statement might ultimately weigh equally in evidence against the maker who has implicated himself in it, and against another also implicated by it, to grant greater protection to the former than to the latter, would be irrational and indefensible. And yet, that would be the effect of invoking s 3 in this way.

[33] If however, X had confirmed the contents of his statement during his evidence, or not having made an extra-curial statement, had implicated Y during his viva voce testimony, then not only could his version be legitimately tested under cross-examination by Y, but the cautionary rules relating to the receipt of such evidence would be invoked by the trier of fact (see *S v Hlapezula* 1965 (4) SA 439 (A) at 440 D-H). One would have thought that the cautionary rules relating to the reception of viva voce evidence of accomplices should apply even more

stringently to their extra-curial statements. But, no such caution applies to an extra-curial statement that implicates a co-accused even though the inherent dangers of fabrication, or substitution, downplaying and exaggerating of roles, are no less real. That, in those circumstances, an extra-curial statement which has to pass a lower threshold of scrutiny than viva voce evidence from the same source could be as damning as the latter is, to my mind, incomprehensible.

[34] The approach postulated by my learned Sister is not without precedent. It has its roots in the judgment of this Court in *S v Ndhlovu* 2002 (6) SA 305 (SCA). In my view, *Ndhlovu* too readily dismissed concerns expressed in *S v Ramavhale* 1996 (1) SACR 639 (A), which cautioned (at 649*c*-*d*) that a court should hesitate long in admitting hearsay evidence that plays a decisive or even a significant part in convicting an accused person. *Ndhlovu* makes no attempt to reconcile the incongruity between the bar created by s 219 of the Criminal Procedure Act and its application of s 3 of the Law of Evidence Amendment Act. Moreover, in dealing with the constituent parts of s 3, *Ndhlovu* offers no guidance as to how the receipt of the extra-curial admissions which it allows under that section, should be approached given the rationale at common law for their exclusion or what role, if any, the various common law safeguards should play. In effect it is as if a pen has been struck through those well recognised common law safeguards and they have been summarily jettisoned.

[35] What is envisaged it seems in the case of an accused implicated by the extra-curial statement of another, is that he should go into legal battle without the sword of cross-examination or the shield of the cautionary rules of evidence. That can hardly conduce to a fair trial, as in my view, it impacts in a direct and substantial way on the fairness of the process. Moreover, how is an accused person to regulate

his conduct and to make informed choices about the conduct of his defence? For, surely now his decision to apply for a discharge at the close of the prosecution's case or to close his case without testifying or to enter the witness box in his defence or to call other evidence in his defence may well have to be informed not just by the evidence implicating him in the commission of the offence charged and the strength or weakness of the prosecution's case but also by what is contained in an extra-curial statement that has in any event been disavowed by its maker in evidence.

[36] It may well be a fundamental aspect of a fair trial and the adversarial nature of the proceedings proclaimed by a criminal trial, that s 3 be interpreted to prevent the extra-curial statement of one accused from being admissible against his co-accused. That fortunately for me does not arise for decision in this matter. I accordingly content myself with the note of caution that I have sounded. For the rest I am in agreement with my learned Sister.

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V M PONNAN
JUDGE OF APPEAL