THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case no: 327/01
REPORTABLE

In the matter between:

NDHLOVU, Vusi Vincent	**First appellant**
MTHETHWA, Bafana Godfrey	**Second appellant**
MASINGA, Bongani Piet	**Third appellant**
NKOSI, Jabu Sweetdreams	**Fourth Appellant**

and

THE STATE	**Respondent**

Before: Harms and Cameron JJA and Heher AJA
Appeal heard: 7 May 2002
Judgment: 31 May 2002

Criminal law–Hearsay evidence–Act 45 of 1988–Act not unconstitutional–Admission of hearsay evidence by one accused against fellow accused–Admissible when if sufficient guarantees of trustworthiness

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JUDGMENT

CAMERON JA:

INTRODUCTION

[1] The main question in the appeal is whether an accused's out-of-court statements incriminating a co-accused, if disavowed at the trial, can nevertheless be used in evidence against the latter.

[2] Johannes Jochemus Jansen van Rensburg, a forty year-old husband of twenty years and a father of two children, was a partner in a plumbing business that was improving the water and sewerage facilities in the East Rand township of Katlehong. On Sunday morning 17 January 1999, he entered the Ramakonopi section of the township with a team of workers to lay pipes. At 08h00, while his workers were preparing for the day's tasks, he was attacked at the wheel of his Ford Cortina by a group of four young men. One of them approached, pointed a firearm at him, pulled the trigger and fled. A second, armed with a 30-centrimetre iron bar, demanded a cellular phone before also fleeing. The bullet entered Jansen van Rensburg's right shoulder. It lacerated his subclavian arteries and passed through his trachea and left lung. He died shortly afterwards at the scene of the attack. His attackers had by then escaped with his cellphone.

[3] Fifteen months later, the four appellants ('the accused') were arraigned in the High Court in Johannesburg on charges arising from the incident. Goldstein J and two assessors, in a judgment

portions of which have been reported,[1] convicted all four accused of murder and of armed robbery.[2] The first accused was in addition convicted of unlawful possession of a firearm and ammunition.[3] Applying the minimum sentence provisions which had come into force on 1 May 1998,[4] Goldstein J sentenced the first three accused to life imprisonment for the murder, and to fifteen years' imprisonment for the robbery. Accused 1 was in addition sentenced to three years' imprisonment on the firearm charge, and to two years on the ammunition charge. Accused 4, who was just over seventeen at the time of the crimes, was sentenced to 18 years in prison for the murder, and to ten years for the robbery. The sentences were all to run concurrently.[5]

[4] Two eyewitnesses testified against the accused. The first could identify no one. The second placed accused 1 at the scene of the crimes. But the trial court found that his identification was 'virtually worthless'. In consequence, the pivotal factors in the conviction of the accused were the words and actions of accused 3 on the night following the murder, when he led the police to the other three accused and to the purchaser of the deceased's cellphone (resulting in the recovery of the cellphone, the testimony of the

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[1] *S v Ndhlovu and others* 2001 (1) SACR 85 (W).
[2] Robbery with aggravating circumstances as described in section 1 of the Criminal Procedure Act, 51 of 1977.
[3] In contravention of sections 2 and 36 read with sections 1 and 39 of the Arms and Ammunition Act 75 of 1969.
[4] In terms of the Criminal Law Amendment Act 105 of 1997.
[5] In terms of section 32(2)(a) of the Correctional Services Act 8 of 1959 all determinate sentences run concurrently with a sentence of life imprisonment. Goldstein J ordered that the sentences imposed on accused 4 run concurrently.

person to whom it was sold, and the discovery of the murder weapon in the possession of accused 1), and a written statement that accused 4 made the next day, incriminating himself and the other three accused. At the trial accused 3 and 4 denied making any statements to the police. And all four denied complicity. The trial court rejected the defence evidence as false beyond reasonable doubt. Goldstein J granted the accused leave to appeal against their convictions and sentences, but not against his finding, at the end of a trial-with-the-trial, that the post-arrest pointings out and oral statements attributed to accused 3, and the written statement attributed to accused 4, were rightly so attributed, and were admissible as having been made freely and voluntarily. Accused 1 did not seek leave to appeal against his conviction and sentences on the arms charges.

[5] In the result, the principal question in the appeal is the admissibility against their fellow accused of the hearsay evidence deriving from the oral and written statements of accused 3 and 4, and whether that evidence, if admissible, supports the inferences as to motive and conduct the trial court drew against the accused. In addressing that question, the appellants could make no serious attack on the factual and credibility findings of the Court below, which the evidence overwhelming justified.

THE TRIAL COURT'S FINDINGS

[6] In the early hours of the morning after the murder, an informer telephoned Sgt Makhubo of the Katlehong Crime Prevention Unit

and purported to give him ‘the names and addresses of the perpetrators’. Makhubo decided to follow the lead with a group of colleagues. They first went to the home of accused 3 where after advising him of his constitutional rights Makhubo arrested him on a charge of murder. After being handcuffed, accused 3 told Makhubo that he was not alone when they ‘shot a white man’. In the ensuing conversation, accused 3 told him ‘We were four’, but stated that it was not he who pulled the trigger. Asked who did, accused 3 answered ‘Vusi’. Accused 3 then agreed to point out the persons who had been in his company. Makhubo put accused 3 into one of the two vehicles in which the police party was travelling, and boarded the other. Makhubo told the driver of the vehicle in which accused 3 was placed merely that accused 3 would direct them ‘to a certain place’.

[7] That accused 3 proceeded to do. He directed the party to a series of locations at which in turn accused 4, accused 2, the purchaser of the deceased’s cellphone, one Mdunana, and accused 1 were arrested. Before accused 1’s arrest (at a location to which accused 3 directed the police after accused 1 could not be found at his home), accused 3 warned the police to be careful because accused 1 had a firearm. At this point accused 3 also told Makhubo that they were ‘actually going to take the cellphone from this white man and that they were surprised’ when they realised that accused 1 was shooting the man. He said that once the man had been shot, ‘they then took the cellphone and ran away’.

[8] Mdunana was taken into custody after accused 2, 3 and 4, but before accused 1. Accused 3 accompanied the police party that entered Mdunana's home. There Mdunana identified him to the police as the 'the seller' of the cellphone. Later that same night, at the Katlehong Police Station, when Mdunana encountered accused 2, he identified him to the police as the second of two youths who had come to his door, offering the cellphone for sale. At the trial Mdunana (who had by then been convicted and sentenced for possessing stolen property) affirmed these identifications. He testified that at about 09h00 on Sunday 17 January 1999 'four boys' arrived at his home in Ramakonopi East. Two approached him and stood at his door, while the others waited at the gate. Accused 3 offered to sell him a cellphone. When he asked to see the instrument, accused 2 produced it for inspection. They wanted R500, but after some bargaining agreed to take R400. He gave them R150 as a deposit, the balance to be collected the next day. The youths' two companions at the gate Mdunana was unable to identity.

[9] During the afternoon of Monday 18 January, accused 4 signed a written statement in which he answered questions the investigating officer put to him. He stated that at 08h00 on 17 January 1999 he was at Ramakonopi, Katlehong, and that Vusi, Bongani and Bafana were with him. It was not contested that these allusions identified respectively accused 1, 3 and 2 by their first names. Accused 4 further stated that he and the other three

went to 'the people who were working'. He stated that he 'stood and watched', and 'saw Vusi pulling the trigger.' To an inquiry about the firearm he replied that it was a 'Lucini'. At the trial a ballistics expert identified the murder weapon as the 9mm Lorcin pistol found in accused 1's possession. In his statement accused 4 said that after the shooting he ran away alone to Ramakonopi. Finally, he stated that accused 1 had shot 'a white man' who was alone 'behind the steering wheel' of a 'white Ford Cortina'.

[10] Goldstein J rejected a challenge to the constitutionality of section 3 of the Law of Evidence Amendment Act 45 of 1988 ('the 1988 Act'),[6] and applied its provisions to admit the hearsay evidence emanating from the statements and conduct of accused 3 and 4. From all the evidence, the trial court inferred that the accused had acted in concert in carrying out the robbery and that each of them was also guilty of the murder.

HEARSAY EVIDENCE UNDER THE 1988 ACT AND THE CONSTITUTION

[11] Section 3 of the 1988 Act provides:

> 3 **Hearsay evidence**
> (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless -
> (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
> (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
> (c) the court, having regard to-
> (i) the nature of the proceedings;
> (ii) the nature of the evidence;
> (iii) the purpose for which the evidence is tendered;
> (iv) the probative value of the evidence;
> (v) the reason why the evidence is not given by the person upon whose credibility

[6] 2001 (1) SACR 85 (W) paras 62-63.

> the probative value of such evidence depends;
> (vi) any prejudice to a party which the admission of such evidence might entail; and
> (vii) any other factor which should in the opinion of the court be taken into account,
> is of the opinion that such evidence should be admitted in the interests of justice.
> (2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
> (3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.
> (4) For the purposes of this section-
> 'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;
> 'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

[12] In essence, in the absence of agreement, the section prohibits the admission of hearsay evidence unless the interests of justice require it. As Goldstein J pointed out,[7] the provision expressly contemplates its application to both civil and criminal proceedings (ss (1) and (4)). The statute moreover repealed s 216 of the Criminal Procedure Act 51 of 1977 ('the 1977 Act'), the effect of which had been to prohibit, subject to defined common law exceptions, the admission of hearsay evidence.[8] The hearsay provisions of the 1988 Act have been considered and applied in this Court[9] and also in a number of provincial division decisions,

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[7] 2001 (1) SACR 85 (W) at para 50.

[8] Section 216 before its repeal read:
'Except where this Act provides otherwise, no evidence which is of the nature of hearsay evidence shall be admissible if such evidence would have been inadmissible on the thirtieth day of May 1961.' In effect, the English law relating to hearsay evidence as it was on 30 May 1961 applied.

[9] Mdani v Allianz Insurance Ltd 1991 (1) SA 184 (A), S v Ndlovu 1993 (2) SACR 69 (A), S v Ramavhale 1996 (1) SACR 639 (A), McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and another 1997 (1) SA 1 (A), Makhathini v Road Accident Fund 2002 (1) SA 511 (SCA).

including criminal matters,[10] but until the proceedings before Goldstein J their constitutionality had not been contested. On appeal counsel for the first appellant persisted in the submission that the provisions were unconstitutional and that the trial court had therefore erred in invoking them at all.

[13] It is obvious that the 1988 Act, although pre-constitutional, must so far as possible be read in the light of the Constitution and to give effect to its fundamental values.[11] The Constitution requires as much.[12] Only if the statute's provisions cannot be read conformably with the Constitution would the question of unconstitutionality arise. In my view Goldstein J was however clearly right to reject the constitutional challenge. The statute

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[10] *S v Ngwani* 1990 (1) SACR 449 (N) (conviction of unrepresented accused for dealing in dagga, on basis of policeman's evidence that at time of arrest bus conductor had identified bag of dagga as belonging to accused, set aside on review because magistrate omitted to explain the implications of the statute to accused); *S v Dyimbane and others* 1990 (2) SACR 502 (SE) (evidence as to statements of the two deceased indicating that they were municipal police recruits, which evidence was tendered to prove that it was the deceased who were killed, admitted); *S v Cekiso and another* 1990 (4) SA 20 (E) (application in course of trial for admission of hearsay evidence on 'controversial issues upon which conflicting evidence has already been given' refused); *S v Mpofu* 1993 (3) SA 864 (N), 1993 (2) SACR 109 (N) (appeal from conviction of culpable homicide allowed where trial court had relied in convicting accused on evidence that passer-by gave to witness on slip of paper the number of vehicle that collided with the deceased, since the possibility of mistake on the part of the transcriber loomed large); *S v Aspeling* 1998 (1) SACR 561 (C) (opinion of pathologist who had conducted already admitted post-mortem report tendered from bar by prosecutor admissible because appellant's attorney had accepted evidence in this form). The 1988 Act does not appear to have been introduced into Bophuthatswana: compare *S v Banda and others* 1990 (3) SA 466 (BGD) 506-7.

[11] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) paras 21-26; *S v Dzukuda and Others; S v Tshilo* 2000 (4) SA 1078 (CC) para 37(a); *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) para 20; *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) para 10.

[12] Section 39(2) of the Bill of Rights provides that 'When interpreting any legislation, … every Court… must promote the spirit, purport and objects of the Bill of Rights.'

does not license the wholesale admission of hearsay. Long before the Constitution came into effect the common law was alert to the dangers such an approach would have entailed. Not only is hearsay evidence – that is, evidence of a statement by a person other than a witness which is relied on to prove what the statement asserts[13] – not subject to the reliability checks applied to first-hand testimony (which diminishes its substantive value), but its reception exposes the party opposing its proof to the procedural unfairness of not being able to counter effectively inferences that may be drawn from it.[14] For these very reasons, this Court emphasised more than four decades ago that 'hearsay, unless it is brought within one of the recognised exceptions, is not evidence, ie legal evidence, at all'.[15]

[14] The 1988 Act does not change that starting point. Subject to the framework it creates, its provisions are exclusionary.[16] Hearsay not admitted in accordance with its provisions is not evidence at all. What the statute does is to create supple standards within which courts may consider whether the interests

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[13] Compare the definition adopted in *S v Holshausen* 1984 (4) SA 852 (A) 858F and see *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 (PC) 970.

[14] See HL Ho 'A Theory of Hearsay' (1999) 19 *Oxford Journal of Legal Studies* 402. In *Lee v The Queen* (1998) 72 ALJR 1484 the High Court of Australia stated the process point thus (para 32):

'And the concern of the common law is not limited to the quality of evidence, it is a concern about the manner of trial. One very important reason why the common law set its face against hearsay evidence was because otherwise the party against whom the evidence was led could not cross-examine the maker of the statement. Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.'

[15] *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 (3) SA 285 (A) 296F (Schreiner JA).

[16] *S v Ramavhale* 1996 (1) SACR 639 (A) at 647*d-e* per Schutz JA.

of justice warrant the admission of hearsay notwithstanding the procedural and substantive disadvantages its reception might entail. The Act thus introduces the very feature this Court held the common law lacked, namely 'a principle that the rule against hearsay may be relaxed or is subject to a general qualification if the Court thinks that the case is one of necessity'.[17]

[15] The 1988 Act was thus designed to create a general framework to regulate the admission of hearsay evidence that would supersede the excessive rigidity and inflexibility – and occasional absurdity – of the common law position. In the result, as this Court recently stated in *Makhathini v Road Accident Fund*,[18] the 1988 Act retained 'the common law caution' about receiving hearsay evidence, but 'altered the rules governing when it is to be received and when not', principally by glossing the common law exceptions with the general criteria of relevance, weight and the interests of justice:

> 'The statutory preconditions for the reception of hearsay evidence are now designed to ensure that it is received only if the interests of justice dictate its reception.'[19]

[16] The problem however is that the provision conflates the admissibility of evidence with its reliability. That aside, statute's fundamental test, namely the 'interests of justice', as well as the criteria it posits as relevant to that test, must now be interpreted in

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[17] *Vulcan Rubber* at 296H.
[18] 2002 (1) SA 511 (SCA).
[19] para 21, per Navsa JA.

accordance with the values of the Constitution[20] and the 'norms of the objective value system' it embodies.[21] Nothing in the statute inhibits this normative reconfiguration. On the contrary, the scheme and formulation of the relevant provisions of the 1988 Act are consonant with the Constitution. The Act requires that specific account be taken of the 'nature of the proceedings' (s 3(1)(c)(1)). This alludes to the distinction not only between application and trial proceedings, but more pertinently to that between civil and criminal proceedings.[22] The overriding feature of the latter is that the state bears the onus to establish the guilt of the accused beyond reasonable doubt. This will always weigh heavily not only in the admission of hearsay evidence, but also in the weight a court accords it.[23] This Court alluded in *S v Ramavhale* to an intuitive reluctance to permit untested evidence to be used against an accused in a criminal case, observing that an accused 'usually has enough to contend with without expecting him also to engage in mortal combat with the absent witness'.[24] It concluded that 'a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so'.[25]

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[20] See Nico Steytler *Constitutional Criminal Procedure* (1998) p 352.
[21] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC) para 56.
[22] Du Toit and others *Commentary on the Criminal Procedure Act* (3rd reprint 1993, with updates) 24-50
[23] *Hewan v Kourie NO and another* 1993 (3) SA 233 (T) 239E-F.
[24] 1996 (1) SACR 639 (A) 647-8.
[25] 1996 (1) SACR 639 (A) 649*d-e*.

[17] Aside from the importance of these cautionary words, a trial court must in applying the hearsay provisions of the 1988 Act be scrupulous to ensure respect for the accused's fundamental right to a fair trial.[26] Safeguards including the following are important:

- First, a presiding judicial official is generally under a duty to prevent a witness heedlessly giving vent to hearsay evidence.[27] More specifically under the Act, 'It is the duty of a trial Judge to keep inadmissible evidence out, [and] not to listen passively as the record is turned into a papery sump of "evidence".'[28]
- Second, the Act cannot be applied against an unrepresented accused to whom the significance of its provisions have not been explained. In *S v Ngwani*[29] the magistrate in answer to a review query tried to justify a conviction of dagga dealing on the basis that the 1988 Act rendered admissible a policeman's evidence that the conductor of the bus where the dagga was found had identified the accused as the owner of the bag containing it. In setting aside the conviction Didcott J stated:

  'The accused, who was unrepresented, had to have the effect of the subsection fully explained to him, in contrast with the legal position were it not invoked. He then had to be heard on the issue whether it should be invoked. In particular, he had to be heard on the important one raised by para (vi), the issue whether he would be prejudiced were it to be invoked.'[30]

[18] Third, an accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must

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[26] Bill of Rights s 35(3).
[27] *S v Zimmerie en 'n ander* 1989 (3) SA 484 (C) 492F-H (Friedman J, Tebbutt and Conradie JJ concurring).
[28] *S v Ramavhale* 1996 (1) SACR 639 (A) 651*c*.
[29] 1990 (1) SACR 449 (N).
[30] 450*d* (Wilson J concurring).

be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution must before closing its case clearly signal its intention to invoke the provisions of the Act, and the trial judge must before the State closes its case rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces.

[19] Two decisions are in point:

(a) In *S v Ndlovu and another*[31] a conviction of murder depended on police accounts of post-arrest admissions the accused made through interpreters who were not called to testify. The evidence of the policemen was accordingly hearsay. On appeal the State sought to rectify the omission by invoking the 1988 Act. This Court rejected the attempt. It held that the admissions had not been properly proved. It was open to serious doubt whether the Act could be invoked to cure the failure to call the interpreters since evidence was needed that the accused's statements had been accurately translated (the policemen could not speak the accused's language). But even if the Act applied, the admission of the evidence had to be raised and decided in the trial court. Conjuring up the statute on appeal was not good enough.

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[31] 1993 (2) SACR 69 (A) 73*b*.

(b) *S v Ramavhale*[32] is an even clearer instance. The State had not sought to lead the hearsay evidence pivotal to the accused's conviction, it 'did not want it when it came out, and turned its back on it' until at a late stage in argument at the close of the trial, when the trial judge during the State's reply raised its possible admission. At no stage before judgment was the defence aware that the trial court intended to rely on it. This Court subjected the manner in which the trial judge admitted and relied upon the hearsay to stricture. *Ramavhale* makes clear that unless the State obtains a ruling on the admissibility of the hearsay evidence before closing its case, so that the accused knows what the State case is, he or she cannot thereafter be criticised on the basis of the hearsay averments for failing to testify. It also suggests, rightly, that unless the court rules the hearsay admissible before the State closes its case, fairness to the accused may dictate that the evidence not be received at all. (This does not preclude the State in an appropriate case from applying to re-open its case.)

[20] In the present trial, before the State closed its case, during argument on the admissibility of the pointings out and statements of accused 3 and the written statement of accused 4, Goldstein J invited submissions on whether the hearsay they contained was admissible under the 1988 Act against the other accused. He

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[32] 1996 (1) SACR 639 (A).

informed counsel that his ruling was 'reviewable at the end of the case' and that his mind 'will not close after this ruling'. They were therefore entitled to address him again on the question at the close of the trial. After then hearing argument, Goldstein J ruled the statements admissible in evidence, announcing (as is usual) that his reasons would be given later. There was no suggestion that Goldstein J's ruling was 'provisional' in the sense criticised in *S v Ramavhale*[33] (that is, leaving the State or indeed the accused to 'range around vaguely' on the question of the ambit of the admitted evidence). Goldstein J's ruling was clear and unequivocal, albeit subject to re-assessment at the end of the case.

[21] After Goldstein J's ruling, the State closed its case. The accused all elected to testify. When they did so, they knew that they were confronted with the full evidentiary potential of the statements, though the court's reasons, and the weight it attached to the statements, were given only in its judgment on the merits at the end of the case. No question of impropriety in relation to the invocation of 1988 Act therefore arose.

[22] A further consideration bearing on the constitutionality of the statute is that this Court has construed the nature of the power the relevant provisions confer on judges in a way that underscores the rigorous legal framework within which any decision to admit

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[33] 1996 (1) SACR 639 (A) 651*b*-*e*.

hearsay evidence will be scrutinised:

> 'A decision on the admissibility of evidence is, in general, one of law, not discretion, and this Court is fully entitled to overrule such a decision by a lower court if this Court considers it wrong.'[34]

It should be added that in *S v Ndlovu and another*[35] the Court referred to the power s 3(1)(c) confers as a 'judicial discretion' (a term normally taken to refer to a protected discretion, ie an exercise of judicial power in general immune from intervention in the absence of misdirection or abuse).[36] The Court in *McDonald's* was not referred to *Ndlovu*. In contrast to *McDonald's*, it doesn not appear that the precise nature of the power the provision confers was argued in *Ndlovu*. To the extent that the two approaches may conflict, the analysis in *McDonald's* must in my view be accepted as correct.[37]

[23] In making the admission of hearsay evidence subject to broader, more rational and flexible considerations, the 1988 Act's general approach is moreover in keeping with developments in other democratic societies based on human dignity, equality and freedom.[38] The Supreme Court of Canada, for instance, has underlined the need for increased flexibility in interpreting the hearsay rule, and subject to safeguarding the interests of the

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[34] *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and another* 1997 (1) SA 1 (A) 27E (EM Grosskopf JA, Corbett CJ, Nestadt JA, Schutz JA and Plewman AJA concurring).
[35] 1993 (2) SACR 69 (A) 73*b* (Goldstone JA, Botha and Vivier JJA concurring).
[36] See Harms *Civil Procedure in the Supreme Court* (1990) T19.
[37] Insofar as *Metedad v National Employers' General Insurance Co Ltd* 1992 (1) SA 494 (W) 498I may suggest otherwise it must be considered incorrect.
[38] In terms of s 39(1)(c) of the Constitution, when interpreting the Bill of Rights a court 'may consider foreign law'. Section 36(1) permits limitation of a right if reasonable and justifiable

accused, has distilled two criteria (reasonable necessity and reliability) governing its admission.[39] Lamer CJC hailed the Court's new approach as 'the triumph of a principled analysis over a set of ossified judicially created categories'.[40] The Canadian Supreme Court's general criteria accord well with the overall scheme of s 3 of the 1988 Act.

[24] In challenging the constitutionality of the hearsay provisions of the 1988 Act, counsel for the first appellant relied on the fair trial guarantee in the Bill of Rights, specifically the right of the accused 'to adduce and challenge evidence'.[41] It has correctly been observed that the admission of hearsay evidence 'by definition denies an accused the right to cross-examine', since the declarant is not in court and cannot be cross-examined.[42] I cannot accept, however, that 'use of hearsay evidence by the state violates the accused's right to challenge evidence by cross-examination',[43] if is meant that the inability to cross-examine the source of a statement in itself violates the right to 'challenge' evidence. The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination.[44] What it contains is the right

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'in an open and democratic society based on human dignity, equality and freedom'.

[39] *R v Khan* [1990] 2 SCR 531 (SCC).

[40] *R v Smith* [1992] 2 SCR 915, 94 DLR 590 (SCC) 602*c*-e.

[41] Section 35(3): 'Every accused person has the right to a fair trial, which includes the right – … (i) to adduce and challenge evidence'. Compare the interim Constitution, Act 200 of 1993, s 25(3)(d).

[42] Nico Steytler *Constitutional Criminal Procedure* (1998) p 350, citing *S v Ramavhale* 1996 (1) SACR 639 (A) 649*g-h*.

[43] Chaskalson and others *Constitutional Law* ch 27 'Criminal Procedure' 27-94A (F Snyckers). De Waal and others *The Bill of Rights Handbook* (4ed 2001) do not address the question.

[44] Compare *S v van der Sandt* 1997 (2) SACR 116 (W) 132*b-f*.

(subject to limitation in terms of s 36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to 'challenge evidence' does not encompass the right to cross-examine the original declarant.

[25] In the United States, the Sixth Amendment to the Constitution provides that in all criminal prosecutions the accused shall enjoy the right 'to be confronted with the witnesses against him'. This right, even more broadly and directly expressed than that in our Bill of Rights, has never been interpreted to exclude the admission of all hearsay evidence.[45] On the contrary: the Supreme Court has held that where hearsay falling within the traditional exceptions has 'sufficient guarantees of reliability', 'the Confrontation Clause is satisfied'.[46] That Court, too, in seeking to find a general basis for the admission of hearsay evidence, uses a less than absolute test of necessity together with one of

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[45] *Mattox v United States* 156 US 237 243-4 (1895); 'It was not argued, nor could it be, that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced': *Dutton v Evans* 400 US 74 80 (1970), per Stewart J. See John G Douglass 'Beyond Admissibility: Real Confrontation, Virtual Cross-examination, and the Right to Confront Hearsay' (1999) 67 *George Washington LR* 191. The author refers at 196 to 'the increasing variety of admissible hearsay' in the United States.

[46] *White v Illinois* 502 US 346, 356 (1992) (Rehnquist CJ, White, Blackmun, Stevens, O'Connor, Kennedy and Souter JJ concurring).

reliability.[47]

[26] I conclude that the 1988 Act provides a constitutionally sound framework for the admission of hearsay evidence, and turn to the question of its admission in the present case.

THE ADMISSION OF THE HEARSAY EVIDENCE IN CONVICTING THE ACCUSED

[27] In ruling the hearsay admissible, Goldstein J relied in the first instance on s 3(1)(b), which provides that hearsay evidence is admissible if 'the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings'. As already pointed out, after the admissibility ruling on their statements, accused 3 and 4 themselves elected to testify. Goldstein J considered that the requirements of the provision had therefore been satisfied. He observed: 'There is no doubt that the requirements of ss (1)(b) for the admissibility of extra-curial statements and pointings out … are satisfied if the provision is read literally and in accordance with its ordinary meaning'. He held that if the literal meaning were not applied the sub-section would have 'no or little purpose since an extra-curial statement, which is repeated under oath, need not be referred to at all, and is indeed of doubtful admissibility, constituting as it does

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[47] *Ohio v Roberts* 448 US 56 64-66 (1980) (Blackmun J, Burger CJ, Stewart, White, Powell and Rehnquist JJ concurring). Rule 801 of the Federal Rules of Evidence, accessible at http:/www2.law.cornell.edu/cgi-bin/foliocgi.exe/fre/query=[jump!3A!27rule801!27]/doc/{@237}?, regulates the admission of hearsay evidence.

a previous consistent statement'.[48]

[28] This approach is not in my view correct. The literal effect of ss (1)(b) would be to make self-corroborating statements admissible – otherwise the need to admit hearsay evidence where the declarant testifies at the proceedings cannot arise. That would make no sense. Rather, the provision must be read in tandem with ss (3). That provision discloses the primary purpose of ss (1)(b). Sub-section (3) provides that hearsay may be 'provisionally admitted' under ss (1)(b) 'if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify'. Before the Act, a witness whose narrative was conjoined with that of a later witness could not refer at all to the latter's hearsay statements. This could render the delivery of evidence fragmentary and even incoherent. Any allusion to hearsay would be met with justified objection, and the court would have to wait for the later witness to be called for coherence to emerge. In these circumstances the provision permits the first witness to testify fully and without objection, provided the court is informed that the declarant will in due course be called. If the declarant is not called the hearsay is 'left out of account' unless the opposing party agrees to its admission or the interests of justice require its admission under s 3(1)(c). The provisional admission of hearsay in the situation the statute

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[48] 2001 (1) SACR 85 (W) para 50. See also para 58, and compare Schmidt and Rademeyer *Schmidt Bewysreg* (4 ed 2000) pages 476, 483.

envisages is procedurally unexceptionable[49] and its practical value in rendering court proceedings coherent should not be under-estimated.

[29] Second and in any event, the literal reading entails that a hearsay statement automatically becomes admissible simply because the extra-curial declarant happens to testify, regardless of the content of his or her testimony, and regardless of the interests of justice. It is hardly conceivable that the legislation intended this result. When hearsay evidence is tendered, the person on whose credibility the probative value of the hearsay depends may (i) testify and confirm its correctness; (ii) not testify; (iii) testify but deny ever making the hearsay statement; (iv) testify and admit making the statement but deny its correctness; (v) testify but neither confirm nor deny making the statement.

[30] If the witness, when called, disavows the statement, or fails to recall making it, or is unable to affirm some detailed aspect of it (situations (iii)-(v) above),[50] the situation under the Act is not in substance materially different from when the declarant does not testify at all. The principal reason for not allowing hearsay evidence is that it may be untrustworthy since it cannot be subjected to cross-examination. When the hearsay declarant is called as a witness, but does not confirm the statement, or

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[49] See para 18 above and contrast *S v Ramavhale* 1996 (1) SACR 639 (A) 651*c*-*e*.
[50] The hearsay question arose partly in such circumstances in *R v Starr* (2000) 190 DLR (4th) 591 (SCC).

repudiates it, the test of cross-examination is similarly absent, and similar safeguards are required.

[31] The probative value of the hearsay evidence depends primarily on the credibility of the declarant at the time of the declaration, and the central question is whether the interests of justice require that the prior statement should be admitted notwithstanding its later disavowal or non-affirmation. And though the witness's disavowal of or inability to affirm the prior statement may bear on the question of the statement's reliability at the time it was made, it does not change the nature of the essential inquiry, which is whether the interests of justice require its admission.

[32] That question the literal approach to the meaning of ss (1)(b) would entirely efface. The legislation is at pains to provide that if the declarant is unavailable to testify hearsay is admissible should the interests of justice require it. It can hardly be intended that the interests of justice should become irrelevant if the declarant happens to testify but disavows or is unable to affirm the prior statement. The logical approach to the substance of the legislation, as opposed to its letter, is thus that hearsay not affirmed under oath is admissible only if the interests of justice require it.[51]

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[51] Rule 801(c) of the United States Federal Rules of Court avoids this difficulty by defining hearsay as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted'.

[33] The facts of the present case illustrate the force of this conclusion. At the trial, accused 3 and 4 radically disavowed their earlier statements. It is inconceivable that their hearsay averments, inadmissible against accused 1 and 2 in the absence of an appropriate ruling under s 3(1)(c), suddenly became admissible, automatically and without regard to the interests of justice, once accused 3 and 4 elected to testify. The 'probative value' of the accused's statements to the police did not depend on their credibility at the time of the trial – which the court rightly found totally lacking – but on their credibility at the time of their arrest. And the admissibility of those statements depended not on the happenstance of whether they chose to testify but on the interests of justice.

[34] In these circumstances I conclude that the provision deals differently with the situation where hearsay evidence is subsequently affirmed under oath at the proceedings [situation (i) in paragraph 29 above] from where it is not [situations (ii) to (v)]. Its admission is in the first case governed by ss (1)(b); in the others by ss (1)(c), and whether or not the hearsay declarant testifies but fails to confirm the prior statement is irrelevant to the application of ss (1)(c). The admissibility of all hearsay evidence not affirmed under oath at the proceedings in question therefore depends on whether the interests of justice require it.

[35] Goldstein J went on to consider this question. Before scrutinising his conclusion, it is convenient to consider the non-

hearsay evidence against accused 3 and 4. From his own mouth accused 3 was convicted of both murder and robbery. He admitted to the police that he was present with three others when the deceased was shot. He admitted sharing with the others the purpose of 'taking' the deceased's cellphone. He was therefore engaged when so present in a joint attack on the deceased in effecting that purpose. It may be inferred with a high degree of certainty that accused 3 knew in advance that one of his fellow robbers had a firearm. He attempted to exculpate himself by claiming surprise when the deceased was shot. But he did not try to suggest that before the robbery he was unaware of the firearm's deadly presence. It follows from his knowledge that one of the party was armed that accused 3 must have envisaged the use of force if necessary. Such force when threatened with a firearm is always potentially deadly. Accused 3 therefore by ineluctable inference must have reconciled himself to the deadly consequences of that use. That may be inferred also from his admission that once the deceased had been felled, he with the others 'took the cellphone and ran away'. The character of the entire enterprise appears from the consistent nature of the robbers' association with one another other and from their joint plundering of the deceased's property as he lay dying. Although accused 3 told the police that he was 'surprised' when he realized that the deceased was being shot, his exculpatory statement loses its plausibility when weighed against the stark facts of the shared enterprise and the manner of its execution. Accused 3's untruthful denial of his post-arrest admissions and his palpably false alibi

also count heavily against him.

[36] Accused 4, likewise, was rightly convicted from the words of his own tongue. He was at the scene of the killing with three others. He not only knew that a firearm was present, but knew its make ('Lucini' for 'Lorcin'). Although he said that he ran away alone, it is overwhelmingly probable that after the shooting and robbery the four regrouped, and that he and the other three he named comprised the group of four youths who barely an hour after the deceased lay dead approached Mdunana to sell the cellphone. The possibility that another youth had joined the group, and that it was he, and not accused 4, who stood at Mdunana's gate while the cellphone was being sold, is so remote that it may safely be excluded. In accused 4's case the same inferences apply as in that of accused 3, and the same adverse consequences from his lying testimony. His presence on the deadly mission, his association with its execution and his plucking of its fruits mark him as intimately associated with all aspects of its attainment, including the murder. That accused 4 recounted to the police his presence at the scene of the murder while the trigger was pulled without an attempt at exculpation merely underscores the conclusion already inevitable from the other proven facts.

[37] The critical question, however, is the admissibility of the hearsay statements of accused 3 and 4 against accused 1 and 2. Accused 1 was found in possession of the murder weapon some 20 hours after the murder. That fact, together with his untruthful

denial of possession and his spurious alibi, on their own point strongly, probably beyond reasonable doubt, to his culpable association with the fatal robbery. But the hearsay evidence, if admitted, puts that issue beyond question, for both accused 3 and 4 identify him as the actual killer.

[38] But it is the case of Accused 2 that brings the hearsay question into starkest relief, since against him the only direct evidence was the identification of Mdunana. The trial court rightly found Mdunana, who was independent of any of the parties, 'a most impressive witness who gave a clear and coherent account of what he observed'.[52] Upon seeing accused 2 at the Katlehong Police Station less than 24 hours after their meeting, he identified him as the second of the two youths who came up to his door. It was accused 2 who produced the cellphone for his inspection during the transaction. Since the bartering was protracted – some fifteen or twenty minutes, Mdunana testified – he had a good opportunity to view the faces of the two at his door, and good reason to remember them, since the transaction involved their returning for the balance of the purchase price. He was certain that they were accused 2 and 3. This identification, as Goldstein J pointed out, is not without value or importance, and Mdunana convincingly withstood cross-examination on it. But the possibility, slight though it be, that he might have been mistaken, makes it necessary to consider whether accused 2 should be convicted of

[52] 2001 (1) SACR 85 (W) para 37.

the murder and robbery on the strength of the hearsay statements of accused 3 and 4 that tie him to the scene of the crime itself.

[39] This certainly entails 'admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused',[53] and we should tread this path only if there is compelling justification for doing so. Goldstein J carefully weighed the factors set out in sub-paragraphs (i)-(vii) of the section and concluded that the interests of justice required the admission of the hearsay statements of accused 3 and 4 against accused 1 and 2. He observed:

> 'The evidence concerned so convincingly completes the mosaic of the State case that it would be absurd to disregard it.'[54]

[40] If this conclusion is wrong, on the strength of the *McDonald's* case[55] we must overturn it. Goldstein J's approach to the matter was in my view however clearly right. The first factor that requires consideration, the fact that the proceedings are a criminal trial, has already been emphasised (para 16 above). Regarding the nature of the evidence (s 3(1)(c)(ii)), Goldstein J correctly observed[56] that it related to information accused 3 conveyed –

> 'voluntarily and spontaneously, and before he had any opportunity to fabricate. The information related to a very recent event of which he must have had a very clear memory and in respect of which he had an adequate opportunity for observation. He had personal knowledge of the facts. There is no reason to doubt his ability to observe and perceive properly what occurred. What he conveyed was uncomplicated and easy of comprehension.'

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[53] *S v Ramavhale* 1996 (1) SACR 639 (A) 649*d-e*.
[54] 2001 (1) SACR 85 (W) para 54.
[55] *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and another* 1997 (1) SA 1 (A) 27E.
[56] 2001 (1) SACR 85 (W) para 53.

[41] Goldstein J applied these same considerations to accused 4's statement, save that it occurred after the lapse of a few hours.

[42] It is in this that the fundamental distinction between the present case and *Ramavhale* lies. *Ramavhale* concerned a statement of future intention attributed to the deceased by a friend whose testimony was not assuredly disinterested.[57] The resemblances between *Ramavhale* and the recent decision of the Canadian Supreme Court in *R v Starr*[58] are striking. There the court – albeit by a bare majority of 5-4 – rejected a trial court's reliance on a similar statement of future intention attributed to the deceased under 'circumstances of suspicion' matching those that led this Court in *Ramavhale* to similar caution. Here, by contrast, the hearsay involves a first-hand account of a past event, relayed and recorded soon after its occurrence, by persons not only present but participating themselves. The vagaries attending statements of future intention by a deceased are entirely absent.

[43] Did accused 3 and 4 have a motive unjustly to implicate accused 1 and 2? Where the declarant is himself suspected of participation, a motive to implicate another falsely may be present if hearsay emanates from a self-exculpatory statement. That is not the position here. The declarants were under suspicion, but they confirmed that suspicion without ado by implicating themselves. No motive was suggested at the trial or on appeal for

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[57] 1996 (1) SACR 639 (A) 649*i-j*.

either of them needlessly to implicate the others, and I can think of none. Accused 4 and accused 1 are related. They stayed on the same street in Katlehong as accused 2, and no history of past animus or present conflict was suggested. The possibility of fabricated implication may safely be rejected.

[44] The purpose of the evidence (ss (1)(c)(iii)) is plainly to put accused 1 and 2 on the scene of the crimes. This purpose is direct, not oblique, and its attainment depends not on speculative inference – as may be the case in statements of future intention – but squarely on the reliability of the hearsay. I turn then to the question of the probative value of the hearsay (ss (1)(c)(iv)). Here the most striking aspect is the undeniably powerful way in which all the evidence interlinks. This includes the facts at the scene, the recovery of the cellphone, the discovery of the murder weapon, the self-incriminating statements of accused 3 and 4, and their hearsay incrimination of accused 1 and 2. There is strong corroboration in all the other evidence for the self-incrimination of accused 3 and 4 and for their implication of accused 1 and 2. The recovery of the dead man's cellphone in Mdunana's possession, and Mdunana's identification of two of the four sellers of the cellphone as accused 2 and 3 meshes in detail with what accused 3 and 4 told the police. What is more, accused 4, when asked who actually took the cellphone, answered 'Bafana'. This confirms strikingly Mdunana's account that when he asked to see

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[58] (2000) 190 DLR (4th) 591 (SCC).

the cellphone, accused 3 having done the talking until then, it was accused 2 who produced the instrument. Similarly, the hearsay averments of both accused 3 and 4 that it was 'Vusi' who fired the fatal shot links inexorably with the discovery of the murder weapon in accused 1's possession.

[45] 'Probative value' means value for purposes of proof. This means not only, 'what will the hearsay evidence prove if admitted?', but 'will it do so reliably?' In the present case, the guarantees of reliability are high. The most compelling justification for admitting the hearsay in the present case is the numerous pointers to its truthfulness. The only detail in which anything that either accused 3 or 4 told the police was proved wrong was accused 4's statement that the deceased's vehicle was 'white'. It was, in fact, light yellow. That detail can hardly dent the pile of accurate, reliable information that accused 3 and 4 supplied to the police.

[46] It is, in short, utterly unlikely that accused 3 and 4 would truthfully tell the police that the murder victim, a white man at the wheel of his Ford Cortina, was shot with a Lorcin pistol, which was in the possession of accused 1, whereafter the cellphone was sold to Mdunana, without its also being true that accused 2 was one of the robbers and that accused 1 fired the actual shot. It is even less likely that the two accused would implicate themselves, and each other, and each the other two, and do so in an account containing each of the accurate details set out above, without the

evidence implicating accused 1 and 2 also being reliable.

[47] In effect, we must weigh the risk that accused 3 and 4 falsely implicated accused 1 and 2 against the likelihood that their post-arrest statements were in relation to those accused as reliable as they were in every other respect. I am satisfied that the latter is the case. The high probative value of the evidence in this case, and the objective guarantees of its reliability, provide the compelling justification that must always be sought if hearsay evidence is to play a decisive or even significant part in convicting an accused.

[48] It is obvious why accused 3 and 4 did not at the trial give the evidence implicating accused 1 and 2 ((ss (1)(c)(v)): they recanted their post-arrest disclosures and sought to take refuge (unwisely, as it proved) in self-protective evasion and fabrication.

[49] The question whether the admission of hearsay might entail 'any prejudice to a party' ((ss (1)(c)(vi)) has already been alluded to (para 13 above). 'Prejudice' in the section 3 clearly means procedural prejudice to the party against whom the hearsay is tendered. It envisages the fact that the party against whom the hearsay is tendered cannot cross-examine the original declarant.[59] That prejudice is always present when hearsay is admitted. It must be weighed against the reliability of the hearsay in deciding

[59] *S v Ramavhale* 1996 (1) SACR 639 (A) 650-1.

whether, despite the inevitable prejudice, the interests of justice require its admission.

[50] The suggestion that the prejudice in question might include the disadvantage ensuing from the hearsay being accorded its just evidential weight once admitted[60] must however be discountenanced. A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute 'prejudice'. In the present case, Goldstein J found it unnecessary to take a final view, but accepted that 'the strengthening of the State case does constitute prejudice'.[61] That concession to the proposition in question was in my view misplaced. Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must already have concluded that the reliability of the evidence is such that its admission is necessary and justified. If these requisites are fulfilled, the very fact that the hearsay justifiably strengthens the proponent's case warrants its admission, since its omission would run counter to the interests of justice.

[51] Goldstein J also considered that the fact that accused 3 and 4 had testified, and could be cross-examined on their statements,

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[60] *S v Dyimbane and others* 1990 (2) SACR 502 (E) 505*b-c* ('Clearly, any evidence which establishes a crime is prejudicial to the accused').
[61] 2001 (1) SACR 85 (W) para 57.

entailed that there was no procedural prejudice to the other accused.[62] I cannot agree. The entitlement to cross-examine a hearsay declarant called at the trial who disavows the previous statement is almost entirely illusory. In the present trial, given the radical disavowal of their statements by accused 3 and 4 (they denied not just implicating accused 1 and 2, but making any statements to the police at all; accused 4 even denied his signature on his statement), the opportunity to cross-examine them on the original declarations was of no material worth. In this accused 1 and 2 were patently prejudiced. But, as Goldstein also observed, where the interests of justice require the admission of the hearsay, the provision 'does not require the absence of all prejudice'.[63] This conclusion is clearly right.

[52] It remains to consider 'any other factor which should in the opinion of the court be taken into account' (sub-para (c)(vii)). I can think of only one. It is that the admission of hearsay evidence in circumstances such as the present may affect the manner in which police conduct their investigations. The surest proof of guilt is real evidence – eyewitness accounts, first-hand identification, fingerprints, hairs, traces of fabrics, articles left at the crime scene or found upon a suspect. Because of the procedural prejudice it inflicts, hearsay evidence is always less than ideal, and it would be a regrettable consequence of the implementation of the statute if its admission encouraged less reliance on adequate police

[62] Para 58.

investigatory procedures. That consideration cannot however lead to the exclusion of otherwise admissible evidence in terms of the statute. In the present case, the quality of the hearsay evidence and the extraneous reliability guarantors make it imperative that it be admitted, as Goldstein J rightly held.

[53] Once the evidence is admitted, the case against accused 1 becomes overwhelmingly strong. He is convicted of murder as the actual killer, and of participation in the robbery as one of its prime protagonists. Accused 2 is placed on the scene as a robber intimately associated with all that happened there. The reasoning in relation to accused 3 and 4 (paras 31 and 32 above) apply also to him, and his false evidence and fabricated alibi likewise conduce to the conclusion of guilty participation.

[54] The accused were all therefore rightly convicted of murder and of robbery with aggravating circumstances.

SENTENCE

[55] Goldstein J sentenced the accused before the decision in *S v Malgas*,[64] where this Court held that the Criminal Law Amendment Act 105 of 1997 permitted a sentencing court to take into account all considerations traditionally relevant to sentence.[65] Counsel for the State accordingly conceded that the adoption in the trial court

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[63] Para 59.
[64] 2001 (2) SA 1222 (SCA), 2001 (1) SACR 469, endorsed as 'undoubtedly correct' in *S v Dodo* 2001 (3) SA 382 (CC), paras 11 and 40 (Ackermann J).

of the pre-*Malgas* approach entitled this Court to intervene in the sentences imposed. While no broad range of considerations of compelling mitigation were presented to the court, and the accused's lack of remorse (stemming from their continued denial of all involvement) counts against them, I am of the view that in each of their cases a sentence less than the prescribed sentence is justified.

[56] Accused 1, though he pulled the trigger, was not yet twenty when he murdered the deceased. His youth is a consideration of substance compelling the imposition of a lesser sentence. The same apples in the case of accused 3 (only 18 at the time of the crime) and more especially in the case of accused 4 (17 at the time). Although accused 2 was older than the others (24 years), I consider that in his case, as in the case of accused 3 and 4, the fact that oblique intent to kill was proved (*dolus eventualis*) counts as a mitigating factor of substance.

[57] In the result:

1. The appeals of all the appellants against the convictions are dismissed.
2. The appeals of each of the appellants against the sentences imposed upon them on the counts of murder and robbery are allowed, and those

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[65]Paras 9-10.

sentences are set aside. In their place, the following sentences are imposed:

(i) Accused 1 is sentenced to 25 years for the murder, and to ten years for the robbery.

(ii) Accused 2 is sentenced to 18 years for the murder, and ten years for the robbery.

(iii) Accused 3 is sentenced to 18 years for the murder and ten years for the robbery.

(iv) Accused 4 is sentenced to 15 years for the murder and eight years for the robbery.

3. All the sentences imposed upon the accused are to run concurrently.

4. In terms of s 282 of the Criminal Procedure Act, 51 of 1977, the sentences imposed upon the accused are antedated to the date upon which they were originally sentenced, 29 September 2000.

E CAMERON

JUDGE OF APPEAL

HARMS JA) CONCUR

HEHER AJA)