CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 292/21

In the matter between:

MAKHI KAPA Applicant

and

THE STATE Respondent

Neutral citation:	*Kapa v The State* [2023] ZACC 1
Coram:	Baqwa AJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J, Rogers J and Tshiqi J
Judgments:	Mbatha AJ (minority): [1] to [69] Majiedt J (majority): [70] to [109]
Heard on:	11 August 2022
Decided on:	24 January 2023
Summary:	Law of Evidence Amendment Act 45 of 1988 — application of section 3(1)(c) — admission of hearsay evidence — interests of justice

ORDER

On appeal from the High Court of South Africa, Western Cape Division, Cape Town:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is dismissed.

JUDGMENT

MBATHA AJ (Baqwa AJ and Rogers J concurring):

Introduction

[1] The applicant, Mr Makhi Kapa, was convicted of murder and sentenced to 15 years' imprisonment by the High Court of South Africa, Western Cape Division, Cape Town. The respondent is the State. The applicant seeks leave to appeal against both conviction and sentence.

[2] In 2018, the applicant (accused 1 in the High Court) and six other accused persons stood trial in the High Court for crimes seemingly forming part of vigilantism in Khayelitsha. The applicant was charged with four counts of kidnapping, two counts of murder, two counts of assault with intent to do grievous bodily harm, and one count of attempted murder. The applicant was legally represented and tendered a plea of not guilty on all counts. He offered no explanation in terms of section 115 of the Criminal Procedure Act[1] (CPA), preferring to exercise his right to remain silent. He was convicted on one count of murder of Mr Makhuze Bungane (the deceased) and was

[1] 51 of 1977.

sentenced to 15 years' imprisonment. His applications for leave to appeal against conviction and sentence were dismissed by both the High Court and the Supreme Court of Appeal.

[3] This matter turns on whether the High Court was correct, under section 3(1)(c) of the Law of Evidence Amendment Act[2] (Hearsay Act), to admit the statement of Ms Bomikazi Dasi, who died before the trial.

Jurisdiction and leave to appeal

[4] In my view, whether the admission of Ms Dasi's statement was in the interests of justice engages our constitutional jurisdiction. This is because the statutory interests of justice test for the admission of hearsay evidence has a constitutional dimension, and the admission of hearsay might be so unfair as to infringe the applicant's fair trial rights.[3]

[5] If, however, this Court concludes that it was in the interests of justice for the High Court to admit Ms Dasi's statement, our jurisdiction would not extend to determining whether the applicant's conviction was justified on all the evidence.

[6] In respect of leave to appeal, the issues raised in this application are of public importance. The events that led to the conviction of the applicant arose in a vigilante context. Vigilantism is alarmingly common in South Africa due to, among others, inadequate policing in low-income communities. This lack of state support leads to self-help by residents. This Court has said, "[s]elf-help . . . is inimical to a society in which the rule of law prevails . . . . Respect for the rule of law is crucial for a defensible and sustainable democracy."[4] Self-help cannot be condoned by our courts, but even in

[2] 45 of 1988.

[3] *Savoi v National Director of Public Prosecutions* [2014] ZACC 5; 2014 (5) SA 317 (CC); 2014 (5) BCLR 606 (CC) at para 49; *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) at para 26; and *S v Ndhlovu* [2002] ZASCA 70; 2002 (6) SA 305 (SCA) at para 16.

[4] *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 at paras 11 and 17.

these circumstances, it remains important to ensure that fair trial rights are upheld. It is in the interests of justice that leave to appeal be granted.

Condonation

[7] It is in the interests of justice for condonation for the late filing of this application to be granted. The applicant filed the application over four months late. The applicant, however, advanced reasonable grounds for the delay in bringing the matter before this Court. Additionally, and despite the length of time it took the applicant to bring the application before this Court, the potential prejudice the applicant stands to suffer in the wake of the alleged violation of his right to a fair trial if condonation is refused far outweighs the prejudice that would be suffered by the State if condonation is granted.

Summary of evidence before the High Court

Ms Aida Bungane

[8] Ms Aida Bungane, the grandmother of the deceased, gave the following oral evidence before the High Court. On the morning of 21 August 2016, three men, "Azisa", "Lazaro" and another person, arrived at her home looking for the deceased. The three men wanted the deceased to point out certain missing items. She testified that all the accused persons before court were known to her. She identified Lazaro as accused 2, Mr Siviwe Mlotywa. Azisa and the third man were not before court. The deceased left her home with the three men.

[9] Later that day, Mr Masonwabe Makoma (accused 4, also known by the nickname "Big") arrived at her house carrying the deceased. Mr Makoma explained that the deceased and others had been assaulted in the applicant's house and that he had found the deceased at the applicant's house. An ambulance was called. Upon its arrival, the deceased was examined by paramedics and certified dead at 17h08.

Dr Bronwyn Afton Inglis

[10] Dr Bronwyn Afton Inglis, a medical doctor and a forensic pathologist based at Tygerberg Forensic Pathology Services, testified in relation to the deceased's post-mortem report. In the High Court, Dr Inglis read her report into the record:

> "The following was noted on external examination of the body. Abrasions were noted to the face and forehead. Multiple lacerations of the scalp were present. Extensive circumferential swelling and bruising of both arms were present. Extensive swelling and bruising of both lower legs were present. Tramline bruises were present on the posterior and lateral aspects of the left thigh. Multiple abrasions were present on both arms, both thighs and both legs. Multiple lacerations were present on both shins. Extensive bruising and scattered abrasions were present on the lower back. On internal examination of the body traumatic subarachnoid haemorrhage of the brain was present. Haemorrhage was noted into the eighth intercostal muscle on the left . . . . All of the organs were pale."

[11] Dr Inglis concluded that the cause of death was consistent with extensive blunt force injury to the head and body and its consequences. She also testified that tramline or railway bruises were present on the body of the deceased and that wounds of this kind are typically caused by a rod-like object, such as a broomstick.

Warrant Officer Blanche Amy Stubbs

[12] Warrant Officer Blanche Amy Stubbs, a forensic analyst stationed at the Forensic Science Laboratory in Plattekloof, testified in relation to two DNA reports. She confirmed that blood samples obtained from inside the applicant's house matched samples obtained from the deceased and Mr Monwabisi Nkayi (second deceased).

Sergeant Simphiwe Msolo

[13] Sergeant Simphiwe Msolo, the investigating officer, testified that he took statements from, among others, Ms Dasi, Ms Bulelwa May and Mr Zukisani May. Ms Dasi, the complainant in respect of count 9 (assault with intent to do grievous bodily harm), died before the commencement of the trial. Ms Bulelwa May could not be

traced. Mr Zukisani May's evidence was expunged from the record by agreement between the parties after he repudiated his written statement.

[14] Sergeant Msolo sought the services of Captain Joubert from the Plattekloof Forensic Laboratory who found evidence of blood spatter that had been cleaned up on the floor and walls of the applicant's house.

[15] Sergeant Msolo testified that, after Ms Dasi gave her statement, she pointed out the homes of various suspects to him. The State never applied to admit this oral hearsay evidence.

The statement of Ms Dasi

[16] The State brought an application in terms of section 3(1)(c) of the Hearsay Act to admit Ms Dasi's statement. This statement was taken by Sergeant Msolo on 23 August 2016, two days after the death of the deceased. Ms Dasi spoke to Sergeant Msolo in isiXhosa, and he reduced the statement to writing in English. Sergeant Msolo read back an isiXhosa translation of what he had written. She confirmed the correctness of what he had read back to her and signed the statement.

[17] The defence opposed the admission of the statement. The High Court admitted the statement and held:

> "In the exercise of my judicial discretion I find that the interests of justice demand the admission of the oral and written hearsay evidence of the deceased. In the result the application is accordingly granted."

[18] Ms Dasi's statement reads as follows:[5]

[5] This is the transcript of the statement as read into the record by Sergeant Msolo. The statement itself, which was exhibit "O" in the trial court, was not part of the record in this Court. On the State's version, the names mentioned by Ms Dasi refer to the following people:

"Makhi" – the applicant, accused 1; "Anele" – accused 3; "Big" – accused 4; "Svegi" / "Svitch"– accused 5; "Vubela Viwe" – accused 6; "Siyabulela" – accused 8, deceased by time of the trial; "Makhuze" – Mr Makhuze

"On Sunday 21 August 2016, at about plus/minus 16h00, I did arrive at home, coming from Gugulethu. I did heard from my mother that there were guys looking for me, driving a white Tazz. At that moment I did see this Tazz passing on my street. I decided to follow it. I did saw this Tazz parked on Makhi's house. I did also go there. I did saw Makhuze desisting [sitting]. Both hands were tied up with a rope. Also his legs were tied up with yellow-and-black rope. They did took off his trouser. Bongane was carrying a plank hockey stick, busy beating Makhuze on his hands. Azizo was carrying a silver golf stick, hitting Makhuze over his head. Makhi did pull Makhuze to other room as he was bleeding over his hedge [head] and mouth. Bongane said to Monwabisi, Nono, the deceased, nicknaming Nono, the deceased, he must stand up. And he said he can't stand. Nono did ask me to pick him up to those people in dining room. He did crawl to dining room. Anele did kicked him over his chest, and he fell down. Anele took out a knife and stabbed Monwabisi on his hips and left side and on right side. He also stabbed him twice on lower abdomen. Svegi did call Bulelwa as [she] was on that room. Sakumzi did hit Bulelwa with a plank over her head. Xolani was having a sjambok. He assaulted Bulelwa with it over her body. Anele did hit her with a chisel over her head on the back and she fainted. They did call Zukisani. His hands were both tied up with yellow-and-black rope and his both legs. I did assisted him to stand up. They informed him to clean blood on dining room. He was using a mop. Vubela Viwe, he did hit Zukisani under his feet and also hit him over his hands, saying he will hit [him] 20 times. Big [Mr Makoma] also did came inside the room and hit Makhuze with sjambok over his face. Makhi also hit Makhuze with golf stick over his body. Bongane also hit Makhuze with empty bottle over his head. Anele did stepped Makhuze on other leg twice and Anele did hit Makhuze with chisel on other leg four times. Big did put up Monwabisi on a mat and pulled him outside. Bongane did hit Monwabisi with a hockey stick of plank on the back of his neck. Big did put Makhuze over his shoulders and took him back home. I was with Big to Makhuze's place. Bulelwa and [her] brother, I did left them there. Monwabisi was already outside. Lazaro was also there but I didn't see him beating anyone. Anele did also hit me with chisel while I was trying to block him not to assault Makhuze. He hit me over the head.

Bungane, the deceased, of whose murder the applicant was convicted; "Monwabisi" / "Nono" – Mr Monwabisi Nkayi, the second deceased, of whose murder the applicant was acquitted; "Bulelwa" – Ms Bulelwa May, the complainant in count 7; and "Zukisani" – Mr Zukisani May, the complainant in count 8.

The other perpetrators named by Ms Dasi ("Bongane", "Azizo", "Mara", "Sakumsa" / "Sakumzi", "Andile" and "Xolani") were not located by the police. Ms Dasi named 12 perpetrators in total, though "Lazaro" (accused 2), according to her, played a passive role.

> By the time I arrived, Monwabisi was already being assaulted as he was bleeding. Siyabulela did slap Monwabisi over his face several times. Mara did kick Makhuze on his groin several times. The role players on this matter who assaulted both deceased and victims are Makhi, Azizo, Andile, Anele, Svitch, Sakumsa, Vubela, Xolani, Siyabulela and Mara. All of them, they suspect that deceased and victim has stolen music of Makhi."

[19] At the end of the State's case, the defence applied for a discharge in terms of section 174 of the CPA. The applicant was discharged on counts 1 to 4 but not on counts 5 to 9 (which included the two murder charges). After taking instructions, counsel for the applicant closed the defence's case. None of the accused testified.

Mr Makoma's warning statement

[20] Mr Makoma, accused 4, gave a warning statement that contained the following: Mr Makoma heard that people were being assaulted at the applicant's house, so he went there. He saw multiple victims with signs of injury, including the deceased who had wounds on both legs. He also saw the alleged stolen items on the ground, "such as a car radio and other things". He took the deceased back to his grandmother, Ms Bungane's, house. Later on, he learnt that the deceased had died.

Admissions

[21] The applicant made the following relevant admissions in terms of section 220 of the CPA: that the deceased was in fact Makhuze Bungane; that he was declared dead at his grandmother's house at about 17h08 on 21 August 2016; that Dr Inglis performed a post-mortem on the deceased on 26 August 2016 and that her findings were noted correctly; that the deceased did not sustain further injuries from the time the alleged offence was committed until the post-mortem was conducted; that the cause of death of the deceased was consistent with blunt force injury to the head and body; that the photographs of the scene and report filed by Captain Joubert were correct; and the correctness and contents of the chain-of-custody statements.

High Court's findings

[22] On the admissibility of the hearsay statement, the High Court held that Ms Dasi's statement was admissible under section 3(1)(c) of the Hearsay Act. It found that the statement was "the only conduit through which . . . the accused's actions [could] be linked". It found the evidence reliable because it was evidence of an eyewitness and the other evidence "bolster[ed] the veracity of what [was] contained in Ms Dasi's statement".

[23] The High Court found the applicant guilty of the murder of the deceased based on the doctrine of common purpose. It found that the applicant actively participated in the assault on the deceased by dragging his body and hitting him with a golf club.

[24] On the question of identification, the High Court considered the evidence of Ms Bungane, Sergeant Msolo, the statement of Ms Dasi and the warning statements of certain of the accused, including Mr Makoma. It concluded that, although Ms Dasi did not point out the accused, either in a formal identification parade or otherwise, it was sufficient that she pointed out their homes to Sergeant Msolo, who testified that the accused were arrested on the strength of her statement. In light of the above evidence, the High Court held that the State had proved that the accused, including the applicant, were the persons mentioned in Ms Dasi's statement.

[25] In relation to the applicant's involvement in the incident, the Court considered Ms Dasi's statement. The High Court found that Ms Dasi's statement was corroborated by forensic evidence and the accused's admissions in terms of section 220 of the CPA.

The right to adduce and challenge evidence

[26] The right to a fair trial enshrined in section 35(3) of the Constitution encompasses various fundamental rights, including the right to remain silent, and to adduce and challenge evidence. In *Molimi*, this Court described the right to a fair trial as follows:

> "[T]he right to a fair trial . . . 'has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime'. . . . More importantly, proceedings in which little or no respect is accorded to the fair trial rights of the accused have the potential to undermine the fundamental adversarial nature of judicial proceedings and may threaten their legitimacy."[6]

[27] Although the concept of a fair trial is a cornerstone of our criminal law jurisprudence, not every minor irregularity vitiates the right to a fair trial.[7] In *Zuma*, this Court expressed itself as follows on the nature of the irregularities that render a trial unfair:

> "The right to a fair trial . . . embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In *S v Rudman; S v Mthwana* 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a court of criminal appeal in South Africa was to enquire—
>
> > 'whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted . . . [A court of appeal] does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice", or with the "ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration".'
>
> That was an authoritative statement of the law before 27th of April 1994. Since that date, section 25(3) has required criminal trials to be conducted in accordance with just those 'notions of basic fairness and justice'. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions." [8]

[6] *S v Molimi* [2008] ZACC 2; 2008 (3) SA 608 (CC); 2008 (5) BCLR 451 (CC) at para 42.

[7] *S v Jaipal* [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC).

[8] *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 16. This was with reference to section 25(3) of the interim Constitution, the predecessor of section 35 of the Constitution.

[28] Section 35(3)(i) of the Constitution guarantees the right to adduce and challenge evidence. In *Ndhlovu*, the Supreme Court of Appeal clarified that section 35(3)(i) does not create an automatic right to cross-examine. The Supreme Court of Appeal said that:

> "The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of section 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."[9]

[29] There are instances, such as the present case, where challenging evidence through cross-examination is impossible. In such circumstances, the notions of basic justice and fairness demand that the admission of hearsay evidence in criminal proceedings is done with caution, having regard to all the factors in the statutory test for the admission of hearsay and the overriding consideration of the interests of justice. This is particularly so where the decision on admission of the hearsay evidence is likely to play a decisive role in whether the accused is convicted or acquitted.

Should the High Court have admitted Ms Dasi's statement?

[30] Section 3(4) of the Hearsay Act defines hearsay as "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". Ms Dasi's statement, as tendered by the State through the oral evidence of Sergeant Msolo, is hearsay evidence. The State successfully applied for the admission of this hearsay evidence in terms of section 3(1)(c) of the Hearsay Act.

[9] *Ndhlovu* above n 3 at para 24.

[31] Section 3(1)(c) of the Hearsay Act provides as follows:

> "(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—
>
> . . .
>
> (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;
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> (iv) the probative value of the evidence;
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> (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
>
> (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."

[32] Hearsay evidence is inadmissible, unless the court is of the opinion that it is in the interests of justice for it to be admitted, taking into account the factors referred to in section 3(1)(c)(i) to (vii). The Supreme Court of Appeal in *Ndhlovu* held that section 3(1)(c)'s criteria – which must be "interpreted in accordance with the values of the Constitution and the 'norms of the objective value system' it embodies" – protects against the unregulated admission of hearsay evidence and thereby sufficiently guards the rights of accused.[10] I turn to a consideration of the factors listed in section 3(1)(c).

The nature of the proceedings

[33] It is more likely that hearsay evidence will be admitted in civil proceedings than in criminal proceedings – this is "because of [the] presumption of innocence, and the

[10] Id at para 16.

courts' intuitive reluctance to permit the untested evidence to be used against the accused in a criminal case".[11] The nature of the proceedings under appeal in this matter, namely a criminal trial, militates against admission.

The nature of the evidence

[34] The statement contained information about the criminal acts allegedly perpetrated by the accused; a single witness provided the statement; the statement described a crowded and traumatic scene in which the witness was herself allegedly assaulted; and the investigating officer who took the statement already had suspects in mind. The cautionary rule is applicable because the statement identified the accused and was made by a single witness. That Ms Dasi's statement was the only evidence which the State could tender on the identification of the perpetrators, was known at the time the High Court was called upon to decide upon its admissibility. It was thus known that the decision on the admission of the statement was likely to be decisive in whether the applicant was convicted or acquitted.

[35] The cautionary rule requires that courts treat evidence as to the identity of the accused person with caution, as eyewitness identifications are notoriously fallible and prone to error. This is especially so in this matter because Ms Dasi was a single witness. In *Mthetwa* the Appellate Division held that—

> "[i]t is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence."[12]

[11] *Metedad v National Employers' General Insurance Co Ltd* 1992 (1) SA 494 (W) at 499.

[12] *S v Mthetwa* 1972 (3) SA 766 (A) at 768. This was reiterated in *S v Miggel* 2007 (1) SACR 675 (C) at 678.

[36] Ms Dasi's statement should not have been admitted without proper application of the cautionary rule. This rule is premised upon the accused's right to a fair trial. Although oral identificatory evidence is not, as a general rule, inadmissible, the reliability of a witness testifying as to the identification of an accused must be considered in light of the evidence as a whole. The High Court in this matter did not take into account the circumstances under which Ms Dasi's observations, as contained in her statement, were made. The cautionary rule was mentioned but not applied in respect of the evidence, as is required by law. The cautionary rule impacts upon the assessment of the reliability and probative value of the statement under the section 3(1)(c) enquiry. Where a single witness as to identification testifies orally, the accused has the opportunity to test all the matters calling for caution. This opportunity does not exist where such evidence is received in hearsay form.

[37] The High Court paid lip service to the cautionary rule. Ms Dasi's evidence was the only evidence identifying the applicant as an assailant. This fact was overlooked by the High Court. The finding of the High Court cannot be the one as envisaged in section 208 of the CPA.[13] It is evident that the contents of her statement did not meet the requirements of section 208. The deficiencies in the statement, considered holistically, reveal a wanting version. It is difficult to get a chronological sequence as to what exactly happened.

[38] In *Lubaxa* it was held that what a fair trial entails must be determined by the circumstances of each case.[14] The circumstances of this case required independent corroborative evidence on the identification issue, in particular the presence of the applicant when the assaults were perpetrated and his involvement therein.

[13] Section 208 of the CPA reads that "[a]n accused may be convicted of any offence on the single evidence of any competent witness".

[14] *S v Lubaxa* [2001] ZASCA 100; 2001 (4) SA 1251 (SCA) at para 21.

The purpose for which the evidence was adduced

[39] The State tendered the evidence to link the accused to the crime. In other words, the evidence was adduced for purposes of proving the guilt of the accused in circumstances where, but for the hearsay evidence, the accused would have been acquitted. The absence of other eyewitness evidence indicates a failure by the State to discharge its onus. The fact that the State does not have such evidence is not a justification for allowing the admission of hearsay evidence. It is of no legal significance, in considering whether to admit evidence, how important a party regards a piece of evidence for the bolstering of its own case.

The probative value of the evidence

[40] The Supreme Court of Appeal in *Ndhlovu* defined "probative value" in the following terms:

> "'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."[15]

[41] The enquiry also encompasses the extent to which the evidence is considered to be reliable as well as the exercise of balancing the probative value of the evidence against its prejudicial effect.

[42] There are a host of factors relevant to the reliability question, namely: (a) any interest in the outcome of the proceedings by the witness; (b) the degree to which it is corroborated or contradicted by other evidence; (c) the contemporaneity and spontaneity of the hearsay statement; and (d) the degree of hearsay.[16]

[15] *Ndhlovu* above n 3 at para 45.

[16] Schwikkard and van der Merwe *Principles of Evidence* 4 ed (Juta & Co Ltd, Cape Town 2016) at 298.

[43] Ms Dasi's statement only accounts for a short period of time on the day in question. The deceased was fetched from his grandmother's house on the Sunday morning. According to Ms Dasi's statement, she got home around 16h00 and followed the white car to the applicant's house, where she would have arrived a little after 16h00. The deceased was declared dead at 17h08. Before then, accused 4 had to carry the deceased from the applicant's house to Ms Bungane's house, and the ambulance had to be called. Therefore, on Ms Dasi's version, she would only have been observing events at the applicant's house for about half an hour, say from 16h15 to 16h45. Though the State did not prove the exact time that the deceased was fetched in the morning, there are a number of hours that are unaccounted for before Ms Dasi arrived and during which the deceased is likely to have been in the hands of community members.

[44] The post-mortem report does not exclude, as a reasonable possibility, that the fatal wounds were administered before Ms Dasi arrived on the scene. If that is a reasonable possibility, there is no evidence that the applicant was present or made common cause with the persons who perpetrated the fatal assault. In the circumstances, and even if it is assumed that Ms Dasi's observations were honest and reliable, her statement was not calculated to establish that the applicant (or any other persons whom Ms Dasi named) were the persons responsible for the deceased's death.

[45] The reliability of the statement in respect of identification is questionable. Sergeant Msolo already had the applicant's name as a suspect when he interviewed Ms Dasi. On his own admission, Sergeant Msolo did not test the reliability of her version, particularly as it related to the identification of the accused persons. He did not establish whether there was sufficient lighting to enable Ms Dasi to observe events clearly (for example, whether the door and curtains were open) or whether Ms Dasi had previous knowledge of the accused persons.

[46] Ms Dasi was not an independent witness. She was the deceased's girlfriend and the complainant in count 9. She had an interest in the outcome of the proceedings. On its own, this cannot vitiate the reliability of her evidence. I have had the benefit of

reading the judgment of my Brother Majiedt J (second judgment). I agree that there is nothing untoward about a victim seeking justice for themselves and their loved ones. However, Ms Dasi's independence is a relevant consideration in the enquiry into the probative value of her statement and, taken together with the other factors, militates against a finding of reliability.

The reason evidence was not given by Ms Dasi

[47] Ms Dasi died before the commencement of the trial. We cannot speculate whether she would have confirmed, disavowed or corrected her statements materially if she had survived to testify. We do know, however, that the only other alleged eyewitness, Mr May, repudiated his statement, and his evidence was thus expunged.

Prejudice to the applicant

[48] Ms Dasi's statement must be weighed against the prejudice occasioned to the accused person, if admitted. I accept that the mere fact that evidence strengthens the prosecution's case does not render it prejudicial to an accused. *Ndhlovu* states:

> "A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute 'prejudice'. . . . 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."[17]

[49] However, the Court in *Ndhlovu* emphasised that—

[17] *Ndhlovu* above n 3 at para 50.

> "prejudice is always present when hearsay is admitted. It must be weighed against the reliability of the hearsay in deciding whether, despite the inevitable prejudice, the interests of justice require its admission."[18]

[50] The prejudice occasioned to the applicant by the admission of Ms Dasi's statement is significant – it played a decisive role in his conviction. This is clear because all evidence, apart from the hearsay statement, applied equally to the murder of the second deceased, of which the applicant was acquitted. Further, although the right to adduce and challenge evidence does not create an automatic right to cross-examine, Ms Dasi's statement was, for the reasons outlined in the discussion on its probative value, of a sort that would have been susceptible to significant challenge under cross-examination. This increases the prejudice occasioned to the applicant by the statement's admission.

Any other factor

[51] The applicant also raised an objection to the admissibility of Ms Dasi's statement on another ground – what I term "the language issue". He argued that Ms Dasi's statement did not comply with regulation 2(1)(a) of the Regulations[19] promulgated in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act.[20] This regulation states that a deponent must be able to confirm that she "knows and understands the content of the declaration". The contention here is that, because there was no qualified interpreter when the statement was taken, it is unclear that the English recordal is an accurate statement of what Ms Dasi said in isiXhosa or of what Sergeant Msolo translated back to her in isiXhosa.

[52] As an independent objection to the validity of the statement, this argument is of no moment. Although Ms Dasi's statement may not qualify as a valid affidavit in light of the regulation in question, the admissibility of the hearsay statement does not depend

[18] Id at para 49.

[19] Regulations in terms of section 10, GN R1258 *GG* 3619, 21 July 1972 (as amended).

[20] 16 of 1963.

on whether or not Ms Dasi's statement qualified as a valid affidavit. The hearsay evidence was in fact Sergeant Msolo's testimony as to what Ms Dasi told him and that testimony does not depend on whether Ms Dasi's statement was a valid affidavit.

[53] However, for the purposes of assessing whether or not the statement should have been admitted, the language issue becomes relevant. It is unsettling that Ms Dasi's statement was recorded in a language that she did not understand. Her signing of the statement was not, in the circumstances, a satisfactory guarantee of her adoption of the English version recorded by Sergeant Msolo.

The interests of justice

[54] A court must be of the opinion that it is in the interests of justice for the hearsay evidence to be admitted. The provisions of section 3(1)(c) each require consideration in order to limit prejudice to the accused, and all the factors must be considered cumulatively.

[55] Section 3 of the Hearsay Act is qualified by the opening words of the section which provide that it is "subject to the provisions of any other law". Therefore, the ordinary rules of evidence apply. It is clear that the case brought against the applicant in the High Court was based on the uncorroborated identificatory evidence of a single witness, Ms Dasi.

[56] Ms Dasi may have been honest but, in the absence of cross-examination, the High Court was not in a position to assess her honesty. However, and assuming that she was honest, there were still major shortcomings in her statement. The Supreme Court of Appeal, in *Shaik*, reasoned that although the accused whose hearsay evidence was under consideration in that case was unreliable or dishonest in general, it did not follow that they were unreliable or dishonest in respect of the content of the hearsay statement in that case.[21] Ms Dasi's statement did not deal with the

[21] *S v Shaik* [2006] ZASCA 105; 2007 (1) SA 240 (SCA) at para 174.

visibility at the scene (perhaps because Sergeant Msolo did not ask her) nor whether she had sufficient opportunity to observe the events, given the number of role players in the room. The statement says that she was assaulted with a chisel on her head. Sergeant Msolo's evidence in this regard contradicted Ms Dasi's. He said that she had no injuries when he interviewed her. Because Ms Dasi's statement falls short on the aforementioned safeguards, her evidence lacks reliability. The utility of the statement was limited to further investigation by Sergeant Msolo.

[57] Notwithstanding the extensive references to what each accused person did to the deceased, it is doubtful that she could have had the opportunity to observe about 12 people and be precise about each and everyone's role in the assault in a highly charged scene in which she was allegedly assaulted. That the recollection of the names of the assailants was made with such precision, in the absence of an explanation of how she knew them, is questionable. In her statement, Ms Dasi stated that by the time she arrived the second deceased was already being assaulted and was bleeding. She gave a blow-by-blow account of the assault on both of the deceased by various persons. Her ability to closely observe these simultaneous assaults was not explained. Furthermore, it was never established how close in proximity she was to the deceased persons, as it appears that there were many assailants in the room. These are among the matters which a cross-examiner would have explored, and quite probably exploited to good effect, had Ms Dasi survived to give oral evidence.

[58] Courts are generally hesitant to admit hearsay evidence that is decisive in convicting an accused. The Supreme Court of Appeal in *Ndhlovu* stated that "admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused" should only be done "if there is compelling justification for doing so".[22] Ms Dasi's statement played a decisive role in convicting the applicant. It ascribed an active role to the applicant in respect of the murder of the deceased, but did not do so in respect of the murder of the second deceased. It was on this basis that the

[22] *Ndhlovu* above n 3 at para 39, relying on *S v Ramavhale* [1996] ZASCA 14; 1996 (1) SACR 639 (SCA) at 649.

High Court acquitted the applicant of the murder of the second deceased. In other words, the presence of bloodstains, the DNA evidence of the second deceased's blood in the applicant's house, and the fact that the applicant did not testify were not regarded by the High Court as justifying the applicant's conviction on count 6.

[59] Implicit in the provisions of section 3(1)(c) is that there should be a cumulative consideration of all the factors in arriving at a conclusion as to whether it is in the interests of justice to admit the hearsay. This was confirmed by this Court in *Molimi*.[23] In the absence of direct evidence, the trial court ought to have been alive to the dangers posed by the admission of the hearsay evidence.

[60] The High Court relied upon what Ms Dasi allegedly told Sergeant Msolo about where the various persons mentioned in her statement resided, when he was taking her home. There was, however, no section 3(1)(c) application brought by the State to admit this hearsay evidence. Therefore, Ms Dasi's pointing-out evidence should not have been considered at all. The alleged pointing-out did not amount to corroboration of Ms Dasi's statement.

[61] Ms Bungane's testimony is of no assistance as to the identification of the applicant as he was not amongst the persons who fetched the deceased. Ms Bungane knew all the accused persons before the High Court and could have identified the applicant if he was amongst those who fetched the deceased from his home.

[62] It appears that the High Court did not have regard to *Mhlongo*[24] when it relied on the warning statements of the applicant's co-accused as corroborative evidence. This Court held that extra-curial admissions of an accused person are inadmissible against their co-accused and that such an admission violates the co-accused's rights to equality before the law and equal protection of the law.[25]

[23] *Molimi* above n 6 at para 35.

[24] *S v Mhlongo; S v Nkosi* [2015] ZACC 19; 2015 (2) SACR 323 (CC); 2015 (8) BCLR 887 (CC).

[25] Id at para 44. See also *Litako v S* [2014] ZASCA 54; 2015 (3) SA 287 (SCA) at paras 53-4.

[63] The DNA evidence established two undisputed facts: that the blood samples taken from the applicant's house were a match to the two deceased persons and that the assault took place at the house of the applicant. However, the mere presence of the deceased persons' blood in the applicant's house is not enough to conclude that the applicant was present during the assault or participated in the assault in furtherance of a common purpose. The true issues at the trial concerned the identification of the perpetrators, and not the fact that the two deceased persons were assaulted at the applicant's house.

[64] In the second judgment, emphasis is placed on the fact that the deceased's body had tramline injuries consistent with the applicant having hit the deceased with a golf club. The second judgment opines that Ms Dasi "would have to have had direct knowledge (or received peculiarly accurate second-hand information) of the kinds of wounds sustained by the deceased for the narrative in her statement to accord in such significant detail with the post-mortem report". In my view, this observation overstates the extent to which the post-mortem report corroborates Ms Dasi's statement. The second judgment assumes that Ms Dasi did not see the effects of the injuries suffered by her boyfriend. However, her own statement says that she accompanied accused 4 to Ms Bungane's house, where the deceased was certified dead at 17h08. So she could quite plausibly have seen what injuries the deceased sustained. Furthermore, her statement identifies several persons who allegedly assaulted the deceased with stick-like objects. At different times, according to her, "Azizo" and then the applicant struck the deceased with a "golf stick" while on another occasion "Bongane" struck the deceased with a hockey stick. And ultimately, the question is not whether the statement could reliably prove that the deceased was struck with a rod-like object but whether it could reliably prove that the perpetrators of those particular assaults were the persons she named.

Failure to testify

[65] The High Court found that the applicant's failure to testify in the face of the prima facie evidence against him, led that evidence to be proof beyond a reasonable doubt. Before the advent of the Constitution, the Appellate Division expressed itself as follows in *Mthetwa*, which was quoted with approval in *Chabalala*:

> "Where . . . there is a direct *prima facie* evidence implicating the accused in the commission of the offence, his failure to give evidence, *whatever his reason may be* for such failure, in general, *ipso facto* tends to strengthen the State's case, because there is nothing to gainsay it, and therefore less reason for doubting its credibility or reliability."[26]

[66] Similarly, in *Boesak*,[27] this Court, having stated that an accused person who chooses to remain silent in the face of evidence calling for an explanation runs the risk that the court may well be entitled to conclude that the evidence is sufficient for a finding of guilt, warned that whether such a conclusion is justified will depend on the weight of the evidence.[28]

[67] The right to a fair trial includes the right "to be presumed innocent, to remain silent, and not to testify during the proceedings".[29] Accused persons have the right not to testify but, if they elect not to, they run the risk of leaving the State's case unrebutted. However, "[t]he failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt".[30] In *Hlongwa*, it was held that "the accused's silence adds nothing to the strength of the prosecution case. What it does is no more than to

[26] *Mthetwa* above n 12 at 769D quoted with approval in *S v Chabalala* 2003 (1) SACR 134 (SCA*)* at para 20.

[27] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC).

[28] Id at para 24.

[29] Section 35(3)(h) of the Constitution.

[30] *Osman v Attorney-General, Transvaal* [1998] ZACC 14; 1998 (4) SA 1224 (CC); 1998 (11) BCLR 1362 (CC) at para 22.

leave the prosecution case undisturbed by any evidence that either challenges it or explains it away."[31]

[68] The High Court held that the evidence showed that the applicant's house was the scene of the crime and required an answer from him. However, the basis on which the Court placed the applicant at the scene of the crime and concluded that he had made common purpose with the deceased's assailants was Ms Dasi's statement. If the admission of Ms Dasi's statement was incorrect (as is my view), the remainder of the evidence presented by the State against the applicant was insufficient to prove the guilt of the applicant beyond a reasonable doubt. The State's counsel made a guarded concession to this effect during the hearing. The applicant's election not to testify, therefore, cannot be detrimental to his case.

[69] Accordingly, had I commanded the majority, I would have upheld the appeal and set aside the conviction and sentence.

MAJIEDT J (Kollapen J, Madlanga J, Mathopo J, Mhlantla J and Tshiqi J concurring):

[70] I have had the pleasure of reading the judgment of my Sister, Mbatha AJ (first judgment). I agree on the granting of condonation. Save for what I say in relation to the appeal against sentence, I agree that the appeal against the applicant's conviction engages our jurisdiction and that the interests of justice require that we grant leave to appeal. In respect of the appeal against the conviction, this Court's jurisdiction is engaged on the basis that there is sufficient evidence on record to suggest, *prima facie*, that there *may* have been a serious breach of section 35 of the Constitution.[32] In addition, I am of the view that it is in the interests of justice for this Court to hear the appeal against the conviction. This is because the question of when it is in the interests

[31] *S v Hlongwa* 2002 (2) SACR 37 (T) at para 45.

[32] Compare *S v Van der Walt* [2020] ZACC 19; 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC) at para 15.

of justice to admit hearsay evidence in terms of section 3(1)(c) of the Hearsay Act – the central issue in this case[33] – is clearly of sufficient interest beyond those of the parties in this case. In this case, that admissibility question concerns, in the main, the probative value of Ms Dasi's statement.

[71] As regards the application for leave to appeal against sentence, it is clear from this Court's judgment in *Van der Walt* that in order for the Court to entertain an appeal against sentence, the appeal must either raise a constitutional issue or it must raise an arguable point of law of general public importance which the Court ought to consider.[34]

[72] The main thrust of the applicant's argument is that the High Court should have deviated from the prescribed minimum sentence due to his personal circumstances which, according to him, mitigated against imposition of the prescribed minimum sentence. The applicant argues that the High Court, instead, "[paid] lip service to the *Zinn* triad".[35] This is so, according to the applicant, because the High Court overemphasised the seriousness of the crime, the applicant's role in the commission of the crime, and failed to consider the interests of society. The sum of the applicant's argument, thus, is that the High Court did not evaluate and weigh the facts or evidence placed before it in a satisfactory manner.

[73] It is clear from the above that the appeal against the sentence does not raise an arguable point of law, let alone one of general public importance which this Court ought to consider. Consequently, the Court's extended jurisdiction is not engaged and nothing more needs to be said on that score. The question becomes whether it engages the Court's constitutional jurisdiction.

[33] The first judgment correctly confines its deliberations to this aspect. The other grounds argued for the setting aside of the conviction were all unmeritorious and require no consideration at all.

[34] *Van der Walt* above n 32 at paras 18-21.

[35] In *S v Zinn* 1969 (2) SA 537 (A) at 540G, the Court held that what has to be considered, when determining the suitable sentence in each circumstance, is "the triad consisting of the crime, the offender and the interests of society".

[74] In *Bogaards*, this Court held that:

> "[A]bsent *any other* constitutional issue, the question of sentence will generally not be a constitutional matter. It follows that this Court will not ordinarily entertain an appeal on sentence merely because there was an irregularity; there must also be a failure of justice. Furthermore, *this Court does not ordinarily hear appeals against sentences based on a trial court's alleged incorrect evaluation of facts*. For instance, this Court will not, in the ordinary course, hear matters in relation to sentence merely because the sentence was disproportionate in the circumstances. Something more is required."[36] (Emphasis added.)

[75] The Court, albeit in a footnote, then states that "[s]ome irregularities are considered per se failures of justice. These are irregularities which are so gross a departure 'from established rules of procedure that it can be said that the appellant was not properly tried'."[37] As is clear from the applicant's argument as summed up above, he simply takes issue with the High Court's evaluation of the facts; there is no indication or a suggestion of a failure of justice, actual or otherwise. Consequently, the appeal against sentence does not engage the Court's constitutional jurisdiction and leave to appeal against the sentence falls to be refused. I discuss next the merits on conviction.

[76] My Sister has set out the material facts in substantial detail and I gratefully adopt that exposition. For purposes of emphasis and context, I may repeat some of them or elaborate, where necessary. The first judgment correctly accepts that this incident emanated from an apparent act of vigilantism. Plainly, the High Court convicted the applicant primarily on the strength of Ms Dasi's statement. This view is supported by the following:

[36] *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC); 2012 (12) BCLR 1261 (CC) at para 42. The "any other constitutional issue" must be an issue relating to sentence as was the case in *Bogaards*. See also *Van der Walt* above n 32 at paras 18-21.

[37] *Bogaards* id at fn 41.

(a) The only evidence that pertinently related to the role that the applicant directly played in the murder of the deceased and in the death of the second deceased was the statement of Ms Dasi.

(b) Ms Dasi's statement attributed an active role to the applicant in the death of the deceased and little to no role at all in the death of the second deceased.

(c) As a result, and notwithstanding the fact that both deceased persons' blood was found at the applicant's house and that both were suspected of having stolen the applicant's property, the Court found the applicant guilty of the murder of the deceased and acquitted him in respect of the murder of the second deceased.

[77] The provisions of section 3(1)(c) of the Hearsay Act have been set out in the first judgment. The factors listed in section 3(1)(c) must be viewed holistically and weighed collectively in determining whether it is in the interests of justice to admit the hearsay evidence.[38] The factors that bear consideration when a court is determining whether it is in the interests of justice for the statement to be admitted are:

(a) the nature of the proceedings;
(b) the nature of the evidence;
(c) the purpose for which the evidence is tendered as evidence;
(d) the probative value of the evidence;
(e) the reason why the evidence is not given by Ms Dasi;
(f) any prejudice which the admission of the evidence might entail for the applicant; and
(h) any other factor which should, in the opinion of the court, be taken into account.

[38] Schwikkard and van der Merwe above n 16 at 298.

Nature of the proceedings

[78] It is has been suggested that the likelihood of hearsay evidence being admitted in civil application proceedings is greater than in criminal trial; and it is least likely to be admitted in criminal proceedings.[39] Here, the nature of the proceedings self-evidently militates against admission.

Nature of the evidence

[79] In essence, the enquiry under this rubric is, first, the extent to which the evidence can be considered reliable; and, second, the weighing of the probative value of the evidence against its prejudicial effect.[40]

[80] There are a number of factors relevant to the reliability question, namely:

(a) any interest in the outcome of the proceedings by the witness;
(b) the degree to which it is corroborated or contradicted by other evidence;
(c) the contemporaneity and spontaneity of the hearsay statement; and
(d) the degree of hearsay.[41]

[81] In *Savoi*, this Court explained that courts' aversion to hearsay evidence stems from its *general* unreliability as it is not subject to the reliability checks applicable to other evidence – such as cross-examination – and as its nature makes it difficult for a party to effectively counter inferences drawn from it.[42] This Court noted, however, that notwithstanding hearsay evidence being untested, and despite the possibility of risks of faulty memory or erroneous perception, insincerity or ambiguities in narration, hearsay evidence may prove to be reliable.[43]

[39] Id at 296. This is "because of the presumption of innocence, and courts' intuitive reluctance to permit the untested evidence to be used against the accused in a criminal case". See also *Ndhlovu* above n 3 at para 16.

[40] Schwikkard and van der Merwe above n 16 at 298.

[41] Id.

[42] *Savoi* above n 3 at para 38, quoting *Ndhlovu* above n 3.

[43] *Savoi* id at paras 42-6.

[82] Ms Dasi arguably had an interest in the deceased's killers being brought to book,[44] which in principle adversely affects the reliability of her evidence. However, that interest must be viewed in the context of seeking justice for a loved one. There is nothing untoward in seeking justice in those circumstances, indeed it is to be expected. Attributing any measure of potential bias to her as a factor adverse to the probative value of her statement is based purely on conjecture and is misplaced. Furthermore, there is corroboration of her evidence, an aspect to be addressed presently.

[83] In respect of the contemporaneity and spontaneity of the hearsay statement, it must be borne in mind that the statement was taken two days after the events occurred. Like reliability, probative value is enhanced by the existence of admissible evidence which is consistent with the hearsay evidence.[45] Ms Dasi's statement has significant probative value to the extent that it is corroborated by circumstantial evidence. However, it is true that, given that hers is the only version of the assault itself, its probative value diminishes in this respect.

The purpose of the evidence

[84] Ms Dasi's statement was the only available eyewitness account. One eyewitness inexplicably disappeared. The other recanted his statement while testifying. Ms Dasi's statement fulfils two main important functions. In the first instance, it serves to identify the parties that were involved. In the second, it serves to tell the court the role that each party played in the assault and murder of the victims. It thus plays a significant part in the matter.

The probative value of the evidence

[85] In *Ndhlovu*, "probative value" was defined in the following terms:

[44] The deceased, Mr Bungane, was her boyfriend.

[45] Schwikkard and van der Merwe above n 16 at 299.

> "'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.*"[46] (Emphasis added.)

[86] In order for Ms Dasi's statement to be reliable or for it to have probative value in its entirety, it is not required that every material aspect of the statement must be corroborated. The requirement is that there must either be corroboration of every material aspect of the statement or corroboration of a significant number of material aspects. In the latter instance, all the aspects of the statement that have not been corroborated by other pieces of evidence, first, cannot contradict other objectively proven facts and, second, must fit into the picture that has been established by all of the other objectively proven facts. The fact that Ms Dasi's statement is corroborated by other witnesses' testimony and the objective medical evidence point to its truthfulness, reliability, and probative value.

[87] Ms Dasi's account of events is based on first-hand experiences – she was present at the scene and she alleged that she was one of those being assaulted. This is undisputed. This was an extraordinary event and of considerable importance to her; she witnessed her boyfriend being seriously assaulted and she was allegedly also on the receiving end of the assault. This would have impressed upon her the importance of noting who did what and to whom at the scene.

[88] The corroboration of her first-hand account, outlined in the impugned statement, consists of other compelling circumstantial evidence:

(a) Ms Bungane's testimony, to the extent that she recalls Mr Makoma's admission of having collected the deceased from the applicant's house;

(b) Mr Makoma's statement recording some knowledge of assaults occurring at the applicant's house; seeing multiple victims there with signs of

[46] *Ndhlovu* above n 3 at para 45.

assault and that the deceased had been collected from the applicant's house;

(c) the post-mortem report;

(d) the blood spatter evidence; and

(e) the DNA evidence confirming that the blood found at the applicant's house belonged to the deceased.

[89] I commence with the extracts from the post-mortem report. The pathologist report of Dr Inglis records:

> "The following was noted on external examination of the body. Abrasions were noted to the face and forehead. Multiple lacerations of the scalp were present. Extensive circumferential swelling and bruising of both arms were present. Extensive swelling and bruising of both lower legs were present. Tramline bruises were present on the posterior and lateral aspects of the left thigh. Multiple abrasions were present on both arms, both thighs and both legs. Multiple lacerations were present on both shins. Extensive bruising and scattered abrasions were present on the lower back. On internal examination of the body traumatic subarachnoid haemorrhage of the brain was present. Haemorrhage was noted into the eighth intercostal muscle on the left."

As a result of her observations, Dr Inglis then concludes that—

> "the cause of death was consistent with extensive blunt-force injury to the head and body and the consequences thereof."

[90] Dr Inglis testified:

> "[T]he bruises noted to the arms and the legs and the lower back as well as the lacerations on the scalp and then all the multiple abrasions . . . these are all consistent with the application of a blunt force to the body. There were two wounds that were a bit different in their pattern . . . . [These are described in the report] as tramline bruises or they're also known as a railway bruise. . . . [A] tramline bruise is typically two parallel bruises with a centre that is spared in the middle. And these wounds are

typically caused as a result of a rod-like object. An everyday example would be the top part of the stick of the broom."

[91] The injuries and the objects that may have caused them, as described by Dr Inglis in her report and oral testimony, are consistent with the events described by Ms Dasi in her statement. Ms Dasi's statement in relevant part, reads:

"I did saw Makhuze [the deceased] desisting [sitting]. Both hands were tied up with a rope. Also his legs were tied up with yellow-and-black rope. They did took off his trouser. Bongane was carrying a plank hockey stick, busy beating Makhuze on his hands. Azizo was carrying a silver golf stick, hitting Makhuze over his head. Makhi [the applicant] did pull Makhuze to other room as he was bleeding over his hedge [head] and mouth. . . . Big also did came inside the room and hit Makhuze with sjambok over his face. Makhi also hit Makhuze with golf stick over his body. Bongane also hit Makhuze with empty bottle over his head. Anele did stepped Makhuze on other leg twice and Anele did hit Makhuze with chisel on other leg four times."

[92] In respect of the blood spatter at the applicant's house, Sergeant Msolo testified that:

"I requested Captain Joubert from the Plattekloof lab to go to [the applicant's house] . . . where the alleged offence took place. I requested him to go and see whether there was any blood or anything that he might [find] there. He did go there during one night. . . . Captain Joubert told me that he did find some blood on the tiles on the floor and also on the walls were red that was also already washed off."

[93] Captain Joubert, in a report headed "Bloodstains and bloodstain patterns observed at the scene", concluded:

"17.1 The mechanisms responsible for the deposition of these bloodstains, B1 to B7, when considered contextually, the bloodstains may have been created due to the following mechanisms and/or a combination thereof. Impact resulting from force applied to a blood source or sources, like wounds of the victim, expirated bloodstains when the victim exhaled blood from the victim's respiratory system (mouth and nose) during the incident, which resulted in

> blood being deposited onto the living room wall, or projected an object covered with the victim's blood, blood projected from an object in motion which resulted in blood being deposited onto living room wall.
>
> 17.2 Diluted bloodstains documented in bathroom, B8, B9, B10, may indicate the following. Area cleaned after blood-shedding events and/or blood was transferred from the soles of a shoe or shoes or other objects contaminated with blood, which resulted in blood being deposited or transferred onto bathroom floor and/or diluted blood accumulated on tile areas."

[94] DNA analysis was later conducted on the blood samples collected at the scene and the results revealed that the blood in question belonged to the two deceased.

[95] As regards the post-mortem report, in particular, Ms Dasi would have to have had direct knowledge (or received peculiarly accurate second-hand information) of the kinds of wounds sustained by the deceased for the narrative in her statement to accord in such significant detail with the post-mortem report. That report, supporting Ms Dasi's statement, concomitantly undergirds, to a large extent, Ms Dasi's version as it lends credence to her being at the scene during the alleged assault of the deceased and honestly and reliably having witnessed the events. In fact, Ms Dasi's statement is uncontroverted. The only respect in which the statement is not directly supported by other evidence is in identifying the applicant as present at the scene of the alleged crime. That appears to be the principal basis on which the first judgment holds that the applicant's conviction is legally unsound.

[96] As I understand it, the first judgment holds that Ms Dasi's statement has limited probative value that is confined to the fact that—

(a) the deceased was assaulted at the home of the applicant (corroborated by the forensic evidence); and

(b) that the deceased was assaulted with a golf club or similar blunt instrument (corroborated by the post-mortem report).

[97] The first judgment also holds that Ms Dasi's statement does not reliably prove that the applicant was the assailant; or that the applicant actively associated with other assailants in the assaults; or even reliably places the applicant at the scene of the assaults at the relevant time. It also finds that Ms Dasi's evidence is defective in a further respect, that her statement only accounts for a small portion of the time during which the deceased was away from home.

[98] In this approach, the first judgment impermissibly evaluates the probative value of the statement in a piecemeal fashion. It should instead apply a holistic approach, assessing whether on the whole the statement was of adequate probative value in light of all of the other circumstantial evidence taken together. Approached in this way, the outcome must be different.

The reason why the evidence is not being given by Ms Dasi

[99] The reason the State seeks to rely on the statement is because Ms Dasi sadly passed on before the trial commenced.

The prejudice occasioned to the accused

[100] The prejudice occasioned to the applicant as an accused person by the admission of the hearsay evidence is significant. The accused was deprived of an opportunity to cross-examine the witness, which could have shed light on the credibility and reliability of the witness, her powers of observation, and so forth.

[101] The Supreme Court of Appeal in *Ndhlovu* considered whether the admission of hearsay evidence in itself violates the constitutional right to challenge evidence as entrenched in section 35(3)(i) of the Constitution and, consequently, the right to a fair trial. The Court held that the criteria in section 3(1)(c) – which must be "interpreted in accordance with the values of the Constitution and the 'norms of the objective value system' it embodies" – protects against the unregulated admission of hearsay evidence

and thereby sufficiently guards the rights of an accused.[47] The Supreme Court of Appeal emphasised:

> "The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of section 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."[48]

[102] It bears emphasis that the fact that the evidence in question evidently strengthens the prosecution's case does not render the evidence prejudicial to an accused. In this regard, the Supreme Court of Appeal in *Ndhlovu* held:

> "The suggestion that the prejudice in question might include the disadvantage ensuing from the hearsay being accorded its just evidential weight once admitted must however be discountenanced. *A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute 'prejudice'.* 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 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."[49] (Emphasis added and footnotes omitted.)

[103] There can hardly be any doubt that the applicant is being substantially prejudiced by the admission of the statement as he is deprived of the opportunity to cross-examine the deponent. But that is not the only consideration – the Court must also consider the fact that the witness is deceased, and the overriding consideration of the interests of

[47] *Ndhlovu* above n 3 at para 16.

[48] Id at para 24.

[49] Id at para 50.

justice. Ultimately, the question is whether there are adequate pointers of truthfulness, reliability, and probative value for the statement to be admitted as evidence.

The interests of justice

[104] It is a well-established principle that a trial court's decision must be based on the totality of evidence available to the court.[50] In respect of the applicant's conviction, the High Court reasoned, based on the section 220 admissions, the forensic evidence, Ms Dasi's statement, and Sergeant Msolo's testimony, that "there is no disputing that [the applicant's] house was the crime scene".[51] No direct inference can, however, be drawn between the crime scene at the applicant's house and his participation in the events that led to the death of the deceased. The High Court relied entirely on Ms Dasi's statement to place the applicant on the scene and to establish his involvement in the fatal assault. Ms Dasi's statement, therefore, plainly played a decisive role in the conviction of the applicant.

[105] On the indisputable or, at least, undisputed version advanced by the State:

(a) Prior to the incident in question, some of the applicant's possessions had gone missing, including his car radio.

(b) People who were apparently regarded as suspects in the disappearance of these items were being rounded up in the township – so too, the deceased, who was fetched at his house.

(c) The deceased was severely assaulted at the applicant's house.

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[50] In *S v Trainor* [2002] ZASCA 125; 2003 (1) SACR 35 (SCA) at para 9, Navsa JA said:

> "A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong."

See further *Savoi* above n 3 at para 55; *Doorewaard v S* [2020] ZASCA 155; 2021 (1) SACR 235 (SCA) at para 133; and *Maemu v S* [2011] ZASCA 175.

[51] *S v Kapa*, unreported judgment of the Western Cape Division of the High Court, Cape Town, Case No SS45/2017 (30 May 2018) at 60.

(d) The deceased died, as a result of the assault, shortly after being returned to his grandmother's house.

(e) The statement of Ms Dasi not only places the applicant at the scene of the assault, but directly implicates him as one of the perpetrators of the severe assault upon the deceased.

[106] In the face of this damning prima facie evidence directly implicating him in the fatal assault on the deceased, the applicant elected to leave the evidence unanswered. That of course does not provide any corroboration of the State's case, nor does it attract an adverse inference for the applicant's case *qua* accused.[52] But it does leave the State's compelling case unanswered.

[107] I take the view that the impugned statement is reliable and is sufficiently corroborated by the circumstantial evidence. The State has established a strong prima facie case that the applicant was not only present at the scene where the deceased was severely assaulted, but that he actively participated in that assault by beating the deceased with a blunt object. The conviction is sound in law and the appeal against conviction ought to be dismissed.

[108] For these reasons, leave to appeal should be granted, but the appeal dismissed.

Order

[109] The following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is dismissed.

[52] *Osman* above n 30 at para 22.

For the Applicant:	W Booth and E L Goliath instructed by William Booth Attorneys
For the Respondent:	S M Galloway instructed by the Director of Public Prosecutions, Western Cape