e-MANTSHI

A KZNJETCOM Newsletter

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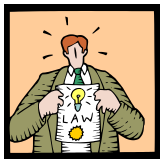
Welcome to the hundredth and ninety eighth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."
Any feedback and contributions in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Department of Justice and Constitutional Development invites interested parties to submit written comments on the Discussion document on proposed reforms for the whistleblower protection regime in South Africa (discussion paper).
The comments on the discussion paper must be submitted to Adv. T Nkabinde, on or before 15 August 2023.
The contact details are:
(a) Postal address: The Director-General: Justice and Constitutional Development, Private Bag X 81, Pretoria, 0001, marked for the attention of Adv. T Nkabinde; or
(b) E-mail address: whistleblowingreforms@justice.gov.za; or
(c) Fax nr: 012 406 4632. The discussion document can be accessed here:

https://www.justice.gov.za/legislation/invitations/20230629-Whistleblower-Protection-Regime.pdf

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Recent Court Cases

1. S v Ndzishe (221/2023; 222/2023) [2023] ZAWCHC 167 (20 July 2023)

The fact that an accused person confirms the identity of the drugs or that he used them as drugs means nothing if there are no further attributes or indicators that are sufficient to establish the identity of the substance at issue.

Lekhuleni J *et* Nziweni J

Introduction

[1] There are two separate cases before us, that were submitted for automatic review by the Magistrate of Cape Town, in terms of section 303, of the Criminal Procedure Act 51 of 1977 ("the CPA"). The relevant cases are *S v Mthunzi Ndzishe* and *S v William Fisher*. Both cases were presided over by the same magistrate, and involved similar charges and issues. For brevity, we will set out the factual background of each case and then deal with the issues raised in these cases concurrently.

[2] In both cases, the accused were facing a charge of possession of drugs in contravention of section 4(b) read with sections 1, 13, 17, 18, 21 to 25, and 64, read with Schedule 2, Part 2 of the Drugs and Drug Trafficking Act, 140 of 1992 (Possession or use of dangerous dependence-producing substances). In respect of S v *Mthunzi Ndzishe,* it was alleged that on 24 December 2022, and at Strand Street in the district of Cape Town, the accused did wrongfully have in his possession to wit:
9 methaqualone tablets, also known as Mandrax;
3 packets of methamphetamine also known as Tik;
1 Tik Lolly (methamphetamine residue).

[3] Meanwhile, in *S v William Fisher,* the State alleged that on 17 May 2023, and at Aspeling Street, in the district of Cape Town, the accused did wrongfully have in his possession to wit:
22 packets of cocaine;
8 packets of dagga; and
½ tablet of mandrax.

[4] In both cases, the charges were put to the accused, and they pleaded guilty to the charge. The court then invoked the provisions of section 112(1) (b) of the CPA. After questioning the accused in terms of section 112 (1) (b) of the CPA, the magistrate returned a guilty verdict on the above-mentioned count. The accused were subsequently found guilty on the strength of their guilty pleas.

[5] After careful consideration of the two records, it was clear that the affidavit [forensic report] in terms of s 212 (4) (a) and (8) (a) of the CPA, which is supposed to establish the identity of the substances; was not considered during both plea proceedings. Additionally, it became quite discernible from the record that the questioning by the magistrate did not delve into the accused's knowledge and understanding of the technicalities or the scientific essential elements of the crimes they were facing.

[6] We got the distinct impression that the court did not, upon questioning both accused, establish if there were factual basis for the technical admissions made by the accused. Consequently, the sufficiency of the evidence to uphold the guilty verdicts was immediately called into question.

[7] Because of clear evidential problems concerning both cases, we did not deem it necessary to direct queries first to the learned magistrate in terms of section 304(2)(a) of the CPA.

[8] To consider whether the provisions of section 112(1)(*b*) of the CPA were properly applied, it is necessary to quote from the record on how the trial court conducted the questioning of the accused in both cases.

[9] In *S v Mthunzi Ndzishe,* the questioning by the court in terms of section 112(1) (b) reveals the following:

"Q. . Where were you on 24/12/2022 that brings you to court today?

A I was in Strand Street by the steps as you going up to Top Deck. We were 3. A police van came stopped in front of us and searched us, x 9 tablets, x 3 bankies (sic) of tik were found on me.

Q Exactly where on your person were the drugs?

A I was wearing a tight underneath my pants, drugs found there.

Q Did you give the police authorisation to search you Sir?

A Yes your worship

Q You confirm the drugs were:

9 x Mandrax containing methaqualone?
A Yes

Q 3 *bankies* (sic) of tik containing methamphetamine

A Correct

Q 1 x tik *lollie* (sic) with methamphetamine residue?
A Yes your worship

Q What were you going to do with these things so (sic)?

A I was smoking tik since 2002, since I started staying on the streets being using tik and mandrax.

[10] While the court's questioning of *William Fisher* was as follows:

[11] "Q … Where were you on 17 May 2023 that brings you to court today?
A Aspelling Street District 6, I was walking, Law Enforcement were travelling in a bakkie. They stopped me and searched me, they get (sic) in a silver box these drugs, like a pencil box, silver in colour, in my right side of my tracksuit pants.
Q In this silver pencil case there were:
A x 22 bankies of cocaine (cocoa leave extract)
A Yes
Q x 8 bankies of dagga?
A Correct Mam.
Q ½ tablet mandrax containing methaqualone?
A Correct
Q How do you know dagga, cocaine, madrax?
A I use them as drugs for more than 2 years.
Q So you were going to smoke the drugs
A Yes, Mam . . ."

Evaluation

[12] It is not clear how the accused could conclude that what was found in their possession were indeed the drugs at issue. The fact that an accused person confirms the identity of the drugs or that he used them as drugs means nothing if there are no further attributes or indicators that are sufficient to establish the identity of the substance at issue. It cannot thus be assumed that the accused possessed a technical understanding of the substances found on them.

[13] Given the above questions and answers, there is simply no proof that the accused, by reasons of their use experience, were cognisant of and uniquely capable of determining that what they had in their possession were indeed undesirable-dependence producing substances.

[14] In these two matters, because of the nature of the admissions of the accused, there is no evidence or reasonable inference to justify that what was found upon the accused had the necessary features or indicators of the particular substances mentioned in the charge sheet. After all, the accused did not even lay a foundation as to why they stated that they were in possession of undesirable substances.

[15] Essentially, the accused's admission should reveal his or her knowledge of the properties of the substance through past experience and his or her current observation of the substance at issue that led him to conclude that the substance is indeed the substance at issue.

[16] As far as the admissions made by the accused are concerned, they are quite sparse to establish beyond reasonable doubt that the various substances found in their possession were, as the prosecution claimed, undesirable dependence-producing substances. Plainly, the above answers proffered by the accused contained merely the bare-bones of what is required to be proven by the prosecution. This missing crucial fact [that the material the accused possessed was undesirable substances as described in the charge sheet] is necessary to prove for the conviction of the accused. Therefore, it is clear that neither of these admissions satisfy the elements of the offence. In the circumstances, it is difficult for this Court to safely assume the fact.

[17] As is clear from the case-law, that greatest care must be taken to ensure that the admission made by an accused person is not a product of ignorance, but that the accused fully understands the meaning and the effects of the admissions he/she is making.

[18] Although the issue in these matters did not really involve a forensic report, we still find it necessary to mention that; if the forensic reports were admitted, they would have left no room for doubt that the various substances found in the possession of the accused were, as the prosecution claimed, undesirable dependence-producing substances.

[19] Significantly, we find it very concerning that despite previous cases from this division addressing this issue, magistrates, in particular from Cape Town Magistrates Court, continue to neglect this aspect of the law. See *S v Ashwin Elmie* (143/21; 16/2021) [2021] ZAWCHC 188 (11 May 2021). Recently, in *S v Paulse* 2022 (2) SACR 451 (WCC) para 11, a case that also emanates from Cape Town Magistrate Court, Henney J, after reviewing several cases dealing with admissions by an

accused of facts falling outside of his personal knowledge, stated that it is clear from the authorities that where an accused pleads guilty to a charge where one of the elements of the crime can only be proven by scientific means, the court must request the prosecutor to hand up the analysis certificate. The learned justice went on to say that there may well be cases where a court may convict a person without the production of such certificate, if from the questioning of an accused and subsequent admissions made, the court can come to such a conclusion.

[20] Similar sentiments were echoed by Nziweni J, (with Lekhuleni J concurring), in *S v Nazeem Bassadien,* unreported case number:178/2022 (16 September 2022), where the following was stated:

"[14] (t)his is not to say that forensic report is the only way to prove composition of seized material. I say this quite mindful of the fact that there may also be alternative ways to prove substance composition; other than through forensic evidence. Thus, the aforegoing, in no way alters the other type of evidence (including testimony of a police official or an accused person regarding their knowledge of substance) that may be sufficient to sustain a conviction. See, S *v Elmie* (143/21; 16/2021) [2021] ZAWCHC 188 (11 May 2021), at paragraph 16.
[15] I think once again clarity needs to be afforded in this area. The point of admitting a forensic report into evidence during plea proceedings provides amongst others, prima facie evidence of the substance's composition, net weight and the truth about the allegation made by the state that, the material which was found in possession of an accused person and was seized by the police, was undesirable dependence-producing substance; as claimed in the charge sheet. It is meant to guard against the risk of false conviction.
[16] As such, it is not surprising that a forensic report even in plea proceedings plays a decisive role, particularly if an accused person is unrepresented. All these are part of the protections for the unrepresented accused. Thus, the Court is not *per s*e being overly rigid."

[21] We are of the view that, in this case, the trial court did not have enough information for it to conclude that the accused in both cases were in possession of dependence producing substance.

[22] Lastly, we have also noted that in *S v Mthunzi Ndzitshe,* when the accused made his first appearance in court on 22 December 2022, the accused elected to engage the services of Legal Aid after his rights to legal representation were explained to him. On that day, Legal Aid came on record for the accused. The matter was postponed to 6 January 2023 for bail information. On 6 January 2023, Legal Aid was absent, and the case was postponed to 11 January 2023 for Legal Aid. On 11 January 2023, the Legal Aid attorney was in attendance. The attorney informed the court that the accused was abandoning his bail application, and the case was by agreement, postponed to 25 May 2023 for further investigation.

[23] On 25 May 2023, when the matter resumed, the court once more explained the accused's rights to Legal representation, notwithstanding the fact that Legal Aid was already on record. Nothing from the record indicates why the Legal Aid Attorney was absent on 25 May 2023 despite the fact that the matter was postponed by agreement. Furthermore, there is no evidence on record suggesting that Legal Aid had withdrawn from representing the accused, and neither did the accused inform the court that he withdrew his mandate for Legal Aid to represent him. For all intents and purposes, Legal Aid was still on record when the trial of the accused was heard and finalised.

[24] In our view, the fact that the accused elected Legal Aid to represent him had to be respected. The reason for the presiding officer's second explanation of the accused's right to legal representation is unclear, especially since Legal Aid was on record and had already appeared on behalf of the accused twice in the previous court sittings. Importantly, when the case was postponed on 11 January 2023 to the 25 May 2023, Legal Aid was in attendance and informed the court that the accused was abandoning his bail application. Pursuant to the court's second explanation, the accused elected to conduct his own defence.

[25] In *S v May* 2005 (2) SACR 331 (SCA) para 6, the Supreme Court of Appeal observed that it is incumbent on the person presiding over a criminal trial to ensure that the accused is fully informed, in open court, not only of the right to legal representation but also of the consequences of not having a lawyer to assist in the defence. The court noted further that the application of the rule regarding legal representation is context-sensitive. In any given situation, the inquiry is always whether an accused's fair trial right has been infringed. See *Shiburi v The State* (205/2017) [2018] ZASCA 107 (29 August 2018) at para 13.

[26] In our view, it was irregular to proceed with the trial against the accused in the absence of Legal Aid, despite the fact that Legal Aid was still on record representing him. Pursuant to the findings we made hereinabove, we are of the view that the accused was prejudiced, and the irregularity infringed his right to a fair trial. As discussed above, the presiding officer failed to question the accused adequately to ensure that all the elements of the charge levelled against the accused were properly established. Crucially, it cannot be said in this case that the accused represented himself adequately throughout the trial.

[27] In the circumstances, the conviction and sentence in both cases cannot stand.

Conclusion

[28] In view of these considerations, we cannot confirm that the conviction and sentence of the accused in both cases were in accordance with justice. The irregularities observed in this cases, in particular, relate to a failure to comply with section 112(1)(b) of the CPA, and therefore, the matter should ordinarily be remitted to the court *a quo* in terms of section 312 of the CPA. However, we are mindful of the guidance of the Supreme Court of Appeal in *S v Mshengu* 2009 (2) SACR 216 (SCA), where the court observed that section 312 should not be invoked if compliance with the section would be unfair. To this end, we find the following excerpt from that judgment apposite. The court stated:

"[17] The purpose of s 312 is to prevent an injustice which may occur if an accused person were to escape punishment for his or her crime only because his or her conviction was set aside on the ground that there was a failure to comply with s 112 of the Act. *But an injustice cannot occur where the accused has served the entire sentence by the time the conviction is set aside on appeal.* Nor can it occur where a fresh conviction cannot be achieved following a remittal to the trial court…. *There can be no justification for ordering that an accused person, who has already served the entire punishment, be subjected to a second trial. Such an order would be inconsistent with the right to a fair trial.* In my view it could never have been the intention of the legislature that a court is obliged to comply with the section irrespective of the injustice or unfairness that it may cause." (our emphasis)

[29] The charges involved in both cases are serious. It is also important to remind ourselves at this stage that it would certainly be a failure of justice if both accused could escape because of mere technicalities. The circumstances of these cases evince that the accused would not be prejudiced, and justice would be achieved if the proceedings are again instituted against the accused.

[30] In the result, the following order is granted:

(a) The convictions and sentences in respect of both proceedings, are set aside.
(b) In terms of section 312 of the CPA, the matters are remitted back to the same magistrate to allow the accused to plead afresh, so that the accused can be sufficiently questioned.
(c) Should the accused still plead guilty and be convicted; in sentencing the court should consider the time already spent by the accused in custody serving sentences. The court may also consider to *ante* date the sentences.
(d) The State should make sure that the matters are dealt with promptly.

From The Legal Journals

Bekink, M

New legislative provisions relating to the evidence of children given through intermediaries

2023 (86) THRHR 151

Rosenberg, W

Upholding the child's right to be heard in contempt of court proceedings because a "child's best interests are of paramount importance in *every matter concerning a child*"

2023 TSAR 578

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

Hearsay evidence: Section 3 (1) (c) Law of Evidence Amendment Act 45 of 1988, interests of justice test.

The case of *Kapa v The State* [2023] ZACC 1 concerns the admission of hearsay evidence in terms of the interests of justice test, as set out in section 3 (1) (c) of the Law of Evidence Amendment Act 45 of 1988. In the case a minority and majority

judgement were rendered. The minority judgement was penned by Mbatha AJ (Baqwa AJ and Rogers J concurring), and the majority decision was written by Majiedt J (Kollapen J, Madlanga J, Mathopo J, Mhlantla J and Tshiq J concurring).
The applicant was convicted of the murder of Mr M Bungane (the deceased) and was sentenced to 15 years imprisonment by the High Court. He applied for leave to appeal against the conviction and the sentence to the High Court, and then the Supreme Court of Appeal – but both courts dismissed the applications. He then approached the Constitutional Court for condonation and leave to appeal the High Court's decision.
The case turned on whether the High Court had acted correctly in admitting the hearsay statement of the deceased's girlfriend, Ms Dasi in terms of section 3 (1) (c) of the Law of Evidence Amendment Act 45 of 1988. Ms Dasi had died before the trial (para [3]) The main issue was the probative value of Ms Dasi's statement (para [70]).

Jurisdiction
The minority decision held that the question of whether the admission of Ms Dasi's statement was in the interests of justice did engage the court's constitutional jurisdiction. This was because the interests of justice test had a constitutional dimension and because the admission of the hearsay evidence could be so unfair as to interfere with the applicant's right to a fair trial (para [4], see also *Savoi v National Director of Public Prosecutions* 2014 (5) SA 317 (CC) at para [49], *S v Basson* 2005 (1) SA 171 (CC) at para [26], and *S v Ndhlovu* 2002 (6) SA 305 (SCA) at para [16]). The court continued by saying, however, that if it was decided that the admission of Ms Dasi's hearsay statement was in the interests of justice, the court's jurisdiction would not extend to determining whether the applicant's conviction was justified on all the evidence (para [5]).
The majority agreed that the case engaged the court's jurisdiction in as much as the evidence on record suggested *prima facie* that there *may* have been a serious breach of section 35 of the Constitution (para [70]: court's emphasis. Compare *S v Van Der Walt* 2020 (2) SACR 371 (CC) at para [15]). The majority stipulated that the court's jurisdiction was only engaged in respect of the appeal against conviction, not sentence (para [75]). In the *Van Der Walt* case (supra at paras [18] – [21]) the court had held 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 should consider. In casu, the court held that neither condition was met. The applicant was simply arguing that the High Court did not evaluate the evidence before it properly, in relation to sentence (para [72]. Also see *S v Bogaards* 2013 (1) SACR 1 (CC) at para [42]). This did not raise an arguable point of law, let alone one of public interest (para [73]); further it did not raise a constitutional issue because the applicant only took issue with the High Court's evaluation of the facts, he did not indicate or suggest a failure of justice (para [75]).

Leave to appeal

In respect of leave to appeal, the minority judgement highlighted that the issues raised in the application were of public interest, because although the facts arose in a vigilante context it was still important to ensure that fair trial rights are upheld (para [6]). The court observed that vigilantism was alarmingly common in South Africa, that self-help could not be condoned by the courts and that respect for the rule of law was crucial for a defensible and sustainable democracy (See *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) at paras [11] and [17]). The minority therefore concluded that it was in the interests of justice that leave to appeal be granted (para [6]). The majority agreed with this (para [70]).

Condonation

The applicant filed his application for leave to appeal four months late, but he was able to satisfy the minority that there were reasonable grounds for the delay. In addition, the minority held that the prejudice that would be suffered by the applicant if his fair trial rights had been violated far exceeded the potential prejudice to be suffered by the state if condonation were to be granted (para [7]). The majority aligned itself with this reasoning (para [70]), holding that it was in the interests of justice for the court to hear the appeal against conviction because the question of the admission of the hearsay statement was 'of sufficient interest beyond those of the parties to the case' (para [70]).

Merits of the appeal against conviction

The evidence

The facts were set out in the minority judgement (paras [8] – [18]). The majority accepted that exposition of the facts (para [76]). The facts were as follows: the deceased was carried to his grandmother's house by one of the applicant's co-accused, who said that the deceased had been assaulted at the applicant's house. Paramedics were called and the deceased was declared dead at 17h08 (paras [8] – [9]).

Dr Inglis conducted a post mortem on the deceased and testified to her findings at the trial (para [10]). Her report showed that the deceased had been assaulted. He had abrasions, lacerations and contusions all over his body. She specifically mentioned 'tramline bruises' on his left thigh, likely caused by hitting the deceased with a rod-like object like a broomstick (para [10] – [11]). She testified that the cause of death was consistent with extensive blunt force trauma to the head and body of the deceased (para [11]).

A forensic analyst testified in relation to two DNA reports which had been obtained. She confirmed that the blood samples taken from inside the applicant's house matched the samples from the deceased, and Mr Nkayi (the second deceased) (para [12]).

The investigating officer testified that he took statements from a number of people, including Ms Dasi (para [13]). He testified that after Ms Dasi gave him her statement, she pointed out the homes of various suspects to him. Ms Dasi died before the trial.

The minority noted that the state did not apply for the admission of the oral hearsay pointing out, only for the admission of Ms Dasi's written statement (para [15]). The investigating officer also engaged the services of a forensic expert who found evidence that blood spatter had been cleaned from the floor and walls of the applicant's house (para [14]).
Ms Dasi's statement was taken by the investigating officer two days after the death of the deceased. Ms Dasi spoke to him in isiXhosa, and he reduced the oral statement to written English. He read back an isiXhosa translation of what he had written to her, and she confirmed it was correct and signed the statement (para [16]). Ms Dasi died before the trial. The state successfully applied to have her written hearsay statement admitted into evidence in the interests of justice (para [17]). The investigating officer read the statement into the record at the trial (para [18]). Ms Dasi's statement implicated the applicant in the assault of the deceased, and was an astonishingly detailed account of the assault in which she named a total of twelve perpetrators. She recounted how she was also hit on the head with a chisel (para [18]).
The applicant, and his other co-accused, exercised their right to remain silent at the trial. They did not testify (para [19]). Accused number 4, Mr Makoma, however gave a warning statement in which he said that he had heard of the assault at the applicant's house, so he went there. He took the injured deceased to his grandmother's house (para [20]). The applicant did however make certain admissions in terms of section 220 of the Criminal Procedure Act (para [21]).

The High Court's findings

On the admissibility of the hearsay statement, the High Court was alive to the fact that it was only Ms Dasi's statement which linked the applicant to the assault of the deceased. It found that the statement was 'the only conduit through which … the [applicant's] actions [could] be linked' (para [22], see also para [34]). The High Court nevertheless found that the statement could be admitted in terms of section 3 (1) (c) of the Law of Evidence Amendment Act 45 of 1988 because it was reliable, being bolstered by the other evidence, being an eye witness account and being corroborated by the forensic evidence and the applicant's section 220 admissions (paras [22], and [25]). On the question of identification, the High Court considered the evidence of the deceased's grandmother, the investigating officer, Ms Dasi's statement and the warning statements of some of the accused, including Mr Makoma. It concluded that, although Ms Dasi did not point out the applicant, it was sufficient that she pointed out the homes of the accused, including the applicant to the investigating officer. The High Court concluded that this was sufficient for the state to prove that the accused, including the applicant, were the person's mentioned in Ms Dasi's statement (para [24]).

The right to adduce and challenge evidence

The minority judgement starts off by setting the scene, quoting *S v Molimi* 2008 (3) SA 608 (CC) on the right to a fair trial. The court in *Molimi* emphasised how respect for the accused's fair trial rights underpinned the legitimacy of the entire criminal

justice system (para [26]). The minority then referred to *S v Jaipal* 2005 (4) SA 581 (CC) as authority for the statement that not every minor irregularity in a trial vitiates the right to a fair trial. Tempering this statement was also a quote from *S v Zuma* 1995 (2) SA 642 (CC), where the court contrasted the position pre and post the Bill of Rights, saying that now criminal trials must be conducted in accordance with 'notions of basic fairness and justice' (para [27]). The minority then dealt with the right to adduce and challenge evidence in terms of section 35 (3) (i) of the Constitution, saying that in the *Ndhlovu* case (2002) (6) SA 305 (SCA) at para [24]) the Supreme Court of Appeal had clarified that the right to challenge evidence does not always create an automatic right to cross examine (para [28]). The minority added that sometimes, such as when admitting hearsay evidence, cross examination is impossible. The minority held that in such cases, the notions of basic fairness and justice demand that the admission of hearsay evidence be done with caution, having regard to the statutory interests of justice test. The minority added that this is particularly so when the admission of the hearsay evidence is likely to play a decisive role in whether the accused is going to be acquitted or convicted (para [29]). This was the situation in casu.

Section 3 (1) (c), Law of Evidence Amendment Act 45 of 1988

Section 3 (1) (c) provides for seven factors to be taken into account in deciding whether to admit hearsay evidence in accordance with the interests of justice. The Supreme Court of Appeal in *Ndhlovu's* case (supra at para [16]) held that section 3 (1) (c)'s factors protect the accused from the unregulated admission of hearsay evidence, thereby protecting the fair trial rights of the accused. The court held further that the factors must be considered in accordance with the values and norms of the Constitution (para [32]). With that background, the minority turned to examining the seven factors relevant to a decision on whether it is in the interests of justice to admit the hearsay evidence or not. The background to the majority's examination of the seven statutory factors consisted of emphasising that they must be considered holistically and weighed collectively in deciding whether the test for admission is met (para [77]).

The nature of the proceedings

The minority correctly stated that it is more likely that hearsay evidence could be admitted in civil cases than criminal cases because of the presumption of innocence and the 'courts' intuitive reluctance to permit untested evidence to be used against the accused in a criminal case' (para [33], see also *Metedad v National Employers' General Insurance Co Ltd* 1992 (1) SA 494 (W) at 499). The majority judgement reached the same conclusion, saying, like the minority, that the nature of the case in casu militates against the admission of hearsay, being a criminal case (para [78]).

The nature of the evidence

At para [34], the minority judgement describes the nature of the evidence as follows: '[t]he statement contained information about 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 minority emphasised the fact that at the time of admitting the statement, the High Court was aware that the statement was the only link the state could provide between the applicant and the crime, and thus would be decisive in whether the applicant was convicted or acquitted (para [34]). The majority judgement makes the same point at para [76], saying that '[p]lainly, the High Court convicted the applicant primarily on the strength of Ms Dasi's statement.'
The minority also highlighted the fact that two cautionary rules attached to Ms Dasi's evidence – the one because it was an eyewitness account and the other because Ms Dasi was a single witness (para [34] – [35], see also *S v Mthetwa* 1972 (3) SA 766 (A) at 768, and *S v Miggel* 2007 (1) SACR 675 (C) at 678). The minority criticised the High Court for failing to interrogate the circumstances in which the identification was made, and for playing mere lip service to the cautionary rule (paras [36] – [37]). The minority held that Ms Dasi's statement could not have been the single evidence upon which an accused's conviction could rest in terms of section 208 of the Criminal Procedure Act 51 of 1977 (para [37]). The minority also comments on the 'deficiencies' in Ms Dasi's statement which revealed a 'wanting version' (para [37]).
At para [38] the minority observes, following *S v Lubaxa* 2001 (4) SA 1251 (SCA) at para [21], that what a fair trial entails must be decided on a case by case basis according to the circumstances at play. The minority concludes that the circumstances in casu required 'independent corroborative evidence on the identification of the applicant and his involvement in the fatal assault on the deceased' (para [38]).
When the majority considered the nature of the evidence, it identified that essentially, this factor requires consideration of the reliability of the hearsay evidence, and its probative value weighed against its prejudicial effect (para [79]). The majority identified four considerations relevant to this enquiry, being: any interest in the outcome of the proceedings by the witness, the degree to which it is corroborated by other evidence, the contemporaneity and spontaneity of the hearsay statement and the degree of hearsay (para [80]). The majority referred to the decision in *Savoi v National Director of Public Prosecutions* 2014 (5) SA 317 (CC) at [42] – [46] where the court had held that evidence may prove to be reliable despite it being untested and despite the possibility of risks of, inter alia, faulty perception (para [81]). As regards the possible bias of the witness, the majority said that although Ms Dasi was the deceased's girlfriend, any suggestion that she was biased was based solely on conjecture and was therefore inappropriate (para [82]). It is worth noting that because Ms Dasi could not be cross examined, and in the context of the admission of a hearsay statement, one is limited to conjecture in respect of potential bias on the part of the witness. In respect of the contemporaneity and spontaneity of the statement, the majority simply record that it was taken two days after the incident. They note further that Ms Dasi's statement is corroborated by the circumstantial evidence but agreed that because Ms Dasi's statement was the only version of the assault itself (in

other words that it was single evidence) its probative value was diminished (para [83]).

The purpose for which the evidence was adduced

The minority said that the evidence was tendered to link the applicant to the crime, in circumstances where it was the only evidence upon which the applicant was convicted. They concluded that 'the absence of other eyewitnesses indicates a failure by the state to discharge its onus' (para [39]). The majority also recorded that Ms Dasi was the only available eyewitness to the incident and that her statement served to identify the parties concerned and indicate their involvement in the crime. It therefore played a significant part in the matter (para [84]).

The probative value of the evidence

In the case of *S v Ndhlovu* 2002 (6) SA 305 (SCA) the Supreme Court of Appeal defined 'probative value' as 'value for purposes of proof' which entailed the question of what the hearsay evidence would prove if admitted and whether it would do so reliably (para [40]). Probative value must be balanced against the prejudicial effect the admission of the evidence might have (para [41]). The minority reasoned that Ms Dasi only observed the events she gave her evidence about for a short period of the day, about half an hour, where the deceased was likely to have been in the hands of community members for a significant period before Ms Dasi arrived on the scene to witness events (para [43]). The minority also notes that the post mortem report does not exclude the reasonable possibility that the fatal blows were administered before Ms Dasi arrived at the applicant's house. In such circumstances, the minority opined, there was no evidence that the applicant was present or made common cause with the persons administering the blows to the deceased (para [44]). As to reliability, the minority observes that the investigating officer already had the name of the applicant at the time Ms Dasi made her statement to him, and that by his own admission he did not test the reliability of her version, especially as regards to the identification evidence therein (para [45]). The minority also noted that Ms Dasi was not an independent witness, being the girlfriend of the deceased (para [46]). The minority agreed with the majority that there was nothing untoward in a victim seeking justice for themselves and loved ones, but still considered Ms Dasi's independence as a relevant consideration in the reliability enquiry, and one which militated against admission (para [46]).

The majority held that not every material aspect of Ms Dasi's statement had to be corroborated, corroboration of a significant number of material aspects was sufficient. The majority held that Ms Dasi's statement was corroborated by other witnesses' testimony, and the objective medical evidence (para [86]). This evidence was the testimony of the deceased's grandmother that co-accused four, Mr Makoma, had said he collected the deceased from the applicant's house, Mr Makoma's statement recording that he had knowledge of assaults being carried out at the applicant's house, seeing multiple victims there and collecting the deceased from the applicant's house (para [88]), the post-mortem report (discussed at paras [89] – [91], [94]), the

blood spatter evidence (discussed at para [92] – [93]), and the DNA evidence confirming that the blood found at the applicant's house matched the deceased (discussed at para [94]). The majority ask how Ms Dasi could have included such detailed evidence consistent with the post mortem report if she had not in truth witnessed the assault. The minority answers this question by saying that Ms Dasi had ample opportunity to observe the nature of the injuries sustained by the deceased when she accompanied accused number four who was carrying the deceased to the deceased's grandmother's house. The minority had a different take on the evidence. They held that the majority overstated the extent to which the post mortem report corroborated Ms Dasi's statement (para [64]). They held further that the evidence of the grandmother of the deceased did not assist in the identification of the applicant which was the true issue at trial (para [61]). Also, accused number four's warning statement should not have been considered as corroboratory evidence on the authority of *S v Mhlongo; S v Nkosi* 2015 (2) SACR 323 (CC) at para [44] where the court held that extra-curial admissions of an accused person are inadmissible against their co-accused (para [62], see also *Litako v S* 2015 (3) SA 287 (SCA) at paras [53] – [54]). The minority also emphasised that the blood spatter evidence, and the DNA evidence only established that the deceased was assaulted at the applicant's home, not who the perpetrators were (para [63]). The majority did agree that the statement was not corroborated as regards the identification of the applicant as having participated in the assault (para [95]). The majority considered Ms Dasi's statement to have high probative value because she was a first-hand witness who would have appreciated the importance of noting the perpetrators and events because it was her boyfriend who was being assaulted, and because she herself was undisputedly also assaulted (para [87]). The minority saw this as something that may have rendered her statement less reliable (para [57]).
The majority criticise the reasoning of the minority in respect of the reliability of the statement as evaluating the evidence in a piecemeal fashion, rather than applying a holistic approach and evaluating the evidence in the light of all the surrounding circumstantial evidence (paras [96] – [98]).

The reason the evidence was not given by Ms Dasi
Both the minority and the majority simply record that the reason for the state relying on hearsay evidence was because Ms Dasi had died prior to the date of the trial (para [48], and para [99]).

The prejudice to the applicant
The minority accepted that the mere fact that evidence strengthens the state's case does not mean that it is prejudicial to the accused (para [48], see also the majority decision at para [102]). However, it noted that prejudice is always present when hearsay evidence is admitted (para [49], see also *S v Ndhlovu* 2002 (6) SA 305 (SCA) at para [49]). In casu, significant prejudice was present because the applicant's conviction rested on the hearsay evidence, and it would have been subject to obvious challenges if cross examination had taken place (para [49] read

with para [57]). The minority pointed out that courts are generally reluctant to admit hearsay that is decisive in convicting the accused (para [58], see also *S v Ndhlovu* supra and *S v Ramavhale* 1996 (1) SACR 639 (SCA) at 649). The majority agreed that the prejudice to the applicant was significant in that he could not test Ms Dasi's evidence through cross examination (para [100]) but stated that this was not the only consideration – the court must also consider that the witness is deceased and whether there were adequate pointers of truthfulness, reliability and probative value for the interests of justice test to be met (para [103]).

Any other relevant factor

The minority judgement dealt with a point the applicant made under the heading of 'any other relevant factor', the seventh factor in the interest of justice test in section 3 (1) (c) of The Law of Evidence Amendment Act 45 of 1988.

The applicant raised the 'language issue' concerning the taking of Ms Dasi's statement. He argued that Ms Dasi's statement did not comply with regulation 2 (1) (a) of the regulations promulgated in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1983 (GN 1258 GG 3619, 21 July 1972, as amended). The regulation in question requires the deponent of an affidavit to confirm that they 'know and understand the content of the declaration.' The applicant argued 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 and what the investigating officer translated back to her in isiXhosa (para [51]). The minority of the court dismissed the argument on the basis that the admission of a hearsay statement does not require Ms Dasi's statement to be in the form of a valid affidavit (para [53]).

The conclusion of the minority

The minority of the court found that Ms Dasi's honesty could not be tested in court, and that there were major shortcomings in her statement to the extent that it could not be said to be reliable (para [56]). They concluded that the conviction of the applicant was based on the uncorroborated identification evidence of a single witness (para [55]), and that the decision to admit Ms Dasi's statement as hearsay evidence in the interests of justice was incorrect (para [68]). Without Ms Dasi's statement, the remainder of the evidence was insufficient to prove the applicant guilty beyond a reasonable doubt (para [68]). The High Court had erred in finding that the evidence showed that the applicant's house was the scene of the crime and thus required an answer from him, instead of him exercising his right to silence (paras [65] and para [68]). This was because the only evidence placing him at the scene was Ms Dasi's inadmissible statement. Ms Dasi's pointing out of the applicant's house to the investigating officer did not take the matter any further, because the state did not make an application to have that hearsay evidence admitted into evidence (para [60]).

The minority therefore concluded that had it commanded the majority, it would have upheld the appeal and set aside the conviction and sentence (para [68]).

The conclusion of the majority

The majority of the court took the view that Ms Dasi's statement was correctly admitted into evidence because it was reliable and sufficiently corroborated by the circumstantial evidence. It concluded, therefore, that the state had established a strong prima facie case against the applicant: his house was clearly the scene of the crime and Ms Dasi's statement implicated him in the assault (para [104] - [105]). The applicant, therefore, bore the evidentiary onus of answering the prima facie case against him (para [107]). The applicant chose not to testify, and so the prima facie case became conclusive proof of his guilt (para [106]).

The majority therefore concluded that the conviction was sound in law, and that the appeal against conviction should be dismissed (para [108] and [109]).

Comment

This is a tricky case and, after much thought, I find that I align myself with the reasoning of the minority of the court. Ms Dasi's hearsay statement was the only evidence identifying the applicant as one of the perpetrators of the assault on the deceased. Both the majority and the minority of the court agreed on this (paras 39 and 84). There was no corroboration for Ms Dasi's single witness identification of the applicant, in the circumstantial evidence or at all (para 55). In addition it should be noted that the hearsay statement of Ms Dasi attracted two cautionary rules, and that she was not independent (paras 46 and 95). In my view Ms Dasi's statement was too detailed to be regarded as reliable. Particularly since she purportedly observed the events in a crowded and chaotic scene and where she had also been assaulted (paras 18 and 34). Therefore, in balance, I would agree with the minority of the court that Ms Dasi's statement should not have been admitted as it was not in the interests of justice to do so. Had Ms Dasi's statement not been admitted, there would be no evidence implicating the applicant, and thus no prima facie case shifting the evidentiary burden onto the applicant.

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Matters of Interest to Magistrates

Bail application: Are there exceptional circumstances?

When a person has been arrested with or without a warrant in terms of s 50(1)(*a*) of the Criminal Procedure Act 51 of 1977, they shall be informed of their right to apply and be released on bail or be informed their further detention in terms of s 50(1)(*b*) and s 50(6)(*a*) respectively. In the event that somebody has been arrested and the case brought against them is of a more serious nature, they might fall under s 60(11)(*a*) of the Criminal Procedures Act, which provides that: 'Notwithstanding any provision of this Act, where an accused is charged with an offence –
(*a*) referred to in schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permits his or her release'.

How the courts have dealt with the 'exceptional circumstances' requirement

In *S v Jonas and Others* 1998 (2) SACR 677 (SE) it was held that the term 'exceptional circumstances' in a schedule 6 bail application are not defined. No direct causes were attached to what constitutes 'exceptional circumstances'. In *Mvambi v S* (GJ) (unreported case no A113/2021, 4-2-2022) (Malangeni AJ) at paras 19, 20 and 22, the court held that the burden is on the appellant in a bail application to provide 'that exceptional circumstances exist which in the interest of justice permit his [or her] release'. The court held that normal or ordinary circumstances do not amount to exceptional circumstances. The court in *Mvambi* referred to *Jonas* that an urgent serious medical condition and a cast-iron alibi can be considered exceptional circumstances. In *Nhlapo v S* (GP) (unreported case no A07/2023, 17-2-2023) (Ally AJ) at para 5, the court referred to exceptional circumstances as, 'more than what can be described as the run-of-the-mill bail applications.' The court in *Nhlapo* held that the appellant 'must present cogent evidence' that will be able to 'stand up to scrutiny' in order to convince the court on a 'preponderance of probabilities' that the appellant is a candidate for bail.

Result of not challenging the exceptional circumstances advanced by the appellant

In *Fourie v S* (GP) (unreported case no A107/2020, 8-6-2020) (Rabie J), the appellant was charged with nine counts, among others – robbery with aggravating

circumstances; attempted murder; and malicious injury to property to name but a few. The charges against the appellant fell under s 60(11)(*a*). The burden was on the appellant to advance exceptional circumstances in order to discharge the burden placed on him in terms s 60(11)(*a*). The charges emanated from a cash in transit heist where the armoured vehicle was physically forced off the road. Shots were fired at the armoured vehicle while being at the side of the road. The occupants inside the armoured vehicle were forced to open it under threat that the robbers would use explosives to gain entry if they did not comply. It was submitted by the defence that the matter should be dealt with as a matter falling under schedule 5. They argued that the appellant was not physically involved in the robbery. The court rejected the defence's contention and stated that if the allegations are true, the appellant acted in concert with the perpetrators and his intention was to the accomplish the desired outcome and as such he should face the same consequences. The court proceeded with the bail application as a schedule 6 offence. It was submitted by the state that the appellant was an employee of SBV as the Head of Logistics. The state alleged that the appellant manipulated the route taken by the occupants of the vehicle the day of the robbery in order to execute the robbery. It was found that the appellant did not have the mandate to change routes. The appellant submitted that he would stand his trial and that he had no relatives abroad. The state did not place anything before court in opposing the application. The state did not do anything to rebut the appellant's denial that he did not commit or was involved in this crime. The court held that: 'It would appear that the state had adopted this line of approach on the assumption that the appellant had all to do in order to succeed with his application for bail'. The court in this matter found in favour of the appellant after proving exceptional circumstances, the court found that the version of the appellant stood unchallenged by the state.

When is the state required to challenge and rebut the exceptional circumstances advanced by the defence?

In *Maponyane v S* (NWM) (unreported case no CAB 07/2022, 2-9-2022) (Petersen J), the accused were charged with attempted murder, kidnapping, robbery, pointing of firearm, possession of a firearm and possession of ammunition. The court at para 8 concluded that the appellant relied predominantly on his personal circumstances and that he believed the state's case was weak. In his affidavit the appellant stating that: 'The learned magistrate erred in failing to attach the necessary weight to the personal circumstances of the appellant.' The appellant adduced evidence by way of affidavit, that he is a father of three. His continued incarceration makes it difficult to support his children financially. He stated that he is employed at his father's place of business and that his father is a sick elderly man. His continued incarceration placed a strain on the family business. The investigator in this matter testified that one of the mothers confirmed that she had two children by the appellant, but that she had not received maintenance money for more than a year from the appellant. It was also pointed out that the appellant's father was in the court the day the bail application was heard and that he was present at every postponement prior to that day. The court dismissed the

version of the appellant on the bases that every assertion made by the appellant was rebutted by the state. The court in dismissing the appellant's application stated that: 'The appellant against the presumption of innocence regularly finds himself in conflict with the law, being released on bail on very serious charges and being arrested while on bail. That, in itself, undermines the proper functioning of the bail system and contributes to bringing the administration of justice into disrepute in the eyes of society.'

In *S v Mathebula* 2010 (1) SACR 55 (SCA) at para 12, the court held that: 'Thus it has been held that until an applicant has set up a *prima facie* case of the prosecution failing there is no call on the state to rebut his evidence to that effect.' The difference in how the state opted to apply itself in the *Maponyane* case as opposed to the *Fourie* case is evident in the outcome of both cases. The proactive approach by the investigator in the *Maponyane* case, by bringing the relevant information to the attention of the court, to place the court in a position to determine that exceptional circumstance did not exist.

Unintentional consequences of a schedule 6 bail application

In many schedule 6 offences, one finds that the investigation has been dragged on for too long and the state requests a remand for the investigations to be completed. It is in the defence's discretion to request that the matter be struck from the roll to 'give the state ample time to conclude the investigation'. Should the matter be struck from the roll, how do you secure the attendance of the accused before court when the investigation is completed? Does the state opt for a summons? Section 60(11)(*a*) states that 'the court shall order that the accused be detained in custody.' This is a mandatory provision, and the detention of the accused is the subject of this provision, until he is dealt with in terms of the law. The provision indicates that his detention is to be secured first and his detention shall be by way of a court order. This indicates that his detention shall be by way of warrant of arrest. In order to properly understand the provision, the case of *S v Hewu and Others* 2017 (2) SACR 67 (ECG), might be of assistance. In the *Hewu* case, the postponements were numerous and because of that the magistrate struck the matter from the roll. The appellant was arrested with a J50 warrant of arrest that same day and was brought before a different magistrate the next day. The matter was struck of the roll for a second time in as many days. On appeal, the judge requested submissions form the offices of the National Director of Public Prosecutions (NDPP) in Port Elizabeth and Grahamstown. The Port Elizabeth offices of the NDPP submitted that s 60(11)(*a*) 'makes no distinction between accused persons who appear for the first time' and those released on bail, there attendance should be secured by warrant of arrest. By issuing a summons, it is contrary to the intention of the provision. The Grahamstown offices of the NDPP submitted that the magistrate should have held a s 342A inquiry in order to determine what caused the delay in the finalisation of the investigations and then should have applied its mind based on the outcome of the inquiry. The court in *Hewu* stated that each case should be dealt with on its own merits but concluded that in the present case the court should have held a s 342A inquiry in order to ascertain what caused

the delays. The court held at para 23 that: 'Section 60(11) of the Act does not constitute an absolute bar to a court's refusal to postponement and a decision to strike it from the roll in terms of s 342A(3)(*a*).' The court also held that: 'If it later transpires that the trial can be proceeded with and be completed soon, the re-arrest of the accused could be justified.' The court in *Hewu* was willing to accept both submissions made by the different NDPP's offices, but the method to be followed will be indicative of the case before court.

Conclusion

In *S v Mabena and Another* [2007] 2 All SA 137 (SCA) at para 6, the Supreme Court of Appeal confirmed that the 'potential factors for and against the grant of bail', listed in the Act, s 60(4), are no less relevant than what they are in a schedule 6 bail application. In almost every bail hearing the appellant recites the provisions of s 60(4) and assert that the state's case against them is weak. On the former assertion the court in *Mathebula* at para 15 held that: 'Parroting the terms of ss (4) of s 60 … does not establish any of those grounds, without the addition of facts that add weight to his *ipse dixit*.' On the latter assertion the court in *Mathebula* at para 12 stated that, 'he [the appellant] must prove on a balance of probability that he will be acquitted of the charge.'

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A Last Thought

[13] Seeing justice done in court enhances public confidence in the criminal justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. *S v Mokoena; S v Phaswane* 2008 (2) SACR 216 (T). However, this right is not absolute. Like other rights in Chapter 2 of the Constitution, it may be limited in terms of section 36. Depending on the circumstances, the court may direct that the proceedings be held behind closed doors if the interests of justice so demand.

[14] Section 153 expressly allows the courts, in exceptional cases, to exclude the public or certain members or categories of people from attending the proceedings. Section 158 on the other hand, allows witnesses to not testify directly in courtrooms for a variety of reasons. Section 158(3) empowers a Court to allow for the giving of evidence through a closed-circuit television or other electronic means if the facilities are available. Section 153 of the CPA, is therefore intended to protect vulnerable witnesses from public exposure, either because disclosure of their identity may endanger their lives or safety or because of the discomfort or embarrassment at having to testify before an audience.

[15] Where the accused's right to a fair trial (in the form of the right to a public hearing) is at odds with the provisions of sections 153 and 158, a court must ensure that the proceedings before it is fair and must strike a balance between those competing rights and determine what is in the interest of justice. In resolving this conflict, the Court must protect those interests which, on the facts of the case, weigh in favour of the proper administration of justice. Crucially, an equitable and unbiased criminal justice system can only be achieved if the rights of victims, witnesses, and accused persons are recognised, protected, and balanced.

[16] The Constitutional Court observed in *S v Jaipal* 2005 (1) SACR 215 (CC) at para 29, that the right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It 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.

[17] I also find the dictum of Cloete JP, as he then was, in *S v Madlavu and Others* 1978 (4) SA 218 (E) at 225G - 226A, apposite. The learned justice stated as follows:
'It seems to me that the administration of justice is made impossible unless witnesses can give their evidence without fear of repercussions and danger to themselves. It is of paramount importance that the Courts should, wherever possible, give such witnesses the protection which the law allows. Such protection is provided for in ss (2) of s 153.'

[18] In many instances, sections 153 and 158 have been invoked in sexual offences cases as well as in cases involving minor children. However, I must stress that the application of these sections is not exclusively limited to child witnesses / offenders and sexual offences cases. These sections apply with equal force to adult witnesses whose evidence is likely to be compromised by fear or distress about testifying in an open court or in the accused's presence. In *Director of Public Prosecutions, Transvaal v. Minister for Justice and Constitutional Development and Others* 2009 (2) SACR 130 (CC) para 115, within the context of section 170A of the CPA, the Constitutional Court held that these measures should not be seen as

justifiable limitations on the right to a fair trial, but as measures conducive to a trial that is fair to all. In my view, this dictum applies with equal force regarding sections 153 and 158 of the CPA.

Per Lekhuleni J in *S v Lenting and Others (CC08/2018) [2023] ZAWCHC 168 (24 July 2023)*