e-MANTSHI

A KZNJETCOM Newsletter

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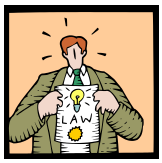
Welcome to the hundredth and eighteenth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now 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.
Your feedback and input is important to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. Act no 1 of 2016 the *Local Government: Municipal Electoral Amendment Act* has been published in Government Gazette no 39838 dated 18 March 2016.The Act will only come into operation on a date to be proclaimed by the President in the Government Gazette. One of the important amendments is the amendment of section 49 of Act 27 of 2000.

5**.** Section 49 of the principal Act is hereby amended—
(a) by the substitution for subsection (1) of the following subsection:
''(1) If a voter **[accidentally]**—
(a) Marks a ballot paper in a way that does not indicate for whom the voter wishes to vote; or
(b) after having marked the ballot paper, changes his or her mind as to how he or she wishes to vote, and the ballot paper has not yet been placed in the ballot box, the voter may return that ballot paper to the presiding officer or a voting officer.'';
and
(b) by the addition of the following subsection:

''(4) The Commission must prescribe the number of times a new ballot paper may be issued in terms of subsection (3), with due regard to section 19 of the Constitution.''

Recent Court Cases

1. S v SN 2016 (1) SACR 404 (GP)

During proceedings in terms of s 77(6) (a) of Act 51 of 1977 and after the court has found an accused committed no offence the court shall direct that the accused be detained in an institution as indicated by s 77(6)(a)(ii)(aa) of Act 51 of 1977 which is peremptory.

Fourie J (Tuchten J concurring):

[1] The accused was charged with theft of a motor vehicle in the magistrates' court and then referred to the Sterkfontein Hospital for 30 days' mental observation in terms of s 77(1) of the Criminal Procedure Act 51 of 1977. A psychiatric report was presented to the court a quo, indicating that the accused was not fit to stand trial and also that he, at the time of the alleged offence, was unable to appreciate the wrongfulness of his actions. It was recommended that he be admitted to the Sterkfontein Hospital as an involuntary patient under ch V of the Mental Health Care Act 17 of 2002.

[2] Subsequent to the receipt of the psychiatric report the matter was postponed for a decision of the Director of Public Prosecutions. An instruction was then issued that the prosecution had to proceed and that the court should be requested to act in terms of s 77(6)(a) of the Criminal Procedure Act. The court a quo then proceeded to hold an inquiry in terms of s 77(6)(a) of the Act. The magistrate found that the accused could not be linked to any offence and promptly released the accused back into society.

[3] The Director of Public Prosecutions then requested the court a quo to refer the matter to the High Court for review. The acting senior magistrate requested a special review in terms of s 304(4) of the Act. In his submission he pointed out that the presiding magistrate had failed to establish from the prosecution and the defence

whether the findings in the psychiatric report were disputed or accepted, to make a finding in terms of s 77(6)(a) and to direct that the accused was to be admitted to and detained in an institution as if he were an involuntary mental-health-care user contemplated in s 37 of the Mental Health Care Act 17 of 2002.

[4] The first question to be decided is whether these proceedings are reviewable. The matter is not serving before us as a review in terms of s 304 or s 304A, as the accused was not convicted of an offence or sentenced as envisaged by these sections. However, this is not the end of the matter. In terms of s 22(1)(c) of the Superior Courts Act 10 of 2013 the proceedings of any magistrates' court may be brought on review if there was a 'gross irregularity in the proceedings'. In Qozeleni v Minister of Law and Order 1994 (2) SACR 340 (E) (1994 (3) SA 625; 1994 (1) BCLR 75) at 353f – H Froneman J said the following in this regard:

'If the magistrate did err in his interpretation of s 241(8), the effect thereof would be that he had decided not to apply the (supreme) law of the land in a court of law. That, in my view, is as fundamental an irregularity as one can get. Mistakes of law by officials exercising judicial functions are under certain circumstances liable to lead to the review of decisions made in consequence thereof . . . . That does not mean that any wrong application of the law by a magistrate will lead to review: there is a distinction between a mistake of law leading to a situation where the supreme law of the land is not applied at all, and a situation where the law of the land is applied, but incorrectly. In the latter case, generally speaking, there will be no possibility of review . . . .'

[5] I fully associate myself with this dictum. Although this was said with regard to the interim Constitution of 1993, the same principle should apply where a magistrate fails to comply with a statutory provision which is peremptory. Such a failure will amount, in my view, to a gross irregularity in the proceedings, rendering them reviewable in terms of s 22(1)(c) of the Superior Courts Act.

[6] The next question to be considered is whether the presiding magistrate committed a gross irregularity. Section 77(6)(a) of the Criminal Procedure Act provides as follows:

'(6)(a) If the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused's incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited J evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems A fit so as to determine whether the accused has committed the act in question and the court shall direct that the accused —

(i) ……...

(ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence —

(aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002,

(bb) and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under section 106(4) to be acquitted or to be convicted in respect of the charge in question.'

[7] The provisions of ss (6)(a)(ii)(aa) appear to be peremptory. That also applies to a case where a court finds that the accused has not committed any offence. In either event the court 'shall direct' that the accused be admitted to and detained in an institution as referred to in the subsection.

[8] In the matter before us the court a quo found that the accused could not be linked to any offence, but failed to apply the provisions of s 77(6)(a)(ii)(aa) of the Act. This is not a mistake where a statutory provision is applied incorrectly. This is a mistake where a statutory provision, which is peremptory, was not applied at all. This in my view amounts to a gross irregularity in the proceedings which necessitates that the proceedings and order in terms whereof the accused was released should be set aside.

Order

In the result, I propose the following order:

1. The proceedings and the order in terms whereof the accused was released are set aside in toto.

2. The matter is remitted to the magistrate, Vereeniging, to be dealt with de novo in terms of the provisions of s 77 of the Criminal Procedure Act 51 of 1977, with specific reference to ss (6)(a)(ii)(aa) thereof, and for this purpose the accused must be brought before the court again.

2. S v CHAUKE 2016 (1) SACR 408 (SCA)

A Psychiatrist report that an accused is not suffering from any mental illness or defect after an unspecified examination lasting just one day does not meet the requirements set out in ss 79(3) and (4) of Act 51 of 1977.

In the appellant's trial in the High Court on two counts of murder his defence counsel

requested that he be examined by a psychiatrist in order to determine his mental accountability at the time when the offences were committed. The matter was adjourned for this purpose. On resumption of the trial, a report drawn up by his psychiatrist after an examination conducted in one day — in the presence of four colleagues — was handed in to court. The report stated that they found no acute or residual symptoms of a mental illness and concluded that the appellant was fit to stand trial and that there was no evidence that he was mentally ill at the time of the alleged offence. It did note, however, that the appellant had previously been admitted to a psychiatric hospital and periodically received antipsychotic medication.
After the appellant testified, the court questioned him and asked him inter alia whether during an 'attack' of his disorder he understood what he was doing. The appellant replied in the negative. The court then called the investigating officer regarding the appellant's mental capacity, who testified that his impression was that there was nothing wrong with the appellant. Relying on the findings of the report, the court rejected the appellant's defence that he did not know or remember anything about the offences, and convicted him of the two counts of murder.
On appeal it was argued that the court had failed to comply with the provisions of ss 77 and 79 of the CPA and should have referred the appellant for observation in terms of those provisions.

Held, that the record reflected a concern that the appellant might, at the time of the commission of the offences, have been suffering from a mental illness or defect. In such circumstances the court ought to have acted in terms of s 78(2) and directed that the matter be enquired into and reported on in accordance with the provisions of s 79. (Paragraph [11] at 412*g*–413*b*.)

Held, further, that the report by the psychiatrist did not meet the requirements set out in ss 79(3) and (4) and was of no assistance for the purposes of an enquiry into the appellant's mental state. It was silent on the nature of the tests conducted and the basis upon which the conclusions were reached, and the trial court was accordingly not in possession of all relevant facts regarding the appellant's mental condition. Such a report ought to be based on a holistic assessment of all such relevant facts and circumstances and include interviews with persons other than merely the medical personnel conducting the assessment. (Paragraphs [14]–[16] at 414*b*–415*e*.)

Held, further, that the court had erred in attempting to seek assistance from the investigating officer, who was not an expert in the field of mental disease, and that this constituted an irregularity. (Paragraph [17] at 415*e*–*i*.)
The appeal was upheld and the convictions and sentences were set aside. (Paragraph [21] at 416*g*.)

3. S v GOVENDER 2016 (1) SACR 236 (KZP)

House arrest constitutes a form of detention without the option of a fine as intended by s 112(1)(a) of Act 51 of 1977 and is therefore impermissible as a component of a sentence of correctional supervision following a conviction under that section.

Ndlovu J (Ntshangase J concurring):

[1] This matter served before me as a special review in terms of s 304(4) of the Criminal Procedure Act 51 of 1977 (the CPA). It was submitted by the senior magistrate and head of office of the Scottburgh magistrates' court, KwaZulu-Natal, after detecting an apparent technical irregularity in the sentence imposed on the accused by the additional magistrate.

[2] The accused, a 38-year-old woman from the Umthwalume area on the south coast of KwaZulu-Natal, appeared before the magistrates' court on two charges involving a contravention of s 58(1)*(b)* of the Marine Living Resources Act, 1998, read with regs 22(1)*(d)* and 27(1)*(a)*, in that she unlawfully possessed 67 shad; and further that she unlawfully sold the said fish without being the holder of a prescribed permit.

[3] Upon arraignment the accused pleaded guilty to both counts and the prosecutor accepted the pleas in terms of s 112(1)*(a)* of the CPA. The accused was, without further ado, summarily convicted as charged. On 14 August 2014 she was sentenced to undergo six months' correctional supervision, in terms of s 276(1)*(h)* of the CPA, with certain specified conditions, including house arrest.

[4] The issue for consideration is whether the sentence of correctional F supervision which includes house arrest is a competent sentence where an accused is convicted on a guilty plea in terms of s 112(1)*(a)* of the CPA.

[5] Section 112 (1)*(a)* provides:

'(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea —

(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment *or any other form of detention without the option of a fine* or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and —

(i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*; or

(ii) deal with the accused otherwise in accordance with law; . . . .'

[Emphasis added.]

[6] House arrest, in the context of judicial punishment, is clearly and logically a 'form of detention without the option of a fine' as envisaged in s 112(1)*(a)* of the CPA. Thus, a fortiori, any type of sentence that includes house arrest may not competently be imposed following upon a C conviction under s 112(1)*(a).*

[7] In *S v Cedars* 2010 (1) SACR 75 (GNP) a similar scenario as in the present case was encountered. The accused in that case pleaded guilty to theft of toothbrushes valued at R130, from Checkers. The prosecutor consented to the matter being dealt with in terms of s 112(1)*(a)* and the accused was convicted accordingly. At that stage it transpired that the accused had two previous convictions for theft — both committed within a year prior to the commission of the current offence. In mitigation of sentence the accused revealed, amongst other things, that he had a drug problem and he requested to be subjected to a rehabilitation programme. After considering the submissions presented on sentence, including pre-sentence reports compiled by the social worker and the correctional- supervision official, the magistrate acceded to the accused's request and sentenced him to 12 months' correctional supervision with certain conditions, including house arrest. On review the court found that the sentence of correctional supervision including house arrest was incompetent where an accused was dealt with under s 112(1)*(a).* However, after referring with approval to earlier decisions in *R v Harmer 1906 TS 50 at 52* and *S v Zulu*, 1967 (4) SA 499 (T) at 502D. the court concluded that 'the circumstances of this case do not dictate that the sentence imposed [should] be set aside', notwithstanding the 'technical irregularity', on the basis that the court was 'satisfied that the sentence was in accordance with real and substantial justice'. Accordingly both the conviction and sentence were confirmed.

[8] Indeed, it is clear from the wording of s 304(1) of the CPA that, for H certification by a judge, the review proceedings under ss 302(1) and 304(4) need not strictly be in accordance with law, but they need, more importantly, to be in accordance with justice. Section 304(1) reads:

'If, upon considering the proceedings referred to in section 303 and any further information or evidence which may, by direction of the judge, be supplied or taken by the magistrate's court in question, *it appears to he judge that the proceedings are in accordance with justice*, he shall endorse his certificate to that effect upon the record thereof, and the registrar concerned shall then return the record to the magistrate's court in question.' [Emphasis added.]

[9] Whether the proceedings in question are in accordance with justice is a matter that will depend on the facts and circumstances of a particular case. In my view the facts and circumstances of this case are distinguishable from those in *Cedars* above. In the present instance the accused had no previous convictions proved against her. In other words, she was treated as a first offender. She did not have any drug or alcohol problem. She did not request to undergo any rehabilitation programme for whatever reason. It only appeared in the social worker's report that the accused suffered from a physically disabling condition known as *genu valgum*, commonly referred to as 'knock-knees'. As a result of this condition the accused was reported to be unable to walk for a fairly long distance without support. On the basis thereof she was approved to receive a monthly state disability grant of R1320. In terms of the correctional-supervision report, it was only certified that the accused had a fixed abode and was, therefore, 'monitorable' for the purpose of a sentence of correctional supervision, in the event of the court determining same to be an appropriate sentence. The report did not in any way purport to recommend to the court that such sentence be imposed.

[10] In light of the above, it is unclear to me on what legal or moral basis a sentence involving house arrest was considered to be suitable and appropriate in the circumstances of this case. I further note that one of the other conditions of the sentence was that 'the accused refrains from using intoxicating substances except on medical prescription'. I am perplexed as to what purpose this particular condition sought to achieve, since the social worker's report, for instance, specifically noted that the accused did not take any alcoholic drinks. Nor was it ever suggested by anyone that the accused had any drug problem.

[11] In my view the sentence imposed on the accused was not an appropriate sentence in the circumstances of this case and, therefore, it cannot stand. On 11 September 2014 I issued the following order which was transmitted to the magistrate:

'The operation of the sentence imposed on the accused is suspended pending review in terms of s 304(4) of Act 51 of 1977. The accused must accordingly be released from house arrest forthwith.'

[12] In the circumstances, it seems to me appropriate that the matter be remitted to the magistrate in order for him/her to consider the question of sentence afresh, in light of this judgment. If deemed necessary, further evidence and/or submissions on sentence may be presented before the magistrate. As it appears to have been the magistrate's intention to impose a non-custodial sentence, there is indeed a range of suitable options in that regard, including correctional supervision without house arrest.

[13] Accordingly I make the following order:

1. The conviction is confirmed.
2. The sentence is set aside and the matter is remitted to the magistrate to consider

the question of sentence afresh, in light of this judgment; and, if deemed necessary, further evidence and/or submissions on sentence may be presented before the magistrate.

3. The magistrate shall take into account the period of house arrest already served by the accused; and the new sentence shall be antedated to 14 August 2014.

From The Legal Journals

Roestoff, M

"The objective of providing debt relief to over-indebted consumers and the interpretation of section 85 of the National Credit Act *Firstrand Bank Ltd v Govender* [2014] JOL 31572 (ECP)"

2015 (78) THRHR 694

Govender, D

"Is domestic violence being policed in South Africa?"

Acta Criminologica: Southern African Journal of Criminology 28(2)/2015

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

Contributions from the Law School

THE CONSTITUTIONAL COURT DELIVERS THE FINAL WORD ON THE ADMISSIBILITY OF ADMISSIONS BY ONE ACCUSED AGAINST ANOTHER CO-ACCUSED – SAYING 'NO, THEY ARE NOT.'

The common law rule forbidding the use of admissions made by one co-accused against the other stood until the case of *S v Ndhlovu and others* (2001 (1) SACR 85 (W)) (*Ndhlovu's* case) where the court invoked s 3 of the Law of Evidence Amendment Act 45 of 1988 (LEAA) to admit such evidence as hearsay evidence (*Litako and others v S* 2014 (2) SACR 431 (SCA) at para 64) (*Litako's* case). The SCA in *Litako's* case rejected the approach in *Ndhlovu's* case and reiterated the rule excluding the use of extra curial statements made by one co-accused against another. This position has now been confirmed by the constitutional court in the case of *Mhlongo v S; Nkosi v S* 2015 (2) SACR 323 (CC) where the court focused on the problem with treating admissions and confessions differently, which was the result of the application of the *Ndhlovu* approach.

This note will discuss the *Mhlongo v S; Nkosi case* (supra).

FACTS

Warrant Officer Makuna, the deceased, was shot at his home on 3 August 2002 and later died in hospital. It was alleged that the applicants belonged to the number of men who planned to steal Mr Makuna's bakkie and who shot him. He subsequently died and his service pistol was never found. The applicants (accused 2 and 4), together with six co-accused, were found guilty in the trial court of having common purpose to murder and rob the deceased and were sentenced to life imprisonment for the murder, 15 years' imprisonment for the robbery and three years' imprisonment in respect of the unlawful possession of firearms and the unlawful possession of ammunition.

The applicants (who were accused 2 and 4 in the trial court) sought leave to appeal against their convictions and sentences, calling upon the court to decide whether the admissibility of the extra curial statements which implicated them was constitutionally valid in the light of the rights to equality before the law and to a fair trial.

The crisp issue to be decided was the constitutional tenability of the decision in *Ndhlovu*, which allowed extra-curial statements to be admitted against a co-accused if it was in the interests of justice to do so (para 4). A trial-within-a-trial was held to determine the admissibility of the extra-curial statements made by accused 1, 3, 6 and 7 (para 5). The accused contested the admissibility of these statements on the grounds that they were not made freely and voluntarily but the court ruled them admissible and found that they were not confessions but admissions (contrary to the view of the trial court). Furthermore the court found that the statements were admissible against the other co-accused in terms of section 3(1)(c) of the LEAA, following the reasoning in *Ndhlovu* (para 6). The accused were duly convicted of four of the five charges against them and sentenced accordingly.

The accused then appealed to the full court against their convictions and sentences based on the contention that the extra-curial statements were inadmissible (para 7). The court held that the hearsay evidence of accused 1 and accused 3 (on which the Court relied to convict the applicants) had become "automatically admissible" in terms of section 3 (1) (b) of the LEAA since it had been confirmed by them in their oral testimony and was thus no longer 'hearsay evidence'(para 7). In addition, the trial court held that the statement of accused 7 was admissible against the applicants in terms of s 3 (1) (c) of the LEAA (para 8). The full bench dismissed their appeals and their petition to the SCA for leave to appeal also failed (para 9). The applicants then applied for leave to appeal to the CC on the grounds that the admission of extra-curial statements against co-accused violates constitutionally protected rights to equality and to a fair trial (para 9 &10).
In the CC the state conceded that at common law an accused's extra-curial statement is inadmissible as evidence against a co-accused (para 11). It further conceded that the SCA in *Litako,* which had taken a different approach from *Ndhlovu*, was correct in confirming the common law prohibition against the use of extra-curial statements against co-accused (para 11). Nevertheless, the state argued that s 3 of the LEAA might render such statements admissible if the requirements prescribed in the *Ndhlovu* case were adhered to. However, it was conceded by the State, that neither the High Court nor the Full Court properly applied the *Ndhlovu* requirements before admitting the extra curial statement against the co-accused. The provisions required that the LEAA be properly applied; that no constitutional principles be compromised by the admission of the evidence and that the admission of the evidence must be in the interests of justice (para 26).

The question of whether the constitution permits the admission of an extra curial statement against a co-accused was not raised before the trial court or the full bench – which was the reason the CC in *Molimi's* case had declined to consider it (para 16). However, in casu, the CC was satisfied that the matter had been fully ventilated in argument before it, and that the SCA had had an opportunity to consider the question in the cases of *Litako*, *Libazi* and *Balkwell* (para 16).

The CC proceeded with an overview of the common law prohibiting the admission of an on the admissibility of extra-curial statements by the accused against a co-accused, Theron AJ (Moseneke DCJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J and Tshiqi AJ concurring) emphasised the absolute prohibition at common law of an extra-curial statement against a co-accused, highlighting the fact that in *R v Barlin* it was confirmed that extra-curial statements were only admissible against their makers provided that they were freely and voluntarily made and not induced by any promise or threat (para 19). The court noted that before 1918, the common law did not differentiate between admissions and confessions made by accused persons. The distinction, and the term 'confession,' was introduced for the first time in South African law by way of in the Criminal Procedure Code Act 31 of 1917 which explicitly stated that a confession by an accused was inadmissible against a co-accused, but contained no similar provision in respect of admissions (para 22). It also introduced more stringent requirements for the admission of confessions than for admissions (para 22). (para 22). In *R v Hans Veren* 1918 TPD 218 the term confession was strictly interpreted to distinguish it from 'a mere statement which, together with other evidence, may lead to conviction of an accused', which would constitute an admission (para 23). The distinction between admissions and confessions was retained in the Criminal Procedure Act 56 of 1955 and remains in the current Criminal Procedure Act 51 of 1977 (paras 23, 25). The watershed decision in *S v Ndhlovu* 2002 (2) SACR 325 (SCA) relaxed the common law rule that an extra -curial statement by an accused is inadmissible against a co-accused (para 26). The constitutional court noted the *Ndhlovu* decision had had the effect of relaxing the absolute prohibition on the admission of extra curial statements by an accused against a co-accused (para 26). In casu the CC reviewed the *Ndhlovu* decision with regard to the admission of an extra-curial admission as evidence against a co-accused and held that the *Ndhlovu* approach could not be supported on four main grounds (para 27):

Firstly, the constitutional court criticised the *Ndhlovu* decision for having ignored the common law rule prohibiting admissions being used as evidence against co-accused persons and having instead assumed that the hearsay character of the evidence was the major obstacle to its admission which could be resolved by the application of s 3 of the LEAA (para 27).

Secondly, the CC held that the *Ndhlovu* court had failed to take sufficient cognizance of the provisions of section 3(2) of the LEAA to the effect that its provisions which provide that s 3 (1) shall not render admissible any evidence which is inadmissible on any ground other than that it is hearsay evidence (paras 28, 29). The constitutional court noted that the statements of the co-accused in casu were inadmissible for reasons other than the hearsay prohibitions, viz: the common law prohibition on the admissibility of such statements.

Thirdly, the *Ndhlovu* decision was criticised for not taking into account section 219A of the current CPA, which only allows for an admission to be used against the person who made the admission. The CC regarded the reasoning of the SCA in *Litako*, according to which section 219A was interpreted as not permitting extra-curial admissions to be admitted as evidence against any person other than the maker thereof, as sound (para 30).

Fourthly, the CC court held that sufficient attention had not been paid to the well-established approach to the interpretation of a statute to the effect that unnecessary inroads into the common law should be curtailed. The CC held that while the LEAA altered the common law regarding hearsay evidence, sections 3(2) and 3(1) clearly indicate that it was not the intention of this Act to change the common law so as to allow the admissibility of extra-curial statements made by an accused to be admitted as evidence to be used against a co-accused (para 31).

As regards equality before the law, it was contended by the applicants that the "distinction drawn by *Ndhlovu*, between admissions and confessions, effectively leads to indirect differential treatment between different groups of accused: those implicated by an admission and those implicated by a confession. A confession is statutorily inadmissible against another person, while, according to *Ndhlovu*, an admission may be admissible against another as a species of hearsay. The applicants maintained that the distinction violated s 9(1) of the Constitution, which provides that everyone is equal before the law and entitled to equal protection and benefit of the law (para 32).

The CC considered the different requirements for the admission of confessions and admissions into evidence – and held that when one considers that the distinction between them is determined by the extent to which the statement implicates its maker, the distinction becomes relevant in determining the safeguards that are put in place to ensure the voluntariness of the confession or admission. If a confession can be used, with little more, to secure the conviction of its maker (as opposed to an admission which would still require the state to prove various elements of the crime), then there may be logic in applying more stringent requirements on its admission against that accused"(para 33). However, "the distinction has nothing to do with a third party. Accordingly there is no rational reason why, when used against another person, there should be a difference in the admissibility of the two types of statement"(para 33). The CC court quoted the SCA in *Litako* with approval, where it had said: 'From the perspective of the one accused, who may be implicated in the statement of another, one strains to discern a sound jurisprudential basis for the distinction.'

The CC held that the differentiation must be evaluated in terms of s 9(1) of the Constitution, and a differentiation made in the law will contravene s 9(1) if it is irrational. This is "so as to ensure that the state functions in a rational manner, in

order to enhance the coherence and integrity of the law. This is essential to the rule of law — the fundamental premise of the constitutional state" (para 34).
The CC held that "it must be ascertained whether the differentiation complained of is rationally connected to the achievement of a legitimate government purpose, as opposed to being arbitrary or capricious. To this end, a legitimate purpose must be identified. It is difficult to conceive of any rational reason why an admission ought to be admissible against a co-accused, but not a confession. The state offered no reasons for this differentiation. The rationale for precluding the admissibility of a confession — the inherent dangers in using statements by co-accused — which is expressly guaranteed in s 219 of the current CPA, applies equally to admissions" (para 35).

Ultimately, therefore, the CC concluded that "the differentiation between accused implicated by confessions versus admissions cannot be lawfully sustained. It is not designed to achieve any legitimate purpose. It is an irrational distinction which violates s 9(1). It cannot be saved by the limitations clause contained in s 36 of the Constitution because this limitation on the right to equality before the law is not 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. Nor did the state seek to justify this limitation" (para 37).

The court concluded that "the interpretation adopted in *Ndhlovu*, that extra-curial admissions are admissible against co-accused in terms of s 3(1)*(c)* of the Evidence Amendment Act, creates a differentiation that unjustifiably limits the s 9(1) right of accused implicated by such statements" (para 37). The decision of the CC therefore restored the pre-*Ndhlovu* common-law position that extra-curial confessions and admissions by an accused are inadmissible against co-accused.

As a result of this finding, it was not necessary for the CC to consider the applicants' additional argument that the admission of extra-curial statements of an accused against a co-accused offended against the right to a fair trial (para 38).

Since the only case against the applicants was contained in the extra-curial statements of the other accused, their convictions were set aside (para 41).

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Matters of Interest to Magistrates

Services for South African rape victims come under threat

15 March 2016

South African newspapers recently reported that organisations supported by The Global Fund to Fight AIDS, Tuberculosis and Malaria face severe funding cuts.

This follows a decision from the United States-based organisation to limit its funding to the eight areas in South Africa that have recorded the highest prevalence of HIV.

These cuts will also apply to the critical services that non-governmental organisations (NGOs) offer to rape victims in the areas that fall outside these designated areas, including in Limpopo, Northern Cape and the Free State.

In Gauteng, only Tshwane is eligible for funding, and in the Western Cape and KwaZulu-Natal, only the big metros of Cape Town and eThekwini. These include Thuthuzela Care Centres – government's 'one-stop' service, support and counselling centres for rape victims – in the affected areas.

The implications of these funding cuts raise important questions that require urgent attention. The first is, why are services to rape victims dependent on international donor funding, and thus vulnerable to donor policy trends and changes?

Efforts to address gender-based violence, including the allocation of state money spent on campaigns like 16 Days of Activism against gender-based violence, are strongly policy driven. It therefore seems unconscionable that the most important services to those worst affected by rape should be vulnerable to funding cuts and changes in this way.

The Thuthuzela Care Centres' counselling service is provided by NGO employees, who do the heavy lifting at a far lower rate of pay than their state counterparts. Surely these services should be secured by state funding?

We also need to question the unintended consequences of this decision. It seems sensible to concentrate efforts to tackle HIV in the areas with the highest infection rates, but these areas do not necessarily overlap with those where high rates of rape are reported. And because rape frequently carries the risk of infection with HIV, this means that all-important support to survivors to complete their course of post-exposure prophylaxis may be lost.

These services also matter for many other reasons.

According to research published in 2008 by the South African Stress and Health Survey, rape was the form of violence most likely to result in post-traumatic stress disorder (PTSD), and the most severe and long-term forms of PTSD. But this is not all: depression, anxiety, suicidal tendencies, substance abuse, repeated victimisation, disability, HIV-infection and chronic physical health problems can also develop in the aftermath of rape.

In an ideal world, all victims would have the emotional resources and resilience required to deal with violence. They would also be surrounded by supportive family members and friends, and assisted at all times by officials equipped with empathy and knowledge. This is not the reality for many of the women, girls, boys and men who are raped.

Rape affects not only the emotional and physical wellbeing of survivors, but also their ability to work and – if they are parents – to provide the love, care and attention their children require. Victims may also find that the rape reactivates memories of earlier victimisation or loss. This complicates attempts to deal with rape, and increases the effect of the trauma. Family members and friends may be absent – if not involved in the abuse themselves – while officials can be untrained or indifferent to the victims' needs and circumstances.

This means that the counselling services to rape victims are essential. But where rape is concerned, no service is better than a bad service. A substantial body of research shows that services do more harm than good when provided by people who have not been adequately trained to respond to rape, who hold victim-blaming beliefs, and who do not receive debriefing and supervision.

A degree of specialisation is required to provide quality services, which also take a range of different forms. These include psychological first aid (an evidence-based approach to assisting victims in the aftermath of trauma) in the acute stage of trauma and assessment of children's circumstances – including their removal from neglectful circumstances. Counselling and testing for HIV is another important aspect, along with assistance regarding post-exposure prophylaxis to prevent HIV infection.

Other support services include individual, group or family counselling in the medium and long term; and legal help, such as preparation for testifying in court; accompaniment to court; writing reports for court and providing expert testimony. This requires a dedicated investment by the state to ensure that the services are available sustainably – at least at all Thuthuzela Care Centres.

But for now, these services are about to disappear for many rape victims who need support from the Thuthuzela Care Centres. The women who have been providing the services also face an uncertain future.

Rape is an entrenched social problem in South Africa, and post-rape care will remain necessary for the foreseeable future. The Inter-ministerial Committee on Gender-Based Violence must step up to their task and find ways to ensure that rape survivors and the people who care for them are not subject to the shifting priorities of donor decision making.

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A Last Thought

" In his well-known book *Judges*, David Pannick refers to a statement made in 1952 by Justice Jackson of the United States Supreme Court, that 'men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance and other weaknesses to which human flesh is heir'. In *The Modern Judiciary: Challenges, Stresses and Strains*, Sir Fred Phillips, after acknowledging that the statement is as true now as it was then, goes on to consider a pronouncement by Lord Hailsham that judicial officers sometimes develop 'judges disease', the symptoms of which are 'pomposity, irritability, talkativeness, proneness to *obiter dicta'.* The present case is concerned principally with whether steps taken in relation to a contemplated inquiry into judicial impropriety were legitimate. However, the alleged conduct at the centre of the dispute is not of the lesser kind of sin to which we as judges, with our human foibles, to which Phillips refers, are sometimes prone. It touches upon something much more foundational to the judicial institution in a constitutional democracy, namely, integrity ".

Per Navsa ADP in ***Nkabinde v The Judicial Service Commission*** **(20857/2014**) **[2016] ZASCA 12 (10 March 2016).**