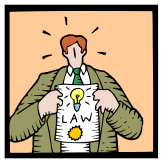
e-MANTSHI

A KZNJETCOM Newsletter

October 2025: Issue 223

Welcome to the two hundredth and twenty third 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 Rules Board for Courts of Law has, under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), with the approval of the Minister of Justice and Constitutional Development, amended the rules regulating the conduct of the proceedings of the magistrates' courts of South Africa. The notice to this effect was published in Government Gazette no 53572 dated 24 October 2025. The amendments are substantial and generally relate to what is called an e-justice system which is being introduced. The amendments will be coming into operation on 28 November 2025.
The amendments can be accessed here:

https://www.gov.za/documents/notices/rules-board-courts-law-act-rules-conduct-proceedings-magistrate%E2%80%99s-courts-south-6

2. The Department of Transport has gazetted the latest set of amendments to certain regulations under the 1998 Administrative Adjudication of Road Traffic Offences (AARTO) Act 46 of 1998.The notice to this effect was published in Government Gazette no 53605 of 31 October 2025.

The notice can be accessed here:
https://legalacademy.co.za/news/read/aarto-act-latest-regulatory-amendments-gazetted

Recent Court Cases

1. Nedbank Limited v Abandoned Vehicle and Truck Solutions (Pty) Ltd and Others (074260/2023) [2025] ZAGPPHC 744 (22 July 2025)

Motor salvage liens: may they be sold-on or transferred?
No, they cannot, rules the Pretoria High Court, finding against 'secondary' salvagers who, relying on their purported liens, claimed the right to retain possession of the vehicles until paid for the costs they incurred. The court points out that the fundamental problem for the secondary salvagers is that the primary salvagers had no right to hand possession of the vehicles to the secondary salvagers without following legal process or obtaining the consent of the consumer or owner. Nor can the liens be ceded, as it was not a cause of action but merely a competency to hold possession until the debt is paid. The court therefore declares that salvage or improvement liens cannot be ceded, sold or transferred, and that any such purported cession or sale is null and void.

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZAGPPHC/2025/744.html

2. S v Porritt and Another (SS40/06) [2025] ZAGPJHC 794 (15 August 2025)

Admissibility of evidence on commission without leading of witness otherwise subject to cross-examination
In a trial in the High Court, the state wished to introduce certain evidence emanating from Hong Kong without leading a witness who would otherwise be subject to cross-examination. The court considered various questions relating to the admissibility of such an affidavit, including the effect of failure of accused to identify paragraphs in affidavits objected to; whether it could be based on questions and answers put to the deponent; whether oral evidence required; and the effect of the loss of the fair-trial right to cross-examine the witness. Interests of justice warranted admission of majority of affidavit evidence and documents – Constituted crucial business records relevant to charges – Specific limited portions not admissible – International Co-operation in Criminal Matters Act 75 of 1996, s 5.

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZAGPJHC/2025/794.html

From The Legal Journals

Ngobane, Y

Examining the Implications of an Inference of Remorse or Lack Thereof Drawn From a Convicted Offender's Plea of Guilty or Not Guilty

OBITER 2025 577

Abstract

The concept of remorse is often referred to as a sentencing factor carrying enough weight to mitigate the sentence imposed on a convicted offender, and the lack thereof is seen as an aggravating factor. Numerous cases have referred to an offender's plea of guilty (in terms of section 112 of the Criminal Procedure Act) as an indication of remorse, and to a plea of not guilty (in terms of section 115 of the same Act) as a lack thereof. In drawing such inferences, our courts seem to negate the right to a fair trial,

particularly the right to adduce and challenge evidence as envisaged in section 35(3)(i) of the Constitution of the Republic of South Africa, 1996. This article seeks to analyse the implications of drawing an inference of remorse (or lack thereof) from a convicted offender's plea of guilty or not guilty. This article seeks to answer the question of whether the inference of remorse or lack thereof, drawn by sentencing courts from a plea of guilty or not guilty, is a blind one; and if it is not a blind inference, then how do sentencing officers ensure that a balance between the aggravating and mitigating factors is maintained to ensure that the punishment fits the crime.

This article can be accessed here:
https://obiter.mandela.ac.za/article/view/18866/24794

Botha, R & Sease, K

What the Doctor Ordered: Lessons From Abroad to Strengthen South Africa's Medical-Parole System

OBITER 2025 605

Abstract
Certain outcomes of South Africa's medical-parole system in recent years have raised questions about the adequacy of the legislation governing the system, particularly in respect of eligibility criteria and cancellation of parole should the offender recover. Cases in point include the to-ing and fro-ing on compliance with criteria in the Derby-Lewis matter, Jacob Zuma's near-immediate release on medical parole, and the granting of medical parole on grounds of terminal illness to Zuma's former advisor Shabir Shaik, who served barely two and-a-half years of his fifteen-year sentence and has since been spotted out and about. To ascertain how the medical-parole regime in South Africa compares with other jurisdictions, this article juxtaposes it with the systems in Canada and the American states of Mississippi, New York and California. The comparison takes into account the type of parole available, illnesses that would typically qualify a prisoner for medical parole, the minimum period of imprisonment to be served, types of conviction excluded from medical parole, as well as the option to cancel medical parole. A comparative strength of the South African system appears to be the delineation of a clear, transparent application process, which not unimportantly includes the provision of a comprehensive, well-defined list of eligible illnesses and conditions. South Africa should also be commended for not relying on the type of conviction as a deciding factor in granting medical parole, thereby adhering to the nation's founding value of human dignity enshrined in the Constitution. Yet there is also ample room for improvement.Requiring prisoners to serve a minimum period of imprisonment before they can apply for medical parole could help prevent abuse of the system as a quick escape route. In addition, arguably the most important

step South Africa could take to strengthen the system would be to provide for the cancellation of medical parole where the parolee recovers.

This article can be accessed here:
https://obiter.mandela.ac.za/article/view/24128/24796

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

Contributions from the Law School

A recent hearsay evidence case

1 Introduction:
This case, *Makhala and Another v Director of Public Prosecutions, Western Cape* (2025 (1) SACR 275 (CC)), concerns an appeal against the conviction of two applicants for, inter alia, murder. The convictions relied heavily on two statements made by a witness (Luzuko Makhala) under section 204 of the Criminal Procedure Act 51 of 1977 (CPA), which he later recanted in court. The central legal issue revolves around the admissibility of these prior inconsistent statements, specifically within the context of the Law of Evidence Amendment Act 45 of 1988 and the Constitution of the Republic of South Africa, 1996.

2 Litigation History
The High Court convicted the two applicants and sentenced them, inter alia, to life imprisonment (*S v Makhala* [2019] ZAWCHC 182). The convictions were based on two statements made by a section 204 witness to the effect that the accused had procured the services of a third accused to kill the deceased (para [5]). The first statement was made to a colonel with 25 years of experience. The witness had his constitutional rights read to him, and he was told that the plan was to use him as a section 204, CPA witness (para [4]). A second statement was made to a different police officer (para [6]). The

statements incriminated both himself, the two appellants, and the third accused in the murder of the deceased (para [7]).
In the High Court the witness recanted his statements saying that he had been forced to make them (para [8]). He was declared a hostile witness (para [9]). In determining the admissibility and probative value of the two statements, the High Court found that the police officers' evidence was overwhelmingly convincing and corroborated by another officer (para [10]). They found that the witness was the source of the statements and that they had been made freely and voluntarily (para [10]).
Because the witness had recanted the statements, the High Court considered whether the two statements should be admitted in the interests of justice as hearsay evidence under the Law of Evidence Amendment Act 45 of 1988. Since the statements were found to have high probative value, corroborated by independent and objective evidence, they were admitted into evidence (paras [11]-[12]). The accused were ultimately convicted (para [13]).
The appellants then appealed to the Supreme Court of Appeal (SCA) (2022 (1) SACR 485 (SCA). It was common cause in this court that without reliance on the two recanted statements, the convictions could not stand (para [14]). The SCA wrote two judgments. In a split of four to one, the majority (per Meyer AJA) concurring with the order of the minority (per Unterhalter AJA) dismissed the appeal (para [15]). The two judgments diverged on the question of whether the recanted section 204 statements were hearsay evidence or not. The minority held that since the witness was available to testify, it could not be said that the probative value of the statements depended on a witness who was not present before the court, and it was therefore not hearsay evidence (paras [19]-[20]). The majority held that it was hearsay evidence and, therefore, the court had to consider the interests of justice in deciding whether to admit them as extra-curial hearsay admissions (para [22]). Ultimately, both the minority and majority found that the statements were admissible and reliable and that the appeal must fail (para [22]).

3 Constitutional Court

Leave to appeal was granted because the appellants' appeal raised arguable points of law which were in the interest of justice for the court to clarify (paras [23] – [26]). The central issues were whether a court could convict an accused solely on the basis of a recanted section 204 statement and whether the section 204 statement is hearsay evidence if the witness takes the witness stand (para 38]).
The Constitutional Court split six to three, with Tshiqi J writing the majority decision, and Bilchitz AJ penning the minority judgement. Both judgements concurred in the outcome, being to uphold the appeal and overturn the convictions of the appellants (para [145]).

3.1 Majority judgement

The majority set out by outlining the law on section 204 statements (paras [39]-43]), which is well known. Next, they considered whether the trial court was correct in declaring the section 204 witness a hostile witness (para [44]). The significance of this is that the prosecution obtained the right to cross-examine the witness they had called

as a section 204 witness. The applicants argued that just because the section 204 witness had recanted his earlier statements, it did not mean that he had the necessary animus to prejudice the state's case, but they did not pursue this argument with any vigour (para [44]). Even if they had, the majority held that it would have confirmed the witness's declaration as hostile because the trial court had instructed the section 204 witness that he was expected to answer questions put to him frankly and honestly, and it explained what would happen if he did not. The court then adjourned for the day, allowing the witness to reflect on what he had been told and to decide how to proceed. The next day, the court reiterated what it had explained and proceeded to declare the witness hostile, stating that he had likely retracted his statement because it implicated himself as a main perpetrator and his brother (para [45]). Also, it was not just that there were contradictions in his evidence but that he denied everything that he had said (para 46]), including information not known to the police (para [58]). The majority found that there was nothing improper in having the section 204 witness declared hostile by the trial court (para [47]).

The section 204 witness was cross-examined by the state and the defence, where he stated that his earlier statements to the police were just lies (para [49]). The trial court rejected this, favouring the state's version.

The trial court then found that it had to decide on the admissibility of the section 204 statements by applying section 3 (1) (c) of the Law of Evidence Amendment Act 45 of 1988 (para [54]). The majority questioned the High Court's finding that although the two section 204 statements had been made to the police only after the witness had been caught misleading them, they were nonetheless reliable (para [57]). There had been no cross-examination on this aspect. The majority also questioned the trial court's finding that "objective and independent" circumstantial evidence corroborated the section 204 statements. The majority asked whether the inference drawn by the high court from the circumstantial evidence was the only reasonable inference to be drawn (para [59]). There had been no cross-examination on this either. A further aspect the majority criticized was the trial court's reliance on neutral evidence as further evidence implicating the appellants (para [60]. See also *S v Maqubela* [2013] JOL 30994B (WCC), which dealt with the correct use of circumstantial evidence, and which was discussed by the majority at paras [62] – [65]).

Next, the majority considered whether the two section 204 statements constituted hearsay evidence as defined in the Law of Evidence Amendment Act 45 of 1988 (para [67]). The definition of hearsay evidence is evidence, the probative value of which depends on the credibility of any person other than the person giving that evidence (para [67], section 3 (4) Law of Evidence Amendment Act 45 of 1988). The majority reasoned that the person upon whose credibility the probative value of the section 204 statements depended was the section 204 witness who was called at the trial to testify (para [67]). Therefore, the majority, aligning itself with Unterhalter AJA in the SCA, found that the statements were not hearsay and therefore not admissible under the interests of justice test per the Law of Evidence Amendment Act 45 of 1988.

The question for the majority then was whether the trial court should have convicted the applicants based on the section 204 statements on any other ground, to which their

answer was a resounding “no” (para [68]). The majority reasoned that the key witness had made previous inconsistent statements, he had been declared hostile by the trial court and he had admitted he lied to the police, who could have had no way of knowing which version was the truth because of the lack of any other corroborating evidence (para [68] – [69]). The majority was not convinced that the circumstantial evidence was sufficiently strong to prove that the statements were true and that the applicants were guilty beyond any reasonable doubt (para [70]).
The majority held that sections 219 and 219A, Criminal Procedure Act 51 of 1977 were of no relevance in casu, because the statements were not confessions, and the maker of the statements was not a co-accused (paras [71]-[74]. See also *S v Litako and others* 2014 (2) SACR 431 (SCA)).
In the event, the majority found that the applicants should have been acquitted and therefore replaced the SCA’s decision with the decision that the appellants’ convictions be set aside (para [[75]-[76]).

3.2 Minority judgement
The minority decision starts by saying that there is a need to consider and outline the procedural and substantive legal framework for determining the admissibility of prior inconsistent extra-curial statements, which are not hearsay because the witness who made those statements testifies (para [77]). The crux of the question is whether, and under what conditions, a judge can accept such a statement as proof of the truth of that statement (para [79]).

3.2.1Hearsay and section 204
One core question was whether the section 204 statements, recanted at trial, constituted hearsay. Agreeing with the majority, the minority held that because the section 204 witness testified and was cross-examined, the statements were not hearsay evidence under the definition in section 3(4) of the Hearsay Act. The probative value hinged on his credibility, which was directly tested in court (para [82]). Some of the concerns surrounding the reliability of the section 204 statements raise the same questions that arise when considering the admission of hearsay evidence in the interests of justice (para [82]).
In this case, the prior inconsistent statement was given by the witness before he had been offered section 204 indemnity (para [83]). The minority held that for section 204 to have any application, it must be possible for the witness to testify against the accused persons and to be cross-examined on that testimony (para [83]). In addition, when evidence is taken from the witness in anticipation of them becoming a section 204 witness, they must be warned of their right to remain silent and of the consequences of not doing so; and that they are not compelled to make any self-incriminating statements. They should also be told of the consequences of becoming a section 204 witness (para [85]). In the case before the court, the relevant warnings were given to the section 204 witness prior to taking his statements.
The minority did not agree with the majority that having determined that the statements were not hearsay, the next step was to evaluate the probative value of the statements

in the light of the onus on the state to prove guilt beyond any reasonable doubt (para [86]).

3.2.2 Section 219 and 219A, CPA

The minority turned to consider the applicability of sections 219 and 219A of the Criminal Procedure Act 51 of 1977, finding that these sections did not render the two statements inadmissible. *S v Litako* (2014 (2) SACR 431 (SCA)) and *S v Mhlongo, S v Nkosi* (2015 (2) SACR 323 (CC)) established that sections 219 and 219A entail that extra curial statements that constitute either admissions or confessions made by a co-accused are not admissible against other co-accused persons (para [89]-[94]). This approach has attracted some criticism regarding the rigidity caused by the decisions on the admissibility of co-accused's statements (Watney The Clock Turned Back for the Admissibility of Extra Curial Hearsay Admissions in Criminal Cases (2014) 4 *SALJ* 855. See also Bellengere & Walker When the Truth Lies Elsewhere (2013) 26 *SAJCJ* 175, Naude The Substantive use of a Prior Inconsistent statement (2013) 26 *SAJCJ* 55) and Whitear-Nel The admissibility of extra curial admissions by a co-accused: A discussion in the light of the *Ndhlovu*, *Litako* and *Mhlongo/Nkosi* cases and international law (2017) 134(2) *SALJ* 244).

However, *Litako* and *Mathonsi/Nkosi* did not deal with the situation in casu where the extra-curial statement was made by a witness not a co-accused (para [89]). The minority examined the literal meaning of sections 219 and 219A, and concluded that these sections only dealt with statements that had been made a co-accused and was therefore distinguishable from *Litako* (para [90]-[95 that nevertheless, there remained serious concerns about the admissibility of such a prior inconsistent statement (para [95]). This led to the development of the relevant traditional common law rule which was based on English law (*Wright v Beckett* (1833) 174 ER 143 at 145 and *R v Golder; R v Jones; R v Porrit* [1960] 3 ALL ER 457 at 459). This rule was that such a prior inconsistent statement could be admitted to impugn credibility but not as truth of its contents (para [95]).

3.2.3 Traditional common law rule and the power of the courts to develop it

The English common law rule on previous inconsistent statements became part of South African law by virtue of section 252, CPA which provides that if the matter was not provided for in South African law, then the law in force in the criminal courts of England on the 30 May 1961 would apply (para [96]). Section 252 predates the Constitution of the Republic of South Africa, 1996 which is now the supreme law and invests higher courts with the power to develop the common law taking into account the interests of justice (section 173, Constitution) and provides that courts interpreting the law and developing the common law must promote the spirit, purport and object of the Constitution (para [98], section 39(2), Constitution and see also *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) (Ltd)* 2000 (2) SACR 349 (CC)).

There is a direct relationship between the rules of admissibility and the Constitution (Para [99]), *Visser v 1 Life Direct Insurance (ltd)* 2015 (3) SA 69 (SCA) at para 48). The

minority, therefore, found that the question of the admissibility of prior inconsistent extra curial statements implicates the constitutional right to a fair trial, requiring this court to ensure fairness in the procedures of the criminal trial while balancing all the stakeholders' rights (para [99], section 35, Constitution). Section 252, CPA, importing the common law of England into South African criminal law, therefore, must be interpreted in conformity with the Constitution and in a way that empowers the courts to develop the old English common law rules relating to the admissibility of prior inconsistent statements, which themselves have been altered in England since 30 May 1961 (para [100]-[101]).
The minority held that it would look at comparable jurisdictions, like Canada, and build on the work of Unterhalter AJA in the SCA to develop the common law regarding prior extra curial inconsistent statements (para [102]).

3.2.4 The rationale behind the traditional common-law rules and its difficulties.
The minority proposed that it would first consider the rationale behind the common law rule, which rule applied once the statements had been found not to be hearsay evidence (para [102] – [105]). Nevertheless, although not hearsay evidence because the declarant testifies, many of the concerns about this type of evidence are the same in relation to hearsay evidence (para 105]).
The minority outlined the objections to the admissibility of prior inconsistent statements for the truth of their contents, which had been articulated in the Canadian case of *R v B KG* ([1993] 1 SCR 740 (1993 SCC 116 at 764) mentioned at para [106] of the case under discussion). The concerns were threefold. Firstly, the extra curial statement would not have been made under oath. The minority held that the oath has less significance nowadays, and people do not fear divine retribution if they lie after taking the oath (para [107]). Secondly, the demeanour of the witness while making the statement would not have been observable by the presiding officer as a guide to credibility. The minority held that the concern about demeanour was overstated and that the witness's demeanour could be observed when he was questioned on his extra curial statement. Further, evidence could be led as to his demeanour when giving the statements and with the ubiquity of smartphones it would be very easy to videotape the giving of the statement, so preserving the witness's demeanour at the time (para [108]). The minority did add that videotaping the statement would not be a necessary condition for admissibility, however (para [108], [139]). See also *R v B KG* ([1993] 1 SCR 740 (1993 SCC 116 at 768). Lastly, there would be no contemporaneous cross-examination of the witness concerning the statement he had made. The minority also thought that this concern was exaggerated since the witness was in court and could testify, unlike the hearsay situation (para [109]. See also Wigmore Evidence in Trials at Common Law (Little Brown and Company, Boston 1970) vol 3A s 1018 at 996).

The minority also noted that the traditional English common law rule has been being questioned in South African cases such as *S v Rathumbu* (2012 (2) SACR 219 (SCA)) and *S v Mathonsi* (2012 (1) SACR 335 (KZP)) and by academics such as Bellengere and Walker (Bellengere and Walker When the Truth Lies Elsewhere (2013) 26 *SACJ*

175) and Naude (Naude The Substantive Use of a Prior Inconsistent Statement (2013) 26 SACJ 55). Further, Canada, the United Kingdom, Australia and the USA had all re-considered this rule (paras [113], [114] and [115]).
The minority held that the concerns about the admission of such statements as the section 204 statements in casu should be addressed by developing principles to govern in what circumstances such statements can be admitted (para [116]).

3.2.5 The procedure for the admission of prior inconsistent extracurial statements

The minority pointed out that if cross-examination takes place on the recanted prior inconsistent statement in the midst of the trial itself, the defence would find itself in a conundrum. The recantation helps the defence so they would have no desire to cross-examine on the recanted statement because it might bring up points in favour of the veracity of the recanted statement. On the other hand, there are risks to the defence in failing to probe the witness on their account of the statement, the circumstances in which it was made and why they recanted (para [117]).
The solution to this conundrum was, the minority held, to hold a trial within a trial to determine the admissibility of the prior inconsistent statement. All relevant matters could then be probed in the security of the knowledge that those proceedings remain insulated from the main trial. This will ensure the substantive realisation of the right to challenge and adduce evidence (para [118]-[119]). When the defence does not have enough information to realise this right, they must remember that in terms of rule 55 (10) of the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (GN 168 GG 42337 as amended) the defence can interview a state witness if the prosecution consents or if a court orders it (para [120]-[121]).

3.2.6 The legal principles governing the admission of prior extra-curial statements

The minority postulated a number of different scenarios that might present themselves when dealing with prior inconsistent statements (para [123]-[126]), but the one in play in casu was where the witnesses admitted making the statements but then recanted them in court. The minority held that if the witness had testified in a trial within a trial and the statement was admitted, the witness is then available to be cross-examined to the full extent in the main trial and the probative value of the statement can be assessed after conclusion of the questioning (para [126]). Prior inconsistent statements cannot be admitted if they were eligible to be received as testimony. Section 35 (5) of the Constitution, the exclusionary rule, would still apply. If the prior inconsistent statement was obtained in breach of the bill of rights, and to admit it would render the trial unfair or be otherwise detrimental to the interests of justice, it must be excluded from the evidence (para [127]).
The minority held that it would be necessary for the judicial officer to consider the substantive and procedural indiciae of reliability before admitting the evidence (para [128]). The procedural dimension of reliability involves considering the various circumstances surrounding the taking of the statement and whether they provide

adequate safeguards for reaching a conclusion that it was voluntarily made and is a true reflection of what was said (para [129]). Again, the minority mentioned that videotaping the taking of the statement would be very useful and easy to do given the ubiquity of smartphones (para [130]. See also *R v B KG* ([1993] 1 SCR 740 (1993 SCC 116 at 824-825). Substantive reliability at the trial within a trial relates to the content of the statement and whether it can be shown to be trustworthy through evidence that contradicts or corroborates it. Substantive reliability involves demonstrating that the statement is sufficiently trustworthy to admit it in the main trial, and to counteract the dangers associated with such statements (para [131]). The minority then traversed some cases to provide examples of factors the courts have used to assess reliability (para [133] – [138]. *R v B KG* ([1993] 1 SCR 740 (1993 SCC 116 , *R v U (FJ)* [1995] 3 SCR 764, *S v Rathumbu* (2012 (2) SACR 219 (SCA)) and *S v Mathonsi* (2012 (1) SACR 335 (KZP)). Overall, a court concerned with the admissibility of a prior extra-curial statement at a trial-within-a-trial must consider whether all the available evidence confirms the trustworthiness of the statement sufficiently to guard against the dangers of such statements (para [139]).

The minority held that it is important to distinguish between the admissibility of these statements at the trial-within-a-trial and the ultimate probative value of the statement in relation to his overall guilt in the main trial. At a trial-within-a-trial, the focus is only on whether the statement is trustworthy. To establish that it must cross the judicial threshold of being sufficiently reliable to counteract the dangers attached to such statements: the lack of an oath, the ability of the judicial officer to evaluate demeanour and contemporaneous cross-examination (para [140]. *R v Bradshaw* [2017] SCC 35 paras 28-30 and *R v Charles* ([2024] SCC 29 paras 46-48).

Turning finally to the application of these principles to the case under discussion, the minority notes that since this is the first time a court has held that a trial-within-a-trial be held to determine the admissibility of prior inconsistent statements, the trial-within-a-trial was not held and therefore the procedural reliability of the two statements was not probed. The applicants' representative only cross-examined on the oral evidence of the section 204 witness. If a trial within a trial had been held, the defence would no doubt have cross-examined on the content of the statements themselves. This pointed to an infringement of the applicants' right to adduce and challenge evidence in terms of section 35 (3) (i), Constitution, 1996 (para [141])

The minority concluded by agreeing with the order of the majority. They held that nothing would be achieved by referring the matter back to the High Court to hold a trial-within-a-trial because even if the statements were admitted, there was insufficient evidence to sustain the convictions. The convictions of the applicants must be overturned (para [145]).

4 Conclusion

The Constitutional Court thus overturned the applicants' convictions. The court's judgment significantly refined South African hearsay law concerning prior inconsistent statements made by witnesses who later testify and recant their evidence, finding that such evidence is not hearsay evidence. The minority established a new framework

emphasizing the importance of procedural fairness and a trial-within-a-trial approach to ensure the accused's right to a fair trial is protected, while also acknowledging the need for flexible application of evidence rules to uncover the truth in criminal proceedings. The judgment highlights a move away from rigid common-law rules towards a more flexible and constitutionally compliant approach to the admissibility of evidence. The majority judgement, on the other hand, having found that the statements were not hearsay, held that their admissibility should be determined in terms of whether the prejudice of admitting the statements outweighed the benefit of doing so. By evaluating the statements and finding them to be of low probative value, the majority rejected the statements as not proving the applicants' guilt beyond any reasonable doubt. The majority approach is simpler, but ignores the real problem the defence has in trying to exercise their right to challenge the evidence in the main trial, without inadvertently prejudicing the accused. In effect, the right to challenge evidence is curtailed and the defence would in almost all cases choose only to cross-examine on the oral recanting of the written statements. They would not venture to cross-examine on the content of the recanted statements, but this might turn out to be necessary. It is without a doubt correct that the court has the power to develop the common law on the procedure to be followed before deciding whether to admit a recanted previous inconsistent statement or not and the minority's suggestion of a trial within a trial seems sensible and not very procedurally onerous.

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Matters of Interest to Magistrates

Evidence of both a single and a child witness in criminal proceedings

Phogole v S **(SCA) (unreported case no 370/2023, 9-5-2025) (Makgoka, Mokgohloa and Mothle JJA)**

This article discusses the evidence of a single and a child witness in criminal proceedings. Section 208 of the Criminal Procedure Act 51 of 1977 (CPA) provides that a court can convict an accused person based on evidence of a single witness.

However, there are general guidelines and principles, which must be taken into consideration by the presiding officers, if a conviction on the evidence of a single witness should follow. In *Sphanda v S* (GP) (unreported case no A607/2017, 29-3-2021) (Phahlane AJ), the court noted in *S v Webber* 1971 (3) SA 754 (A) that the court held:

'A conviction is possible on the evidence of a single witness. Such witness must be credible, and the evidence should be approached with caution. Due consideration should be given to factors which affirm, and factors which detract from the creditability of the witnesses. The probative value of the evidence of a single witness should also not be equated with that of several witnesses.'

One such case occupied the attention of the Supreme Court of Appeal (SCA) in *Phogole,* where conviction of an accused person based on evidence of a single and a child witness came under consideration.

Facts and background

This case concerned the rape of an 8-year-old girl, which happened in or around 2010 or 2011, in a toilet at a tavern. The rape occurred during the day while she was playing 'hide and seek' with her friends.

According to the testimony of the complainant, the accused approached the complainant at her hiding place, pulled her away and took her to a nearby tavern. The accused took the complainant's clothes off; he took off his clothes and raped her. According to the complainant, the accused lifted her and pressed her against the wall and raped her. This happened inside the toilet, and it was daylight. Thereafter, the accused ordered her to go home. The prosecution also led evidence of the complainant's mother and that of a forensic nurse that examined the complainant.

The accused testified and denied raping the complainant. He testified that he believed that the complainant's mother, with whom he was in a secret relationship for about ten years, influenced the complainant to lay false charges of rape against him and falsely implicate him because he refused to give her, the mother, money that she requested from him on 31 December 2013.

Nonetheless, the accused was convicted of rape in terms of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by the Regional Court, Johannesburg, on 26 November 2014. He was sentenced to life imprisonment. In terms of s 309(1) of the CPA, once the regional court imposes a sentence of life imprisonment, the accused is entitled to an automatic right to appeal. The accused appealed to the Full Bench of the Gauteng Division of the High Court, the full court then dismissed the appeal on both conviction and sentence, per Khumalo J and Matthys AJ. The case then went to the SCA. Phogole, the accused, through his legal representative, claimed that –

- the prosecution did not prove its case beyond a reasonable doubt;
- the trial court failed to apply the cautionary rule in evaluating the evidence of a single child witness; and
- the evidence of the complainant was not satisfactory and reliable and was inconsistent.

The accused's appeal against conviction based on evidence of a single and a child witness was thus dismissed and the appeal against sentence was upheld by the SCA. Reducing a term of life imprisonment to one of ten years' direct imprisonment.

Cautionary rule

'The cautionary rule is a rule of practice that aims to assist judges in assessing evidence. It requires judicial officers to exercise caution before adopting the evidence of certain witnesses on the ground that the evidence of such witnesses is inherently potentially unreliable. The rule thus requires the presiding officer to cautiously regard the evidence of children, [single witnesses] … and accomplices' (Nikki Naylor 'The survival of the cautionary rule' (https://health.uct.ac.za, accessed 7-10-2025)).

Single witness

It is trite that the evidence of a single witness in a criminal trial is always treated with caution and must be satisfactory in all material respects or be corroborated (*Stevens v S* [2005] 1 All SA 1 (SCA)).

Child witness

In South Africa a child means a person under the age of 18 years (s 28(3) of the Constitution).

'The cautionary rule relating to the evidence of children entails that the presiding officer should fully appreciate the dangers of accepting the evidence of children. … In terms of the cautionary rule a court should not easily convict unless the evidence of the child has been treated with due caution. Where the child is also the sole witness the evidence will be regarded with even more caution (*S v Mokoena* 1932 OPD 79 at 80). As a consequence the court will seek corroboration, even though corroboration of a child's evidence is not required by law or by practice. A child's evidence, if not corroborated, will therefore, be scrutinised with great care in terms of this rule and will be accepted with great caution (*R v Manda* 1951 (3) SA 158 (A))' (M Bekink 'Defeating the anomaly of the cautionary rule and children's testimony – *S v Haupt* 2018 (1) SACR 12 (GP)' (2018) 51 *De Jure* 318).

'There is no particular age below which the cautionary rule applies. The degree of corroboration or other factors required to reduce the danger of reliance on the child's evidence will vary with the age of the child and the other circumstances of the case (*R v Manda* 1951 (3) SA 158 (A); *Woij v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A)' (Bekink (*op cit*) 319).

'The court does not enumerate the factors that could increase or lessen the danger, nor does it define the class of children to whom the danger of reliance on the child's evidence is applicable (Joubert *et al The Law of South Africa Vol 9 Evidence* (2005) par 832). However, the younger the child the greater the likelihood that the court will require substantial confirmation of the evidence (*R v Bell* 1929 CPD 478; *De Beer v*

R 1933 NPD 30; *R v W* 1949 (3) SA 772 (A); *R v J* 1958 (3) SA 699 (SR))' (Bekink (*op cit*) 319).
In the case of *Phogole,* Makgoka JA, who wrote the dissenting judgment, held that the High Court misconstrued the application of cautionary rule.

Majority judgment
Phogole's appeal against his conviction was dismissed by the majority of the SCA (per Mokgohloa JA, with Mothle JA concurring). The majority judgment stressed that the evidence of the complainant, a single and a child witness was clear in all material respects.
The majority held that the accused was correctly found guilty by the regional court, the majority of the SCA considered the fact that the complainant was both a single witness and a child, and accordingly, her evidence required to be treated with caution. The majority held that the complainant was consistent and clear in her account of the events. The majority found her evidence to be reliable and trustworthy, and, therefore, satisfactory in all material respects.
The court said her evidence was independently corroborated by medical evidence, which confirmed a history of previous penetration. The SCA rejected the accused's claim that he was falsely implicated by the complainant and her mother.
One of the contradictions was that the complainant testified that the accused raped her while she was face-to-face with the accused. However, the mother testified that the complainant told her that she was rape from the back while she was facing the wall. The majority held that this contradiction was immaterial.

Minority judgment
Makgoka JA wrote the minority and dissenting judgment in which he arrived at the conclusion that the appeal against conviction should have been upheld. He held that both the court of first instance (the regional court) and the High Court failed to adequately take into consideration, or entirely overlooked, issues that were important in determining whether the prosecution had proved its case against the accused person beyond a reasonable doubt.
Makgoka JA's minority judgment identified discrepancies in the complainant's version of how the offence occurred. He held that the complaint's evidence, being that of a single witness, was not satisfactory in all material respects (para 80).
The minority judgment observed the following:
'The complainant was both a child witness, and a single witness. As a single witness, the complainant's evidence had to either be: (a) substantially satisfactory in every material respect, or (b) corroborated' (footnotes omitted).
The minority found that the medical evidence given by the forensic nurse was far from satisfactory in that the nurse could not adequately answer questions posed to her. He further stated that the prosecution failed to call crucial witnesses who could have provided much-needed corroboration of the complainant's version. As the complainant was playing with her friends, the friends could have been called to confirm her version to a certain extent.

The minority would have set aside a conviction.

Conclusion

This case serves as a reminder that the court can convict based on evidence of a single and a child witness in criminal proceedings. This case also highlighted the importance of s 208 of the CPA in our courts as this section enables our courts to convict based on evidence of a single witness.

I agree with the minority judgment that the accused should not have been convicted as the evidence of the complainant was that of a single witness and, in my opinion, it was riddled with contradictions and improbabilities.

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(This article was first published in *De Rebus* in 2025 (Nov) *DR* 30).

A Last Thought

Magistrates protest outside Parliament

Magistrates are demanding salary increases and better working conditions

About 30 magistrates protested outside Parliament at lunch time on Wednesday. They were demanding salary increases and better working conditions. A Parliamentary representative accepted their petition on behalf of the presidency..

The magistrates came from across the country, including KwaZulu-Natal, Gauteng and the Western Cape. Dressed in their robes, they held signs that read: “Magistrates Matter” and “Justice for Justice Workers.”

Magistrate Mondli Nhlangulela said magistrates are the “forgotten child of the judiciary”, and their salaries have not kept pace with inflation.

“We can’t afford school fees for children,” Nhlangulela said. “It is a dire situation … Sometimes you can’t even make it to work because you can’t put fuel in your car.”

Magistrates currently earn around R1.1-million a year, but Magistrate Neelan Karikan, president of the Judicial Officers Association of South Africa, said much of this goes in tax.

Magistrates we spoke to said they want similar benefits to judges, such as a car and housing allowances and medical aid. They also want lifelong salaries, as is the case with judges, instead of the pensions from the government pension fund.

Magistrate Rohan Roopnarian said magistrates lack resources. Several magistrates expressed safety concerns about having to share bathrooms with the public.

“We are the coal face of the judiciary,” Roopnarian said. “95% of the work in the court is done by us, but we don’t get the recognition and the status we deserve.”

Magistrate Denni Leppan, 35 years on the bench, said she hopes their remuneration package is completely restructured and their demands are addressed in a major review, which she said is 17 years overdue.

In 2008 in its first major review, the Independent Remuneration Commission acknowledged that the remuneration gap between the lowest-paid judge and highest-paid magistrate was “too wide and unjustifiable”.

Earlier this year, after being taken to court, the President referred the latest review (2024) back to the commission with questions. The Minister of Justice is expected to address the matter in the National Council of Provinces on Thursday.

“The IRC seems to have not been doing their job, inclusive of our president,” said Karikan, “because he had the major review about a year ago, and he didn’t sign off on it and implement it in Parliament.”

Earlier this month, magistrates picketed outside the court in Durban with similar demands.

Magistrates’ Commission secretary Maritshane Finger had not responded at the time of publication.

(The above post by Zora Hollie appeared on the Ground Up website on 30 October 2025).