

EXTRA-CURIAL STATEMENTS BY A NON-TESTIFYING CO-ACCUSED, THE CANADIAN SUPREME COURT AND CHANGE IN SOUTH AFRICA

1 Introduction

In *S v Ndhlovu* (2002 (2) SACR 325 (SCA)), the court opened the door to the admissibility of extra-curial statements made by a non-testifying accused against a co-accused as hearsay in terms of section 3 of the Law of Evidence Amendment Act (45 of 1988), if the interests of justice so require. However, first the Supreme Court of Appeal and later the Constitutional Court rejected such an approach (see *Litako v S* 2014 (2) SACR 431 (SCA) and *Mhlongo v S; Nkosi v S* 2015 (2) SACR 323 (CC)). (For a useful overview and discussion of the cases that have dealt with this issue, see Whitear “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 2 SALJ 244.)

It is beyond the scope of this comment to repeat the arguments in favour of a discretionary approach for such statements, but it is submitted that there is scope for disagreement with the findings of both courts. (See generally Whitear 2017 2 SALJ 244ff; Watney “Admissibility of Extra-judicial Admissions as Hearsay Evidence against a Co-accused” 2008 TSAR 834; Naudé “Testimonial Hearsay and the Right to Challenge Evidence” 2006 3 SACJ 320; Naudé “The Admissibility of Extra-curial Statements by a Non-testifying Accused” 2008 29(2) *Obiter* 247.)

Whitear points out that the provisions dealing with the admissibility of hearsay in the Law of Evidence Amendment Act (45 of 1988) were not declared unconstitutional by any court. The Supreme Court of Appeal found that section 3 of the Law of Evidence Amendment Act (45 of 1988) could not be used to admit the extra-curial statement of an accused against his co-accused because the interests of justice would never allow this. The Constitutional Court found that section 3 did not override the common-law rule prohibiting the admission of extra-curial statements against a co-accused since this would amount to unfair discrimination against an accused implicated by such admissions or confessions. Significantly, because it is stated in section 3 of the Law of Evidence Amendment Act (45 of 1988) that section 3 is subject to the “provisions of any other law”, the court decided that the common-law prohibition should prevail.

Previously, however, the Supreme Court of Appeal has held that the “other laws” referred to in the Law of Evidence Amendment Act (45 of 1988) are alternative ways for admitting hearsay, and do not preclude the

admissibility of hearsay in terms of section 3, even where there is another law that prohibits it. In this regard, the court in *Giesecke and Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* (2012 (2) SA 137 (SCA)) explained that it did not mean that

“a negative ruling on admissibility in terms of some other law, such as the Evidence Act or the common law, also rules out the admission of the evidence under section 3 [since that] would leave section 3 with rather limited, if any, scope for application where hearsay evidence would be admissible only under the section when it is already allowed by some other law.” (par 28)

The court also referred with approval to *S v Ndhlovu* (*supra*) where it was explained that the very purpose of section 3 of the Law of Evidence Amendment Act (45 of 1988) was to “supersede the excessive rigidity and inflexibility – and occasional absurdity – of the common law position” by allowing for the admission of hearsay when the interests of justice so require (see *S v Ndhlovu supra* par 15). It therefore agreed with Whitear that the current situation:

“is excessively rigid, and has the effect of depriving courts of the ability to assess each case on its merits to decide if the interests of justice require the admission of the hearsay evidence, whatever its form and even if it is an admission by an accused which incriminates a co-accused.” (Whitear 2017 2 SALJ 260)

The admissibility of out-of-court statements by an accused against a co-accused is also dealt with differently in the United Kingdom (our relevant common law) today. Section 114(1)(d) of the Criminal Justice Act of 2003 makes it possible to admit the out-of-court statement of an accused against a co-accused as hearsay (see generally Richardson (ed) *Archbold Criminal Pleading, Evidence and Practice* (2013) par 11–3d). In *R v Y* ([2008] 1 Cr. App. R. 34), the court states:

“Section 114(1)(d) is available in law for all types of hearsay, and on application by any party to a criminal trial. In the case of an out-of-court statement contained in, or associated with, a confession, s.118(1)(5) does not exclude the application of s.114(1)(d).” (par 61)

More importantly, it is also of the opinion that:

“Explicit statutory provisions prevail over the common law, not the other way round. The residual power to admit hearsay under s.114(1)(d), if the interests of justice genuinely require it, does indeed prevail over the general common law rule that hearsay is inadmissible, and thus it prevails over the particular common law rule that hearsay contained in a confession is inadmissible except against its maker.” (par 48)

However, the court in *R v Y* (*supra* par 57–62) did mention that this does not mean such statements should routinely be admitted without a consideration of the relevant factors mentioned in the Criminal Justice Act of 2003 and that, in the majority of cases, it will not be in the interests of justice to admit such statements, especially those made during police interviews. (For a critique of this approach, see Glover and Murphy *Murphy on Evidence* 13ed (2013) par 8.20 and 9.16.1. See also the decision by the High Court of Australia in *Baker v The Queen* [2012] HCA 27).

Even though, under South African law, it is not currently possible to present evidence of an extra-curial statement made by an accused that also

implicates a co-accused, the recent judgment by the Canadian Supreme Court in *R v Bradshaw* (2017 SCC 35) provides insight into how this could possibly happen in future. It is thus useful to consider the Supreme Court's decision.

2 The Canadian Supreme Court's decision in *R v Bradshaw*

2.1 *Majority judgment*

In *R v Bradshaw* (*supra*) the facts were briefly as follows: Two people were shot dead and a suspect, Thielen (T), became the target of a so-called "Mr Big operation", during which he told an undercover officer that he shot both victims. Then he proceeded to tell Mr Big that he had shot one victim and that Bradshaw (B) had shot the other. T was arrested. During a later re-enactment of the murders, he implicated B in both. They were charged with two counts of first-degree murder and T pleaded guilty to second-degree murder. T subsequently refused to give sworn testimony at B's trial and the prosecution sought to admit into evidence T's re-enactment, which had been video-recorded. The trial judge allowed the evidence under a principled exception to the hearsay rule. B was convicted on two counts of murder. The Court of Appeal allowed an appeal and ordered a new trial. The majority of the Supreme Court of Appeal, however, dismissed the appeal.

In Canada, hearsay is seen as an out-of-court statement tendered for the truth of its contents and is presumptively inadmissible (see generally Lederman, Bryant and Fuerst *The Law of Evidence in Canada* 4ed (2014) ch 6). Because there is no opportunity to cross-examine the declarant at the time the statement is made, it is mostly difficult to establish its truth. Hearsay may, however, exceptionally be admitted into evidence under the principled exception, when it meets the criteria of necessity and threshold reliability. A co-accused's refusal to testify at trial, for example, would meet the necessity criterion.

In *R v Bradshaw* (*supra*), the main issue is the extent of corroborative evidence needed before a trial judge can conclude that the threshold reliability of a hearsay statement is established. Karakatsanis J, on behalf of the majority, is of the opinion that corroborative evidence may be used to assess threshold reliability if it overcomes the specific hearsay dangers presented by the statement (par 4). The corroborative evidence must show, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement. The material aspects are those relied on for the truth of its contents.

In the case at hand, the statement was tendered for the truth of T's claim that B participated in the murders. There were hearsay concerns because the court could not assess whether T lied about B's participation in the murders, and in addition to the reliability concerns inherent in all hearsay statements, T had a motive to lie – namely, to shift the blame to B. T stated

previously that he shot both victims and did not implicate B. T was also a *Vetrovec* witness, or a witness who cannot be trusted to tell the truth due to his unsavoury character (*Vetrovec v The Queen* [1982] 1 SCR 811).

Karakatsanis J points out that the trial judge relied significantly on the existence of corroborative evidence in order to admit T's statement, but is of the opinion that the evidence relied upon, when considered in the circumstances of the case, did not show that the only likely explanation was that T was truthful about B's involvement in the murders (par 6–7). The corroborative evidence did not "substantially negate" the possibility that T lied about B's participation in the murders. The judge states that although this corroborative evidence may increase the probative value of the statement, it is of no assistance in assessing the statement's threshold reliability. Because the court could not adequately test the trustworthiness of T's statement, and because there were also no circumstances or corroborative evidence showing that this statement was inherently trustworthy, it should not have been admitted into evidence.

In the judgment, Karakatsanis J elaborates on the rationale for the rule against hearsay and for the principled exception to this rule (see from par 19). She points out that the truth-seeking process of a trial is predicated on the presentation of evidence in court and notes that in order to determine whether a witness is telling the truth, the trier of fact must observe the witness's demeanour and assess whether the testimony withstands testing through cross-examination (with reference to *R v Khelawon* [2006] 2 SCR 787 par 35). Because hearsay is declared outside of court, it can therefore be difficult for a trier of fact to assess whether it is trustworthy. The court cannot observe the declarant's demeanour at the time the statement is made and the hearsay cannot be tested through cross-examination (par 20). In addition, hearsay is generally not taken under oath. She points out that allowing hearsay could compromise trial fairness and the trial's truth-seeking process. The hearsay statement may also be inaccurately recorded, and in addition the court cannot easily investigate the declarant's perception, memory, narration or sincerity.

Over time, however, certain types of hearsay became admissible because they were considered necessary and reliable and, eventually, a more flexible approach developed in Canada. This allows hearsay to be admitted into evidence when it can be demonstrated that the twin criteria of necessity and threshold reliability are met on a balance of probabilities. Even if the trial judge is satisfied that the hearsay is necessary and sufficiently reliable, he or she still has discretion to exclude this evidence if the prejudicial effect outweighs its probative value.

In the case at hand, the necessity of the hearsay was clearly established because T refused to testify. The same cannot be said of the threshold reliability of the statement. She points out that threshold reliability is established when the hearsay "is sufficiently reliable to overcome the dangers arising from the difficulty of testing it" (par 26 with reference to *R v Khelawon supra*). A trier of fact must therefore identify the specific hearsay dangers presented by the statement and consider any means of overcoming them. She notes:

“The dangers relate to the difficulties of assessing the declarant’s perception, memory, narration, or sincerity and should be defined with precision to permit a realistic evaluation of whether they have been overcome.” (par 26)

She points out that threshold reliability can be established by first showing that there are adequate substitutes for testing truth and accuracy (procedural reliability), or second, that there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability).

Adequate substitutes for testing procedural reliability “must provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement” and can include the following: a video recording of the statement, or the presence of an oath, or a warning about the consequences of lying (par 28). Some form of cross-examination of the declarant, such as preliminary inquiry testimony or the cross-examination of a recanting witness at trial is usually required. Safeguards relevant to procedural reliability are, therefore, those that existed at the time the statement was made and those available at trial.

As far as substantive reliability is concerned, inherent trustworthiness can be established by considering the circumstances in which the statement was made and evidence that corroborates or conflicts with the statement (par 30 with reference to *R v Khelawon supra*).

She points out that although the standard for substantive reliability is high, it does not require that reliability be established with absolute certainty. The trial judge must be satisfied that the statement is “so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process” (*R v Khelawon supra* par 49). She points out that the level of certainty required has been articulated in different ways by the Supreme Court. It has been noted that substantive reliability is established when the statement “is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken” (*R v Smith* [1992] 2 SCR 915 at 933); “under such circumstances that even a sceptical caution would look upon it as trustworthy” (*R v Khelawon supra* par 62); when the statement is so reliable that it is “unlikely to change under cross-examination” (*R v Khelawon supra* par 107); when “there are no real concerns about whether the statement is true or not because of the circumstances in which it came about” (*R v Khelawon supra* par 62); or, when the only likely explanation is that the statement is true (*R v U(FJ)* [1995] 3 SCR 764 par 40).

Karakatsanis J notes that the two approaches to establish threshold reliability may work together but that the standard to establish threshold reliability always remains high – “the statement must be sufficiently reliable to overcome the specific hearsay dangers it presents” (par 32). Care should therefore be taken that a combined approach does not cause hearsay to be admitted despite insufficient procedural safeguards and guarantees of inherent trustworthiness to overcome the hearsay dangers.

Karakatsanis next considers the crux of the appeal – namely, when and how corroborative evidence can establish substantive reliability (par 33). She comes to the conclusion that not all evidence that corroborates the

declarant's credibility, the accused's guilt, or one party's theory of the case, is of assistance in assessing threshold reliability (par 44). She explains:

"A trial judge can only rely on corroborative evidence to establish threshold reliability if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspect of the statement." (par 45)

Corroborative evidence must first go towards the truthfulness or accuracy of the material aspects of the hearsay statement. Because hearsay is tendered for the truth of its contents, corroborative evidence must go to the truthfulness or accuracy of the content of the hearsay statement. The focus must be on the aspect of the statement that is tendered for its truth. She notes:

"The function of corroborative evidence at the threshold reliability stage is to mitigate the need for cross-examination, not generally, but *on the point* that hearsay is tendered to prove." (par 45)

Secondly, corroborative evidence must work in conjunction with the circumstances to overcome the specific hearsay dangers raised by the tendered statement. This will happen if its combined effect, when considered in the circumstances of the case, shows that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement (par 47).

Karakatsanis J points out that in assessing substantive reliability, the trial judge must therefore identify alternative, even speculative, explanations for the hearsay statement (par 48). Corroborative evidence will be of assistance in establishing substantive reliability if it shows that these alternative explanations are unavailable. Corroborative evidence that is equally consistent with the truthfulness and accuracy of the statement as well as another hypothesis is of no assistance. She further notes that the fact that the threshold reliability analysis takes place on a balance of probabilities means that, based on the circumstances and any evidence led in the trial within a trial, the trial judge must be able to rule out any plausible alternative explanations on a balance of probabilities (par 49). To be relied on for the purpose of rejecting alternative hypotheses, corroborative evidence must itself be trustworthy (par 50).

She concludes by stating:

"In all cases, the trial judge must consider the specific hearsay dangers raised by the statement, the corroborative evidence as a whole, and the circumstances of the case, to determine whether the corroborative evidence (if any) can be relied on to establish substantive reliability." (par 56)

In order to determine whether corroborative evidence is of assistance in the substantive reliability inquiry, the following approach should be followed (see par 57):

- (1) identify the material aspects of the hearsay statement that are tendered for their truth;
- (2) identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case;

- (3) based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and
- (4) determine whether, given the circumstances of the case, the corroborative evidence led at the trial within a trial rules out these alternative explanations to such an extent that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

At first glance, this approach is of a technical and complicated nature and sets a tough standard for the admissibility of extra-curial statements that implicate a co-accused. The dissenting judgment, delivered by Moldaver J, provides insight in this regard and will show why the suggested approach is not beyond criticism (see from par 98).

2.2 *Dissenting judgment*

Moldaver J starts off by pointing out that the majority applied a "restrictive new test" to the admissibility of hearsay that departs from the functional approach to threshold reliability that the Canadian Supreme Court has endorsed, and notes that he cannot agree with the majority's approach or conclusion.

While acknowledging that hearsay in the case was not problem-free, and that hearsay dangers are more pronounced when a declarant is not available for cross-examination, the exceptionally strong corroborative evidence in the *Bradshaw* case made it different. This included surreptitiously recorded conversations in which B admitted his involvement in the murders. The procedural safeguards adopted by the trial judge also made a proper evaluation of the evidence possible. These included the limited admission of prior inconsistent statements taken by the police, along with the opportunity to cross-examine them, strict cautionary instructions to the jury, and wide freedom provided to the defence to deal with the same points in closing argument that he would have had were he able to cross-examine (see par 100). Working together, the strong corroborative evidence and the procedural safeguards satisfied the test for threshold reliability (par 101). He notes:

"The principled approach to hearsay should not stand in the way of the truth-seeking function of a trial where the impugned evidence is shown to be trustworthy and the jury has the tools it needs to critically evaluate its ultimate reliability." (par 101)

In his discussion of the test for threshold reliability, he points out that the extent to which the reliability of hearsay may be difficult to assess depends on the context and that in certain circumstances "the challenge in assessing the declarant's perception, memory, narration or sincerity and the dangers arising from this will be sufficiently overcome to meet the test for threshold reliability" (par 106).

Moldaver J states that the principled approach to hearsay recognises that threshold reliability can be met in three circumstances (par 107):

- (1) where the statement has sufficient features of substantive reliability;

- (2) where the statement has adequate features of procedural reliability; or
- (3) where the statement does not satisfy either of the first two ways, but incorporates features of both which, in combination, justify its admission.

He explains that where a statement has a sufficient level of trustworthiness, relative to the strength of the procedural safeguards for the trier of fact to evaluate its ultimate reliability, it can be admitted. He refers to Paciocco and Stuesser (*The Law of Evidence* 7ed (2015) 134) who are of the opinion that “[s]o long as [the hearsay statement] can be assessed and accepted by a reasonable trier of fact, then the evidence should be admitted”.

Moldaver J notes the importance of differentiating between *threshold reliability* and *ultimate reliability*. He is of the opinion that a trial judge does not need to be satisfied that the hearsay statement is true for it to meet the threshold reliability requirement under any of the three circumstances mentioned above. The reliability of the hearsay statement does not therefore have to be established to a point of certainty before it can be admitted (see par 113–114). He refers to *R v Khelawon* (*supra*), in which Charron J notes:

“It is important that the trier of fact’s domain not be encroached upon at the admissibility stage. If the trial is before a judge and jury, it is crucial that questions of ultimate reliability be left for the jury – in a criminal trial, it is constitutionally imperative. If the judge sits without a jury, it is equally important that he or she not prejudge the ultimate reliability of the evidence before having heard all of the evidence in the case. Hence, a distinction must be made between ‘ultimate reliability’ and ‘threshold reliability’. Only the latter is inquired into on the admissibility *voir dire*.” (par 50)

Moldaver J also refers to Watt JA in *R v Carrol* (304 CCC (3d) 252), where it was said that the party tendering hearsay:

“[n]eed not eliminate all possible sources of doubt about the perception, memory or sincerity of the declarant. All that was required in this case was that the circumstances in which the statements were made and any relevant extrinsic evidence provided the trier of fact with the means to critically evaluate the honesty and accuracy of the declarant ...” (par 111)

Importantly, he is of the opinion that the majority unduly restricted the extrinsic evidence that a court can consider when assessing a statement’s substantive reliability, and secondly, that it adopted an unnecessarily narrow view of the procedural safeguards available at trial that are required to assess the ultimate reliability of a statement (par 117). This issue deals with the jury and will not be considered here.

With regard to the extrinsic evidence that a court can consider when assessing a statement’s substantive reliability, he disagrees with the majority that a trial judge can only rely on corroborative evidence to establish threshold reliability if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant’s truthfulness about, or the accuracy of, the material aspect of the statement. Moldaver J is of the opinion that such a view would replace their current functional approach with a restrictive test that would unnecessarily complicate the analysis and that would also discard important information for evaluating threshold reliability (par 119). He points out that there is no clear distinction between factors that inform threshold

and ultimate reliability. The question is rather whether the extrinsic evidence addresses hearsay dangers by providing information on whether the statement is trustworthy. He refers to *R v Khelawon*, in which was stated:

“In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility.” (par 4)

In *R v Khelawon*, the court also stated:

“[R]elevant factors should not be categorized in terms of threshold and ultimate reliability. Rather, the court should adopt a more functional approach ... and focus on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome dangers.” (par 93)

Moldaver J also quotes Akhtar, who states:

“The categorizing or labelling of evidence that is suitable for including in the *decision-making process* of hearsay admissibility is neither necessary nor desirable.” (Akhtar “Hearsay: The Denial of Confirmation” 2005 26(6) *CR* 46 60)

Moldaver J continues by criticising the majority’s focus on whether each individual piece of corroborative evidence indicates that the “only likely explanation” is the declarant’s truthfulness. For a piece of corroborative evidence to be considered in determining threshold reliability, it must effectively be independently capable of tipping the scale. This ignores the reality that individual pieces of extrinsic evidence may work together with other extrinsic evidence or features of substantive reliability to satisfy the test for threshold reliability. The majority’s test therefore fails to look at the picture as a whole and discards corroborative evidence that could play a vital role in showing threshold reliability (par 121). Moldaver J does, however, acknowledge that it may be necessary to limit the extrinsic evidence that can be considered. He notes:

“In my opinion, the line should be drawn where the trial judge is of the view that the probative value of certain corroborative evidence is tenuous and outweighed by its prejudicial effect in prolonging and complicating the proceedings – in other words, where the bang is not worth the buck. Trial judges should be trusted to make this determination and exercise restraint when considering extrinsic evidence to ensure the trial proceedings are not derailed by the *voir dire*: *Blackman*, at para. 57.” (par 122)

As far as the role of procedural safeguards implemented at trial in order to establish procedural reliability are concerned, Moldaver J points out that where there are adequate substitutes for the traditional safeguards in this regard, common sense dictates that the benefit of the evidence should not be lost (par 123 with reference to *R v Khelawon supra* par 63). Procedural safeguards present in a specific case may therefore provide the necessary tools to evaluate the ultimate reliability of the hearsay. This would include safeguards present at the time the statement is made and those that could be implemented at trial (par 125). He refers to the examples of a recanting declarant who is available to be cross-examined at trial on a prior statement, and the cross-examination of a third party who witnessed the declarant’s demeanour (par 126). Other tools include limiting the admission of prior inconsistent statements that contradict the hearsay statement and which would require the prosecution to call the police officers who took such

statements so that they can be cross-examined, and allowing wide leeway for the admissibility of such statements during closing arguments.

In the case concerned, the following procedural safeguards existed: the re-enactment was video-taped ensuring an accurate record of the statement and enhancing the ability to observe and evaluate it; the prosecution was required to call police officers who were present at the re-enactment and the prior inconsistent statements in order to enable their cross-examination on any inconsistencies and any plea offers or inducements made to T; prior inconsistent statements by T were admitted in order to assess his credibility; and the defence was provided with wide latitude to discuss T's possible motives and to challenge the ultimate reliability of the re-enactment in closing submissions (par 170).

3 Comment

It is submitted that Moldaver's dissenting judgment makes more sense and that the majority's test unnecessarily complicates the admissibility analysis. The majority judgment, therefore, unduly restricts the corroborative evidence that a court can consider when assessing a statement's substantive reliability. Part 3 of the majority's test requires from the trier of fact to speculate about an explanation that undermines the truthfulness of the corroborative evidence. It can be argued that the word "speculate" is rather limitless, essentially making it impossible for corroborative evidence ever to establish threshold reliability. In the *Bradshaw* case, for example, the majority was not prepared to accept that the corroborative evidence satisfied the threshold reliability test. This was despite the fact that the recordings surreptitiously made of T and B discussing the murders severely implicated B. These recordings were made without the involvement of the undercover police officers who elicited the statements from T and B, and without either accused knowing that they were being recorded. This evidence is clearly exceptionally relevant as far as the truthfulness of the re-enactment is concerned. (For a discussion of how the contextual nature of hearsay can provide circumstantial guarantees of reliability, see De Sa "Revisiting Baldree: Analyzing the Underlying Basis for the Admission of Implied Assertions" 2017 22 *CanCrimLRev* 121.)

4 Conclusion

Whether one supports the majority's (more complicated and restrictive) test for the admissibility of hearsay originating from a co-accused, or the dissenting judgment's (simple and wider) test, the *Bradshaw* case is a useful exposition of how an extra-curial statement of a non-testifying co-accused can be admitted as hearsay against another accused. South African courts have reverted to the common-law position, which no longer exists in the UK. Stuesser has commented that such an approach "[i]s attractively simple but too absolute. Fairness to the accused must also be weighed against fairness to society in seeing that reliable and relevant evidence is allowed to be introduced in appropriate cases" (see Stuesser "Using the Statements of Co-accused" 2008 13 *CanCrimLR* 73 87). He suggests that a:

“rigorous reliability assessment be undertaken before any co-accused statement is admitted and that before admitting any co-accused statement the state must prove its reliability beyond a reasonable doubt.” (75)

It is submitted that the approach suggested by Moldaver J in the dissenting judgment presents the better option; by not restricting the extrinsic evidence that a court can consider when assessing a statement’s substantive reliability, the test for threshold reliability is not unnecessarily complicated.

Section 219 of the Criminal Procedure Act (51 of 1977) should be reconsidered; it should be possible to apply to admit the extra-curial statement of a non-testifying accused implicating a co-accused, regardless of whether it is an admission or a confession. This would not mean a routine admission of co-accused statements and would only happen in rare instances. In this regard, a court should be able to exercise discretion in terms of the Law of Evidence Amendment Act (45 of 1988) and decide whether to admit the statement as hearsay. In line with the dissenting opinion in *R v Bradshaw (supra)*, it should be possible to admit such a statement by ensuring the threshold reliability thereof in three circumstances (see par 107):

- (1) where the statement has sufficient features of substantive reliability;
- (2) where the statement has adequate features of procedural reliability; or
- (3) where the statement does not satisfy either of the first two ways, but incorporates features of both, which, in combination, justify its admission.

BC Naudé
University of South Africa (UNISA)