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THE DANGER FOR AN UNDERESTIMATION OF NECESSARY PRECAUTIONS FOR THE ADMISSIBILITY OF ADMISSIONS IN SECTION 219A OF THE SOUTH AFRICAN CRIMINAL PROCEDURE ACT 51 OF 1977

ABSTRACT. The *Prima facie* view regarding the admissibility of admissions, as evidence, in criminal matters is that, to admit admissions as evidence, the court requires a single consideration as to whether the admission was made freely and voluntarily. Without too much ado, the simple view to this understanding presupposes that admission of an admission as evidence against its maker is of a lesser danger compared to the admission of a confession. The admissibility of confessions against their makers does not come as easily as that of admissions. There are many prescribed requirements to satisfy before confessions are admitted as evidence. This comparison has led to a questionable conclusion that requirements for the admissibility of admissions are of a less complexity equated to the requirements for the admission of confessions. This paper answers the question whether an inference that the requirements for the admissibility of admissions are of a less complexity compared to the requirements for the admission of confessions is rational? It equates this approach to the now done away with commonwealth states rigid differentiation perspective. In the 1800s the commonwealth states, especially those vowing on the Wigmorean perspective on the law of evidence, developed from a rigid interpretation of confessions and admissions and adopted a relaxed and wide definitions of the word, “confession.” To this extent there was a relaxed divide between confessions and admissions hence their common classification and application of similar cautionary rules. The article recounts admissibility requirement in section 219A of the South African Criminal Procedure Act 51 of 1977 (CPA) (Hereinafter CPA). It then analyses Section 219A of the CPA requirement in the light of the rationale encompassing precautions for the admission of confessions in terms of 217(1) of the CPA. It exposes the similarities of potential prejudices where confessions and admissions are admitted as evidence. It reckons that by the adherence to this rigid differentiation perspectives of confessions and admissions which used to be the practice in the commonwealth prior the 1800s developments, South African law of evidence remains prejudicial to accused persons. To do away with these prejudices this article, recommends that section 219A be

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amended to include additional admissibility requirements in section 217(1). In effect it recommends the merging of sections 217(1) and 219A of the CPA.

I INTRODUCTION

Section 219 A¹ of the CPA deals with the admissibility requirement for admissions as evidence. It thus then separates this requirement from the requirements for the admissibility of confessions which are dealt with separately in section 217 (1) of the CPA.² This article revisits the admissibility requirement of admissions in section 219 A.

¹ This section reads,

“219A Admissibility of admission by accused

- (1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained-
 - (a) be admissible in evidence against such person if it appears from such document that the admission was made by a person whose name corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the admission and any question put to such person by the magistrate; and
 - (b) be presumed, unless the contrary is proved, to have been voluntarily made by such person if it appears from the document in which the admission is contained that the admission was made voluntarily by such person.
- (2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1).

² This section reads,

“217 Admissibility of confession by accused

- (1) Evidence of any confession made by any, person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made, by such person in his sound and sober senses and without having been unduly “influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided:
 - (a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section. 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorised to exercise any power conferred upon him under that section, shall not be

It shows that to some extent section 219A may be limiting necessary precautions before admissions may become admissible. It is the argument in this paper that there are potential prejudices if admissions are willy nilly accepted as evidence in criminal matters. In principle, the argument continues, requirements for the admissibility of admissions ought to be the same as requirements for the admissibility of confessions.

II THE IMPLICATIONS OF THE ADMISSIBILITY REQUIREMENTS OF SECTIONS 219A AND 217(1)

The regulation of the admissibility of confessions and admissions in South African law of evidence stems from both statutory provisions³ and Common Law.⁴ Statutorily, the admissibility of confessions by accused persons is regulated by section 217 of the CPA, while the admissibility of admissions is regulated by section 219 (A). The regulation of the admissibility of confessions and admissions gives an impression that that there is a difference between the two types of statements.⁵ In the first place, their development under Common Law

Footnote 2 continued

admissible in evidence unless, confirmed and reduced to writing in the presence of a magistrate or justice; and

- (b) that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question-
- (i) be admissible in evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to that of such person; and in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such documents to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate and
- (ii) be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto.

³ Sections 217 and 219 A of the CPA.

⁴ For the interpretation of this law in other cases, see *S v Mangena* 2012 (2) SACR 170 at para [70], which gives an account on the Common Law regulation of confessions and admissions.

⁵ See *S v Molimi* 2008 (2) SACR 76 (CC) para [21] as well as B C Naudé 'Admissibility of extra-curial statements against a non-testifying accused' (2008) *Obiter* 247 at 250 and M Watney 'Admissibility of extra-curial admissions as hearsay evidence against a Co-Accused' (2008) *TSAR* 834.

was never on par.⁶ In the second place, the engaged two sections of the CPA imply a separation between the requirements for the admissibility of admissions and confessions. Further, admissions are simply described as statements adverse to their makers,⁷ while confessions are referred to as unequivocal admissions of guilt, equivalent to a plea of guilty.⁸ As explained in *R v Becker*,⁹ in a confession, the maker of the statement admits all elements of an offence and the statement contains no exculpatory part.

The statutory differentiation between the admissibility requirements for confessions and admissions poses some problems in that, to some extent, it may be understood as putting confessions at the pedestal of *prejudice* while attempting to undermine the *prejudicial effect* of admissions.¹⁰ Indicating that the admissibility of both confessions and admissions as evidence have a similar requirement, namely, that it is necessary to prove that they were made freely and voluntarily and also that there is limited requirement to voluntariness with respect to admissions,¹¹ while the admissibility of confessions calls for extended requirements to prove voluntariness creates a room for prejudicial complexities.

⁶ See *S v Mphala* 1998 (1) SACR 388 (W); *S v Mangena* 2012 (2) SACR 170 at para [70] as well, see MMM Monyakane and S M Monye 'The legal implications of *S v Ndhlovu* and *Litako v S* on the South African law of hearsay evidence: A critical overview,' (2016) *SACJ* Vol. 29 No. 3 308 at pp. 312–313.

⁷ P J Schwikkard and S E Van der Merwe *Principles of Evidence* 4th ed (2016) 327 at 16:1.

⁸ *R v Becker* 1929 AD 167.

⁹ *R v Becker* 1929 AD 167.

¹⁰ Regarding the admissibility of admissions of one co-accused against another, consider literature concerning a debate spanning for 14 years. During this period, courts and academics were for a long period convinced that extra-curial admissions of one co-accused could be admitted against another co-accused, while confessions could not be so admitted. For a differing view, read MMM Monyakane and S M Monye 'The legal implications of *S v Ndhlovu* and *Litako v S* on the South African law of hearsay evidence: A critical overview' (2016) *SACJ* Vol. 29 No. 3 308 at 309. Also refer to *S v Ndhlovu* 2002 (2) SACR 325 (SCA); *Litako & Others v S* 2014 (3) ALL SA 138 (SCA); *Mhlongo v S*; *Nkosi v S* 2015 (2) SACR 323 (CC) and *Khanye and Another v S* (CCT86/16) [2017] ZACC 29 (10 August 2017). Compare with B C Naudé 'Admissibility of extra-curial statements against a non-testifying accused' (2008) *Obiter* 247 at 250 and M Watney 'Admissibility of extra-curial admissions as hearsay evidence against a co-accused' (2008) *TSAR* 834.

¹¹ *S v Mpetha & Others* (2) 1983 (1) SA 576 (C); *R v Barlin* 1926 AD 459; Section 219A read with section 217(1).

In addition to the mentioned requirement, a confession has to be proven to have been made by a person of a sound mind and sober senses.¹² This means that the accused must have been sufficiently *compos mentis* to understand what he was saying.¹³ It is argued that although this requirement is not prescribed in section 219A and yet mentioned in section 217, it would not make legal sense that an admission that was made while the accused was not in his right mind is admitted as evidence.

Another requirement for an admissible confession is that the maker ought not to have been subjected to undue influence.¹⁴ This means that there ought to have been no external factor, which nullified the accused's freedom or will. Accordingly, *S v Mpetha*¹⁵ held that the circumstances of each individual case will have to be taken into consideration, in determining whether the confessor's will was swayed by the external impulses. The court further stated that the term "negative" was not intended to connote a degree of impairment of will so high that in reality there was no act of free will at all. The criterion was held to refer to the improper bending, influencing or swaying of the will, and not to its total elimination as a freely operating entity. On the same note it is argued that if an admission is made by a person who was swayed by promises, it would not be sensible to trust its validity.¹⁶

The next requirement for the admissibility of a confession is that, if made to a peace officer who is not a justice of peace or a magistrate, such confession has to be confirmed and reduced to writing in the presence of a magistrate or justice of the peace.¹⁷ Justices of the peace are police officers designated as such in terms of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963, as amended, read with Regulations to the South African Police Service Act 68 of 1995, relating to police ranks in the South African Police Service. Justices of peace are normally high-ranking police officers, whereas peace

¹² Section 217(1).

¹³ Section 217(1).

¹⁴ Section 217(1).

¹⁵ *S v Mpetha & Others* (2) 1983 (1) SA 576 (C) from 578H–585H.

¹⁶ The same concern dominated court decisions. See *S v Mpetha & Others* (2) 1983 (1) SA 576 (C), where Williamson J held in favor of the views from earlier decisions in *S v Yolelo* 1981 (1) SA 1002 at 1009C-D and *R v Barlin* 1926 AD 459 at 462 as well as *R v Zwane* 1950 (3) SA 717 (O) at 720H.

¹⁷ Section 217(1).

officers are low-ranking police, including immigration and traffic officers.

The rationale behind this requirement is, amongst other reasons, inclined to the satisfaction of the constitutional demand in clause 35(5). In the need to exclude unconstitutionally obtained evidence for the satisfaction of fairness in criminal trials,¹⁸ the second leg of section 35(5) can be referred to in emphasising the need to vet a police official's actions in investigations. This section decrees that actions that could bring the administration of justice into disrepute may taint evidence. In particular, the law is cautious of police action that overlooks the law and especially disrespect of the Bill of Rights clauses. Most important in this regard is the suspect's right against self-incrimination.

The law is concerned that police aspiring for promotions may consider questionable actions when they seek to extract confessions from suspects to speed up the criminal proceedings. The decision in *S v Mphala*¹⁹ echoes this concern where it excluded evidence that emanated from an investigation by a police official who deliberately disobeyed investigative rules. In this regard the court held that it could not "accept that the conduct of the investigating officer was anything, but intentional."²⁰ Where evidence has been obtained as a result of a deliberate and conscious violation of the constitutional rights of an accused, it should be excluded.²¹

It is submitted that the same precaution is of essence for admissions as well. The ensued differentiations do not mitigate the ultimate effects of relying on evidence emanating from admissions and confessions, which were extorted from suspects through unconstitutional means. It is submitted further, that the effects of evidence emanating from admissions and confessions sought through forceful interrogations bear similar consequences of deprivations on accused persons.

¹⁸ *S v Khan* 1997 (2) SACR 611 (SCA). In effect this case held that, for evidence to be admissible, in contrast with the common law prime rule it was enough to prove whether such evidence was relevant to issues before court. Under the Constitution, section 35(5) puts a protective requirement, namely, that every evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

¹⁹ *S v Mphala* 1998 (1) SACR 388 (W).

²⁰ *S v Mphala* 1998 (1) SACR 388 (W) para[b] p. 400.

²¹ See the recent case of *Gumede v S* (800/2015) [2016] ZASCA 148; [2016] 4 All SA 692 (SCA); 2017 (1) SACR 253 (SCA).

It is from this perspective that it is argued that confessions and admissions are inseparable by nature.

III THE INSEPARABLE NATURE OF CONFESSIONS AND ADMISSIONS

The inseparable nature of admissions and confessions is exposed in several court decisions dealing with evidence of their nature. The fact that confessions and admissions are of the same species cannot be underrated. It is obvious from common law jurisprudence founding the principles of their admissibility as evidence before courts. The same expression is deciphered from the statutory and constitutional expression of these admissions.

3.1 *The South African Common Law Courts Expression of the Intertwined Nature of Confessions and Admissions*

As early as 1965, within the Common Law perspective, in the case of *S v Hlapezula*,²² following the leading cases of *Barlin*²³ and *Becker*,²⁴ Common Law differentiation between confessions and admissions was appreciated. In upholding the conviction of the rest of the perpetrators by the High Court, the South African Supreme Court of Appeal accepted evidence based on statements(admissions) made by two accomplices to the police. In the midst of that, the South African Supreme Court of Appeal encouraged courts to exercise a Common Law cautious approach in dealing with the admissibility of confessions and admissions.²⁵

3.1.1 *The Principle in S v Hlapezula*

S v Hlapezula,²⁶ precedent is the core principle in dealing with the admissibility of admissions consisting of hearsay evidence. It expresses a discrete approach in admitting these categories of hearsay

²² *S v Hlapezula* 1965 (4) SA 439 (A) at 440D–H.

²³ *R v Barlin* 1926 AD 459.

²⁴ *R v Becker* 1929 AD 167.

²⁵ *S v Hlapezula* 1965 (4) SA 439 (A) at 440D–H.

²⁶ *S v Hlapezula* 1965 (4) SA 439 (A) at 440D–H.

admissions²⁷ such as statements²⁸ vouching for the perpetration of an on-going conspiracy.

3.1.2 *The Concern in S v Ralukukwe*

Pinpointing the unreasonableness in the differentiation engaged in admitting admissions and confessions, Monyakane and Monye, observed that, “in *S v Ralukukwe*,²⁹ counsel questioned *the possible ambiguity* in the law, but, as the court did not make a ruling on the matter, the correct application of this differentiation remained in doubt leaving *lacunae*.” It is these *lacunae* that have left the law still wanting even today. The same vacuum rendered, amongst others, hearsay jurisprudence vulnerable to the damaging conceptualisms.³⁰

To answer the concern raised in *S v Ralukukwe*³¹ Monyakane and Monye came up with an explanation that resonated the Common Law admissibility principles. They, reasoned that,

common law, hearsay evidence was considered as such if statements, confessions and admissions are proffered as evidence against other persons. In terms of this definition, admissions and confessions have never before been regarded as admissible in a court of law. However, a different condition was applicable in respect of extra-curial admissions, which could be admitted only in those rare cases where such statements related to the planning and execution of a conspiracy but if such conspiracy was never executed relevant statements could not become evidence for convicting conspirators.³² In this respect the permissibility of admissions, as regulated by the common law, remained settled practice.³³

²⁷ *S v Hlapezula* [1965] 4 SA 439 (A) at 440D–H.

²⁸ Referring to both confessions and admissions.

²⁹ 2006 (2) SACR 394 SCA.

³⁰ The conflicting views are that as a precaution against prejudices in criminal justice, only confessions can be admitted against their maker and that admissions can generally be admitted against both their maker and co accused. B C Naudé ‘Admissibility of extra-curial statements against a non-testifying accused’ (2008) 29 *Obiter* 247 at 250 and M Watney ‘Admissibility of extra-curial admissions as hearsay evidence against a co-accused’ (2008) *TSAR* 834. As well see *Ndlovhu v S* 2002 (2) SACR 325 (SCA) and cases that follow the *Ndhlovu* matter as precedent.

³¹ 2006 (2) SACR 394 SCA.

³² See *S v Mangena* 2012 (2) SACR 170 at para [63].

³³ MMM Monyakane and S M Monye “The legal implications of *S v Ndhlovu* and *Litako v S* on the South African law of hearsay evidence: A critical overview” (2016) SACJ Vol. 29 No. 3 308 at 328.

This interpretation is indeed reasonable, it is impossible that a person will unwittingly make statements that are to his or her prejudice.³⁴ However, a person can implicate himself or herself only in terms of what he or she knows, intended and acted upon. This does not apply to what he or she knows about the acts, knowledge and intentions of others, unless this person was told by the other what he or she intended. It is submitted that this reasoning applied to both admissions and confessions.

3.1.3 *Vicarious Admissions*

Monyakane and Monye are also of the opinion that the same analysis can incline with vicarious admissions as “they are made by one person on behalf of another, for example a representative of a company and its agents.”³⁵ Scwhikkard and van der Merwe,³⁶ implying the same view as Monyakane and Monye, recognised other instances of vicarious admissions, such as “express or implied authority including agents and servants; partners in a partnership; legal representatives; spouses; and referees.”³⁷

3.1.4 *Combined Responsibility as a Class Within Vicarious Admissions*

Monyakane and Monye aware of another class of combined responsibility, write, “a category of privity or identity of interest or obligation, for example, predecessors in title; master and servant; and nominal and real parties.”³⁸

In their understanding Monyakane and Monye comprehended that vicarious admissions require “that the relationship should be sufficiently close to warrant the assumption that what one has admitted on behalf of another can be said to carry the authority of

³⁴ See in general D T Zeffert and A Paizes, *The South African Law of Evidence*, 2nd ed 2009 at 478–480.

³⁵ MMM Monyakane and S M Monye “The legal implications of *S v Ndhlovu* and *Litako v S* on the South African law of hearsay evidence: A critical overview” (2016) *SACJ* Vol. 29 No. 3 308 at 313.

³⁶ P J Schwickard and S E Van der Merwe, *Principles of Evidence* 3rd ed (2009), pp. 294–297.

³⁷ P J Schwickard and S E Van der Merwe, *Principles of Evidence* 3rd ed (2009), pp. 294–297.

³⁸ MMM Monyakane and S M Monye “The legal implications of *S v Ndhlovu* and *Litako v S* on the South African law of hearsay evidence: A critical overview” (2016) *SACJ* Vol. 29 No. 3 308 at 313.

the other or to possess intrinsic knowledge of the truth of the statements³⁹ made.”⁴⁰

3.1.5 *Executive Statements Made in Furtherance of Common Purpose*

In addition, Monyakane and Monye argued that, “the Common Law was addressing this scenario when it referred to an admission forming part of an “executive statement”⁴¹ made in furtherance of a common purpose to commit conspiracy. In such a case that statement should be admitted against all who were party to the venture.⁴² In this instance an admission will not offend the requirement of being admitted against the maker, because each is a representative of another. Thus, if these were to be admitted against several partners, their admission would not be hearsay in the strict sense because the partnership aspect is intrinsic to their relationship.”⁴³

Monyakane and Monye’s explanation is embraced as a clarification that Common Law was applied with caution when parties sought courts to admit admissions. It is submitted that common law courts tried in all costs to do away with any possible doubt that any one is falsely accused and consequently convicted while courts insisted on rigid distinctions between admissions and confessions.

³⁹ Meaning confessions or admissions made.

⁴⁰ MMM Monyakane and S M Monye “The legal implications of *S v Ndhlovu* and *Litako v S* on the South African law of hearsay evidence: A critical overview” (2016) *SACJ* Vol. 29 No. 3 308 at 313.

⁴¹ An executive summary summarises the main points of an in-depth report; it is written for nontechnical people who have insufficient time to read a full report. The executive report in this instance provides enough information to enable a reader to familiarize himself or herself with the issues raised in P J Schwikkard and S E Van der Merwe *Principles of Evidence* 3rd ed (2009) pp. 294–297 without having to read it.

⁴² See P J Schwikkard and S E Van der Merwe *Principles of Evidence* 3rd ed (2009). The authors observed that the view predates the LEEA. See also the views of Hoffman and Zeffertt, Hoffmann & Zeffertt *The South African Law of Evidence* 4th ed (1988) 175 as well as Bellengère et al., *The Law of Evidence in South Africa: Basic Principles* (2013) at 27.

⁴³ MMM Monyakane and S M Monye ‘The legal implications of *S v Ndhlovu* and *Litako v S* on the South African law of hearsay evidence: A critical overview’ (2016) *SACJ* Vol. 29 No. 3 308 at 313.

3.2 *Courts' Differing Expressions on the Statutory Differentiation of Confessions and Admissions*

Another challenge posed by the identified prejudice caused by the rigid differentiation of confessions and admissions within the South African Law concerns the almost impossible distinction of a statement that is an admission from a statement that is a confession, especially where the suspect utters the statement and police are tasked with reducing the statement to writing. In *S v Yende*,⁴⁴ the court was seized with the adjudication of the question of whether a statement was a confession for the purposes of s 217(1)(a) of the Criminal Procedure Act 51 of 1977. The court suggested an objective test to overcome the ensuing prolonged argument.⁴⁵ It suggested a consideration of a statement as a whole in order to decide whether the statement amounts to a confession. It preferred cognisance of what actually appears in the statement and what it necessarily implies. If there was doubt in respect of these aspects, then the statement was not a confession, as it did not contain a *clear* admission of guilt.

The court opposed a subjective approach in investigating whether a statement is a confession or not. It maintained that an objective approach was suitable, since a subjective test would be concerned with the facts that the accused stated, rather than the intention behind them. The application of an objective standard does not mean, however, that all subjective factors are left out. The state of mind or intention of the declarant will sometimes be taken into account as one of the surrounding circumstances from which the objective meaning of statement can be ascertained. The true meaning of a statement can often be decided only by considering the surrounding circumstances.

⁴⁴ *S v Yende* 1987 (3) SA 367 (A) 374C–375E.

⁴⁵ The earlier cases that embarked on an appropriate test argument are *R v Hanger* 1928 AD 459, followed by *R v Kant* 1933 WPA 128 and *S v Grove-Mitchell* 1975 3 SA 417 (A). The first on the list suggested a subjective test, namely a determination based on whether the accused directly admitted guilt. The second one suggested an objective test, which determines from facts as to whether there is an indication of guilt even if the accused does not directly or intentionally say so. The third case, which was later, unsettled by *S v Yende* 1987 (3) SA 367 (A) 374C–375E opted for a subjective test. The law was finally settled by the *S v Yende* 1987 (3) SA 367 (A) 374C–375E case. Objective test takes precedence over subjective test while both of them can be applied simultaneously to determine the rationale of an accused's statement.

In effect, this reasoning attempts to prevent possible evidence being lost through faulty interpretation of statements as either confession or admission due to their integral similarities.⁴⁶ It is submitted that neither the subjective test nor the objective test or a combination of them goes to the extent of solving potential prejudices posed by the differentiation of confessions and admissions. This is well exposed in the current constitutional era courts attempt where they grapple with the rigid distinction perspective. Both the common law era and the constitutional law era seem to be battling with prejudices in this perspective. It would seem as far as the law entailing confessions and admissions the ensued rigid perspective determines the reasoning in circles.

3.3 *The Current South African Constitutional Law Perspective*

In the current South African constitutional law perspective, the ensued difficulty in determining whether a statement is a confession or an admission so as to establish its admissibility criteria persisted and continued to influence courts determinations. In *S v Molimi*,⁴⁷ for example, the Constitutional Court was, amongst other issues, faced with determining whether a statement was a confession or an admission? The appellants had argued that the High Court and the Supreme Court of Appeal misinterpreted the statement as an admission instead of a confession. As a result of that interpretation the prosecution was barred from using the statement against the co accused⁴⁸ The Constitutional Court applied the objective test suggested in *S v Yende*⁴⁹ several years ago and found that the statement was a confession.

⁴⁶ In most cases, appeal courts ought to deal with deciphering whether a statement ought to have been classified as an admission or confession. This problem is posed by the state's ability to explore the possibility that admissions could be admitted against co-accused. The state normally classifies statements as admissions instead of confessions. If it favours the state that a statement be classified as an admission, then the statement would be introduced as such before courts. In most cases, the prosecution would prefer to do that because, compared to confessions, an admission can cast a net much further. See, for example, the cases of *S v Ndhlovu* 2002 (2) SACR 325 (SCA); *S v Molimi* 2008 (2) SACR 76 (CC); *S v Mangena* 2012 (2) SACR 170; *Litako & Others v S* 2014 (3) ALL SA 138 (SCA); *Mhlongo v S; Nkosi v S* 2015(2) SACR 323(CC) and *Khanye and Another v S* (CCT86/16) [2017] ZACC 29 (10 August 2017).

⁴⁷ *S v Molimi* 2008 (2) SACR 76 (CC).

⁴⁸ In terms of the direct provision in Section 217.

⁴⁹ *S v Yende* 1987 (3) SA 367 (A) 374C–375E.

The case of *S v Molimi*⁵⁰ specifically dealt with the admissibility of admissions as hearsay evidence within the prescripts of section 3 of the Law of Evidence Amendment Act (LEAA).⁵¹ The gist of the applicant's matter was whether extra-curial admissions of his co accused were admissible against the appellant to corroborate cell phone records which alone could not prove the case against him beyond a reasonable doubt. The court held that the statements of the co accused were not admissible against the applicant. The Court refrained from expressing any view on the question of whether the admission of hearsay evidence in terms of the LEAA denies the accused the right to cross-examination. The court could not as well determine the question raised obiter in amicus curiae arguments concerning the legality of *the differentiations between the admissibility principles of confessions and admissions posed in Sections 219 and 219A*. The Constitutional Court dwelt much on the area of law regarding hearsay evidence and touched in a limited manner on this point.

The court merely assessed the statement which was subject to dispute and determined that it was a confession and not an admission and therefore slipped over a cover on the issues pertaining to the differentiation of confessions and admissions. To reach its conclusion, the Constitutional court repeated the usual rhetoric. Referring to *S v Yende* objective test,⁵² it observed that no statute defines what a confession is. However, the court observed that the definition of confession is construed narrowly by courts as "an unequivocal acknowledgement of guilt which is the equivalent of a plea of guilty." Further, the Constitutional Court held, that "South African Courts construe an admission as a statement or conduct adverse to the person from whom it emanates."

The Constitutional Court observed, further that admissions are made out of court and tendered in evidence against their maker and that if admissions are made to a magistrate and reduced to writing, they are admitted in court, in the same manner, upon their mere production. The Constitutional Court perused the co accused statement and read it in conjunction with accused 1's warning statement. It then concluded that the statement establishes an admission of the elements of the robbery with aggravating circumstances and thus an unequivocal acknowledgment of guilt.

⁵⁰ 2008 (2) SACR 76 (CC); 2008 (3) SA 608 (CC), hereinafter *Molimi*.

⁵¹ Act 45 of 1988.

⁵² *S v Molimi* 2008 (2) SACR 76 (CC).

It was the argument of the amicus that it was unconstitutional to differentiate between the admissibility of confessions and admissions. The amicus pointed out the procedural irregularity of Section 219A read with section 219 in the light of common law.⁵³ The court did not make a ruling on whether this argument was correct or not.

Without that decision, the state of law that differentiated between admissions and confessions remained untouched and thus the emphasis that in South African law as opposed to other common law states,⁵⁴ differentiation of confessions and admissions remained as rigid as before the 1800s AD turnover. It is submitted that if the Amicus argument on differentiation could have been carried over, their main bone of contention against the use of different admissibility principles for confessions as opposed to admissions would have been progressive.

In particular, it could have remedied the rigidity of the law on the admissibility of confessions and admissions reflecting that, while confessions could not be admitted within section 3(1) of the LEEA, admissions could with respect to the leading case of *S v Ndlhovu*.⁵⁵ After Molimi's decision this principle was still untouched. In *Ndlovhu v S*⁵⁶ the South African Court of Appeal, decision of the year 2000 agreed with the High Court decision in *Ndlhovu v S* when it differentiated on the admissibility of extra-curial statements to the effect that, while confessions could be admitted only against their maker, extra-curial admissions could be admitted against any person implicated by the maker.

As seen earlier under the common law and statutory law perspectives courts made differing decisions on whether confessions and admissions are separable. To reiterate, earlier attempts made, in South African High Courts, questioning the logic in *S v Ndlhovu*,⁵⁷ although *obiter dicta* were concerned with the prejudice in the rigid

⁵³ *S v Molimi* 2008 (2) SACR 76 (CC).

⁵⁴ Regarding the 1800 s AD turnover read the holding of Gillette J in the case of *State v. Manzella*, 759 P. 2d 1078 – Or Re. Another important writing is M C Slough 'Confessions and Admissions' 28 *Fordham L. Rev.* 96 (1959) 96–114 who extrapolates on the post 1800 s Commonwealth law relaxations of the rigid separation on the admissibility of admissions and confessions.

⁵⁵ 2002 (2) SACR 325 (SCA).

⁵⁶ 2002 (2) SACR 325 (SCA), hereinafter *Ndlhovu*. The Supreme Court of Appeal (SCA) judgment in 2014 overruled the High Court finding in the matter of *Ndlovhu v S* in the year 2000.

⁵⁷ 2002 (2) SACR 325 (SCA).

interpretation of confessions and admissions. These concerns are deciphered from challenges expressed in Ponnán J's reasoning in *Balkwell v S*⁵⁸ and Splig J in *S v Mangena*.⁵⁹ These were not taken to be of much significance at the time they were voiced. As a result, other courts⁶⁰ followed without question the decision in *Ndlhovu*.⁶¹ As per *Ndlhovu*⁶² confessions and admissions continued to be admitted differently. *Ndlhovu*⁶³ was regarded as a principle that changed the Common Law definition of the admissibility of confessions and admissions as hearsay evidence for almost 14 years. It was cited with approval by courts⁶⁴ as well legal writers, endorsed the finding in the *Ndlhovu* case.⁶⁵ In April 2014 when deciding *Litako*,⁶⁶ the South African Supreme Court of Appeal, presided over by several justices including Justice Ponnán reconsidered the ruling in *Ndlhovu*,⁶⁷ and found it to be a wrong decision on hearsay evidence law.

In *Litako v S*⁶⁸ the Constitutional Court cried out that the differentiations made between confessions and admissions reflect that the law in this area is pregnant with *complexities*. The *Litako v S*⁶⁹ matter revolves around the events of the 4th February 2007 which

⁵⁸ 2007 (3) All SA 465 (SCA) paras 32–35.

⁵⁹ *S v Mangena* 2012 (2) SACR 170 at paras [65] and [75] hereinafter *Mangena*.

⁶⁰ For example, *S v Mamushe* 2007 (4) All SA 972 (SCA); *S v Mpungose v The State* (460/10) [2011] ZASCA 60; *S v Saeed* [2012] Jol 29 299 (FB) at para [41]; *S v Libazi & Another* 2010 (2) SACR 233 (SCA).

⁶¹ 2002 (2) SACR 325 (SCA).

⁶² 2002 (2) SACR 325 (SCA).

⁶³ 2002 (2) SACR 325 (SCA).

⁶⁴ For example, *S v Mamushe* 2007 (4) All SA 972 (SCA); *S v Mpungose v The State* (460/10) [2011] ZASCA 60; *S v Saeed* [2012] Jol 29 299(FB) at par [41]; *S v Libazi & Another* 2010 (2) SACR 233 (SCA).

⁶⁵ Various scholars of legal evidence expressed the view that it is appropriate to subject the extra-curial admissions to the provisions of section 3 of the law of evidence amendment act. See B C Naudé 'Admissibility of extra-curial statements against a non-testifying accused' (2008) *Obiter* 247 at 250, who comments, on the principle currently under scrutiny, that the finding in *S v Ndlhovu and Others* 2002(2) SACR 325 (SCA) is a positive development. He adds that this good move should also be extended to include the admissibility of confessions. See as well, M Watney 'Admissibility of Extra-Curial Admissions as Hearsay Evidence Against A Co-Accused' (2008) *TSAR* 834.

⁶⁶ *Litako v S* (584/2013)[2014] ZASCA 54 (SCA).

⁶⁷ 2002 (2) SACR 325 (SCA).

⁶⁸ *Litako v S* (584/2013)[2014] ZASCA 54 (16 April 2014), at par[31].

⁶⁹ *Litako v S* (584/2013)[2014] ZASCA 54 (16 April 2014), at par[31].

transpired at a village called Mmatau in the North West province. In *Litako*, the state argued that five accused were perpetrators of armed robbery, murder and possession of firearms without a licence. The state alleged that the owner of a tavern was robbed at gun point and an amount of R5000, 00 rand in cash was seized by the robbers. It was also alleged that one patron was murdered during the robbery and other patrons were robbed of their cell phones. The evidence relied upon was the oral account of the witnesses, forensic evidence and the statement of the first accused (appellant).

The crux of the matter was that first accused in his statement to the police, had implicated other co-accused in the case. This statement was later accepted by the court as extra-curial admission. Whilst he had implicated his co-accused, he did not testify during trial and had challenged the admissibility of the confession/admission made to the police. The other co-accused pleaded not guilty to the charge and distanced themselves from the allegations levelled against them. The High Court per Hendricks J found all the accused guilty of the various crimes they were alleged to have committed. The court found that the oral statements of the owner of the tavern and other witnesses read together with the accused statement were of assistance and have contributed to the final judgement that the accused were guilty as charged.

The court also relied on the ballistic evidence of various experts who testified and concluded that such evidence connected the accused to the crimes they are alleged to have committed. With regard to the extra-curial statements of the first accused, the court concluded that the evidence placed the accused at the scene of crime. The accused were convicted principally on the basis of a statement made by the first appellant to a magistrate which, although exculpatory in respect of him, implicated the other appellants to a greater or lesser degree.

Mr Litako and another co accused appealed against their sentence and conviction to the SCA. The basis of their appeal was that the state did not discharge its duty to prove its case against them beyond dispute. However, three issues became pertinent in the judgement and they were:

1. The development of our law in relation to the acceptance of evidence in the form of confessions and admissions by a co-accused, and consideration of the philosophy underlying safeguards and cautions both at Common Law and by way of statutory regulation.
2. The need to scrutinise the ambit, application and correctness of the decision in *Ndlhovu v s*.⁷⁰
3. The need to determine whether the judgement of the court below was well founded based on the determination of the available evidence at its disposal.

The court made several considerations to found its decision. First, the court considered the evidence of eye witnesses and found that the evidence was unhelpful or that it could not be relied upon. Secondly, was the consideration made on the ballistic evidence led by the state to only find that it was unhelpful in finding the guilt of the appellants. This led to the court making the finding that “the evidence concerning the ballistics testing [was] conspicuously unhelpful,”⁷¹ and remarking that, “[a]ll of the evidence that [it] sketched was intended to link one or more of the accused to the crime scene. But the chain of evidence which sought to link the firearms and ammunition recovered to the ballistic tests...was woefully inadequate.”⁷² The court went further to find that, “the eyewitness and ballistics evidence were inadequate to found a conviction on any of the charges preferred against the appellants. State’s case therefore, hinged on the extra-curial statement of the first appellant.”⁷³

It was upon this basis that the court went on to consider the admissibility of extra-curial statements of the first applicant. The nature of the statement was to the effect that, first applicant had in general told the police that he was together with the other accused alleged of involvement in the robbery and killing of the patrons. The evidence of the co-accused relied on by the High Court played a significant role in the findings of the trial court against all the accused as it was used to place all of them at the crime scene absent any evidence aliunde. It was the evidence that placed all of the accused at the scene of crime and connected them to various acts committed on that night by each of the co accused. The evidence of the co accused was in a form of an admission made extra-curially.

⁷⁰ *S v Ndlhovu and Others* 2002 (2) SACR 325 (SCA).

⁷¹ *Litako v S* (584/2013)[2014] ZASCA 54 at para [22].

⁷² *Litako v S* (584/2013)[2014] ZASCA 54 At paras [22] and [23].

⁷³ *Litako v S* (584/2013)[2014] ZASCA 54 At para [22].

Monyakane and Monye⁷⁴ supported the *Litako* decision outlined above. They further acknowledged that the Constitutional Court approved the principle set in *Litako* in *Mhlongo v S*.⁷⁵ Their supportive argument pointed that Common Law admissibility principles regarding admissions and confessions bore similar precautions to the extent that both confessions and admissions could not be lightly differentiated.⁷⁶ They maintained that while confessions cannot be admitted against co accused, admissions could not be treated otherwise. Their argument is reinforced in this article and a little more is added to it, namely that Common Law admissibility precautions on the admissibility of confessions cannot be watered down regarding the admissibility of admissions of an accused person even if such admissions are used against *their maker*. Common Law put all inculpatory statements on the same pedestal to the extent that similar caution was exercised when they were admitted as evidence.⁷⁷ Within the rationales of this argument the differentiation in sections 217 read with 219A do not stand.

Confessions and admissions are not only difficult to decipher but their effects are also of the same nature. They cannot be easily differentiated. Aware of this anomaly, Monyakane and Monye,⁷⁸ are of the opinion that admissions and confessions are *Siamese twins*.⁷⁹ They alluded their argument to the obvious conjoined nature of

⁷⁴ MMM Monyakane and S M Monye “The legal implications of *S v Ndhlovu* and *Litako v S* on the South African law of hearsay evidence: A critical overview” (2016) *SACJ* Vol. 29 No. 3 308.

⁷⁵ *Mhlongo v S*; *Nkosi v S* 2015 (2) *SACR* 323 (CC) at para [26].

⁷⁶ See MMM Monyakane and S M Monye “The legal implications of *S v Ndhlovu* and *Litako v S* on the South African law of hearsay evidence: A critical overview” (2016) *SACJ* Vol 29 No 3 308 at 321 and 327, as well as *S v Hlapezula* 1965 (4) SA 439 (A) at 440D–H read it with *Balkwell v S* 2007 (3) All SA 465 (SCA) Paras [32]–[35] and *S v Ramavhale* 1996 (1) *SACR* 639 (A) at Para 649 C–D.

⁷⁷ *S v Mangena* 2012 (2) *SACR* 170 at para 65 who considered an otherwise perspective an anomaly. He held that, “there would be [an] anomaly that would result in absurdity if [a] confession by an accused which implicates his co-accused does not necessarily amount to a confession against his co-accused, but only an admission of certain facts indicating the co-accused’s involvement. Accordingly, to prohibit the admissibility of evidence contained in a statement, on the basis that it amounts to a confession as against its author, does not indicate that the legislature intended that those parts of the confession which amount to an admission by him against his co-conspirator would be receivable in evidence against the latter....”.

⁷⁸ MMM Monyakane and S M Monye ‘The legal implications of *S v Ndhlovu* and *Litako v S* on the South African law of hearsay evidence: A critical overview’ (2016) *SACJ* Vol 29 No 3 308 at 310.

⁷⁹ (2016) *SACJ* Vol 29 No 3 308 at p. 310.

admissions and confessions and their same prejudicial effects. The integral reason for this argument is that confessions and admissions bear similar basic effects when used as evidence.

If these statements are erroneously admitted as evidence, they bear similar prejudicial consequences to the accused. Consequently, an accused person can be convicted on the basis of evidence of an admission-cum-confession in terms of section 209. Equally, an admission of facts in a confession renders facts proved beyond any doubt and no further evidence is required in this regard. In the law of evidence, admissions and confessions are both adverse statements to their maker, even though they differ in determining the extent of the maker's guilt; they bear the same nature, as statements of guilt.

Evidence founded on either confessions or admissions can play a major role in finding an accused person guilty if found to be connected and relevant to the case before court. Evidence based on both admissions and confessions is relevant to the maker of the statement. The minor difference between these two statements concerns their differing weight as evidence before court.⁸⁰ Spilg J's⁸¹ reasoning in *S v Mangena*⁸² exposes yet another resemblance between confessions and admissions which if overlooked may lead to irrationalities in their interpretation and application. He for example held that;

A confession by an accused which implicates his co-accused does not necessarily amount to a confession against his co-accused, but only an admission of certain facts indicating the co-accused's involvement. Accordingly, to prohibit the admissibility of evidence contained in a statement, on the basis that it amounts to a confession as against its author, does not indicate that the legislature intended that those parts of the confession which amount to an admission by him against his co-conspirator would be receivable in evidence against the latter. Yet the state's interpretation of s 219A as read with the Law of Evidence Amendment Act would allow it to argue that the section is wide enough to allow it to extract and use against a co-accused those parts of the confession of the one conspirator which contained admissions (but not a confession) concerning the involvement of the other.⁸³

⁸⁰ Confessions have higher weight while admissions are considered of a lower weight.

⁸¹ Who is also a renowned South African Constitutional criminal justice perspective defender.

⁸² *S v Mangena* 2012 (2) SACR 170 at para 65.

⁸³ *S v Mangena* 2012 (2) SACR 170 at para 65.

Spilg's holding can be understood to have unpacked the intertwined nature of confessions and admissions. He demonstrated a possibility to interpreting confessions as embodiments of admissions. In accord with Spilg J's observation it is submitted that confessions and admissions have an intertwined relationship.

Through Figure 1 below, I depict the ensued relationship between confessions and admissions. The implication in this figure is that full confessions can be constructed on admissions while some admissions may be independent depending on different aspects of different statements.⁸⁴ The independent circle depicts admissions. The inner circle combined with the outer circle is a component for confessions. Thus, confessions and some admissions are bearing similar genetic components even though their combination varies to some extent.⁸⁵ Consequently, any law or procedural step that seeks to convey a razor sharp differentiation to their nature⁸⁶ would be rendering some injustice in the long run.

While confessions are admitted wholeheartedly, and an accused person can be found guilty on their basis without additional evidence, in the case of admissions there needs to be additional evidence on the unadmitted elements of crime, an aspect calling for extra caution. It is submitted that this difference does not remove the danger attached to the possible negative impact on accused persons if different precautions are applied in securing admissions from their maker and for purposes of their admission as evidence.⁸⁷ In particular, it does not remove the potential danger of admitting evidence based on a statement which, if

⁸⁴ Hence different classes of admissions including inculpatory statements.

⁸⁵ This is why under Common Law some classes of admissions namely those consisting of some inculpatory statements was classified confessions. See cases of *State v. Howard*, 102 Or. 431, 452, 203 P. 311 (1921); *State v. Campbell*, 73 Kan. 688, 696–701, 85 P. 784, (1906); *State v. Romo*, 66 Ariz. 174, 185 P.2d 757 (1947); *State v. Gibson*, 69 N.D. 70, 284 N.W. 209 (1939) and *State v. Lindsey*, 26 N.M. 526, 194 P. 877 (1921). This attempt was to move away from the current South African strict interpretation of confessions per *R v Becker* 1929 AD 167.

⁸⁶ Consider a myriad of cases within South African law of evidence jurisprudence which sought to capitalize on the borderline content differences between confessions and admissions so as to maintain a thread for circumstantial evidence that bears no evidential weight without considering the contents of an inconspicuous statement by a co accused. See some of these cases in fn87 below.

⁸⁷ See the case of *State v. Manzella*, 759 P. 2d 1078 - Or: Supreme Court 1988 compare with the cases of *S v Ndhlovu* 2002 (2) SACR 325 (SCA); *S v Molimi* 2008 (2) SACR 76 (CC); *S v Mangena* 2012 (2) SACR 170; *Litako & Others v S* 2014 (3) ALL SA 138 (SCA); *Mhlongo v S*; *Nkosi v S* 2015 (2) SACR 323 (CC) and *Khanye and Another v S* (CCT86/16) [2017] ZACC 29 (10 August 2017).

Fig. 1. The intertwined nature of confessions and admissions

classified as a confession, could not have been admitted because it could not satisfy all requirements for its admissibility.

IV WAS SECTION 219 A INTENDING ANY DISPARITY BETWEEN CONFESSIONS AND ADMISSIONS?

In South African law it is an established rule of interpretation that in enacting a statute the legislature does not intent to discard the existing Common Law principles. Little interference is exerted on existing Common Law. If the legislature wishes to do away with the Common Law, the legislation would directly say so in plain language.⁸⁸ It therefore follows that in case Common Law had had extensive protection for admissions which could be compared to protections for taking confessions from suspects and that through legislation such protections were taken away then that ought to have been done through necessary direct implication.⁸⁹ In the absence of such implication it would not be wrong to argue that the Common Law protections if any still apply.

From the South African Common Law perspective there are several court decisions indicating a differentiation between confessions and admissions.⁹⁰ In most of these decisions aspects of differ-

⁸⁸ *Cornelissen NO v Universal Caravan Sales (Pty) Ltd* 1971 (3) SA 158 (A) at 175C – D.

⁸⁹ *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 552.

⁹⁰ See, for example, the cases of *S v Ndhlovu* 2002 (2) SACR 325 (SCA); *S v Molimi* 2008 (2) SACR 76 (CC); *S v Mangena* 2012 (2) SACR 170; *Litako & Others v S* 2014 (3) ALL SA 138 (SCA); *Mhlongo v S*; *Nkosi v S* 2015(2) SACR 323(CC) and *Khanye and Another v S* (CCT86/16) [2017] ZACC 29 (10 August 2017).

entiation between confessions and admissions were either pinpointed to cement the Common Law rationale for developing the principles surrounding admissibility of either confessions and admissions as evidence where a confusion had arisen regarding their differing requirements for admission exposed in the statutory law.

Spilg J's⁹¹ reasoning in *S v Mangena*,⁹² for example, exposes that even though confessions and admissions were regarded different types of evidence per statutory enactments⁹³ due to their potential prejudicial nature Common Law protections⁹⁴ are still recognised. The ensued protections safeguard the possible adversities and prejudices. In cases where Common Law cautionary principles are not equally applied on the evidence based on either confessions or admissions there are always possible injustices.⁹⁵ Spilg J's reasoning is understood to be indicating that although confessions are admissible against their makers their content cannot be interrogated piecemeal and be turned into admissible admissions against accused and co accused. This holding builds on the possible argument that the rationale behind the rejection of evidence based on a co accused confession if viewed as an admission against other accused negatively affects certain direct and indirect Common Law principles of justice.⁹⁶ Both substantive and procedural principles relevant to the matter in issue ought to be scrutinised before the admission or rejection of such evidence. It is submitted, further, that in so doing the court would be considerate that there ought not be a mere testing of evidence for limited flexibility but the need for going an extra mile and double checking all possible prejudices posed by the ensued admission.

⁹¹ Who is also a renowned South African constitutional criminal justice perspective defender.

⁹² *S v Mangena* 2012 (2) SACR 170 at paras 65–9.

⁹³ Sections 219A and 217.

⁹⁴ See Monyakane M M M 'The Disparities in Section 3, Hearsay-Admissibility Rules and the Negative Effects the Consent Clause in Section (1)(a) has on the Accused whose Representative Agree to the Admission of Hearsay Evidence to Prove a Case Against their Clients.' 2015 (36.1) *Obiter* 136–149 where she mentions the importance of these protections and argues for the need to put admissions through similar tests as confessions before they can be admitted as evidence.

⁹⁵ See, for example, the cases of *S v Ndhlovu* 2002 (2) SACR 325 (SCA); *S v Molimi* 2008 (2) SACR 76 (CC); *S v Mangena* 2012 (2) SACR 170; *Litako & Others v S* 2014 (3) ALL SA 138 (SCA); *Mhlongo v S*; *Nkosi v S* 2015 (2) SACR 323(CC) and *Khanye and Another v S* (CCT86/16) [2017] ZACC 29 (10 August 2017).

⁹⁶ *S v Mangena* 2012 (2) SACR 170 at paras 65–9.

The *Mangena* decision is viewed to have advocated for a need to bringing change on the requirements for the admission of confessions and admissions. It is understood to have rebuked reliance on the principle pertaining to the voluntariness of the maker of the statement only and to have recommended a consideration on the impact of an admission on the law in general if such statement would have to be admitted as evidence.⁹⁷ The holding emphasised on the need to also consider Common Law precautionary rules applicable for the admission of evidence in general.⁹⁸ The decision opposes the strict application of the statutory requirement for the admissibility of admissions. Such an approach seems to *underrate* the dangers experienced in the admission of admissions, especially where only one consideration of strict voluntariness is considered an only requirement.

It is submitted that if this approach is treated with sincerity and adopted as law, it implies a need for a change from the current South African law razor sharp distinctions between confessions and admissions.⁹⁹ It also exposes that there is a need that the same precautions, similar to relaxed concepts of voluntariness exercised in Common Law become applicable to the admissibility of admissions-cum-confessions even though the wording of Sections 219A and 217 indicate otherwise.

V ASPECTS FOR DIFFERENTIATION OF ADMISSIONS AND CONFESSIONS IN THE COMMON LAW WORLD AND THEIR IMPACT ON SOUTH AFRICAN LAW

As indicated earlier, the law founding admissibility of evidence in South Africa is Common Law based.¹⁰⁰ In a nut shell the English Common Law embodies these foundations. It is therefore trite to

⁹⁷ See *S v Mangena* 2012 (2) SACR 170 at paras 65–9.

⁹⁸ See a discussion of these rules in MMM Monyakane ‘The Disparities in Section 3, Hearsay-Admissibility Rules and the Negative Effects the Consent Clause in Section(1)(a) has on the Accused whose Representative Agree to the Admission of Hearsay Evidence to Prove a Case Against their Clients.’ 2015 (36.1) *Obiter* 136–149.

⁹⁹ Read M C Slough ‘Confessions and Admissions’ 28 *Fordham L. Rev.* 96 (1959) 96–114 at 97 where he observed that justice was done in Common Law when the interpretation of confessions was relaxed to accommodate all incriminating admissions and their admissibility precautions were similar to tests applicable to full confessions.

¹⁰⁰ Through Ordinance No 72 of 1830 of the Cape of Good Hope. See *R v Camane* 1925 AD 570 at 575 per Innes CJ and read *R v Gumede and Another* 1942 AD 398 AD, 414–4 per Feetham JA.

refer to basics of law of evidence from the English law and unravel current challenges in the making of current South African law of evidence. Indeed, questions such as, what rationales behind certain South African statutory amendments of the law of evidence, are best answered from looking at relevant Common Law foundations.

Several jurisdictions including England, Canada and America shared South African similar Common Law on admissibility of confessions and admissions before they could develop the law based on their relevant policy and constitutional concerns. A study of some Commonwealth states literature bearing basics of law on admissions and confessions may shed a light at the extent of caution Commonwealth exerted on the admissibility of either confessions or admissions. As noted, these states shared common definitions on legal concepts such as confessions and admissions with South Africa.

Slough MC¹⁰¹ studied the early developments of Common Law on confessions and admissions as well as mid developments posed by changes in law and policies in differing commonwealth states¹⁰² including the United Kingdom whose law eventually became South African Common Law especially the law of evidence.¹⁰³ Slough,¹⁰⁴ warned against, the previously ensued understanding in Common Law, "that confessions are of greater evidentiary value than admissions or that confessions should inevitably be received with greater caution than admissions."¹⁰⁵ His voice of criticism emphasised that the differentiation lends artificial classifications and unnecessary labeling of confessions and admissions.¹⁰⁶

¹⁰¹ MC Slough 'Confessions and Admissions' 28 *Fordham L. Rev.* 96 (1959) 96–114. Slough's opinion remains for decades, within the Common Law confessions and admissions jurisprudence. See various years between cases of *State v. Taylor*, 133 NW 2d 828 – Minn: Supreme Court 1965; *State v. Manzella*, 759 P. 2d 1078 – Or: Supreme Court 1988 which maintained the same criticisms as Slough.

¹⁰² For example, the United States of America, Canada and Australia.

¹⁰³ Refer to Ordinance No 72 of 1830 of the Cape of Good Hope.

¹⁰⁴ MC Slough 'Confessions and Admissions' 28 *Fordham L. Rev.* 96 (1959) 96–114.

¹⁰⁵ MC Slough 'Confessions and Admissions' 28 *Fordham L. Rev.* 96 (1959) 96–114 at 96.

¹⁰⁶ MC Slough 'Confessions and Admissions' 28 *Fordham L. Rev.* 96 (1959) 96–114 at 96–7.

He further maintained that essentially there was no razor-sharp¹⁰⁷ distinctions between confessions and admissions and that not all confessions and admissions may fit into a common mold to the extent that cautionary principles that apply on confessions can be safely excluded from application on admissions. His article exposed what I analysed to be three differing stages¹⁰⁸ for the Common Law development on the admissibility of admissions and confessions.

The preliminary stage is that where admissibility of confessions was differentiated from that of admissions. Thus, during that phase, only confessions were admitted if they passed voluntariness muster, but admissions were willy-nilly admitted even if they were involuntarily made by the suspect- a situation very much akin to South African admissibility procedure today.¹⁰⁹ Yes indeeds excluding admissions from section 217(1) precatations lends them to willy-nilly admissions of evidence. The second stage is where both confessions and admissions were considered within voluntariness requirements. The last phase was the stage where the voluntariness requirement was widened to cover various legal aspects and secure sufficient precaution before the admission of both confessions and admissions as evidence.¹¹⁰

5.1 *The Common Law Differentiation on Admissibility of Confessions and Admissions*

The Common Law perspective on the strict differentiation of confessions and admissions emanated from the English Courts jurisprudence during the 1500 A.D. Accordingly, *State v. Manzella*¹¹¹ held that, “English courts [at this time] placed no restrictions on the use of extrajudicial

¹⁰⁷ MC Slough ‘Confessions and Admissions’ 28 *Fordham L. Rev.* 96 (1959) 96–114 at 97.

¹⁰⁸ Concomitant to this understanding Gillette J in the case of *State v. Manzella*, 759 P. 2d 1078 – Or: Supreme Court 1988 held on the three eras of developments on the admissibility of confessions and admissions in the Commonwealth. Writing from the United States of America experience, three stages were observed, first, stage was associated with the English Courts influence from approximately 1500 A.D. where confessions and admissions were accepted without any restrictions. The second phase was concomitant with the English Courts influence of the middle 1700 s at this stage courts paid cognisance to the unreliability of coerced confessions. The third stage which was influenced by the English courts concerns in 1800 s led to courts posing a general suspicion of all extracurial statements-both confessions and admissions.

¹⁰⁹ See for example, the case of *State v. Spencer* 74 Idaho 173, 258 P.2D 1147. As well see *State v. Allen*, 720 P. 2d 761 – Or: Court of Appeals 1986.

¹¹⁰ *State v. Manzella*, 759 P. 2d 1078 – Or: Supreme Court 1988.

¹¹¹ *State v. Manzella*, 759 P. 2d 1078 – Or: Supreme Court 1988.

statements of the accused in a criminal trial. Most notably, those statements were used without regard to whether they were obtained by coercion or threats, even of torture.”¹¹² This holding accorded with Wigmore’s explanation on the basics of the admissibility of both confessions and admissions.¹¹³ It is submitted that the ignorance of any possible legal precautionary steps nor rules to counter prejudices accustomed with admitting extracurial statements insinuating suspect’s guilt lasted for a while¹¹⁴ due to the lack of a criminal justice system within the English jurisdiction.¹¹⁵ This stage never affected South African principles on admissibility of admissions and confessions due to the fact that the English law was not yet introduced in South Africa.

The second phase was connected to the English Courts decisions of the middle 1700s. Beginning in the second half of the 1700s, courts began at least to recognize the unreliability of coerced confessions.¹¹⁶ The leading case that turned tides on the way confessions and admissions were admitted as evidence in Common Law is the decision in *the King v Warickshall*.¹¹⁷ Rejecting the defence argument that her confession regarding her guilt and subsequent disclosure of the location of stolen property ought to be excluded because she was coerced through promises of favours to divulge it, Justices Nares and Eyre held that:

Confessions are received in evidence, or rejected as inadmissible, under consideration of whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by flattery

¹¹² *State v. Manzella*, 759 P. 2d 1078 – Or: Supreme Court 1988 at paras [3]-[4]. As well see III Wigmore, Evidence § 818 (Chadbourn rev 1970).

¹¹³ Wigmore, Evidence § 818 (Chadbourn rev 1970). As well see *State v. Manzella*, 759 P. 2d 1078 – Or: Supreme Court 1988.

¹¹⁴ Until the 1700 AD. Read the case of *Rex v. Warickshall*, [1783] 168 Eng. Rep. 234, 235 As well, read *US v. Lombera-Camorlinga*, 206 F. 3d 882 – Court of Appeals, 9th Circuit 2000, following the principles in *Rex v. Warickshall* also referred to as the *King v Warickshall*, 1 Leach C.C 263 (1783).

¹¹⁵ Justice in the periods of the 1500 AD to 1700 AD was community based and there were no legal professionals. For example, Magistrates were coopted among the rich societies of England. Magistrates were themselves unpaid officials who were drawn from the ranks of the wealthy and were expected to defend the English law as amateurs. [<https://www.bl.uk/georgian-britain/articles/crime-and-punishment-in-georgian-britain> accessed on 04 02 2019].

¹¹⁶ *Rex v. Warickshall*, [1783] 168 Eng. Rep. 234, 235.

¹¹⁷ *The King v Warickshall*, 1 Leach C.C 263 (1783); *Rex v. Warickshall*, [1783] 168 Eng. Rep. 234, 235.

of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore rejected.¹¹⁸

The ensued reasoning overturned the understanding that segregated between the admissibility of extrajudicial narrative statements of guilt offered as evidence for a latter conviction, and those that create conditions for immediate conviction. In effect *Warickshall* undertook to express the notion that in some instances, confessions may be unworthy of credit due to the circumstances under which they were obtained. In such instances there was a need to exclude them. This understanding was effectively subsumed in Common Law jurisdictions. In effect courts adopted an understanding that the voluntariness doctrine demanded that, “confessions not entitled to credit because of the promises or the threats by which they had been obtained [are ought to be] declared inadmissible in evidence.”¹¹⁹ *Warickshall*; holding although so celebrated, did not extent the protection to admissions and hence the 1800s AD turnover.

5.2 *Common Law Emphasis on Voluntariness*¹²⁰ Requirement on Both Confessions and Admissions Through the Expansion of the Definition of Confessions

During the 1800s, certain challenges regarding tight distinctions between admissions and confessions led to absurdities in law. According to Wigmore¹²¹ courts had “a general suspicion of all confessions, a prejudice against them as such, and an inclination to repudiate them upon the slightest pretext.”¹²² Towards the 19th century, it would seem the courts were concerned with the impact of distinctions between confessions and admissions to the extent that some admissions which acknowledge some elements of crime are just admitted into evidence willy-nilly. The concern that such a move was potentially prejudicial was exacerbated by several concerns including that: -

¹¹⁸ *D Wolchover The Exclusion of Improperly Obtained Evidence* (1986) Sweet & Maxwell pp 25–6; as well read, *P Mirfield Silence, Confessions and Improperly Obtained Evidence* (1998) Oxford University Press.

¹¹⁹ Read *Bram v. United States*, 168 U.S. 532 (1897).

¹²⁰ In III Wigmore *On Evidence* § 821 (3d ed. 1940) (Chadbourn rev 1970).

¹²¹ III Wigmore *On Evidence* 297, § 820 (3d ed. 1940) (Chadbourn rev 1970).

¹²² III Wigmore *On Evidence* 297, § 820 (3d ed. 1940) (Chadbourn rev 1970).

- (1) [there was] a growing recognition that most criminals were members of the lower classes, whose crimes frequently were the result of their “hopeless poverty” rather than inherent dishonesty, and who typically possessed a submissive attitude toward those in authority;
- (2) the absence of the right of appeal in criminal cases, which led *nisi prius* judges to err on the side of caution when asked to receive a confession into evidence; and
- (3) a criminal defendant’s inability to testify or to be represented by counsel¹²³

With these concerns in mind, the law pertaining to the admissibility of confessions and admissions changed in some respects. The 1800s AD definition established a “distinction between “confessions” as acknowledgments of guilt and “admissions,” as acknowledgments of fact. Among other changes courts adopted a relaxed and wide definitions of the word, “confession.” Courts aware that whereas “confessions” were presumed involuntary and inadmissible admissions across all *horizons* were not. Thus, even those admissions containing statements by accused persons before police officials in the course of investigation of the suspect’s guilt were not subjected to the voluntariness test(s). The courts then sought to remedy this problem by effectively expanding the horizon of confessions while limiting that of admissions.¹²⁴

The cases that gave effect to this move are amongst others *State v. Howard*,¹²⁵ which introduced an expansion to confessions by holding a confession to be either a statement that is “actually or practically” an acknowledgment of guilt. It held that such a statement would be considered *prima facie* involuntary. It further held that under those circumstances the prosecution would have to dispose a burden of proof beyond a reasonable doubt and show that the accused had not been subjected to illegal means which induced compliance. The other case of importance is *State v. Campbell*.¹²⁶ It differentiated between confessions and admissions made before the jury. It held that even if a statement made before a jury contains inculpatory admissions, due to the fact that the defendant’s intention was to exculpate himself such a statement is an admission and not a confession. Such a

¹²³ See III *Wigmore On Evidence* § 820 (*Chadbourn* rev 1970). This reason may be extended to the south African situation where accused rarely get the best lawyers in practice for representation.

¹²⁴ See cases of *State v. Howard*, 102 Or. 431, 452, 203 P. 311 (1921); *State v. Campbell*, 73 Kan. 688, 696–701, 85 P. 784, (1906); *State v. Romo*, 66 Ariz. 174, 185 P.2d 757 (1947); *State v. Gibson*, 69 N.D. 70, 284 N.W. 209 (1939) and *State v. Lindsey*, 26 N.M. 526, 194 P. 877 (1921).

¹²⁵ *State v. Howard*, 102 Or. 431, 452, 203 P. 311 (1921).

¹²⁶ *State v. Campbell*, 73 Kan. 688, 696–701, 85 P. 784, (1906).

statement is admitted into evidence against the accused and no preliminary processes to show that the statement was voluntarily made binds the prosecution. *State v. Romo*,¹²⁷ also stated that statements of interest do not attract the same rules against admission of evidence of a defendant's statements as the confessions.

According to the decision in *State v. Gibson*,¹²⁸ statements alleging truth and not stating any crime are not confessions. Similarly, *State v. Lindsey*,¹²⁹ statements not expressly acknowledging guilt on elements of crime are not confessions. Thus, all statements made for some purpose other than to acknowledge guilt within the process of investigation of individuals for commission of crime, for example, statements made as part of a person's employment duties,¹³⁰ were still regarded as admissions not confessions. However, all statements made after the commission of the crime in question, for the purpose of acknowledging that the speaker is guilty of some criminal offence were classified under confessions even if they do not cover all the elements of crime.

This state of law culminated to the result that where the accused admits one or more elements of the crime charged, the state would have to tender corroborating evidence on the established element(s) of crime. This development consequently put all inculpatory statements within similar scrutiny of precautions no matter how *lacking* they were. The common understanding has been that in some respects the distinction between "admissions" and "confessions" is illogical and that their precise distinction is not so easily possible.¹³¹ For example, in circumstances where corroboration for an accused's confession is sought from an accused's admission.

Through this extension the Common Law courts reckoned that the use of a mechanical, content-based test to determine whether a statement is a confession, or an admission leads to absurdities not necessarily intended by the Common Law. It was reckoned that the crucial factor in the admissibility of confessions and admission ought to be focused on the "practical relation of the statement to the

¹²⁷ *State v. Romo*, 66 Ariz. 174, 185 P.2d 757 (1947).

¹²⁸ *State v. Gibson*, 69 N.D. 70, 284 N.W. 209 (1939).

¹²⁹ *State v. Lindsey*, 26 N.M. 526, 194 P. 877 (1921).

¹³⁰ *State v. Manzella*, 759 P. 2d 1078 - Or: Supreme Court (1988).

¹³¹ See M C Slough, 'Confessions and Admissions', 28 *Fordham L Rev* 96 (1959), 106–109; C J Ayling 'Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions' *Wits L Rev* (1984), 1121. As well see *Oppen v. United States*, 348 U.S. 84, 90, 75 S.Ct. 158, 162–63, 99 L.Ed. 101 (1954); *Smith v. United States*, 348 U.S. 147, 155, 75 S.Ct. 194, 198–99, 99 L.Ed. 192 (1954).

government's case" as opposed to the "theoretical relation to the definition of the offense."¹³² It is worth noting that South Africa still uses theoretical relation to the definition of an offence as opposed to the practical relation of the statement to the state's case.

A precise example to compare with the South African current scenario is extracted from the case of *State v. Manzella*.¹³³ It is an example where an accused person's confession could not be used in one matter in the light of missing corroborative evidence but could be used as an admission in another matter and no corroboration as well as precautionary steps apply.

[the accused] stole money from the pocket of an elderly man sleeping on a park bench. At trial, the victim, an elderly man, testifies that he was sitting on a park bench when the defendant approached him and struck him, knocking him unconscious. However, the victim [could not] recall whether he had been carrying money on that day, and so could not testify that any money was stolen. Under the content-based classification of admissions and confessions, if the defendant is prosecuted for theft, his statement is a confession and, as such, will not support his conviction, because there is no other evidence to prove that anything was stolen. However, if the defendant is prosecuted for robbery, his statement is merely an admission, because he did not admit the use of force; the statement, therefore, would be admissible even in the absence of corroborating evidence.¹³⁴

The scenario in the above example begs the argument in this article that South African legal differentiation perspectives on the admissibility of admissions and confessions is fraught with prejudices. The South African law of evidence dealing with admissibility of confessions and admissions allows that a statement that could have been a confession if particular evidence is handy can become an admission if another charge fitting the purpose for its utilisation is evoked.¹³⁵ This is so regardless that irrational results may come to bear. As argued earlier, there is a possibility that, such an admission would be simply used in court without being submitted through cautionary tests like a confession would within trial within a trial.¹³⁶

¹³² *Smith v. United States*, 348 U.S. 147, 155, 75 S.Ct. 194, 198–99, 99 L.Ed. 192 (1954).

¹³³ *State v. Manzella*, 759 P. 2d 1078 - Or: Supreme Court 1988 at fn 12.

¹³⁴ *State v. Manzella*, 759 P. 2d 1078 - Or: Supreme Court 1988 at fn 12.

¹³⁵ Compare with the South African Case of *S v Mangena* 2012 (2) SACR 170.

¹³⁶ The common understanding among local colleagues-legal practitioners similar to what Wigmore had thought in the early 1900 is that admissions and confessions are obviously statements of truth and therefore they need no testing. Read Wigmore J H, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*

The Common Law perspective on the admissibility of confessions and admissions followed a relaxed approach to the classification of statements as either confessions or admissions to ward off prejudices. The resultant developments continued to work on “narrowness or broadness of the exclusionary rule.”¹³⁷ Accordingly, Wigmore¹³⁸ writing from the English law perspective, exposes that even though England legislated on Common Law including the Common Law on admissions and confessions, the precautions in Common Law against the admission of evidence were respected. Accordingly, Wigmore¹³⁹ observed historic distinctions between admissions and confessions but realised that the English Civil Evidence Act 64 of 1968, for example, which transformed the law of hearsay left the pre-existing law on admissibility of evidence including admissions intact.

The Common Law position from other Common Law states differs extensively with the South African legal position as seen earlier. South Africa does not use relaxed classification of confessions and admissions as done in other Common Law states referred to above.¹⁴⁰ As explained earlier there is still an inconsiderate classification and hence differentiation of confessions and admissions even on the tests that ought to apply upon their admission as evidence before courts. The obvious fact of the shortage in the South African law is the sustained wrong interpretation of Common Law precedent adopted in South Africa in the 1800s through ordinance No 72 of 1830 of the Cape of Good Hope.¹⁴¹

*R v Barlin*¹⁴² was clear as to what law of which era of Common Law voluntariness development is adopted in South Africa. *Barlin*

Footnote 136 continued

§§ 835, 867 (2d ed. 1923). This understanding is criticized in this article as an oversight on some prejudices accustomed with admissions such as those secured by police from accused persons in anticipation of charges against such accused persons and containing some elements of guilt although not all elements of crime. Such dangers call for review on a blanket classification given to admissions within South African law on admissibility of confessions and admissions. On the anticipated dangers in confessions read B L Garrett ‘The Substance of False Confessions’ Vol.62 *Stanford Law Review* 1051–1118.

¹³⁷ *Griffin v. State*, 496 S.E.2d 480 (1998).

¹³⁸ Wigmore *On Evidence* vol 4 para 1048 fn 1. (Chadbourn rev 1970).

¹³⁹ Wigmore *On Evidence* vol 4 para 1048. (Chadbourn rev 1970).

¹⁴⁰ For example, the United Kingdom.

¹⁴¹ Read *S v Zuma and Others* 1995 (2) SA 642; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568 at para 3.

¹⁴² *R v Barlin* 1926 AD 459.

captured the principle in cases of *Rex v Thompson*¹⁴³ and *Ibrahim v Rex*¹⁴⁴ which in accordance with the developments on admissibility of confessions and admissions their reasoning amounted to the holding that "... no *statement* made by an accused person to be given in evidence...unless it is shown by the prosecution to have been freely and voluntarily made-in the sense that it has not been induced by any promise or threat proceeding from a person in authority."¹⁴⁵ It was indeed the approach of the 1800s AD era Common Law to make a considerable interpretation of confessions to the extent that none of such statements may be excluded from the need for judicial scrutiny before they could be admitted. As explained earlier courts interrogated the classifications within the admissions cluster and singled out all statements which had inculpatory admissions within them for reclassification as confessions.¹⁴⁶ It is submitted that *Barlin*¹⁴⁷ following *Thompson*¹⁴⁸ and *Ibrahim*¹⁴⁹ to some extent saw a very oblique line between confessions and admission and never sought to separate them- hence reference to statements and without emphasis on statements made by accused to the police as confessions or admissions.

Contrary to the 1800s AD era Common Law developments, from the South African perspective in *R v Becker*,¹⁵⁰ it was held that in a confession, the maker of the statement admits *all elements* of an offence and the statement contains no exculpatory part. In case one element of a crime is missing such statement becomes an admission. This interpretation cements the Common Law ridiculed mechanical, content-based test. This exclusion of statements which ought to be grouped under confessions has led to these statements being taken on a light note and hence their classification as harmless and bearing no potential prejudice to the accused before court. While confessions are supposed to be scrutinised and the prosecutor demanded to prove their voluntariness before they are admitted as evidence, the excluded statements classified as admissions just get into evidence willy-nilly as they are

¹⁴³ 1893, 11 K.B., p. 12.

¹⁴⁴ 111 L.T., p. 23.

¹⁴⁵ *Ibrahim v Rex* 111 L.T., p.23; *Rex v Thompson* 1893, 11 K.B., p. 12.

¹⁴⁶ Hence the adoption of wide scope of confessions while admissions were just left to be statements of fact. See *State v. Brinkley*, 55 Or. 134, 104 P. 893, 105 P. 708 (1909) at 142.

¹⁴⁷ *R v Barlin* 1926 AD 459.

¹⁴⁸ *Rex v Thompson* 1893, 11 K.B., p.12.

¹⁴⁹ *Ibrahim v Rex* 111 L.T., p.23.

¹⁵⁰ *R v Becker* 1929 AD 167.

never tested, and the prosecutor bears no onus of proving their voluntariness within section 217 of CPA requirements. Only confessions go through a trial within a trial, based on section 217 of the CPA requirements. The South African law perspective on the differentiation of admissions and confessions has several aspects which if given a microscope analysis expose abhorrent prejudices. See Table 1.¹⁵¹

5.3 Common Law Broadening of Voluntariness Requirement

As the Common Law developed, there were considerations made by courts through the influence of policies and statutory enactments.¹⁵² With reference to admissibility of confessions and admissions there was a need to make tighter the admissions of confessions as evidence to prove an accused's guilt.¹⁵³ The voluntariness doctrine was given attention and hence received a full and clear expression. It would seem that this time of the history of the development of voluntariness doctrine entailed narrowing or broadening of the doctrine to exclude inadmissible confessions.¹⁵⁴

In this attempt, courts broadened the voluntariness requirement through focussing on voluntariness as an aspect for accused person's legal protections against induced submission to self-incrimination as Common Law privilege or as a statutory right to fair trial. It is argued that such protections are borne from the ordinary Common Law principles of natural justice pertaining to fairness in criminal justice *nemo judex in propria sua causa*¹⁵⁵ rule and the "*nemo tenetur seipsum prodere* rule."¹⁵⁶

¹⁵¹ Summary in Table 1.

¹⁵² Read Kuk Cho, 'Reconstruction of the English Criminal Justice System and Its Reinvigorated Exclusionary Rules' 21 *Loy. L.A. Int'l & Comp. L. Rev.* 259 (1999).

¹⁵³ For ultimate developments see improvements on the interpretation of the voluntariness doctrine within the period between the cases of *Massiah v. United States* 377 U.S. 201 (1964); *Escobedo v. Illinois* 378 U.S. 478 (1964) and *Miranda v. Arizona* 384 U.S. 436 (1966) where courts took a stern approach in their decisions to do away with dissatisfactions regarding what is deemed to have been elusive voluntariness test and adopted a more concrete and manageable standard of exclusion of inadmissible confessions. Courts insisted on the substance of the matter over the form of the process. It was hence, for example, important for suspected persons to have access to legal representation once interrogation is apprehended even before a suspect was charged.

¹⁵⁴ Read *Bram v. United States*, 168 U.S. 532 (1897).

¹⁵⁵ Meaning no man shall be judged at his own cause.

¹⁵⁶ Meaning no one is obliged to accuse himself.

TABLE 1
Summary of South African law rigid differentiation perspectives of confessions
and admissions

Confessions	Admissions
<i>R v Becker</i> 1929 AD 167 confessions are statements admitting all elements of an offence and such statements contain no exculpatory part. They are unequivocal acknowledgments of guilt	Admissions are regarded as obviously voluntary acknowledgments, made by a party, regarding the existence of certain facts that are relevant to the cause of the adversary. They include statements made by a person after an offence has been committed if such statements do not contain a confession to all the elements of crime
Confession relates to the acknowledgment of guilt	Admissions relate to the acknowledgment of facts and include those statements with one or more elements of crime
Confessions require corroboration	Admissions do not necessarily require corroboration
Confession are submitted to voluntariness tests within section 217(1) of CPA before being admitted as evidence	Admissions do not require prosecution to provide evidence that they were indeed voluntary
Confessions are prima facie involuntary and imposes upon the state the burden of showing that they were not induced by threats or promises of favour	Admissions are prima facie voluntary. The defence has a burden to show otherwise
Confessions go through trial within a trial to determine voluntariness. They are subjected to rigorous test measures and obviously all the requirements in section 217 of the CPA	Admissions impose no burden upon state to show that it was not induced by threats or promises of favour and could be admitted into evidence against accused without a preliminary showing that they were voluntarily made. There is necessarily no need for a trial within a trial when admitting admissions. It is the defence who has to object to their introduction and failure to do that they are admitted, sometimes by consent as <i>hearsay</i>
	Not Subjected to Section 217 of the CPA requirements. See Criticism in M M M Monyakane 2015 (36.1) <i>Obiter</i> 136–149
The rule against admission of evidence of statements not voluntarily made applies only to confessions	The rule against admission of evidence of a defendant's statements not voluntarily made does apply to admissions.
Subjected to protections in the bill of rights	Not necessarily given such protections
Considered Untrustworthy?	Considered trustworthy

TABLE 1
continued

Confessions	Admissions
Carries a cluster of written down statement	Carries all statements by action <i>R v Barlin</i> 1926 AD 459
Prosecution is required to prove voluntariness	Voluntariness is assumed no need for a similar exercise
A confession has to be proven to have been made by a person of a sound mind and sober senses	There is no such a requirement regarding admissions, implying that there is possibility that admissions are admitted even if the maker is of unsound mind or without sober senses

Some scholars¹⁵⁷ vouched that the development circulated around the basic principles related to the protections of the rights against self-incrimination as well as the right of the accused to remain silent.¹⁵⁸ The argument supporting the fact that the exclusionary rules were basically a product of natural justice was based on the reasoning that the rule against coerced confessions came to bear as early as the 1800s more than 100 years before the right against self-incrimination and the right to remain silent could be conceived.¹⁵⁹ It is upon the same basis that Wigmore,¹⁶⁰ argued that there was no connectivity between the two rights and the exclusionary rules. Levy,¹⁶¹ who extensively studied the existence of right against self-incrimination and right to remain silent demonstrated that Wigmore's argument on the connectivity between the two rights and the exclusionary rule could not hold water. Levy argued that coerced confessions and self-

¹⁵⁷ Read C T McCormick "Some Problems and Developments in the Admissibility of Confessions" 24 *Tex. L. Rev.* 239 (1946); McCormick, C T *Evidence* (1954) St. Paul, Minn. West Publishing Co and Levy L W *Origins of the Fifth Amendment*. New York: (1968) Oxford University Press.

¹⁵⁸ See for example the decisions following the same perspective in *United States v. Powe*, 591 F. 2d 833 – Court of Appeals, Dist. of Columbia Circuit (1978).

¹⁵⁹ Levy L W *Origins of the Fifth Amendment*. New York: (1968) Oxford University Press at 327–328.

¹⁶⁰ Wigmore On Evidence (Chadbourn rev 1970).

¹⁶¹ Levy L W *Origins of the Fifth Amendment*. New York: (1968) Oxford University Press, pp. 265, 288–289 n. 102.

incrimination were interrelated. He traced such a relationship to as early as the 1600 and 1700.¹⁶²

In effect, as Levy argued, coerced confessions based on torture and self-incrimination practices resulted to the existence of the rules governing inadmissible confessions. Levy and Wigmore's differing arguments explained the differing decisions within the Common Law courts. In following Wigmore's reasoning, some courts' holding maintained the rationale that inadmissibility of confessions was not based on *breach of confidence* or *illegality* in the manner used to obtain it and it was neither due to the connection of such confession with the *privilege against self-incrimination*.¹⁶³

Wigmore further maintained that the fundamental question for the exclusion of confessions was whether there was any danger that such confessions could be *untrue*? He argued that there was nothing in merely subjecting the accused to compulsion to speak in general which created a risk of untruth. However, as Levy predicted such reasoning was overruled by other courts' approaches towards excluding coerced confessions. They still relied on rights against self-incrimination and right to remain silent when excluding coerced confessions.¹⁶⁴ In support of Levy's argument and rejection of purely Wigmorean reasoning McCormick¹⁶⁵ argued for voluntariness pre-prescripts. He reasoned that admissibility of confessions rules are not only aimed at protecting accused against the danger of untrustworthiness but also aimed at protecting interests maintained in protecting right against self-incrimination and the right to remain silent.¹⁶⁶ The

¹⁶² Levy L W *Origins of the Fifth Amendment*. New York: (1968) Oxford University Press, pp. 265, 288–289 n. 102.

¹⁶³ *Brown v. Mississippi* (1936), *Chambers v. Florida* (1940), *Canty v. Alabama* (1940), *White v. Texas* (1940), and *Ward v. Texas* (1942).

¹⁶⁴ See the case of *Bram v. United States*, 168 U.S. 532 (1897) where the Supreme Court explicitly relied on the self-incrimination clause of the Fifth Amendment in holding a confession inadmissible. As well see *other* developments in cases of *Dickerson v. United States*, 530 U.S. 428 (2000); *New York v. Quarles*, 467 U.S. 649 (1984); *Michigan v. Mosley*, 423 U.S. 96 (1975); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Massiah v. United States*, 377 U.S. 201 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Cicenia v. LaGay*, 357 U.S. 504 (1958); *Brown v. Mississippi* 297 U.S. 278 (1936).

¹⁶⁵ C T McCormick *Evidence* (1954) St. Paul, Minn. West Publishing Co, p. 157.

¹⁶⁶ C T McCormick *Evidence* (1954) St. Paul, Minn. West Publishing Co, p. 157; as well read *Miranda v Arizona* 384 U.S. 436 (1966).

same reasoning was decades later followed in courts.¹⁶⁷ Courts considered illegally obtained confessions against privilege from self-incrimination and the right to remain silent as overlapping rules of incompetency of confessions on the basis of untrustworthiness.¹⁶⁸ This rationale applies in the Commonwealth states including the United Kingdom, the United States of America and South Africa.

VI THE INFLUENCE OF COMMON LAW VOLUNTARINESS REQUIREMENT DEVELOPMENTS ON THE SOUTH AFRICAN PERSPECTIVE

As the current situation of South African Law is concerned the differentiation of confessions and admissions is content based. South African Law does not distinguish between statements made prior to an investigation of crime and those made by accused persons in the process of investigation where they sought to exculpate themselves. The scenario is different from other Common Law practicing states. In those states, statements made for some purpose other than to acknowledge guilt, namely, exculpatory statements or statements made as part of a person's employment duties, are not confessions. However, all statements made after the commission of the crime in question, for the purpose of acknowledging that the speaker is guilty of some criminal offence are classified under confessions. This state of law culminates to the result that where the accused admits one or more elements of the crime charged, the state is urged to produce "some other evidence" of that element to corroborate the ensued statement. This advancement, in addition to other improvements mentioned earlier, has put all exculpatory statements within similar scrutiny of precautions.

The Common Law courts reckoned that the use of a mechanical, content-based test could lead to results that the legislature is unlikely

¹⁶⁷ Read amongst other cases, *Spano v. New York* 360 U.S. 315 (1959) which reasoned that the exclusion of involuntary confessions is not only based on their unreliability but also on the understanding that "the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." In *Blackburn v. Alabama* (1960), following *Spano case*, the Court, observed that "a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary."

¹⁶⁸ C T McCormick *Evidence* (1954) St. Paul, Minn. West Publishing Co, p. 157.

to have intended. Taking the example of *State v. Manzella* facts, where “a defendant confesses that he stole money from the pocket of an elderly man sleeping on a park bench. At trial, the victim, an elderly man, testifies that he was sitting on a park bench when the defendant approached him and struck him, knocking him unconscious. Nevertheless, the victim cannot recall whether he had been carrying money on that day, and so cannot testify that any money was stolen.” Under the content-based classification of admissions and confessions, if the defendant is prosecuted for theft, his statement is a confession and, as such, will not support his conviction, because there is no other evidence to prove that anything was stolen. It is submitted that similar prejudice is prudent in the scenario where an accused is charged together with another as in the earlier mentioned case of *Mangena*.¹⁶⁹ However, if the defendant is prosecuted for robbery, his statement is merely an admission, because he did not admit the use of force; the statement, therefore, would be admissible even in the absence of corroborating evidence. To add on such statement if it is used within the South Africa legal perspective it would be simply used in court without being submitted through cautionary tests like a confession would within trial within a trial.¹⁷⁰

VII CONCLUSION

The current South African law still exposes challenges experienced in the early developments of Common Law on confessions and admissions. It would seem that while South African law sought to adopt the Common Law of the 1800s it ignored the Common Law adopted wide perspective on classification of statements as confessions. Thus, some criteria of statements regarded as confessions within Common Law are not treated as such in South Africa. Statements which do not accord with the interpretation of confessions in *R v Becker's* case,¹⁷¹ that confessions contain all elements of crime, are still considered as admissions even if some elements of crime are covered in such statements. Thus, while some confessions are well safeguarded and do not pass admissibility muster if their admissibility is tested within the exclusionary rules some admissions which contain some elements of crime are easily admitted regardless of possibilities that the suspects

¹⁶⁹ *S v Mangena* 2012 (2) SACR 170 referred to above fn83.

¹⁷⁰ See the Illustrative summary in Table 1.

¹⁷¹ *R v Becker* 1929 AD 167.

who gave such statements could have been ill-treated by investigators. All precautions applied in the case of confessions are not applied in the case of these admissions.

The ensued prejudices from evidence based on these admissions speak volumes.¹⁷² It is therefore important to submit the admissibility of admissions to requirements similar to those prescribed in section 217 of the CPA. Such observations will safeguard suspects from being subjected to all illegal attempts by authorities in exchange for incriminating information. Section 219 A of the CPA should therefore be extended to include requirements of admissibility in section 217 of the CPA. For the sake of settling the law and ridding out future challenges that can be posed by the expressed *prima facie* view of section 219A, it is also important at this juncture for the legislature to take heed of a more than a decade opinion raised by the South African Law Reform Commission. The South African Law Commission report concerning its investigation into the simplification of Criminal Procedure, police questioning, defence disclosure, the role of judicial officers and judicial management of trials, Project 73 of the 29 August 2002, have made recommendations that may be utilised positively. A closer look at these recommendations suggest no separation between the admissibility requirements for admissions and confessions. On the other hand, the report suggests that separation between the two breeds endless controversy.¹⁷³

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¹⁷² Noted in the summary in Table 1.

¹⁷³ The South African Law Commission Investigation into the Simplification of Criminal Procedure, Police Questioning, Defence Disclosure, the Role of Judicial Officers and Judicial Management of Trials, Project 73 of the 29 August 2002, See p. Xiii of the report.

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