THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 411/03

In the matter between :

THE DIRECTOR OF PUBLIC PROSECUTIONS, TRANSVAAL Appellant

and

PIETER NICOLAAS JACOBUS VILJOEN Respondent

Before: **STREICHER, NAVSA, VAN HEERDEN JJA, ERASMUS & PONNAN AJJA**

Heard: **12 NOVEMBER 2004**

Delivered: **2 DECEMBER 2004**

Summary: Appeal against acquittal of accused - judge *a quo* erred (a) in relying on hearsay statements contained in documents handed in during bail proceedings but not admitted during the trial; (b) in ruling against the admissibility of evidence without affording the parties an opportunity to adduce evidence in respect of the relevant factual issues; (c) in ruling that the admissibility of a confession cannot be determined by way of a trial within a trial where the admissibility is contested on constitutional grounds; and (d) in holding that the accused's fundamental right to remain silent had been violated – proceedings may be instituted *de novo*.

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] The respondent was charged with the murder of his wife. When he appeared in the magistrate's court and during proceedings in terms of s 119 and s 121 of the Criminal Procedure Act 51 of 1977 ('the Act' and 'the s 119 plea proceedings') he pleaded guilty. Questioned in terms of s 121(1) he explained that the murder was premeditated and how it was executed. However, at his trial in the Transvaal Provincial Division ('the court *a quo*') the respondent pleaded not guilty. The court *a quo* held that the respondent's fundamental rights had been violated and ruled that evidence of a confession and pointing out and of the s 119 plea proceedings be excluded by virtue of the provisions of s 35(5) of the Constitution. At the close of the state's case and in the absence of any evidence implicating the respondent the court *a quo* acquitted him. The state thereupon applied in terms of s 319 of the Act for the reservation of several questions for the consideration of this court. The court *a quo* refused the application but a subsequent application to this court was referred to us for oral argument. At the same time, the parties were advised that they should be prepared, if called upon to do so, to address us on the merits of the appeal.

[2] Immediately after the s 119 plea proceedings the respondent applied to be released on bail. The application was refused as was a subsequent application to the court *a quo* and an appeal to this court. In terms of s 60(11B)*(c)* of the Act the record of the bail proceedings ('the bail record'),

excluding certain parts not presently relevant, formed part of the record of the trial. The following documents were handed in during the bail application:

1 A document headed 'Aantekening van Uitwysing van Toneel (Tonele en/of Punt(e))'. This document consists of 4 pages ('the main document') plus an annexure ('the annexure') numbered pages 5 and 6. A confession is annexed to this document. The annexure purports to be signed by a Senior Superintendent E Viljoen at 13h40 on 29 August 2001. According to it the respondent was informed of his right to a legal practitioner, that he was not obliged to make a confession or an admission and of various other rights. In the main document it is recorded that the respondent appeared before Viljoen at 13h44 on 29 August 2001; that he was warned that 'hy nie verplig is om enige toneel (tonele) en/of punt(e) op die toneel (tonele) aan te wys of om enigiets daaromtrent te sê nie' and that he was informed of various other rights. It is further recorded that the respondent stated that he understood what his rights were and that he nevertheless wished to point out 'die toneel'. It is also recorded that the respondent and Viljoen departed at 14h17 and returned at 15h40. The confession purports to have been signed at 16h00 on 29 August 2001.

2 A 'Notice of Rights in terms of the Consitution' which purports to be signed by the respondent and an Inspector van Rensburg at 17h25 at 29 August 2001. According to this document the respondent was told that

he had various rights inter alia 'the right to consult with a legal practitioner of (his) choice or, should (he) so prefer, to apply to the Legal Aid board to be provided by the State with the services of a legal practitioner' and 'the right to remain silent'.

3 A 'Waarskuwingsverklaring deur Verdagte' which purports to be signed by the respondent and a Captain Fabricius. According to this document the respondent was told at 11h05 on 30 Augustus 2001 why he had been arrested and also that he had a right to remain silent and to consult a legal practioner of his choice or that he could apply to be provided with the services of a legal practitioner at the state's expense.

[3] At the trial the state tendered the evidence of four witnesses none of whom implicated the respondent. The state then requested that a trial within a trial be held in order to determine whether the confession and pointing out, which formed part of the bail record, had been made freely and voluntarily and at the same time to determine whether the respondent acted freely and voluntarily during the s 119 plea proceedings. At that stage Mr Wagenaar, an attorney who represented the respondent, was in agreement that the matter should proceed by way of a trial within a trial. However, a discussion which covered 26 pages of the record, ensued between the judge *a quo* and the parties. In order to properly understand the state's complaints against the exclusion by the court *a quo* of evidence of the confession and plea

proceedings it is necessary to refer in some detail to what was said during the discussion.

[4] Wagenaar indicated that there would be a legal argument to the effect that the presiding officer at the s 119 proceedings had not adhered to the prescribed requirements. Asked by the court *a quo* whether the respondent had been advised of his right to legal representation he replied that that was going to be a 'massive issue' at the trial within a trial. Counsel for the state, Mr Mosing, indicated that the state contended that the respondent had been told of his right to legal representation. Wagenaar proceeded to insinuate in very vague terms that other irregularities were committed during the s 119 plea proceedings and during the bail application in the magistrate's court to which the judge *a quo* responded: 'Yes I know where you are getting to I think I am beginning to read your mind.' Precisely what the judge *a quo* was reading into the insinuations he did not say.

[5] Asked to state in a nutshell what the respondent's objection was Wagenaar stated: 'I am objecting to the state presenting statements by the accused whether in or outside any court to be allowed.'

[6] Mosing then suggested:

> 'M'Lord the issue of the plea proceedings it also may be a subject of a trial-within-a-trial. As I have indicated earlier, my understanding was it could be conducted in one trial-within-a-trial, only as far as the voluntariness and the sound and sober senses of the accused. The other issues M'Lord which has now been pointed out,

perhaps in the light thereof, it would be feasible to have a separate trial-within-a-trial for the plea proceedings.'

[7] The court *a quo* interpreted the objection by the respondent to be an objection to the court *a quo* proceeding with a trial within a trial. Thereupon the following interchange between Mosing and the judge *a quo* followed:

'MR MOSING: I do not understand that it has been opposed M'Lord, I am sorry.

COURT: He objected, it is objected, right there has been an objection.

MR MOSING: The objection is to the admissibility of that statement made by the accused, but it has got to be tested in a trial-within-a-trial M'Lord if the state is proceeding with it.

COURT: No what I have recorded here is an objection by the defence right. The objection of the defence raise various issues. I will not skirt around it, and say right lets plunge into a trial-within-a-trial, but to give the defence a fair opportunity I will consider the objection. Then to rule accordingly I am not simply going to capitulate the rights of this court to the prosecuting authority. There is an objection and I have to deal with it.

MR MOSING: Yes M'Lord.

COURT: In as much as it may be necessary to have the trial-within-a-trial, but I have to hear and it is a fundamental principle of natural rule, *audi alteram partem*. I have to hear to the objection which is the reason why I listen to him. But to plunge into a trial-within-a-trial would be easiest way, but I have to accord the defence their right to be heard in this court.

. . .

There is an objection and I will deal with it tomorrow morning. If either of you have any authorities to support your proposition you can raise it with me tomorrow.'

[8] My understanding of the position emerging from a discussion that must have lasted more than an hour is that the respondent objected to the admissibility of the statement and pointing out as well as the plea proceedings; the state wanted to resolve the issue by way of a trial within a trial; the respondent had no objection to proceeding with a trial within a trial but the judge *a quo* insisted that there was an objection by the respondent to proceeding with a trial within a trial.

[9] In the light of the judge *a quo*'s attitude, one would have thought that the argument was going to be whether the admissibility of the statement and pointing out and the plea proceedings should be determined by way of a trial within a trial. However, the next day the judge *a quo* opened the proceedings as follows:

'Since the objection is taken by Mr Wagenaar I will give him the first opportunity to address the court. I understand that he will be citing various authorities as well.

If I may crystallise very briefly from yesterday. The state contended that it would conduct the trial-within-a-trial, regarding the statement made by the accused, as well as the pointing out as one component and then to deal with the plea proceeding. Whereas on the other hand Mr Wagenaar's objection, if the court understand it correctly, was simply that a trial within a trial should be a single exercise bringing the two components the first, that is the statement made by the accused and pointing out, together with the plea proceedings, because the defence regards that as one process.

This brings to the point that there are two different positions taken by the two sides in this matter. Therefore in fairness to the accused, in the interest of justice, the court will deal with this aspect in some detail to listen to argument.'

[10] Unfortunately, the statement intended to crystallise what had happened the previous day could only have served to confuse the issue further. The state never contended that the statement and the plea proceedings should be dealt with in different compartments. It accepted that the question whether the confession and the statements by the respondent during the plea proceedings were made voluntarily should be dealt with in one trial within a trial. Any legal argument in respect of the plea proceedings could be dealt with afterwards. When the state learned that there were other objections to the plea proceedings based on speculative facts it tentatively suggested that 'perhaps in the light thereof, it would be feasible to have a separate trial within a trial for the plea proceedings.' It did not indicate that it was averse to one trial within a trial to determine all relevant facts relating to the admissibility of the statement and the plea proceedings.

[11] The respondent was also not under the impression that the state contended that the statement and plea proceedings had to be dealt with separately. Wagenaar commenced his argument as follows:

> '[I]n my learned colleague's address to the court about what the next process will be, he . . . indicated that there is a confession, a statement appearing to be a confession, certain pointing outs and then a plea of guilty in the lower court. . . . that in itself indicates, . . . that it involves one process. With respect M'Lord I agree with my learned colleague that these entities involve one process.'

[12] In these circumstances there must have been utter confusion in the minds of the legal respresentatives as to what it was the judge *a quo* wanted to hear argument about.

[13] Wagenaar nevertheless proceeded to address the court. His address lasted more than a day and covers 106 pages of the record. Surprisingly, in the light of his earlier attitude, he argued that if the admissibility of the s 119 proceedings is contested on the basis of duress the matter must be dealt with by means of a trial within a trial but if it is contested on the basis of a violation of the accused's fundamental human rights one first had to deal with the latter question. If there had been such a violation there was no need for a trial within a trial, so he submitted. He then proceeded to deal with the question whether there had been a violation of the respondent's fundamental human rights. In this regard he submitted by reference to the record of the s 119 plea proceedings, which does not purport to be a verbatim record, that the respondent had not been advised of his right to further particulars before he was required to plead; that he was not advised of his right to remain silent during the pleading process; and, what he considered to be 'the most crucial infringement', that the magistrate failed to investigate 'the whole aspect of legal representation'.

[14] At this stage of the proceedings the judge *a quo* said:

'[Y]ou have alluded to 35(3) but I also want you to look at 35(1) and 35(2). I'm not going to identify the relevant . . . paragraphs of 35(1) and 35(2) for you, I think during the lunch adjournment you could go through it because prior to the moment of the accused's

plea he was an arrested person, he was a detained person, and I would like you to address me on any aspects of any of his rights were infringed . . .'

The judge *a quo* was thus saying to Wagenaar that he had addressed him on the rights of an accused during a trial but that he should check whether there had not also been violations of the accused's rights in terms of s 35(1) and (2) of the Constitution. These sections deal with the rights of an arrested person and a detained person respectively.

[15] After an adjournment Wagenaar, having been prompted to do so by the court *a quo*, proceeded to argue that the respondent's fundamental rights in terms of s 35(1) and 35(2) had been breached. He once again stressed that, before entering into a trial within a trial, one should first determine whether there had been an infringement of the accused's fundamental rights. If there had been such an infringement there was no need to have a trial within a trial. 'A trial within a trial deals with the requirements of section 217. Was it freely and voluntary, while he was at his sober senses' he submitted. He then proceeded to draw factual inferences from documents forming part of the bail record. In this regard he stated 'we are dealing with documents and what I am arguing now can be determined from documents'.

[16] At the end of Wagenaar's argument the court *a quo* summarised it as follows:

'So you basically say to the court that on the basis of the legal argument, on the documentation before the court the evidence that the state intents to tender, by way of a

trial-within-a-trial regarding the confession as well as the pointing out and the plea ought not to be admitted.'

[17] Mosing submitted that even where there was an allegation of a breach of fundamental rights in respect of evidence obtained by the state, it was incumbent on the court *a quo* to establish: (a) whether the evidence had indeed been obtained as a result of a breach of fundamental rights of the accused; and (b) whether the admission of such evidence would render the trial unfair or would be detrimental to the administration of justice. That, so he submitted, could only be done by reference to all the relevant facts and circumstances.

[18] In his heads of argument in the court *a quo* Mosing submitted:

'The state should be allowed opportunity to rebut or reply before the court makes a ruling on the admissibility of the evidence'.

The court *a quo* reacted to this submission as follows:

'COURT: At this stage the court is not engaged firstly on the admissibility of evidence. . . .

. . .

MR MOSING: M'Lord that is the way I have understood the effect of the objection.

COURT: You have constantly and continuously harped on the issue of the trial within a trial. The trial within a trial that determines the admissibility of the evidence, this submission of yours is totally misleading, it is a mis-statement. One does not expect counsel of your standing from the director of public prosecution's office to make such a submission because you have constantly harped on a trial

within a trial. The purpose of a trial within a trial is to determine the admissibility of evidence which is in the form of a confession, is that correct?

MR MOSING: M'Lord also . . . (intervenes).

COURT: This court at this stage is engaged in determining whether there has been an infringement of the accused's rights or not. If such infringement had occurred what are the consequences thereof and what its impact on the trial within a trial. It seems either deliberately you have misunderstood the position and this submission is extremely misleading and if it is the intent to mislead the court then I certainly take exception.

MR MOSING: No it is not the intent to mislead the court.

COURT: Well the other point I want to take with you,

"The state should be allowed opportunity to rebut or reply."

. . .

MR MOSING: Yes M'Lord, on legal grounds I have . . . (intervenes).

COURT: You have made submissions.

MR MOSING: On the procedure yes.

COURT: On the arguments that were raised by – well let us put it this way, an objection was raised by Mr Wagenaar, he supported his objections by way of certain contentions followed with submissions backed by authorities. Have you been given a fair and an equal opportunity to rebut the fact in argument?

MR MOSING: Yes indeed my lord.

COURT: Let us be very clearly understood here. Do you have any further submissions?

MR MOSING: No further submissions M'Lord.'

[19] The crititicism of Mosing was totally unwarranted. He made a valiant but unsuccessful effort to persuade the judge *a quo* of an elementary

proposition, namely, that a factual issue cannot be decided by way of argument. If anything he is to be commended for the manner in which he dealt with this criticism and other unwarranted criticisms levelled against him by the judge *a quo*.

[20] The statement by the judge *a quo* that the court was not dealing with the admissibility of evidence is perhaps the most bewildering aspect of the whole saga. In his judgment, after some four days of argument, the judge *a quo* said that he was of the view that the admissibility of statements by an accused had to be dealt with independently from allegations of any infringement or violation of his constitutional rights. He considered it to be axiomatic that once an infringement or infraction of the accused's rights under section 35(1), 35(2) and (3) of the Constitution had been raised by way of an objection during the course of a trial, the court by virtue of section 38 read with section 8(1) and (2) was bound to determine that issue first. He expressed the view that a chaotic situation would arise if the determination of a breach of constitutional rights were conflated with the determination of the admissibility of a confession and pointing out at a trial within a trial and said:

> 'First and foremost, the accused has a right to know if his constitutional rights were violated and any evidence that was procured in violation of his right is to be excluded or not under section 35(5). That constitutional imperative has precedence over a trial within a trial as contemplated within the ambit of section 217 of the Criminal Code.'

Referring to Mosing's submission that the court should not decide the issue without first hearing evidence and establishing the facts he held:

'In the absence of any procedure rules, once an objection to the admissibility of evidence is raised on the basis of a violation of constitutional right whilst being an arrestee, detainee or an accused, then the trial judge has a discretion to deal with the objection by adjudicating on the fundamental rights issues raised.'

. . .

'Therefore, the objection raised by Mr Wagenaar, upon the prosecution's announcement to proceed with the trial within the trial, has merit and needed to be considered first rather than having the rights issue determined within a trial within a trial.'

[21] This statement by the judge *a quo* is of interest for two reasons: First, having criticised Mosing for dealing with the issue as one of admissibility he now recognised that he was dealing with a question of admissibility. Second, the judge *a quo* still did not grasp the trite proposition that he was faced with a factual dispute, the resolution of which required the hearing of evidence.

[22] The judge *a quo* proceeded to refer to the fact that the bail record formed part of the record of the trial and said:

'Mr Mosing, on behalf of the State, was in a position to have assailed or even elucidated on any of the evidence contained in those documents by raising a counter objection and/or applying to tender evidence either by way of affidavits or orally from the police officers concerned as well as from the prosecutor and the magistrate in the lower court. The prosecution elected not to launch a full scale counter-attack and was quite content in rebutting by way of argument.'

How the judge *a quo* could have said this, having stated, shortly before, that Mosing argued that the court should not decide the issue without first hearing

evidence and establishing the facts, is difficult to comprehend. The reference to a counter objection is in itself cause for further bewilderment.

[23] Referring to s 35(3)(f), (h) and (g) the judge *a quo* concluded:

> 'Thus, the right to legal representation and the right to silence form the bedrock to universally accepted values and our democracy not only subscribes but enshrines these values in the Constitution.'

In respect of the s 119 plea proceedings he held that in the absence of any recordal in the record of those proceedings that the respondent was informed of his right to remain silent the only reasonable and probable inference was that the magistrate failed to inform him of his right to remain silent during the proceedings. In doing so he treated factual statements in documents forming part of the bail record as evidence and drew factual inferences from those documents.

[24] The judge *a quo* followed the same approach in respect of the confession. The fact that the 'Waarskuwingsverklaring' was made one day after the respondent had been arrested and detained was considered by him to be the 'most disquietening and disturbing' aspect of the case. He stated that the accused was according to that document informed of his rights in terms of the Constitution at 17h25 ie 'after the pointing out which took place between 14h17 and 15h40'. Ignoring the statements to the contrary in the other documents he concluded:

> 'The only reasonable and probable inference that can be drawn is that the accused was made to point out and confess first without having been informed of his rights and

thereafter an attempt was made by the police to regularise the process by duly informing him of his section 35(1) and 35(2) rights.'

[25] One of the two pages of the annexure and two of the six pages of the 'waarskuwingsverklaring' do not bear the signature, initials or thumbprints of the respondent. Without having heard evidence in this regard the judge *a quo* said: 'The reasonable possible inference is that these pages were inserted at some stage without the possible knowledge of the accused. Inferentially it is indicative of regularising the process *ex post facto*.'

[26] The judge *a quo* concluded that the plea of guilty in the lower court and the confession and pointing out had been obtained in violation of the respondent's fundamental rights and that to admit evidence thereof would render the trial unfair and would be detrimental to the administration of justice. He accordingly ruled that the evidence be excluded in terms of s 35(5) of the Constitution.

[27] After the court *a quo*'s ruling Mosing once again addressed the court. He stated that there might have been a misunderstanding. He said that he had understood the position to be that the court was dealing with the procedure to be followed and that it had been his intention to lead evidence on the aspects mentioned by the court *a quo* in its judgment. He stated that it was possible for the state to elaborate on the documents referred to by the judge *a quo* by way of further evidence and submitted that the state should be allowed to present the evidence of inter alia Viljoen and the investigating officer. Once again he tried to persuade the court *a quo* that the factual dispute between the

parties could only be resolved by way of evidence. At one stage, during an interchange between Mosing and the judge *a quo*, the judge *a quo* reacting to a statement that the court *a quo* never indicated that the state could present *viva voce* evidence, the judge *a quo* said:

'[T]he court is not here to be counsel, to advise the parties. The court indicated it would listen to argument legal argument, factual argument, it was prepared to do that.'

[28] The court *a quo* eventually dismissed the state's application. It held that the application by the state was an attempt to proceed with a trial within a trial through the back door and that to allow the state to lead the evidence after a ruling had been given would be subverting the respondent's right to a fair trial. Mosing then closed the state's case whereupon the respondent was acquitted.

[29] The only manner by which the state can appeal against the judgment by the court *a quo* is by way of the reservation of questions of law for the consideration of this court in terms of s 319 of the Act. The state applied to the court *a quo* for the reservation of several questions but the application was dismissed. One of the questions was: 'Is *S v De Vries* 1989 (1) SA 228 AD authority for and/or is there a constitutional injunction for the proposition that objections based on infringement of s 35(1)(a), (b), (c) and 35(3)(h) and (j) rights be determined first and independently from those contained in s 217 of Act 51 of 1977 (i.e. voluntariness etc.).' The judge *a quo* considered this to be the core question to which all the other questions were intrinsically related. He held that the crucial question was whether evidence of the confession and

pointing out should be excluded because of a violation of fundamental rights. He reasoned that whether there had been such a violation 'was essentially a factual inquiry based on the record, which constituted evidence, that was placed before the Court by the prosecutor'. Thus, he said 'the exclusion of evidence in the form of an accused's confession and pointing out statement was a question of fact rather than a question of law'. He concluded: 'That being so, in my considered opinion, the possibility of that evidence being altered is so remote that it will be an unreasonable exercise of the discretion to allow the catena of questions that the applicant seeks to reserve. The other questions which are also sought to be reserved are so intrinsically intertwined that they do not warrant consideration.' In his view the respondent was 'seeking to create a right of appeal on the facts against the respondent's acquittal'.

[30] The judge *a quo* was quite correct in holding that whether there had been a violation of fundamental rights was essentially a factual enquiry but that was not the question which he was asked to reserve. He never dealt with the question which he considered to be the core question.

[31] As stated above a subsequent application to this court for the reservation of questions of law was referred to us for argument and the parties were advised that they should be prepared to address the court on the merits.

[32] During argument before us the questions that the state wanted to be reserved were reformulated and reduced to the following three questions:

1 Was the judge *a quo* entitled to make factual findings on the basis of inferences drawn from documents forming part of the record of the bail proceedings and to rule against the admissibility of evidence without affording the parties a proper opportunity to adduce evidence in respect of the relevant factual issues.

2 Was the judge *a quo* correct in holding that when the admissibility of a confession is challenged on the basis of an alleged violation of fundamental rights disputed by the State the matter cannot and should not be resolved by way of a trial within a trial but should be dealt with before embarking on a trial within a trial in order to determine whether the confession had been made freely and voluntarily.

3 Does the failure to inform an accused of his right to remain silent during s 119 and 121 (1) of the Criminal Procedure Act 51 of 1977 constitute a violation of the accused's fundamental rights rendering the accused's answers *ipso facto* inadmissible at his trial.

The parties addressed us on whether these questions should be reserved as well as on the merits of the appeal. I shall now deal with both these issues.

Question 1

Was the judge *a quo* entitled to make factual findings on the basis of inferences drawn from documents forming part of the record of the bail proceedings and to rule against the admissibility of evidence without

affording the parties a proper opportunity to adduce evidence in respect of the relevant factual issues.

[33] It does not follow from the fact that the record of the bail proceedings forms part of the record of the trial that evidence adduced during the bail proceedings must be treated as if that evidence had been adduced and received at the trial. The record of the bail proceedings remains what it is, namely a record of what transpired during the bail application.

[34] The judge *a quo* relied on statements made in documents handed up during the bail application. These statements constituted hearsay evidence which had not been admitted at the trial. He, therefore, erred in doing so. In any event, that the judge *a quo* was not entitled to make factual findings without affording the parties a proper opportunity to adduce evidence in respect of the relevant factual issues is so self evident that nothing further needs to be said in this regard.

Question 2

Was the judge *a quo* correct in holding that when the admissibility of a confession is challenged on the basis of an alleged violation of fundamental rights disputed by the State the matter cannot and should not be resolved by way of a trial within a trial but should be dealt with before embarking on a trial within a trial in order to determine whether the confession had been made freely and voluntarily.

[35] In terms of s 35(1)(a),(b) and (c) of the Constitution a person arrested for allegedly having committed an offence has the right to remain silent, the right to be informed promptly of the right to remain silent and of the consequences of not remaining silent and the right not to be compelled to make any confession or admission that can be used in evidence against him. In terms of s 35(2)(b) and (c) a detained person has the right to choose and consult with a legal practitioner, the right to be informed of this right promptly and the right to have a legal practitioner assigned to him by the state and at state expense if substantial justice would otherwise result and the right to be informed of this right promptly.

[36] Evidence obtained in a manner that violates any of those rights must, in terms of s 35(5), be excluded if the admission of that evidence would render the trial unfair or be detrimental to the administration of justice.

[37] It follows that if the admissibility of a confession is contested on the basis of a violation of any of those rights two questions arise. The one is whether the alleged violation occurred and the other is whether the admission of the confession would, as a result of the violation, render the trial unfair or be detrimental to the administration of justice. Whether that would be the case is a factual issue which has to be decided upon the facts of each case. In this regard Kriegler J said in *Key v Attorney-General, Cape Provincial Division, and Another* 1996 (4) SA 187 (CC) at 196B:

'At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.'

[38] In the present case the facts were not common cause and the dispute in this regard had to be resolved before a ruling could be given as to the admissibility of the confession. In order to resolve the dispute the parties had to be given an opportunity to adduce such evidence as they wished to adduce in respect of the factual issues. In these circumstances the judge *a quo*'s view that the factual dispute could not be resolved by way of a trial within a trial but nevertheless had to be decided there and then makes no sense.

[39] The issue arose during the course of a criminal trial and had to be dealt with in terms of the provisions of the Criminal Procedure Act which prescribes the manner in which evidence is to be adduced. There was, therefore, at that stage, only one way to resolve the factual dispute and that was by way of a trial within a trial. A trial within a trial is, as the phrase indicates, a trial held while the main trial is in progress in order to determine a factual issue separately from the main issues. Such a procedure is not unfair to an accused. On the contrary, it is a procedure that evolved in the interests of justice and in fairness to the accused. In *R v Wong Kam-ming* [1980] AC 247 (PC) at 261B-C Lord Hailsham of St Marylebone said:

'... (A)ny civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps

mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill-treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary. For this reason it is necessary that the defendant should be able and feel free either by his own testimony or by other means to challenge the voluntary character of the tendered statement.'

In *S v De Vries* 1989 (1) SA 228 (A) at 233H-I Nicholas AJA after having referred to this passage said:

'It is accordingly essential that the issue of voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the inquiry into voluntariness in a compartment separate from the main trial. . . . In South Africa (the enquiry) is made at a so-called "trial within a trial". Where therefore the question of admissibility of a confession is clearly raised, an accused person has the right to have that question tried as a separate and distinct issue. At such trial, the accused can go into the witness-box on the issue of voluntariness without being exposed to general cross-examination on the issue of guilt. (See *R v Dunga* 1934 AD 223 at 226.)'

[40] The considerations which require that a trial within a trial be held to determine whether a confession had been made voluntarily apply with equal force when the admissibility of a confession is disputed on the ground that it had been obtained in violation of other fundamental rights of the accused and when the relevant facts are not common cause between the parties.

[41] Apart from considering it inappropriate to resolve the issue as to whether there had been a breach of the appellant's fundamental rights to be

informed of his right to legal representation and to remain silent, by way of a trial within a trial, the judge *a quo* also considered it inappropriate to determine these issues together with the issue as to whether the appellant acted freely and voluntarily. He held that these issues, being constitutional issues, had to be decided separately from any other issues. Why he thought that challenges to the admissibility of a confession on constitutional grounds could not be dealt with at the same time that other challenges to its admissibility were being dealt with is not clear to me. I can think of no reason why all the factual issues relating to the admissibility of a confession should not be dealt with at one trial within a trial. As far as I know that is the common practice in the courts of first instance. In any event the judge *a quo* would seem not to have realised that to compel a person to make an admission or to plead guilty is an even more serious violation of a constitutional right than a failure to inform a person of his right to remain silent or to be legally represented.

[42] For these reasons the judge *a quo* erred in holding that when the admissibility of a confession and pointing out is challenged on the basis of an alleged violation of fundamental rights disputed by the State the matter cannot and should not be resolved by way of a trial within a trial. He erred, furthermore, in holding that the dispute should be dealt with before embarking on a trial within a trial in order to determine whether the confession and pointing out had been made freely and voluntarily.

Question 3

Does the failure to inform an accused of his right to remain silent during (the proceedings in terms of) s 119 and s 121 (1) of the Criminal Procedure Act 51 of 1977 constitute a violation of the accused's fundamental rights rendering the accused's answers *ipso facto* inadmissible at his trial.

[43] In terms of s 35(3)(h) an accused has the right to a fair trial which includes the right to remain silent (not a right to be informed of the right to remain silent). The right is clearly one that can be waived. For waiver knowledge is required. It is for this reason that accused should be informed of their right to remain silent at a trial so that an informed decision can be made as to whether to remain silent or not. A failure to so inform an accused may result in the trial being unfair (*Director of Public Prosecutions, Natal v Magidela and Another* 2000 (1) SACR 458 (SCA) at para 18). But that can only be the case if the accused is unaware of his right to remain silent. The respondent never contended that that was the case. It follows that the court *a quo* erred in holding that the respondent's right to remain silent during his trial had been violated.

[44] For these reasons the three questions referred to are reserved and are decided in favour of the state.

[45] The question that now arises is to what relief the appellant is entitled. In terms of s 322(4) read with s 324 of the Act this court having found in

favour of the applicant has a discretion to order that proceedings in respect of the same offence in respect of which the respondent was acquitted may again be instituted either on the original charge, suitably amended where necessary or upon any other charge as if the respondent had not previously been arraigned, tried and acquitted; provided that no judge or assessor before whom the original trial took place shall take part in such proceedings. (See *S v Basson* [2003] 3 All SA 51 (SCA) at para 4 and 5).

[46] Wagenaar, who also appeared before us, submitted that we should not exercise our discretion in favour of a trial *de novo* in that (1) the respondent had been detained in prison for a period of one year before his acquittal; (2) a trial *de novo* would afford the state an opportunity to supplement its case; (3) more than 3 years have elapsed since the respondent's arrest and an accused has a right to have his trial commenced and concluded without unreasonable delay. I shall deal with each of these submissions in turn.

[47] The respondent spent a year in prison before the trial commenced but it was not contended that this was attributable to any fault on the part of the state.

[48] It is true that the state will be given an opportunity to supplement its case but it was wrongly deprived of that opportunity at the instance of the respondent (although only after having been prompted to do so by the court *a quo*). In these circumstances it is not unfair to now give the state an opportunity to do so.

[49] It is regrettable that proceedings *de novo* will only be instituted almost four years after the commission of the crime but it is not the applicant who is to blame for the delay. The delay was brought about by the untenable arguments advanced by the respondent and adopted by the court *a quo*. There is, furthermore, no reason to fear that the respondent would by prejudiced in his defence by the delay.

[50] The respondent has, therefore, not advanced any valid reason why we should refuse to exercise our discretion in favour of a trial *de novo*. There are on the other hand cogent reasons why we should so exercise our discretion. The appellant was charged with the commission of a very serious crime but the state was not allowed a proper opportunity to prosecute him. A refusal to order that a trial *de novo* may be instituted in the face of a confession and a plea of guilty, the admissibility of which the state was not allowed to prove, would be unfair to the prosecuting authority, would be detrimental to the administration of justice and will in fact bring the administration of justice in disrepute.

[51] For these reasons, the questions of law having been reserved and having been decided in favour of the applicant, the following order is made:

> Proceedings in respect of the same offence in respect of which the respondent was acquitted may again be instituted either on the original charge, suitably amended where necessary or upon any other charge as if the respondent had not previously been arraigned, tried and acquitted;

provided that no judge or assessor before whom the original trial took place shall take part in such proceedings.

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P E STREICHER
JUDGE OF APPEAL

NAVSA JA)
VAN HEERDEN JA)
ERASMUS AJA) **CONCUR**
PONNAN AJA)