THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 20169/2014
Reportable

In the matter between:

SIPHO PATRICK MAGWAZA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Sipho Patrick Magwaza v The State* (20169/14) [2015] ZASCA 36 (25 March 2015)

Bench: Ponnan, Maya, Mhlantla and Zondi JJA and Meyer AJA

Heard: **16 March 2015**

Delivered: **25 March 2015**

Summary: Evidence – proscriptive evidence – s 35(5) of the Constitution – evidence excluded because its admission detrimental to the administration of justice.

ORDER

On appeal from: KwaZulu Natal High Court, Pietermaritzburg (PC Combrinck J (Kondile and Theron JJ concurring) sitting as a court of appeal.

The appeal is upheld and the conviction and sentences imposed pursuant thereto are set aside.

JUDGMENT

Ponnan JA (Maya, Mhlantla and Zondi JJA and Meyer AJA concurring):

[1] The appellant, Sipho Patrick Magwaza, was originally indicted as accused number 4 together with three others on five charges. However, at the commencement of the trial before Galgut DJP (sitting with assessors) in the High Court (Durban and Coast Local Division) all of the charges were withdrawn against two of the accused and the first charge was withdrawn against the two that remained. In the result, the appellant and his co-accused (accused 1 in the trial court) stood trial on one count each of murder and robbery with aggravating circumstances. The latter also faced two additional charges pertaining to the unlawful possession of a firearm and eleven rounds of ammunition.

[2] On 13 April 2000, a gang of armed men attacked a pension payment point at Klaarwater Community Centre in Marianhill, KwaZulu Natal and made off with approximately R460 000. During the course of the robbery one of the security guards was fatally wounded and dispossessed of his firearm and its ammunition. The appellant and his co-accused were convicted as charged and sentenced to imprisonment for life. With the leave of the trial court, both accused appealed against their convictions to the full court of the Natal Provincial Division. PC Combrinck J

(Kondile and Theron JJ concurring) dismissed the appeal. The further appeal by the appellant is with the special leave of this court.

[3] It was not in dispute before Galgut DJP that the offences in question had indeed been perpetrated. In any event as the learned judge recorded, the 'accused . . . formally admitted that the crimes were committed'. He added:

'That the crimes on counts 2 and 3 were committed in the furtherance of a common purpose furthermore is on the evidence equally plain. One or more of the robbers had obviously been armed and, in the absence of anything further, it is plain that every member of the gang was aware that one or more of the members was armed, that one or more firearms might be used during the robbery and that someone might be shot and killed. Each member of the gang therefore shared a common purpose with the others in regard to the use of a firearm. Each was therefore responsible for the shooting even though there may be no proof of who it was who fired the shot that killed the deceased. Even though there may have been no direct intention to kill there was what is in law called *dolus eventualis* which simply means that anyone in the gang who knew that the firearm might be used, who knew that someone might be killed and who nevertheless recklessly remained in the gang and took part in the robbery is in law held to have had the necessary intention to kill.

Accused Nos 1 and 4 deny that they had been part of the gang that day, and that is therefore the sole issue before us. Despite the fact that scores of pensioners and others were present and witnessed the incident, and that it occurred in broad daylight, not one of them was apparently able either to see or later to identify any of the culprits.'

[4] The State case against the appellant consisted, in sum, of a pointing out by him to Captain Neville Eva shortly after his arrest, together with certain utterances during the course of that pointing out, which according to Galgut DJP amounted to a confession. After an admissibility trial that evidence was ruled admissible and the appellant was convicted on the strength of it. In the course of his judgment the learned judge observed:

'We are loath to convict any accused person on the single and uncorroborated evidence of a confession, as is now the case with accused No 4. We adopt this approach for reasons I do not propose to go into, save to say that we are aware of the inherent dangers of doing so. In the instant case, however, accused No 4 has been such a bad witness and the evidence of Eva and Ximba has been so impressive that we have no doubt of accused No 4's guilt. We

are strengthened in this in particular by accused No 4's evidence about informing Eva of a spot where he had allegedly lost his firearm.'

The full court affirmed that conclusion and in the result dismissed the appellant's appeal.

[5] The appellant was arrested some two months after the offences had been committed at approximately 8.30 am on 8 June 2000 at the Umlazi Magistrates' Court. His arrest, allegedly on the strength of information furnished by a police informer, was effected by a team of detectives including Inspector Govender and the investigating officer, Inspector Mbatha of the Westmead Murder and Robbery Unit, Pinetown. According to Govender, he warned the appellant at the time of his arrest of the allegation and his rights in terms of section 35 of the Constitution. He added under cross-examination:

'Inspector, you advised the Court that you informed the accused of his rights. Did you read out his rights? --- Not from any document, but from my memory.'

On that score Mbatha had this to say:

'And Inspector Govender told the Court, and you confirmed, that at the time of accused No 4's arrest his constitutional rights were explained to him. --- That is correct.

Were these rights read to him? --- As I explained in my evidence-in-chief that the rights were read.

GALGUT DJP They were read to him? --- Yes.

From which document? --- From the form, the section 35 notice.

Did you have that with you at the time of the arrest? --- I did not have the forms on me.

Well, I think the attorney is talking about the time of his arrest.

--- No, at the time of accused No 4's arrest the forms were not there with us.

Well, let's ask the question again. Was he nevertheless advised of his rights, yes or no? --- Yes, he was.

MS HARIRAM . . . And you interpreted these rights?

--- Yes.

What exactly did you interpret? --- Well, I cannot be precise on the words used when we were at Umlazi but he was advised that he has a right to remain silent. He was also informed of his right to contact his legal representative. These are the rights I can recall that were explained to him when we were at Umlazi.'

[6] The interaction at the Westmead Murder and Robbery Unit between Inspectors Govender and Mbatha on the one hand, and the appellant on the other, was crucial to the admissibility enquiry and in turn to the conviction of the appellant. According to Govender:

'. . . at the Murder and Robbery Office, M'Lord, it was the accused that was in the office with Mr Mbatha, Thabethe and myself.

This, just for the record, happened on the 8th June? --- On the 8th June. Probably it was about 9 o'clock or thereafter on that morning. In respect of this accused, M'Lord, again, I informed him that we were going to interview him about the allegation. Mr Mbatha was going to act as the interpreter. Prior to the interview with the accused, I warned him in respect of his rights in terms of the Constitution, and as the exhibit that I handed in, the document, it was the very same information that I had explained to the accused. This was interpreted by Mbatha, and the accused was prepared to continue with the interview. Again, M'Lord, he did not request the services of an attorney or, if he could not afforded one, if I had to arrange one free of any cost to him.

Just before you proceed, Inspector, just before you took the witness stand you helped me and assisted me in looking for a similar docket . . . [intervention] --- Document.

. . . as Exhibit G for accused No 4 and we couldn't find it. ---

That is correct.

GALGUT DJP Docket?

MR DE KLERK Document. Was there a similar document like that signed by accused No 4? --- Specifically, I cannot recall. Mr Mbatha filed the docket. But what I can recall. M'Lord, is that I did warn the accused of his rights.'

Inspector Mbatha added:

'GALGUT DJP On what you have told us, at your offices accused No 4 was not told of his rights. --- He was warned of his rights. I omitted that.

Well, tell us about it. --- Before we could proceed with the interview of accused No 4 he was told about his rights. He also signed a form containing his rights.

Where is that form? --- I filed it in the docket.

You filed it or you found it? --- I filed it.

Well, where is it? --- When we looked for it, we could not find it.

Now tell me, in regard to that document, both with regard to accused No 1 and accused No 4, how exactly were the rights explained? --- They were explained as they appear in the form.

What do you mean by that? --- As they appear in the form, that he has a right to remain silent. He has a right not to incriminate himself.

No, no, I don't want to know what your recollection is of what the form says. I'm concerned to know how Govender went about informing him of his rights. Let's take accused No 1 first. --- I don't quite follow the question.
You say Govender explained his rights to him? --- Yes.
And that he made use of the form? --- Yes.
Well, how did he go about it? --- As the rights appear in the form.
So he didn't read them to him? --- The rights were read as they are written in the form.
Well, why don't you say so? --- Perhaps the way I explained it was not quite clear.
Well, it wasn't clear and it's not clear to me. Did he read those rights or did he simply summarise them in his own words? --- He wrote the rights as they appear in the form.
He read them? --- Yes, he read them and I read and interpreted them.
Did that happen with accused No 4 as well? --- That is correct.'

[7] Having commenced his interview with the appellant at approximately 9 am that morning, by 10.30 am Govender had made telephonic contact with Captain Eva (so testified the latter) with the request that he assist with a pointing out. In endeavouring to explain how it came to pass that the appellant had elected to participate in a pointing out, Govender testified:

'I then questioned the accused by questioning him with certain question orally. Mbatha also did question him, and that at a stage that the replies that came back from the accused I then cautioned him that he should stop and that at this stage that what he had been telling me, there were certain forums that that could be addressed to. I personally could not take it any further. I informed the accused that he could say the same things said to a Magistrate or mention that to an independent policeman. M'Lord, the accused adopted to want to do a pointing out. At that time I left the accused in the company of Inspector Mbatha and then left to contact an officer. I then got hold of Captain Eva. M'Lord, when Captain Eva then got to the office, if I can recall correctly, is that I handed the accused to Captain Eva.

. . .

GALGUT DJP Tell me something, you say in regard to accused No 1 that you told him he could do a pointing out to an independent policeman of sufficient rank? --- That is correct, sir.
So was it your idea that he should do a pointing out? --- No, it was not. What I said – could I explain, M'Lord?
Well, I wanted to ask you because the way you put it I got the impression that you suggested to him that he should do a pointing out. --- No, no, M'Lord. What I . . . [intervention]

How did it happen? --- What I said to him is that he could make a statement to what he said to a Magistrate or he could say that, what he was saying, to a police officer of sufficient rank or point out certain places to that officer.

Well then, as I understand it, it was you that put the idea into his head to do a pointing out? --- If that's what the Court is saying, M'Lord, yes, I said that to him from the replies he had given me.

Well, let's make no secret of it. What were those replies then? --- From the accused?

What is bothering me, you've not suggested that he said to you that he wanted to point something out to you. --- If I can explain to the Court, M'Lord.

Yes. --- From the replies of the accused, regarded the places where this offence happened. From that reply I then canvassed the issue regarding a pointing out. The pointing out to an officer is about pointing certain places out. That's what was said.

On that explanation then, it was not a case of him saying to you that he wanted to point something out to you? --- Not to me, no.

What . . . [intervention]

The question of a pointing out arose because you said to him that, if he wanted to, he could point out whatever to a policeman, an independent policeman? --- That is correct. That is correct.

Does the same apply to accused No 4? --- The same, M'Lord.

So in his case too, it is not a case of him saying to you, "I want to point something out to you", and you saying to him, "No, wait a minute, you mustn't point it out to me, you must point it out to an independent policeman"? --- That is correct, M'Lord. That is correct.

What is correct? --- That he can point that out not to me, to an independent policeman.

I'm going to start again, because you don't understand. It was not a case of him saying to you, "I want to point out a place to you, to you, Govender". --- Yes, M'Lord.

It didn't happen that way. --- If I could explain, M'Lord, it happened that what the accused said from his reply is that he could point out the place where this incident happened. I told him that I am not in a position from my rank and status to take the accused to that place so that he can point it out to me but he could point that place out to an independent police officer of sufficient rank.

Well, that doesn't answer my question, unfortunately. He did not say to you, "I want to point something out to you"? --- Yes, he did. From his replies he said that – from the replies, my question and answers, from his replies he said he was prepared to point out certain places. Now, in context from the answers given by the accused, I said to him, "I cannot take you to those places", but he could point that place out to a policeman to the rank of Captain and above.

That's what I said, M'Lord.

Inspector, perhaps because my question isn't clear, you don't understand what it is I'm trying to get from you. Did he say to you, "I want to point something out", or did you say to him, "Are you prepared to point something out"? --- He wanted to – he said to me that, "I want to point something out". It was from the accused.

And this was said before there was talk about an independent officer? --- This was said, yes, before there was talk about an independent officer.

Why would they want to point anything out to you? What was the reason? How was that going to help anybody? --- Well, it's going to – from the questions that was put to him, it's going to assist is that they knew the place where the commission of the offence had taken place and whatever transpired there.

I don't understand, quite frankly. You knew already where the incident had taken place. --- That is correct, M'Lord, but I did not know what part the assailants or the suspects or the accused had played. I did not know that.

Well, quite obviously, what each accused said to you amounted to a confession? --- That is correct, M'Lord.

Is that right? --- That is correct.

Why then would the accused want to point anything out to show what their precise participation was? --- Because they volunteered the information to me. It was from their own doing that they did this.

I ask this question because I would have thought that the thing would have proceeded like this, that the accused would have said to you, "Yes, I took part and I did A, B and C", and that you would have said, "Well, are you prepared to point these things out to me?". You say it didn't happen that way? --- I understand what you're saying, M'Lord. No, what happened is that, from their answers that the accused would have said to me that, "Listen,", after telling me what happened is that, "I am prepared to point out what happened on that day and the position of the places". That's what happened.

So they didn't say that because you had first asked whether they'd be prepared to do so? --- No, M'Lord, I did not ask them first.

No? --- No, it came voluntarily from them.

Well, then I come back to my other question. Why would they want to do this pointing out? I ask because quite obviously . . . [intervention] --- Yes, I understand.

Quite obviously, I would have thought it would have been of more interest to you for them to do a pointing out than for them to offer to do so. --- M'Lord, I cannot pre-empt what is in the accused's mind at that stage but it's their voluntariness to co-operate in the investigation. Many accused persons from different examples will say, "Listen, I can even point out the place to you". It's a fact of life.'

[8] Inspector Mbatha, who it will be recalled was not just the investigating officer, but also acted as Govender's interpreter, had this recollection:

'We arrived at our offices at Westmead and we sat with accused No 4 in an office. In that office it was Inspector Govender and myself. We started asking him questions. The questions that we asked accused No 4 were more or less the same as the questions we had asked accused No 1. During the questioning it came to a stage where Inspector Govender had to warn accused No 4 with regards to what accused No 4 was saying. Accused No 4 also ended up wanting to make a pointing out. It was Inspector Govender who made the necessary arrangements for that pointing out. Accused No 4 did the pointing out on that same day.'

When asked: 'What happened after the volunteering of this information?' He replied:

'Well, it was at that stage that Inspector Govender stopped him and explained to him that there were other ways in which this could be dealt with because for him to give us that information was not sufficient.'

His evidence continued:

'And what ways did Inspector Govender suggest? --- He explained to him that he could go and make a statement to a Magistrate and that he could also go and point out the scene where the offence was committed.'

As confusing as Govender's account was, that confusion was compounded by Mbatha's evidence. It is plain that Mbatha's conceptual understanding of what had transpired during the interview appears to have differed markedly from that of Govender. According to Mbatha's understanding the election by the appellant to point out the scene was because of his having furnished information to them that was not sufficient – whatever that may mean. What exactly he intended to convey by 'that information was not sufficient' or in what respects it was insufficient was regrettably not explored any further during his evidence. Significantly, Mbatha added:

'Accused No 4 said if we want to he could go and show us the scene where the robbery was committed, and that was before Inspector Govender warned him. That was the information that came out from accused No 4 himself.'

[9] As recorded in the pointing out form completed by Captain Eva, he met with the appellant in his private office at the Westmead Murder and Robbery Unit at 11.15 that morning. The first part of that form records the details of the: (a) suspect; (b) commissioned officer; (c) interpreter; and, (d) the venue where the interview was being conducted. That is followed by what is described as Part A headed 'HEREAFTER I ASK THE SAID PERSON:'. The first question put to the appellant by Captain Eva

under Part A was 'Do you know why you were brought to me, and if so, why?' The answer that that question elicited was 'Yes we pulled and armed robbery at Klaarwater'. Part B of the form headed 'I NOW CONVEY THE FOLLOWING INFORMATION TO THE SAID PERSON:' reads:

'5. I am an Officer in the South African Police Service and as such I am also a Justice of the Peace. A Justice of the Peace is a Police Officer who, by the virtue of his appointment, has the same rights and powers as those of a Magistrate with regards to the recording of statements. A Police Officer such as myself, can accordingly testify in a subsequent trial about what a person has said and pointed out, whereas a Non-commissioned Officer can only testify in regards to what was pointed out.

Do you understand this? . . . Yes.

6. I have nothing to do with the investigation of this case and you have nothing to fear from me. Further, if you have been assaulted or forced in any way to make a statement or do a pointing out, I am able to assist you. If necessary I can also arrange protection for you against any irregularities.

Do you understand this information? . . . Yes.

7. You are not obliged to point out any scene(s) and/or point(s) on the scene(s) or to say anything about such point(s) or scene(s). You are further warned that whatever you may point out or may say will be noted down and photographs of the scene(s) and/or point(s) pointed out will be taken and may later be used as evidence against you in a subsequent trial.

Do you understand this warning? . . . Yes.

8. You have the right to remain silent. (I also explain to the said person the consequences if he/she elects to say something).

9. You are not obliged to make any confession, admission or statement that might be used against you in a subsequent trial.

Do you understand this? . . . Yes.

10. You also have the right to consult with a legal representative of your choice, and if you cannot afford the services of such legal representative, a legal representative can be appointed for you who is not in the employment of the State and whose services will be provided at no cost to yourself.

10.1 Do you understand these rights? . . . Yes.

10.2 Do you wish to exercise either of them? . . . No.

10.3 If so, how do you wish to do that? . . . N/A.'

[10] Save for certain notable exceptions, the general approach adopted in South Africa prior to 1994 was that relevant evidence was admissible regardless of whether it

was illegally or improperly obtained. A court of appeal, it was said, does not enquire whether the trial was fair in accordance with 'notions of basic fairness and justice' or with the 'ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration' (*S v Rudman & another; S v Mthwana* 1992 (1) SA 343 (A) at 377). That was an authoritative statement of the law before 27 April 1994. It no longer is. Our Constitution now requires criminal trials to be conducted in accordance with just those notions of basic fairness and justice. In *S v Zuma & other* 1995 (2) SA 642 (CC) para 16 it was said by Kentridge AJ that the right to a fair trial 'embraces a concept of substantive fairness' and that it is for the criminal courts hearing criminal trials or appeals 'to give content' to the notions of basic fairness and justice which underpin a fair trial.

[11] In the United States of America, subject only to the so-called 'reasonable mistake' exception, evidence obtained in violation of the Constitution is excluded. The drafters of our Constitution appear to have adopted a *via media* between the approach adopted in the USA on the one hand and that formerly adopted in South Africa on the other. In doing so, they have largely followed the example of Ireland, Australia, New Zealand and particularly Canada (*S v Pillay & others* 2004 (2) SACR 419 (SCA) at 444*d-i*). Thus in terms of s 35(5) of the Constitution: 'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise detrimental to the administration of justice.'

Of s 35(5), this court (*S v Tandwa & others* 2008 (1) SACR 613 (SCA) paras 116-117) stated:

'The notable feature of the Constitution's specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it *(a)* renders the trial unfair; or *(b)* is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.

In determining whether the trial is rendered unfair, courts must take into account competing social interests. The court's discretion must be exercised “by weighing the competing concerns of society on the one hand to ensure that the guilty are brought to book against the protection of entrenched human rights accorded to accused persons” . . .’

[12] Section 24(2) of the Canadian Charter of Rights and Freedom, Part I of Constitution Act, 1982 requires evidence obtained in a manner that infringed guaranteed rights to be excluded if its admission 'would bring the administration of justice into disrepute'. It has been construed as meaning that the administration of justice would be brought into disrepute if the admission of the evidence in question would render the trial unfair (*R v Jacoy* (1989) 38 CRR 290 at 298). In *R v Collins* [1987] 1 SCR 265, a police officer violated the accused's rights by grabbing him by the throat. The accused had a bag of heroin in his hand, which the State sought to admit. The Supreme Court of Canada held that a trial is rendered unfair if the evidence is self-incriminating, such as a confession. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial – the right against self-incrimination. But *Collins* drew a distinction between real and testimonial evidence. While it viewed testimonial evidence (such as a confession) as undermining trial fairness, it expressed doubt that real evidence, discovered derivatively as a result of unconstitutional conscription, could render a trial unfair because the real evidence existed irrespective of the violation of the Charter and its use does not render the trial unfair.

[13] In the later case of *Thomson Newspapers Ltd et al v Director of Investigation and Research et al* (1990) 67 DLR (4th) 161, La Forest J stated:

'A breach of the Charter that forces the eventual accused to create evidence necessarily has the effect of providing the Crown with evidence it would not otherwise have had. It follows that the strength of its case against the accused is necessarily enhanced as a result of the breach. This is the very kind of prejudice that the right against self-incrimination, as well as rights such as that to counsel, are intended to prevent. In contrast, where the effect of a breach of the Charter is merely to locate or identify already existing evidence, the case of the ultimate strength of the Crown's case is not necessarily strengthened in this way’.

Canadian jurisprudence has since rejected a strict distinction between real and testimonial evidence holding that the *Collins* distinction was unfounded (see *R v*

Burlingham (1995) 28 CRR (2d) 244). For example *R v Ross* (1989) 37 CRR 369 at 379 emphasized that the admissibility of evidence under s 24(2) depended ultimately not on its nature as real or testimonial, but on whether or not it would only have been found with the compelled assistance of the accused.

[14] In *Pillay* (at 432*e-h*), Mpati DP and Motata AJA summed up the Canadian position as follows:

'What emerges from this is that evidence derived (real or derivative evidence) from conscriptive evidence, ie self-incriminating evidence obtained through a violation of a Charter right, will be excluded on grounds of unfairness if it is found that, but for the conscriptive evidence, the derivative evidence would not have been discovered.

And Scott JA, who wrote separately, expressed himself thus at 445*c-e*:

'As noted by Martland J in *R v Wray* (1970) 11 DLR (3d) 673 at 691, there is a clear distinction between unfairness in the method of obtaining evidence and unfairness in the actual trial. The former does not necessarily result in the latter. Where the infringement results in the creation of evidence which would not otherwise exist, for example a self-incriminatory statement or, as it is sometimes called, conscriptive evidence, it is generally accepted that the admission of such evidence will affect the fairness of the trial. The reason, of course, is that without the infringement the evidence would not have come into existence. But where, as in the present case, the infringement results in the discovery of a fact, ie the presence of the money in the roof, which would have existed whether there was an infringement or not, the impact on the fairness of the trial, if any, is less obvious.'

Both judgments appear to be at one in respect of the kind of evidence with which we are here concerned, namely 'self-incriminatory' or 'conscriptive' evidence. Whether they, likewise, are at one in respect of the other category alluded to, namely 'derivative' evidence, need not detain us.

[15] Although s 35(5) of the Constitution does not direct a court, as does s 24(2) of the Charter, to consider 'all the circumstances' in determining whether the admission of evidence will bring the administration of justice into disrepute, it appears to be logical that all relevant circumstances should be considered (*Pillay* at 433*h*). *Collins* lists a number of factors to be considered in the determination of whether the admission of evidence will bring the administration of justice into disrepute, such as, for example: the kind of evidence that was obtained; what constitutional right was infringed; was such infringement serious or merely of a technical nature and would the

evidence have been obtained in any event. In *Collins* (at 282), Lamer J reasoned that the concept of disrepute necessarily involves some element of community views and 'thus requires the Judge to refer to what he conceives to be the views of the community at large'. *Pillay* (at 433*d-e*) accepted that whether the admission of evidence will bring the administration of justice into disrepute requires a value judgment, which inevitably involves considerations of the interests of the public.

[16] To the extent here relevant s 35(1) and (2) of the Constitution provides:

'(1) Everyone who is arrested for allegedly committing an offence has the right –

(a) to remain silent;

(b) to be informed promptly –

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

(2) Everyone who is detained, including every sentenced prisoner, has the right –

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;'

Of those rights, Froneman J (*S v Melani & others* 1996 (1) SACR 335 (E) at 347*e-h*) observed:

'The right to consult with a legal practitioner during the pre-trial procedure and especially the right to be informed of this right, is closely connected to the presumption of innocence, the right of silence and the proscription of compelled confessions (and admissions for that matter) which "have for 150 years or more been recognised as basic principles of our law, although all of them have to a greater or lesser degree been eroded by statute and in some cases by judicial decision" (in the words of Kentridge AJ in *Zuma's* case). In a very real sense these are necessary procedural provisions to give effect and protection to the right to remain silent and the right to be protected against self-incrimination. The failure to recognise the importance of informing an accused of his right to consult with a legal adviser during the pre-trial stage has the effect of depriving persons, especially the uneducated, the unsophisticated and the poor, of the protection of their right to remain silent and not to incriminate themselves. This offends not only the concept of substantive fairness which now informs the right to a fair trial in this country but also the right to equality before the law. Lack of education, ignorance and poverty will probably result in the underprivileged sections of the community having to bear the brunt

of not recognising the right to be informed of the right to consultation with a lawyer. (Cf *S v Makwanyane (supra* at [paras 49, 50 and 51]).)'

[17] It is clear that the rights in question exist from the inception of the criminal process, that is from arrest, until its culmination (up to and during the trial itself). In the case of the appellant's co-accused, accused 1, the State produced what was described as a standard constitutional rights warning form, to which was appended his signature as proof that he had indeed been warned. Not so in respect of the appellant. Neither Mbatha, nor Govender were models of clarity as to exactly what was conveyed to the appellant. But, even were it to be accepted that the cumulative effect of their evidence is that there was a warning of sorts, it appears to have been woefully inadequate. For, whilst there is some reference in the evidence of Govender and Mbatha to the rights to silence and legal representation, there is no indication that the appellant was warned of the consequence of not remaining silent (the logical corollary of the right to silence) or of his entitlement to the services of a legal representative at State expense. There was some suggestion in argument from the bar in this court that such deficiencies as there were came to be cured by the rather detailed warning by Captain Eva. But what is readily apparent from the document introduced into evidence, is that by the time the appellant had been warned by Captain Eva he had already confessed to the robbery. It is important to appreciate that a constitutional right is not to be regarded as satisfied simply by some incantation which a detainee may not understand. The purpose of making a suspect aware of his rights is so that he may make a decision whether to exercise them and plainly he cannot do that if he does not understand what those rights are (*R v Cullen* (1993) 1 LRC 610 (NZCA) at 613G-I). It must therefore follow that the failure to properly inform a detainee of his constitutional rights renders them illusory. What must govern is the substance of what the suspect can reasonably be supposed to have understood, rather than the formalism of the precise words used (R v *Evans* (1991) 4 CR (4th) paras 144, 160 and 162).

[18] If it is accepted, as I think it must be, that the appellant was not properly warned of his constitutional rights, then it must follow that there was a high degree of prejudice to him because of the close causal connection between the violation and the conscriptive evidence. For, plainly, the rights infringement resulted in the creation of evidence which otherwise would not have existed. And as it was put in *R v Ross*

(1989) 37 CRR 369 at 379 ‘ . . . the use of *any evidence* that could not have been obtained but for the participation of the accused in the construction of the evidence for the purposes of the trial would tend to render the trial process unfair.’

[19] The police did not employ any other investigative techniques to link the appellant to the crime. Their investigation, which had been ongoing for some two months, did not lead them to the appellant. Instead, it was the accusing finger of an informer that pointed them in the appellant’s direction. There was thus, at the time of his arrest, no other evidence that linked him to the offences. A few hours after his arrest he had furnished to the police the self-incriminating evidence, upon which, without more, he was ultimately convicted. The evidence adduced by Govender and Mbatha of what transpired from the time of the appellant’s arrest until he arrived at a confessing state of mind, so to speak, is unclear and far from satisfactory.

[20] In *R v Ndoyana & another* 1958 (2) SA 562 (E) at 563 De Villiers JP made the point that:

‘The circumstances which led up to an accused person's appearance before a magistrate or justice of the peace to make a confession are not less important than the circumstances surrounding the actual making of the confession.

From the time an accused person is arrested until he is allowed on bail or brought to trial he is in the custody, power and control of the police. If before his trial he expresses the desire to make a confession the police will know the exact circumstances under which he came to express this wish and everything that went before and led, or could have led, up to it. Evidence of these circumstances should be given.'

And in *S v Majozi* 1964 (1) SA 68 (N) at 71E-G, Harcourt J put it thus:

‘As long ago as *R v Gumede* 1942 AD 398 it was stressed that the interposition of the magistrate or justice of the peace should not be permitted to give an aura of respectability and admissibility to a statement which might be suspect in regard to it being motivated by previous events. One must not permit the proceedings before the magistrate or justice to draw a veil between the preceding events and the completed confession. The preceding events should be investigated to convince the Court beyond reasonable doubt of all the requirements in the section set out.’

[21] Both the trial court and the full court focused solely on the voluntariness of the appellant’s conduct. Neither touched, even tangentially, on the Constitution’s

exclusionary provision – s 35(5), or appeared to appreciate as Van der Merwe in PJ Schwikkard et al *Principles of Evidence* 3ed (2009) para 12.9.7 points out:

'If an accused was not prior to custodial police questioning informed by the police of his constitutional right to silence, the court might in the exercise of its discretion conclude that even though the accused had responded voluntarily, all admissions made by the accused to the police should be excluded in order to secure a fair trial.'

The exercise of the relevant discretion leads to the conclusion, in my view, that those factors which justify exclusion materially outweigh those which call for admission.

[22] Having given the matter anxious consideration, and not without some hesitation, I arrive at the conclusion that the evidence should have been excluded. I accept that particularly in the current state of endemic violent crime, the public reaction to the exclusion of such evidence is likely to be one of outrage. But we need to remind ourselves that s 35(5) is designed to protect 'even those suspected of conduct which would put them beyond the pale' (*Key v Attorney-General, Cape Provincial Division* 1996 (4) SA 187 CC para 13). To borrow once again from *Tandwa* (para 121):

'But in this country's struggle to maintain law and order against the ferocious onslaught of violent crime and corruption, what differentiates those committed to the administration of justice from those who would subvert it is the commitment of the former to moral ends and moral means. We can win the struggle for a just order only through means that have moral authority. We forfeit that authority if we condone coercion and violence and other corrupt means in sustaining order.'

[23] It follows that the appeal must succeed and in the result it is upheld and the conviction and sentences imposed pursuant thereto are set aside.

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V M Ponnan

Judge of Appeal

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