IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

In the matter between **Case No : CCT/23/94**

Shabalala and Five Others **Applicants/ Accused**

and

The Attorney-General of the Transvaal **First Respondent**

The Commissioner of South African Police **Second Respondent**

Heard on : 10 March 1995

Delivered on : 29 November 1995

JUDGMENT

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[1] **MAHOMED DP.** Mr Shabalala and five others ("the accused") were charged with the crime of murder before Cloete J in the Transvaal Provincial Division of the Supreme Court. Before any evidence was led, various applications were made to the trial Court on behalf of the accused. These included applications for copies of the relevant police

dockets, including witnesses' statements and lists of exhibits in the possession of the State.

[2] These applications were all opposed by both the Attorney-General of the Transvaal and the Commissioner of the South African Police, who were cited as respondents. They were refused by Cloete J substantially on the grounds that the accused had not satisfied the Court that the relevant documents in the possession of the State, were "required" by them (within the meaning of section 23 of the Constitution of the Republic of South Africa, 1993 ("the Constitution")) "for the exercise of any of their rights to a fair trial".[1]

[3] A related application to the Court *a quo* for an order directing the State to make State witnesses available to the legal representatives of the defence, for the purposes of consultation, was also refused on the ground that the Court was unable "to conclude that the applicants will not be given a fair trial" unless the Court departed from the "practice whereby an accused or his legal representative

[1] *Shabalala and Others v The Attorney General of Transvaal and Others* 1994 (6) BCLR 85 (T) at 120B-C; 1995 (1) SA 608 (T) at 643F-G.

may only consult with a State witness with the consent of the prosecutor."[2]

[4] Notwithstanding these conclusions, Cloete J was of the view that, because of their public importance, a ruling should be given by the Constitutional Court on a number of constitutional questions raised by the applications made on behalf of the accused. Relying on section 102(8) of the Constitution, he accordingly, made an order referring the following questions for decision by this Court -

> "1. Whether a Court interpreting the Constitution is bound by the principles of *stare decisis* to follow the decision of a superior Court; or whether such a Court may hold that a decision of such superior Court (other than the Constitutional Court) is *per incuriam* because it incorrectly interprets the Constitution.
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> 2. Whether section 23 of the Constitution can be utilised by an accused in the exercise of the rights contained in section 25(3) of the Constitution; and if so
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> 2.1 Whether the accused should have access to the police dossier; and if so,
>
> 2.2 To what extent, under what circumstances and subject to what conditions (if any) such access should be exercised.
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> 3. Whether any provision in the Constitution permits an accused to consult with prospective witnesses who have given statements to the police; and if so, under what circumstances and subject to what conditions (if any) such consultations should be exercised."[3]

The competence and terms of the referral

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[2] *Shabalala's case, supra* n.1, BCLR at 121B-C; SA at 644F-H.

[3] *Shabalala's case, supra* n.1, BCLR at 121E-H; SA 644I - 645C.

[5] It was held by this Court, in the case of *Zantsi v The Council of State and Others*,[4] that three requirements had to be satisfied before a Supreme Court was entitled to refer a matter to the Constitutional Court in terms of section 102(8):

> "First, a Constitutional issue must have been raised in the proceedings;
> Secondly, the matter in which such issue was raised must have been disposed of by the Supreme Court; and
> Thirdly, the division of the Supreme Court which disposed of the matter must be of the opinion that the Constitutional issue is of sufficient public importance to call for a ruling to be made thereon by this Court."[5]

[6] I have some difficulty with the form and content of the questions referred by the Court *a quo.*

[7] Paragraph 1 of the referral does not raise a constitutional issue at all. In the proceedings before Cloete J, there was a dispute as to whether or not Chapter 3 of the Constitution and, more particularly sections 23 and 25 thereof, were of application to proceedings which were pending before the commencement of the Constitution. There were a number of conflicting decisions before the decision

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[4] 1995(10) BCLR 1424 (CC); 1995(4) SA 615 (CC).

[5] *supra* n.4,per Chaskalson P, para 1.

of this Court in *S v Mhlungu and Others*[6] on the proper interpretation of section 241(8)of the Constitution, which was the section relevant for the determination of that issue. In some of the cases on this issue decided in the Witwatersrand Local Division and the Transvaal Provincial Division of the Supreme Court, it was held that section 241(8) operated to bar an accused person from relying on the provisions of Chapter 3 in proceedings which were pending immediately before the commencement of the Constitution. Cloete J (who was seized with the matter before the judgment of this Court in *Mhlungu's* case[7] was given) held that the principles of *stare decisis* did not preclude him from coming to a different conclusion.

[8] What the correct application of the *stare decisis* principle should have been in the proceedings before Cloete J in the instant case is, however, not a "constitutional issue" which falls within the jurisdiction of this Court, in terms of the Constitution.[8] The Supreme Court had jurisdiction to determine that question. It is simply the proper interpretation of a common law principle. It is not an

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[6] 1995 (7) BCLR 793 (CC); 1995 (3) SA 867 (CC).

[7] *supra* n.6.

[8] See section 98(2).

issue which can properly be referred to this Court in terms of section 102(8). In my view, this Court should accordingly decline to express its views on the issue raised by paragraph 1 of the order made by the Court *a quo*.

[9] Paragraphs 2 and 3 of the referral are also much too widely phrased. The question as to whether the common law of privilege articulated in the case of *R v Steyn*[9] (as it existed before the Constitution came into force) is in conflict with the Constitution, is indeed a constitutional issue which should properly be determined by this Court. This Court is therefore entitled to decide whether that rule of the common law is consistent with the Constitution. However, it is for the Supreme Court in the first instance to determine what the content of the common law should be having "regard to the spirit, purport and objects"[10] of the relevant provisions of the Constitution and to develop the common law. The manner in which the questions have been formulated by the Court *a quo* does not distinguish sufficiently between these two issues and I therefore propose to confine myself substantially to two issues only and to deal with other factors only to the extent to which

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[9] 1954(1) SA 324 (A).

[10] Section 35(3) of the Constitution.

they impact, directly or indirectly, on the resolution of these two issues. The two issues are:

(A) Whether or not the common law privilege pertaining to the contents of police dossiers, defined in *Steyn's* case,[11] is consistent with the Constitution.

(B) Whether the common law rule of practice which prohibits an accused person or his or her legal representative from consulting with a State witness without the permission of the prosecuting authority, in all cases and regardless of the circumstances, is consistent with the Constitution.

Access to police dockets.

[10] According to the evidence in the Court *a quo,* the police docket normally consists of three sections: section A - witnesses' statements taken by an investigating officer; expert reports and documentary exhibits; section B - internal reports and memoranda; and section C - the investigation diary. The claim of the accused in terms of the notice of motion to this kind of information in the possession of the State rested on the submission that

[11] *supra* n.9

section 23, as read with section 25(3) and section 35 of the Constitution, entitled them to access to such information *as of right.* The applications were opposed by the respondents *inter alia* on the grounds that section 23 was not applicable to an accused; that section 25(3) was exhaustive of an accused's rights; that the provisions of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act") provided an accused with all necessary information for a fair trial and hence that an accused was not entitled to access to the police docket as of right or at all. It was contended on behalf of the respondents that, in terms of the decision in *R v Steyn*[12], there was a "blanket docket privilege" which protected the contents of a police docket from disclosure without the consent of the State and that nothing in the Constitution impacted upon that privilege.

[11] Cloete J held that section 23 could competently be invoked by an accused person in a criminal trial but that-

> "Section 23 does not mean that an accused is entitled, as of right and without more, to access to the whole or part of a dossier; although an accused would be entitled to access to the whole or part of a dossier if he could show ..... that he "required" this information to exercise or protect any of his rights in terms of Section 25(3) of the Constitution." [13]

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[12] *supra* n.9.

[13] *Shabalala's case, supra n.1,* BCLR at 119 G-H; SA at 643C.

[12] In order to decide whether or not an accused person is entitled to claim access to any of the contents of a "police docket" and if so, to what extent and in what circumstances such a claim can successfully be made, it is necessary to consider what the state of the law in this regard was prior to the Constitution and what impact, if any, the Constitution has had on such law.

[13] In the case of *R v H*[14] a full bench of the Transvaal Provincial Division of the Supreme Court upheld an appeal against a conviction on the ground that the Magistrate in the Court *a quo* had erred in refusing an application on behalf of the accused that a police witness who was giving evidence for the prosecution should produce the statements which he had taken from some of the witnesses.

[14] The Appellate Division of the Supreme Court held in *Steyn's case*[15], however, that *R v H*[16] was wrongly decided and that

> "when statements are procured from witnesses for the purpose that what they say shall be given in a lawsuit that is contemplated, these statements are protected against disclosure until at least the conclusion of the

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[14] 1952 (4) SA 344 (T).

[15] *supra* n.9.

[16] *supra* n.14.

> proceedings, which would include any appeal after the decision of the Court of first instance."[17]

[15] The privilege upheld in *Steyn's case*[18] was subsequently extended to the notes made by a State witness[19]; statements taken by the police in contemplation of prosecution even if such witnesses were not being used by the prosecution and were in fact made available to the accused[20] and even though the relevant witness had refreshed his memory outside of the Court proceedings[21]; notes made by the investigating officer and the advice and instructions of a "checking officer"[22]; in some circumstances the pocket book of police officers[23]; and all accompanying communications and notes for the purpose of litigation as being "part of the litigation brief"[24]. All such privileged statements were

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[17] *supra* n.9, at 335 A-B.

[18] *supra n.9.*

[19] *S v Alexander and Others* (1) 1965 (2) SA 796 (A) at 812G-H.

[20] *S v B and Another* 1980 (2) SA 947 (A) at 952F-H.

[21] *Van der Berg en 'n Ander v Streeklanddros, Vanderbijlpark en Andere* 1985 (3) SA 960 (T); *Ex parte Minister van Justisie: In re S v Wagner* 1965 (4) SA 507 (A) at 514B-D.

[22] *S v Mavela* 1990 (1) SACR 582 (A) at 590G-J.

[23] *S v Mayo and Another* 1990 (1) SACR 659 (E) at 662G; *S v Majikela and Others* 1991 (1) SACR 509 (E) at 518F-G.

[24] *S v Yengeni and Others* (1) 1990 (1) SA 639 (C) at 642B-I; *S v Schreuder en 'n Ander* 1958 (1) SA 48 (SWA) at 54A-D.

protected forever on the basis of the principle "once privileged always privileged."[25]

[16] An accused person indicted in the Supreme Court, during the period when *Steyn's* case[26] was decided, was not precluded by that decision from effectively preparing his or her defence with relatively full knowledge concerning the identity of State witnesses who were likely to be called at the trial and the details pertaining to what they were likely to depose to. This advantage followed from the procedure of preparatory examinations which invariably preceded the trial. In practice, every material witness who was to be called at the trial gave evidence at the preparatory examination and was available for cross-examination during those proceedings.

[17] Preparatory examinations were a central feature of the criminal justice system in the Republic both before and after the commencement of the Criminal Procedure Act No 31 of 1917. They were a feature of criminal procedure in

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[25] See, for example, *S v Patrick Mabuya Baleka and 21 Others* (unreported judgment, TPD case No. CC482/85 dated 4/8/87); *Zweni v Minister of Law and Order* (1) 1991 (4) SA 166 (W) at 169B-F; *Jonas v Minister of Law and Order* 1993 (2) SACR 692 (E) at 694A-696i; *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing* 1979 (1) SA 637 (C) at 642A-644G; *Khala v The Minister of Safety and Security* 1994 (2) BCLR 89 (W) at 99G-100E; 1994 (4) SA 218 (W) at 228I-230H.

[26] *supra* n.9.

terms of Ordinance 40 of 1828 in the Cape and continued after Union in 1910. They were entrenched in the 1917 Act by section 92 and perpetuated in the Criminal Procedure Act 56 of 1955 by section 54.[27]

[18] The first indirect erosion into this advantage occurred in 1952 with the establishment of Regional Court jurisdiction in criminal cases which previously fell within the jurisdiction of the Supreme Court. No preparatory examinations were necessary in such cases. The impact on accused persons was quite far-reaching because more and more cases came to be heard in the Regional Courts. The next erosion took place in 1963 when section 54 of the 1955 Act was amended to authorise summary trials in Superior Courts without a preceding preparatory examination whenever the relevant Attorney-General was of the opinion that there was "any danger of interference with or intimidation of witnesses or wherever he deemed it to be in the interest of the safety of the State or in the public interest." The most radical inroad into the procedure of preparatory examinations was however introduced into the criminal justice system by the Criminal Procedure Act in consequence of the recommendations of the report of the Botha

[27] See *Dugard,* South African Criminal Law Procedure, Vol IV, pages 21, 25, 33 to 35.

Commission.[28] Paragraph 3.24 of that report recommended that preparatory examinations should not be essential and that "a summary of the substantial facts as they appear from the statements of the witnesses, which are alleged against the accused" should be provided instead. This proposal found expression in the Criminal Procedure Act and preparatory examinations have now become very rare. During the whole calendar year from 1 July 1980 to 30 June 1981, for example, only 22 preparatory examinations were held in the whole of South Africa.[29] During the year ending on 30 June 1991 there were only 6 such preparatory examinations which were held in the whole country[30] and in the subsequent years preparatory examinations disappeared altogether. Certainly there were no preparatory examinations held during the period 1 July 1992 to 30 June 1994.[31] Jones J summarises the effect of these developments in *S v Fani and Others*[32], as follows:

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[28] "Report of the Commission of Inquiry into Criminal Procedure and Evidence", RP 78/1971.

[29] See paragraph 1.1 at page 72 of the Annual Report of the Department of Justice for the period 1 July 1980 to 30 June 1981.

[30] *Hiemstra*: Suid Afrikaanse Strafproses (5th ed) by J Kriegler, page 342.

[31] Annual Reports of the Department of Justice for the periods 1 July 1992 to 30 June 1993, pg. 121; 1 July 1993 to 30 June 1994, pg. 104.

[32] 1994 (1) BCLR 43 (E) at 46B-H; 1994 (3) SA 619 (E) at 621J-622H.

> "Under the now repealed Criminal Procedure Act 56 of 1955 the general practice was to hold a preparatory examination before a magistrate before a criminal trial was held in the Supreme Court. At such an examination the prosecution would lead its evidence, or at least sufficient evidence, to have the accused committed for trial in the Supreme Court. The accused had the right to be represented and to challenge the evidence led if he so wished, either in cross-examination, or by giving evidence himself if so advised, or by calling the evidence of witnesses. A copy of the proceedings at the preparatory examination would be made available to an accused if he was committed for trial, so that he could prepare properly for trial. A copy was also made available to the trial judge. Preparatory examinations are still part of the procedure laid down in the present Criminal Procedure Act 51 of 1977. But they are virtually never held. The result has been an erosion of the principle of full disclosure. The present practice is invariably to hold a summary trial in the Supreme Court without any preliminary hearing. There is no procedure laid down for the disclosure of information which characterises civil litigation and which was almost universal practice when preparatory examinations were held as a matter of course. Instead of a preliminary hearing, the prosecution now attaches a summary of material facts to a criminal indictment in the Supreme Court. In practice, this has not always in my opinion measured up to the requirement of sufficient information to prepare properly for trial, and hence it does not necessarily facilitate a fair trial within the meaning of the new Constitution Act. It often says little more than the indictment itself. I have the impression that the information contained in this document has become less and less informative as the years go by. Indeed, I recently read such a document, which was annexed to an indictment on a charge of murder, which ran to no more than three paragraphs. It was eight lines in length. In recent years the practice has grown up of the prosecution refusing to furnish an accused with documents such as medical reports until just before the medical witness enters the witness box. This has elicited unfavourable comments from the bench in the past. Only recently have I detected a more open approach to prosecutions in this division."[33]

[19] In terms of the Criminal Procedure Act (interpreted without any reference to the Constitution), therefore, in cases being heard in the Supreme Court, accused persons no longer enjoy the right to a preparatory examination effectively

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[33] See also *Shabalala's case, supra* n.1, BCLR at 97G-J and *S v Sefadi* 1994 (2) BCLR 23(D) at 36C-G; 1995 (1) SA 433 (D) at 445F-J.

containing the substance of the evidence of State witnesses to be called at a trial in the Supreme Court. That right is substituted with a summary of substantial facts of the case which "in the opinion of the Attorney-General are necessary to inform the accused of the allegations against him and that will not be prejudicial to the administration of justice and the security of the State, as well as a list of names and addresses of the witnesses the Attorney-General intends calling at the summary trial"[34]. The contents of the summary do not bind the State and the Attorney-General is entitled to withhold the name and address of a witness if he or she is of the opinion that the witness may be tampered with or be intimidated or that it would be in the interest of the security of the State that the name and address of such witness be withheld[35]. The omission of the name or address of a witness from the list in no way affects the validity of the trial[36].

[20] Apart from this summary, the accused in such proceedings is entitled to be furnished with further particulars of any

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[34] Section 144(3)(a) of the Criminal Procedure Act.

[35] Sections 144(3)(a)(i) and (ii) of the Criminal Procedure Act.

[36] Section 144(3)(a)(iii) of the Criminal Procedure Act.

matter alleged in the charge[37]. If the prosecution does not supply the particulars requested, the Court may order it to do so, if it is satisfied that they are necessary for the proper preparation of the defence of the accused[38]. The particulars directed must be "particulars of any matter alleged in that charge" in terms of section 87 and the Court is entitled to have regard to the summary of substantial facts in determining whether they are necessary for the preparation of the defence of the accused[39].

[21] Although an accused indicted in the Supreme Court is entitled to the summary of substantial facts in terms of section 144, other accused are not. Very many serious and complicated criminal cases are heard in the Regional Courts and sometimes in the District Courts. In terms of the Criminal Procedure Act, the accused in such cases does not enjoy the advantage of either a preparatory examination or "a summary of the substantial facts of the case". The particularity to which the accused is entitled must either be contained in the charge sheet itself or in any further particulars granted or directed in terms of section 87.

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[37] Section 87 of the Criminal Procedure Act.

[38] *S v Cooper and Others* 1976(2) SA 875 (T) at 885H; *R v Moyage and Others* 1958(2) SA 400 (A) at 413B.

[39] *S v Mpetha and Others* (1) 1981 (3) SA 803 (C) at 809F.

[22] In all proceedings, in superior or in inferior Courts, evidence of State secrets, the identity of informers and communications between a legal advisor and a client have at all relevant times before the enactment of the Constitution been protected from disclosure by the rules of privilege set out in *Steyn's* case.[40]

[23] It is necessary to examine the provisions of the Constitution in the light of the law pertaining to the right of an accused person to access to any of the contents of police dockets, to which I have referred. Three constitutional provisions are clearly relevant in this regard. They are sections 23, 25(3) and 33. Section 23 provides :

> "23. Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights."

Section 25(3) provides :

> "(3) Every accused person shall have the right to a fair trial, which shall include the right -
> (a) .. ....
> (b) to be informed with sufficient particularity of the charge;
> (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during the trial;

[40] *Supra* n.9, at 330D-E; *Khala v Minister of Safety and Security, supra* n.25, BCLR at 98H; SA at 228I-J; *Du Toit:* Commentary on the Criminal Procedure Act, at 23-42E.

(d) to adduce and challenge evidence, and not to be a compellable witness against himself or herself; ..."

These sections must be read with section 33 which reads as follows:

"33(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation -
(a) shall be permissible only to the extent that it is -
(i) reasonable; and
(ii) justifiable in an open and democratic society based on freedom and equality; and
(b) shall not negate the essential content of the right in question, and provided further that any limitation to -
(aa) a right entrenched in section ....25; or
(bb) a right entrenched in section ....23, in so far as such right relates to free and fair political activity,
shall, in addition to being reasonable as required in paragraph (a)(I), also be necessary."

"Law of general application" within the meaning of section 33(1) would ordinarily include a rule of the common law[41].

[24] In the interpretation of these three sections of the Constitution it is relevant also to have regard to the provisions of section 35 which read as follows:

"35.(1) In interpreting the provisions of this Chapter a Court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

[41] Section 33(2) of the Constitution.

> (2) No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.
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> (3) In the interpretation of any law and the application and development of the common law and customary law, a Court shall have due regard to the spirit, purport and objects of this Chapter."

[25] Section 35 articulates also the dominant theme of the Constitution, expressed both in the preamble and in the postscript, which is to emphasize the "historic bridge" which the Constitution provides between a past based on "conflict, untold suffering and injustice" and a future which is stated to be founded on the recognition of human rights.

[26] What is perfectly clear from these provisions of the Constitution and the tenor and spirit of the Constitution viewed historically and teleologically, is that the Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of Apartheid and racism to a constitutionally protected culture of openness and

democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised.[42] The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is "justifiable in an open and democratic society based on freedom and equality". It is premised on a legal culture of accountability and transparency.[43] The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment.

[27] This approach has been consistently followed in Southern Africa.[44] Even in jurisdictions without our peculiar history, national Constitutions, and Bills of Rights in

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[42] *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC), para 262; 1995 (3) SA 391 (CC),para 262.

[43] See sections 8; 10; 11; 13; 15; 21; 22; 23; 25; 33 and 35 of the Constitution.

[44] *S v Zuma and Others* 1995 (4) BCLR 401 (CC); 1995(2) SA 642 (CC) at para's 15 - 18; *S v Makwanyane and Another, supra* n.42, para's 9, 262, 302, 323, 362 and 373; *Mwandinghi v The Minister of Defence,* Namibia 1991 (1) SA 851 (Nm) at 857G-858E; *Minister of Defence, Namibia v Mwandinghi*; 1992 (2) SA 355 (Nm) at 362G-363B; *S v Marwane* 1982 (3) SA 717 (A)at 748-9.

particular, are interpreted purposively to avoid the "austerity of tabulated legalism".[45]

[28] The fact that the Constitution contains, in material respects, a new and fundamental commitment to human rights and is not merely a contemporization and incremental articulation of previously accepted and entrenched values shared in our society, is illustrated by the approach of the Appellate Division in the cases of *S v Rudman and another; S v Mthwana*.[46] Nicholas AJA, giving the judgment of the Court, rejected the suggestion that recourse could be had to the principle of a "fair trial" to justify the finding that an indigent accused person who did not have the means to pay for his or her own defence was entitled to be provided with legal representation, if necessary, at the expense of the State.[47] He stated that none of the authorities relied on in the case of *S v Davids*[48] -

> "when viewed in their contextual setting, afford any support for the learned Judge's basic premise that the

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[45] *Minister of Home Affairs (Bermuda) v Fisher* 1980 AC 319 (PC) at 328- 329; *Attorney-General of the Gambia v Momodou Jobe* (1984) AC 689 at 700; *R v Big M Drug Mart Ltd* (1985) 18 DLR (4ed) 321 (SCC) at 395; *Boyd v United States* 116 US 616 at 635; *Attorney General v Moagi* 1982(2) Botswana LR 124 at 184.

[46] 1992 (1) SA 343(A).

[47] See *S v Davids; S v Dladla* 1989 (4) SA 172 (N) at 178C-E.

[48] *supra* n.47.

> touchstone in a procedural appeal is whether the trial was unfair ..... The Court of Appeal 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 civilized systems of criminal administration". The enquiry is whether there has been an irregularity or an illegality, that is a departure from the formalities, rules and principles of procedure according to which our law required a criminal trial to be initiated or conducted...."[49]

[29] The basic distinction made by Nicholas AJA is between an attack made on behalf of an accused person on the general ground that his or her "right to a fair trial" was breached and an attack on the narrow ground that certain specific rules and formalities which were entrenched in the law were not satisfied. The latter attack was held to be competent. The former was not. It is precisely this distinction which is affected by section 25(3) of the Constitution, which expressly guarantees to every accused person the right to a fair trial.[50] If such a fair trial is denied to an accused it can found a competent attack on any ensuing conviction. The accused is not limited to an attack on any specific rules and formalities entrenched in the Criminal Procedure Act. The Constitution imports a radical movement away from the previous state of the law.

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[49] *Rudman's case, supra* n.46, at 376J - 377C.

[50] *Zuma's case, supra* n.44, para 16.

[30] The crucial issue which needs to be determined is whether the "blanket docket privilege" from the pre-constitutional era can survive the application of Chapter 3 of the Constitution. The determination of that issue requires a consideration of the various factors impacting on the consequences of any departure from the rule in *Steyn's* case.[51]

[31] There has been considerable debate in the different divisions of the Supreme Court on the issue as to whether or not section 23 of the Constitution is of application when an accused person seeks access to the contents of a police docket in order to advance his or her defence. Some Courts have held that it did; others that it was

[51] *supra* n.9.

uncertain.[52] In some cases it was positively argued that section 23 has no application.[53]

[32] In support of the contention that section 23 is of application to such proceedings, reliance is substantially placed on the unqualified language of section 23 and the escalating human rights jurisprudence pertaining to the right to official information.[54]

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[52] The cases that held that section 23 was of application include: *S v Majavu* 1994 (2) BCLR 56 (CkGD) at 76D-77E; 1994 (4) SA 268 (Ck)at 309D; *S v Sefadi, supra* n.33, BCLR at 28F-I and 36I; SA at 438B-E; *S v Botha en Andere* 1994 (3) BCLR 93 (W) at 121I-124H; 1994 (4) SA 799 (W) at 831G and 834F; *Phato v Attorney-General, Eastern Cape and Another; Commissioner of the South African Police Services v Attorney-General, Eastern Cape, and Others* 1994 (5) BCLR 99 (E) at 112E-114B; 1995 (1) SA 799 (E) at 814D-816B; *Khala v The Minister of Safety and Security, supra* n.25, BCLR at 96F-G; SA at 226G-H; 97A and 107G; *Qozoleni v Minister of Law and Order and Another* 1994 (1) BCLR 75 (E) at 89C-E; 1994 (3) SA 625(E) at 642G-H; *S v Smith and Another* 1994 (1) BCLR 63 (SE) at 70J-71B; 1994 (3) SA 887 (SE) at 895G-H; *Nortje and Another v The Attorney-General of the Cape and Another* 1995 (2)BCLR 236 (C)at 249J-250E; 1995(2) SA 460 (C) at 473H - 474D; *S v Fani, supra* n.32, BCLR at 45D-G; SA at 621B-E; *S v de Kock* 1995 (3) BCLR 385 (T) at 391H and 392I-393A; *S v Mtyuda* 1995(5) BCLR 646 (E) at 648B-649D; *S v Khoza en Andere* 1994 (2) SASV 611 (W) at 617F; *Shabalala's case, supra* n.1 BCLR at 119F-H; SA at 643A-C.

The cases that held that it was uncertain whether or not section 23 was of application include: *S v James* 1994 (1) BCLR 57 (E)at 61C-I; 1994 (3)SA 881 (E) at 885C-I; *S v Dontas and Another* 1995(3) BCLR 292 (T) at 300D.

[53] See for example, *Nortje and Another v Attorney-General of the Cape and Another, supra* n. 52, BCLR at 249J-250B; SA at 473H-J; *Shabalala's* case, *supra* n.1, BCLR at 97D-G; SA at 620F-I.

[54] See for example, *Khala v The Minister of Law and Order and Another, supra* n.25, BCLR at 95 and 96; SA at 225 and 226; *S v Majavu, supra* n.52, BCLR at 76J-77H; SA at 308H-309F; *Phato's case, supra* n.52, BCLR at 112E-114C; SA at 814D-816D; *S v Botha, supra* n.52, BCLR at 121; SA at 830I-831G.

[33] The opposing contention is substantially founded on the maxim *generalia specialibus non derogant*, the contention being that rights of an accused person in a trial are regulated by the specific provisions of section 25(3) and not by the general provisions of section 23. It is also contended that section 23 was not intended to be a "discovery" mechanism in criminal trials, but a right conferred on citizens to compel disclosure of information in the public interest.[55]

[34] The application for the production of documents in the present case was made during the course of a criminal prosecution of the accused. In that context, not only is section 25(3) of the Constitution of direct application in considering the merits of that application, but it is difficult to see how section 23 can take the matter any further. If the accused are entitled to the documents sought in terms of section 25(3), nothing in section 23 can operate to deny that right and conversely, if the accused cannot legitimately contend that they are entitled to such documentation in terms of section 25(3) it is difficult to understand how they could, in such circumstances, succeed

[55] See, for example, ***Botha's*** case, ***supra*** n.52, BCLR at 120H-I; SA at 830E-G; ***Nortje's*** case, ***supra*** n. 52, BCLR at 249J-250A; SA at 473H; ***S v James, supra*** n.52, BCLR at 61C-61J; SA at 885C-J; ***Shabalala's*** case, ***supra*** n.1 at 97D; SA at 620F-H.

in an application based on section 23. The real enquiry therefore is whether or not the accused were entitled to succeed in their application on the basis of a right to a fair trial asserted in terms of section 25(3).[56]

[35] Section 25(3) must, of course, not be read in isolation but together with Section 23 and in the broad context of a legal culture of accountability and transparency manifested both by the preamble to the Constitution and the detailed provisions of Chapter 3.[57]

[36] The basic test in the present matter must be whether the right to a fair trial in terms of section 25(3) includes the right to have access to a police docket or the relevant part thereof. This is not a question which can be answered in the abstract. It is essentially a question to be answered having regard to the particular circumstances of each case.

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[56] Many cases illustrate the application of the right to a fair trial. See for example, *Stinchcombe v The Queen* 18 C.R.R (2d) 210; *Regina v Egger* 103 DLR (4th) 678; *R v Leyland Magistrates, ex parte Hawthorn* [1979] 1 All ER 209 Q.B.; *R v Maguire and Others* [1992] 2 All ER 433 C.A.; *Regina v Ward* [1993] 1 WLR 619 C.A.; *Regina v Brown* (Winston) [1994] 1 WLR 1599 C.A.; *S v Nassar* 1994 (5) BCLR 60 (Nm); *Bendenoun v France* 18 EHRR 54; *Hentrich v France,* European Court of Human Rights, case No 23/1993/418/497, judgment dated 22 September 1994.

[57] *S v Makwanyane, supra* n.42, para 10.

[37] Ordinarily, an accused person should be entitled to have access at least to the statements of prosecution witnesses but the prosecution may, in a particular case, be able to justify the denial of such access on the grounds that it is not justified for the purposes of a fair trial. What a fair trial might require in a particular case depends on the circumstances. The simplicity of the case, either on the law or on the facts or both; the degree of particularity furnished in the indictment or the summary of substantial facts in terms of section 144 of the Criminal Procedure Act; the particulars furnished pursuant to section 87 of the Criminal Procedure Act;[58] the details of the charge read with such particulars in the Regional and District Courts, might be such as to justify the denial of such access. The accused may, however, be entitled to have access to the relevant parts of the police docket even in cases where the particularity furnished might be sufficient to enable the accused to understand the charge against him or her but, in the special circumstances of a particular case, it might not enable the defence to prepare its own case sufficiently, or to properly exercise its

[58] The application of the law pertaining to the adequacy of the particulars furnished might have to be re-examined having regard to the "spirit, purport and objects" of the Constitution.

right "to adduce and challenge evidence";[59] or to identify witnesses able to contradict the assertions made by the State witnesses; or to obtain evidence which might sufficiently impact upon the credibility and motives of the State witnesses during cross-examination; or to properly instruct expert witnesses to adduce evidence which might similarly detract from the probability and the veracity of the version to be deposed to by the State witnesses; or to focus properly on significant matters omitted by the State witnesses in their depositions; or to properly deal with the significance of matters deposed to by such witnesses in one statement and not in another or deposed to in a statement and not repeated in evidence; or to hesitations, contradictions and uncertainties manifest in a police statement but overtaken by confidence and dogmatism in *viva voce* testimony.

[38] In other cases, which might include a substantial number of routine prosecutions in the inferior Courts, there might be scant justification for allowing such access to police dockets in order to ensure a fair trial for the accused. This would be the case where there is a simple charge in respect of a minor offence involving no complexities of

[59] section 25(3)(d).

fact or law, in which there is no reasonable prospect of imprisonment,[60] and in which the accused can easily adduce and challenge the evidence which the State might lead against him or her, through an analysis of the charge-sheet and any particulars furnished in respect thereof. Hundreds of routine prosecutions in respect of such minor offences take place every day in the Magistrates' Court following upon some kind of acrimony or brawl during a weekend, in which an accused might have become involved. There would ordinarily be little sense in requiring copies of the whole docket to be prepared and made available to the accused in order to dispose of such prosecutions. In such cases where access to witnesses' statements is nevertheless justified it does not follow that copies of witnesses' statements have to be furnished. It might be sufficient to give the defence an opportunity of looking at such statements. No rigid rules are desirable. It is for the trial Court to exercise a proper discretion having regard to the circumstances of each case.

[39] Even in prosecutions in the Supreme Court, the State might successfully contend that, having regard to the particulars in the indictment, read with the summary of substantial

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[60] *Leach v The Ministry of Transport* (1993) 1 NZLR 106.

facts and any particulars obtained under section 87 of the Criminal Procedure Act, access to the contents of the police docket itself is not justified by the need to ensure a fair trial. The Court would have to have regard to all the relevant circumstances in identifying whether the right to a fair trial in a particular case should include the right of access to the police docket. If the answer is in the negative, the application for such access must fail. If the answer is in the affirmative, the Court would ordinarily direct that access by the accused to the relevant parts of the police docket be allowed unless the rule in *Steyn's* case[61] is held to be consistent with the Constitution. It accordingly becomes necessary to examine the constitutionality of the rule in *Steyn's* case.[62]

[40] The approach to the constitutionality of the rule in *Steyn's* case,[63] insofar as it pertains to witnesses' statements, involves an analysis of what that rule seeks to protect. It seems to me that the following is included in the protection -

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[61] *supra* n.9.

[62] *supra* n.9.

[63] *supra* n.9.

1 the statements of witnesses which need no protection on the grounds that they deal with State secrets, methods of police investigation, the identity of informers, and communications between a legal advisor and his client;

2 the statements of witnesses in circumstances where there is no reasonable risk that such disclosure might lead to the intimidation of such witnesses or otherwise impede the proper ends of justice;

3 the statements of witnesses made in circumstances where there is a reasonable risk that their disclosure might constitute a breach of the interests sought to be protected in paragraph 1; and

4 the statements of witnesses made in circumstances where their disclosure would constitute a reasonable risk of the nature referred to in paragraph 2.

[41] The blanket rule in *Steyn's* case[64] denies an accused person access to the statements of State witnesses in all cases falling within all four categories referred to in paragraph 40, regardless of the circumstances. The first question which needs to be considered is whether such a "blanket"

[64] *supra* n.9.

rule of exclusion is constitutional; and secondly, what the consequences are if it is not?

[42] In the determination of those issues it is important to have regard to all the factors which impact on the reasonableness of, and the justifiability and the necessity for, the limitation and on whether or not the limitation negates the essential content of the right. There are factors which support the limitation and others which do not. All these factors must be balanced against each other, regard being had to the purposes sought to be attained both by the right which is protected and the limitation which is claimed to be authorized. What are these factors?

[43] The dominant argument advanced on behalf of the accused to support the attack on the limitations introduced by the rule in *Steyn's case*[65], is that it potentially enables the State to invade their right to a fair trial in terms of section 25(3). It is contended that this is not reasonable or justifiable or necessary. If an accused requires the documents protected by the rule in *Steyn's case*[66] in order

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[65] *supra* n.9.

[66] *supra* n.9.

to have a fair trial, it is argued that both justice and the public interest require that these documents should not be denied to the defence. There would otherwise be the danger of a conviction following upon a trial which is *ex hypothesi* not fair within the meaning of section 25(3). This is obviously a formidable argument. The interests of the accused must, however, be balanced against other legitimate considerations.

[44] A number of general objections have been articulated in support of the privilege against the disclosure of all the statements described in the categories referred to in items 1 to 4 in paragraph 40 above. It is necessary to examine more carefully these objections, which are common to all these categories.

[45] It was contended in the first place on behalf of the State that the written statements of witnesses made to the police are very frequently inaccurate because of administrative and language difficulties and because they have to be obtained under pressure during the initial stage of investigations. It was suggested that disclosure of such statements might lead to cross-examination which might, in the circumstances, unfairly impact on the credibility of

the relevant witnesses who might be deposing to fuller and more carefully considered evidence in Court.[67] Balanced against the dominant interest of the accused to a fair trial, this objection loses much of its impact particularly when regard is had to the fact that the Court must be credited with the capacity of making proper allowances in its judgment for the circumstance that the statement might have been compiled hastily by police officers with administrative, linguistic and logistical problems. The possibility that such statements may be disclosed might also serve as an incentive to investigating officers to compile statements as accurately and as carefully as the circumstances permit.

[46] A recurrent theme which asserts itself in some of the cases is that the disclosure of witnesses' statements might enable an accused person to "tailor" evidence and to give perjured testimony because he or she becomes alive to the fact that the falseness of such evidence may not be detected by the prosecution on the information available to

[67] See for example, *Steyn's case, supra* n.9, at 35G-H, *S v Jija and others* 1991 (2) 52(E) at 64D-F; *S v Botha and Others, supra* n.52, BCLR at 98 G-J; SA at 807H-808B; *Shabalala's case, supra* n.1, BCLR at 102I-J; SA at 626B-D; *S v Majavu, supra* n.52, BCLR at 79C; SA at 310J-311B; *S v Dontas and Another, supra* n.52, BCLR at 301H-302B; *S v Nassar, supra* n.52, at 84 B-D; *Phato's case, supra* n.52, BCLR at 124D-E; SA at 826G-I.

it from the State witnesses.[68] This objection is conjectural and it must be balanced against other factors which have to be weighed in dealing with an accused's insistence that he or she has a right to a fair trial. An alert prosecutor and a competent Court would be able to make adequate allowance for the fact that in the assertion of his or her defence the accused has had the benefit of access to the statement of the State witness and any falsity in the evidence of the accused may be capable of being exposed by establishing other relevant issues. Many enquiries are obvious. When was the defence raised for the first time? What previous opportunities were there to do so? Is the defence consistent not only with the statements of the State witness but with other objective evidence and the probabilities? Is the accused person consistent and credible when the defence is tested? It is also dangerous to assume that every accused person seeking a disclosure of the statements of State witnesses is in fact guilty and is merely seeking an opportunity to fabricate perjured evidence. The presumption of innocence, fundamental to the

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[68] *Steyn's case, supra* n.9, at 333F-H; *Knapp v Harvey* 1911(2) KB 725 at 730-731; *Shabalala's case, supra* n.1, BCLR at 103B-E; SA at 626D-G; *S v Tune* 98 Atlantic Reporter 2d series, 881 at 884 to 886; *S v Majavu supra*, n.52, BCLR at 81B; SA at 312I-313B; *S v Dontas and Another, supra* n.52, BCLR at 301H-302D; *Stinchcombe v The Queen, supra* n.56, at 216; *Nortje and Another v The Attorney-General of the Cape and Another, supra* n.52, BCLR at 255H-256A; SA at 479G-480A; *S v Sefadi, supra* n.33, BCLR at 38B-F; SA at 447E-I; *S v Nassar, supra* n.56, at 75E-F.

criminal law, does not support such an approach. In many cases disclosure would be sought by innocent persons who are assisted by such disclosure in seeking corroborative evidence and probabilities which might establish their innocence.[69] Even in the case of a guilty person the disclosure might sometimes have the opposite effect to the danger suggested. A guilty accused might often genuinely believe that the State would not succeed in proving its case beyond a reasonable doubt, but an examination of the statements of State witnesses might induce the accused to plead guilty and abandon his or her previous plan strenuously and vigorously to contest the State's case.[70] Undoubtedly there are cases in which the disclosure of the statements might remove the tactical advantage of surprise with which the prosecution might successfully have confronted the accused in an ambush. But this does not appear to me to be a sufficiently decisive and pervading consideration to justify denying to an accused person in all cases a right, which he or she has otherwise demonstrated, to the disclosure of the statements for the purposes of a fair trial. Generally,

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[69] See for example, *R v Maguire and Others, supra* n.56 and *Regina v Ward, supra* n.56.

[70] See *Stinchcombe v The Queen, supra* n.56, at 215-216.

> "the search for truth is advanced rather than retarded by disclosure of all relevant material."[71]

[47] It has also been suggested that any obligation on the State to disclose witnesses' statements will place an onerous burden on the prosecution and may lead to delays in bringing an accused to trial.[72] In my view this is not an objection of any great weight. Witnesses' statements have to be prepared in any event in many cases before a charge is proffered and in almost all cases before the trial commences. As I have previously said, such disclosure will not be necessary in a large number of cases because the State may be able successfully to contend that, regard being had to the relative triviality of the charge or its inherently simple content or the particularity already furnished to the accused or from such other circumstances, no access to the police docket is justified for the purposes of ensuring a fair trial for the accused. However, even in cases where the State does not establish such justification, it would not lead to substantial delays

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[71] *Stinchcombe's case, supra* n.56, at 216; See also, *S v Nasser, supra* n.56, at 75E-F; *Khala's case, supra* n.25, BCLR at 111E-J; SA 242E-J; *S v Sefadi, supra* n.33, BCLR at 38C; SA at 447F; *S v Botha and Others, supra* n.52, BCLR at 114C; SA at 823I; *Phato's case, supra* n.52, BCLR at 125D-I; SA at 827H-828D; *S v Fani, supra* n.32, BCLR at 46B; SA at 621I; *International Tobacco Company v The United Tobacco Companies Ltd* (2) 1953 (3) SA 879 (W) at 883D; *S v Mayo supra* n. 23 at 661 (G); *S v Jija, supra* n.67, at 60H-618B.

[72] *R v Steyn, supra* n.9, at 334H; *Stinchcombe v The Queen, supra* n.56, at 215; *S v Nasser, supra* n.56, BCLR at 74J; *S v Sefadi, supra* n.33, BCLR at 25H-I; SA at 435E; *Phato's case, supra* n.52, BCLR at 123I-J; SA at 826C.

or burdens upon the State, because the statements will in any event have had to be prepared for the prosecution to commence. Indeed, in many cases the prior production of witnesses' statements might even shorten the kind of delays which sometimes occur during the trial when the defence asks for opportunities to "obtain instructions" for cross-examination. As I previously remarked, the disclosure might in many instances lead to guilty pleas and shorten delays which would otherwise result.[73]

[48] A related objection is that the trial might become side-tracked into "extraneous issues" as to what a witness might or might not have said on a previous occasion.[74] Such issues may not always be so extraneous. They might be crucial to determine the guilt or innocence of the accused. In cases where they might be of peripheral relevance and of no effective assistance to the Court, the presiding officer has the authority and the experience to control the resultant debate and not to accord to it a weight disproportionate to its importance.

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[73] *Stinchcombe's case, supra* n.56, at pages 215-216.

[74] *R v Steyn, supra* n.9, at 335A; *S v Majavu, supra* n.52, BCLR at 80D-E; SA at 312C-D; *S v Sefadi, supra* n.33, BCLR at 25H-I; SA at 435E-F.

[49] It is also contended that the disclosure of statements might lead to intimidation of witnesses and be prejudicial to the ends of justice or to State interests.[75] It is difficult to see the force of this argument with respect to statements falling within the categories referred to in items 1 and 2 of paragraph 40 above. Any interests of the State in the non-disclosure of such statements must substantially be outweighed by the right of the accused person to obtain access to such statements for the purposes of a fair trial.

[50] If the conflicting considerations are weighed, there appears to be an overwhelming balance in favour of an accused person's right to disclosure in those circumstances where there is no reasonable risk that such disclosure might lead to the disclosure of the identity of informers or State secrets or to intimidation or obstruction of the proper ends of justice. The "blanket docket privilege" which effectively protects even such statements from disclosure therefore appears to be unreasonable, unjustifiable in an open and democratic society and is certainly not necessary.

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[75] *S v Botha and Others, supra* n.52, BCLR at 98E-H; SA at 807E-I; *Khala v The Minister of Safety and Security, supra* n.25, BCLR at 101B-J; SA at 231E-232D; *S v Majavu, supra* n.52, BCLR at 79J-80J; SA at 311B-I; *Stinchcombe v The Queen, supra* n.56 at 216-217.

[51] What about statements falling within items 3 and 4 of paragraph 40? The claim of the accused to the statements referred to in these categories, however justifiable on its own for the purposes of a fair trial, must be weighed against conflicting interests of real substance. The result of affording access to such statements to the accused in these circumstances may indeed impede the proper ends of justice and lead to the intimidation of witnesses. An open and democratic society based on freedom and equality is perfectly entitled to protect itself against such consequences.[76] These dangers clearly exist during the trials of members of crime syndicates who sometimes use organised tactics of terror to prevent witnesses coming forward to give evidence.

[52] In such circumstances it might be proper to protect the disclosure of witnesses' statements and the State might succeed in establishing that such a restriction is reasonable, justifiable in an open and democratic society based on freedom and equality and that it is necessary and does not negate the essential content of a right to a fair

[76] see, for example, *Stinchcombe v The Queen, supra* n.56, at 217; *Commissioner of Police v Ombudsman* (1988) 1 NZLR 385 at 395.

trial.[77] Even in such cases, however, it does not follow that the disclosure of the statements concerned must always be withheld if there is a risk that the accused would not enjoy a fair trial. The fair trial requirement is fundamental. The court in each case would have to exercise a proper discretion balancing the accused's need for a fair trial against the legitimate interests of the State in enhancing and protecting the ends of justice.

[53] The real problems arise, however, not with this principle but with its application. Who determines whether there is a reasonable risk that the disclosure of such statements might reasonably lead to the intimidation of witnesses or the disclosure of State secrets or the identity of informers or otherwise impede the proper ends of justice and how is that to be decided? And how is that to be balanced against the right of the accused to a fair trial in a particular case? The rule in *Steyn's case*[78] would protect these statements from disclosure on the sole jurisdictional ground that they are contained within the police docket without any need for the prosecution to show

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[77] Section 33 of the Constitution; *Khala v The Minister of Safety and Security, supra* n.25, BCLR at 98E-F; SA at 228F-H; *Qozoleni v The Minister of Law and Order and Others, supra* n.52 BCLR at 87B-F; SA at 640F-J; *S v Makwanyane and Others, supra* n.42, para's 102, 217, 297.

[78] *supra* n.9.

that the disclosure of the relevant statement would involve a breach of the nature referred to in item 3 of paragraph 40 above or the risk referred to in item 4. That, appears to me, to be unacceptable. If there is no obligation on the part of the prosecution to justify its claim, injustice towards the accused might be a real and indefensible risk. The alternative is therefore to entrust the Court with the task of enquiring whether the disclosure of the relevant documents fall within the categories referred to in items 3 or 4 of paragraph 40 above, because it would then be able to exercise a proper discretion on the facts of a particular case in order to decide whether the State should or should not be compelled to make the statement available to the defence. It is not, however, a course unattended by some difficulties. In order to exercise a proper discretion the Court would have to be equipped with the contents of the relevant statements so as to decide on the weight to be attached to the objection proffered on behalf of the State to their disclosure. Ordinarily the Court would want to hear the input of the accused in that regard but, if the accused had access to the very documents sought to be protected in order to make a proper input, the whole object of the protection might be defeated. Conceivably, even disclosure of peripheral information, not directly leading to the disclosure of the statements sought to be

protected, might prejudice the State's interest. In the result, the State might be compelled either to disclose a statement in circumstances where the proper ends of justice are impeded or to abandon, perhaps, what might be a prosecution of substantial merit.

[54] These arguments are clearly not without merit, but they must be weighed against the compelling objection that, if the claims of the State in justification of non-disclosure are not subject to judicial adjudication, an accused person might wrongly be refused access to statements and documents which the accused legitimately needs for his or her defence. There is therefore the danger of an unfair trial.

[55] How are these conflicting considerations to be resolved? This is an issue largely to be determined by the Supreme Court, regard being had to the following:

a) It is difficult to conceive of any circumstances in which the prosecution can justify withholding from the accused access to any statement or document in the

police docket which favours the accused or is exculpatory.[79]

b) The unilateral claim of the prosecution in its justification of a refusal to allow access on the grounds that such access might defeat the objects of the protection in items 3 and 4 of paragraph 40 above cannot be sufficient in itself.

c) Sufficient evidence or circumstances ought to be placed before the judicial officer to enable the Court to apply its own mind in assessing the legitimacy of the claim. It is for the Court to decide what evidence would be sufficient in a particular case and what weight must be attached thereto.

d) Inherently there might be some element of uncertainty as to whether the disclosure of the relevant documents might or might not lead to the identification of informers or to the intimidation of witnesses or the impediment of the proper ends of justice. The judgment of the prosecuting and investigating authorities in regard to the assessment of such risks might be a very potent factor in the adjudication process. Police officers with long experience and

[79] *Regina v Keane,* [1994] 2 ALL ER 478; *R v Leyland Magistrates, ex parte Hawthorn, supra* n.56; *R v Ward, supra* n.56; *R v Brown (Winston), supra* n. 56; *Stinchcombe v The Queen, supra* n.56.

acquired skills and with access to sources which can sometimes not be disclosed, quantified and identified, have an advantage which the Court does not always have. What the prosecution must therefore be obliged to do (by a proper disclosure of as much of the evidence and material as it is able) is to establish that it has reasonable grounds for its belief that the disclosure of the information sought carries with it a reasonable risk that it might lead to the identity of informers or the intimidation of witnesses or the impediment of the proper ends of justice. It is an objective test. It is not sufficient to demonstrate that the belief is held *bona fide.* It must be shown that a reasonable person in the position of the prosecution would be entitled to hold such a belief.

e) If the State is unable to justify its opposition to the disclosure of the relevant information on these grounds, its claim that a refusal of access to the relevant documents is justified, should fail.

f) If, in the special circumstances of a particular case, the Court needs access to disputed documents concerned in order to make a proper assessment of the legitimacy of the prosecution’s claim and any insight in that document might reasonably defeat the object of the

protection which the prosecution is anxious to assert, the Court would be entitled to examine such a document for this purpose without affording to the accused a opportunity of any knowledge of its contents but making proper allowance for that factor in the ultimate act of adjudication.[80]

g) Even where the State has satisfied the Court that there is a reasonable risk that the disclosure of the statements or documents sought might impair the protection and the concerns referred to in items 1 or 2 of paragraph 40 above or in any way impede the proper ends of justice, it does not follow that access to such statements in such circumstances must necessarily be denied to the accused. The Court still retains a discretion. There may be circumstances where the non-disclosure of such statements might carry a reasonable risk that the accused may not receive a fair trial and might even wrongly be convicted. The Court should exercise a proper discretion in such cases by balancing the degree of risk involved in attracting the consequences sought to be avoided by the prosecution (if access is

[80] see, for example, ***Regina v Davis,*** [1993] 1 W.L.R. 613***; Regina v Ward, supra*** n.56***; Regina v Keane supra*** n.79; ***Regina v Brown (Winston), supra*** n.56***; Stinchcombe v The Queen, supra*** n.56 at 219.

permitted) against the degree of the risk that a fair trial might not ensue (if such access is denied). What is essentially involved is a judicial assessment of the balance of risk not wholly unanalogous to the function which a judicial officer performs in weighing the balance of convenience in cases pertaining to interdicts *pendente lite.*

h) It clearly follows from these conclusions that the blanket rule of privilege articulated in *Steyn's* case[81] cannot survive the discipline of the Constitution.

[56] In making the aforegoing analysis I have addressed only the issue as to whether and in what circumstances the contents of witnesses' statements should or should not be disclosed to an accused person for the purposes of the proper conduct of the defence. The next issue which arises is when such disclosure must be made if the State fails to justify a refusal to allow the accused access to such material. In many cases such disclosure would be made at the time when the accused is acquainted with the charge or the indictment or immediately thereafter.[82] But if the prosecution succeeds in justifying its assertion that there is a

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[81] *supra* n.9.

[82] cf *S v Khoza, supra* n.52 at 617.

reasonable risk that the disclosure of such material at that stage might impede the proper ends of justice and the Court does not exercise its discretion in favour of the accused at that time, it does not follow that the relevant statements or documents will necessarily remain forever protected during the course of the prosecution. There is a need to assess the extent of the risk at all relevant times during the prosecution. It may be possible to disclose certain parts and not others or some parts earlier than others. There may, for example, be adequate and demonstrable justification for the apprehension that, if the statement of a particular witness is disclosed, there is a reasonable risk that such a witness would be intimidated and would thereafter refuse to testify if his or her identity became known. That objection would, however, not necessarily apply once the witness has given evidence in chief because by that time his or her identity will obviously be known in any event. There might in such circumstances be no justification for refusing to allow the defence to have access to the statement of the witness for the purpose of enabling it to test the consistency of that statement with his or her evidence in chief or any other assertions the witness might make during cross-examination. The crucial determinant is what is fair in the circumstances, regard being had to what might be

conflicting but legitimate considerations. "What the charter guarantees is a fair trial, not the most favourable procedure imaginable and the fairness involves the weighing of the public interests in the equation."[83] Again, it follows from this that the rule in *Steyn's* case[84] is clearly unsustainable in its present form.

[57] In making this analysis I have substantially confined myself to the problem of access to witnesses' statements included in the police docket. There might be other documents in the docket such as expert and technical reports, for example, which might also be important for an accused to properly "adduce and challenge evidence",[85] and therefore for the purposes of ensuring a fair trial. Such documents would seem to fall within the same principles which I have discussed in dealing with witnesses' statements.

[58] The details as to how the Court should exercise its discretion in all these matters must be developed by the Supreme Court from case to case but always subject to the

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[83] Per La Forest, *Thompson Newspapers Limited and Others v Directer of Investigation and Research and Others* 67 DLR 161 at 260.

[84] *supra* n.9.

[85] Section 25(3)(d) of the Constitution.

right of an accused person to contend that the decision made by the Court is not consistent with the Constitution.

Consultations with State Witnesses

[59] The Court *a quo* refused the applications of the accused to consult with the witnesses for the State on the ground that it could not conclude that the accused would not be given a fair trial without that relief. Cloete J stated, however, that-

> "the Courts have repeatedly given effect to the practice whereby an accused or his legal representative may only consult with a State witness with the consent of the prosecutor."[86]

[60] The practice to which Cloete J refers does indeed appear from the authorities which he quotes.[87] The origins of this practice do not appear to rest on any specific provision of the common law or any relevant statutory provision. It seems clearly to be founded on ethical rules of professional practice both in South Africa and abroad. The South African rule is Rule 4.3.2 of the Uniform Rules of Professional Ethics of the various Societies of Advocates. It reads as follows:

> **"4.3.2 Criminal Proceedings**

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[86] *Shabalala's case, supra* n.1, BCLR at 121B-C; SA at 644G.

[87] *S v Hassim and Others* 1972 (1) SA 200 (N); *S v Mangcola and Others* 1987(1) SA 507 (C); *S v Tjiho* 1992(1) SACR 639 (Nm); *S v Gquma and Others (3)* 1994(2) SACR 187 (C).

(a) Unless they have obtained the permission of the attorney-general or of the prosecutor to do so, and unless they comply with any conditions which either of the latter may have imposed when granting such permission, the legal representatives of an accused person may not, at any time after the accused person has been arrested or charged and before he has been convicted or acquitted in respect of the charge against him, interview any other person in connection with such charge or the evidence relating thereto whom they know to be a witness for the prosecution in relation to such charge.

(b) It is the duty of the legal representatives of an accused person, when they do not know whether or not any other person is a witness for the prosecution in relation to the charge against the accused person but when the circumstances are such that it is reasonable to suppose that such other person may be, to ascertain either from such other person or from the prosecutor or the police, before endeavouring to interview such other person in circumstances in which to do so is prohibited in terms of paragraph (a) above, whether or not such other person is in fact a witness for the prosecution in relation to such charge.

(c) For the above purpose of paragraphs (a) and (b) above, a witness for the prosecution in relation to a charge against an accused person:

(i) is someone from whom at any time, whether before or after the accused person was arrested or charged, the prosecutor has or the police have obtained a statement in connection with such charge or the events from which it has ensued;

(ii) is also someone who, having been called by the prosecutor to do so, has testified during the trial resulting from such charge;

(iii) is, notwithstanding that the prosecutor has, or the police have, obtained a statement from him in connection with such charge or the events from which it has ensued, not someone whom the prosecutor has decided not to call to testify during the trial resulting from such charge.

(d) It is the duty of every prosecutor:

(i) when he has decided that any person from whom he has or the police have obtained a statement in connection with the charge against an

> accused person or the events from which it has ensued will not be called to testify during the trial resulting from such charge, forthwith to notify the defence of that decision, to supply it with all the statements of such persons which are in his possession, except for any parts thereof protected from disclosure by reason of some lawful privilege, and to inform it of any other statements of such person previously in his possession and of the reason for their having ceased to be;
>
> (ii) when any person from whom he has or the police have obtained a statement in connection with the charge against an accused person or the events from which it has ensued has been called to testify during the trial resulting from such charge, and when while doing so such person has contradicted or materially deviated from the contents of such statement, immediately to notify the defence of that circumstance and to supply it with such statement.
>
> (e) For the purposes of paragraph (d) above, the defence is;
>
> (i) any legal representative of the accused person in a case in which he is legally represented;
>
> (ii) the accused person in a case in which he is not legally represented."

[61] There were previous ethical rules accepting substantially the same practice.[88]

[62] Whatever be the origin of the rule that an accused person may not consult State witnesses save with the permission of the Attorney-General or the prosecutor, it subsequently became entrenched in practice and now forms such a basic part of our system of criminal justice as to make it effectively impossible for an accused person to get his or

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[88] See *S v Hassim and Others, supra* n.87, at 201 A-C.

her legal representative to consult with such witnesses without the permission of the prosecuting authority. Any legal practitioner who does so would be guilty of unprofessional and unethical practice.[89] Moreover, a breach of an ethical rule has been held to be capable of constituting an irregularity in the trial.[90]

[63] The question which arises is whether such a practice can constitute a denial of the right to a fair trial to an accused person in terms of section 25(3) of the Constitution. In many cases it would not because the accused or his or her legal representative would have a full opportunity of canvassing with the witness during cross-examination relevant material which he or she would otherwise have wanted to canvass in consultation. But there may be circumstances where the right to a fair trial might justify a prior consultation with a State witness. An accused might wish to canvass with the witness the identity or whereabouts of some person vital to his or her alibi and there may be a real risk that the evidence would be lost if the witness is not immediately traced. In a prosecution for culpable homicide there may be an urgent

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[89] *S v Hassim and Others, supra* n.87.

[90] *S v Mangcola and Others, supra* n.87, at 509-510.

need to trace the whereabouts of a particular motor car in order to identify the nature of the damage sustained by it during a collision and there may again be a real danger that, if the witness was not consulted, such evidence might be lost, obscured or distorted by the subsequent use of the vehicle. Many other such examples are conceivable.

[64] The relevant issue is not whether or not such consultations would ordinarily be justified in order to ensure a fair trial but whether it could legitimately be said that such consultations can never be justified. If it cannot be said that such consultations are never justified, the blanket prohibition against the right of an accused to consult State witnesses (without the consent of the prosecution), regardless of the circumstances or the conditions, might indeed bear unfairly on the accused.

[65] This consideration is, however, not in itself decisive in determining whether the rule is indeed unconstitutional because the prejudicial effects of the application of the rule must be weighed against other factors which also bear upon the problem.

[66] The first such factor is that a State witness might be intimidated during such a consultation and might even be

discouraged from making a statement in the first place if the witness is aware of the risk that he or she might have to consult with the accused or his or her legal representative. This is a legitimate consideration but its impact is substantially deflected by the consideration that no witness can be obliged to attend such a consultation. The witness can be informed of this right and he or she could simply exercise that right by declining the opportunity to consult with the defence.[91]

[67] There is a second and related consideration. If such a witness does attend a consultation with the defence, arguments might subsequently develop at the trial as to what he or she did or did not say on such an occasion. This is undoubtedly an undesirable risk but, if the consultation is always subject to the condition that it must be held in the presence of the Attorney-General or a prosecutor or official nominated by them and the interview is recorded, the risk which I have mentioned would substantially be attenuated.[92] It is perfectly true that this would impose some strain on the State to make personnel and facilities available, but it must be

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[91] *S v Botha and Others, supra* n.52, *BCLR* at 124B; SA at 833I; c/f *S v Le Roux and Others,* unreported judgment, WLD, Case No 64/94 at 13.

[92] *S v Botha and Others, supra* n.52, BCLR at 124B-C; SA at 834A.

remembered that there may not be many cases in which such consultations can be justified on the ground that a fair trial will be impaired if such prior consultation is not allowed and on the ground that the opportunities subsequently offered to the accused in cross-examination of the witness to canvass the relevant issues, will not sufficiently compensate the accused for the disadvantage.

[68] My real difficulty with the present rule is its blanket prohibition against all consultations regardless of the circumstances unless the consent of the prosecuting authority is obtained. To that extent, it is unjustified, because it might in some cases impair the right of the accused to a fair trial. Moreover, such a blanket rule of exclusion cannot be justified under Section 33 of the Constitution. It is unreasonable, unjustifiable in an open and democratic society based on freedom and equality and unnecessary. Whatever be its motivation, it must in part at least be based on two untenable propositions. The first is that there can be no circumstances in which the right to a fair trial would justify a consultation with a State witness at the instance of an accused. For the reasons I have already discussed that proposition must be incorrect. The second proposition is that, because the prosecution interviewed a relevant witness first, it had some kind of

right to preclude an accused person from seeing the same witness because he or she was late in the queue or because the State acquired some kind of "property" in the witness. That is manifestly incorrect.[93]

[69] It follows from these conclusions that the blanket rule which prohibits an accused person from consulting with a State witness without the permission of the prosecuting authority in all cases and regardless of the circumstances is too wide and is not protected by section 33 of the Constitution. However, the claim to consult State witnesses without the prior permission of the prosecuting authority can only be justified in circumstances where the right of the accused to a fair trial would in the special circumstances of the case be impaired if the defence is denied the opportunity to have such consultations.

[70] If such consultation is denied to the accused in these circumstances the Court must have the right, in an appropriate case, to test the legitimacy of any such denial and to direct access to a witness for the purpose of such consultation, if such a course is justified for the purpose of ensuring a fair trial.

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[93] see *Harmony Shipping Co SA v Davis and others* [1979] 3 All ER 177 C.A.

[71] Even in cases where the Court takes the view that the requirements of a fair trial indeed justify such consultations with State witnesses in a particular case, it does not necessarily follow that it is obliged to direct access by the accused to the witnesses for such consultation purposes. The Court has a discretion to refuse such a direction if the prosecution is able to establish through the relevant evidence and circumstances, that there is a reasonable risk that such access might lead to the intimidation of the witness or otherwise prejudice the proper ends of justice. It would not be sufficient, however, for the State merely to establish that that is its *bona fide* belief. It must show that a reasonable person in the position of the prosecution would hold such a belief and, even in such a case, the Court would be entitled to exercise its discretion against the prosecution by balancing the interests of the accused against the interests of the State.

Order

[72] In the result I would make an order declaring that -

A. 1. The "blanket docket privilege" expressed by the rule in *R v Steyn* 1954 (1) SA 324 (A) is

inconsistent with the Constitution to the extent to which it protects from disclosure all the documents in a police docket, in all circumstances, regardless as to whether or not such disclosure is justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial in terms of section 25(3).

2. The claim of the accused for access to documents in the police docket cannot be defeated merely on the grounds that such contents are protected by a blanket privilege in terms of the decision in *Steyn's* case.

3. Ordinarily an accused person should be entitled to have access to documents in the police docket which are exculpatory (or which are *prima facie* likely to be helpful to the defence) unless, in very rare cases, the State is able to justify the refusal of such access on the grounds that it is not justified for the purposes of a fair trial.

4. Ordinarily the right to a fair trial would include access to the statements of witnesses (whether or not the State intends to call such witnesses) and such of the contents of a police docket as are relevant in order to enable an accused person properly to exercise that right, but the prosecution may, in a particular case, be able to justify the denial of such access on the grounds that it is not justified for the purposes

of a fair trial. This would depend on the circumstances of each case.

5. The State is entitled to resist a claim by the accused for access to any particular document in the police docket on the grounds that such access is not justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial or on the ground that it has reason to believe that there is a reasonable risk that access to the relevant document would lead to the disclosure of the identity of an informer or State secrets or on the grounds that there was a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice.

6. Even where the State has satisfied the Court that the denial of access to the relevant documents is justified on the grounds set out in paragraph 5 hereof, it does not follow that access to such statements, either then or subsequently must necessarily be denied to the accused. The Court still retains a discretion. It should balance the degree of risk involved in attracting the potential prejudicial consequences for the proper ends of justice referred to in paragraph 5 (if such access is permitted) against the degree of the risk that a fair trial may not enure for the accused (if such access is denied). A ruling by the Court pursuant to this paragraph shall be an interlocutory ruling subject to further amendment, review or recall in the light of

circumstances disclosed by the further course of the trial.

B. 1. Insofar and to the extent that the rule of practice pertaining to the right of an accused or his legal representative to consult with witnesses for the State prohibits such consultation without the permission of the prosecuting authority, in all cases and regardless of the circumstances, it is not consistent with the Constitution.

2. An accused person has a right to consult a State witness without prior permission of the prosecuting authority in circumstances where his or her right to a fair trial would be impaired, if, on the special facts of a particular case, the accused cannot properly obtain a fair trial without such consultation.

3. The accused or his or her legal representative should in such circumstances approach the Attorney-General or an official authorized by the Attorney-General for consent to hold such consultation. If such consent is granted the Attorney-General or such official shall be entitled to be present at such consultation and to record what transpires during the consultation. If the consent of the Attorney-General is refused the accused shall be entitled to approach the Court for such permission to consult the relevant witness.

4. The right referred to in paragraph 2 does not entitle an accused person to compel such consultation with a State witness:-

   (a) if such State witness declines to be so consulted; or

   (b) if it is established on behalf of the State that it has reasonable grounds to believe such consultation might lead to the intimidation of the witness or a tampering with his or her evidence or that it might lead to the disclosure of State secrets or the identity of informers or that it might otherwise prejudice the proper ends of justice.

5. Even in the circumstances referred to in paragraph 4(b), the Court may, in the circumstances of a particular case, exercise a discretion to permit such consultation in the interest of justice subject to suitable safeguards.

Chaskalson P, Ackermann J, Didcott J, Kentridge AJ, Kriegler J, Langa J, Madala J, Mokgoro J, O'Regan J and Sachs J concur in the judgment of Mahomed DP.

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