CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 36/02

ABDURAGHMAN THEBUS First Appellant

MOEGAMAT ADAMS Second Appellant

versus

THE STATE Respondent

Heard on : 20 February 2003

Decided on : [Date]

JUDGMENT

MOSENEKE J:

[1] This is an appeal against the judgment and orders of the Supreme Court of Appeal (the SCA) handed down on 30 August 2002, confirming the convictions of both appellants in the Cape High Court on 14 September 2000 on one count of murder and two counts of attempted murder.

Factual background

[2] On 14 November 1998, a group of protesting residents in Ocean View, Cape Town, gathered and approached the houses of several reputed drug dealers in the area,

including the house of one Grant Cronje. They allegedly caused damage to the property of Cronje before moving on. The protestors drove through the area in a motorcade of about five to six vehicles. As the motorcade approached a road intersection Cronje opened fire on the group. In response, some members of the group alighted from their vehicles and returned fire. In the resulting crossfire, a seven-year old girl, Crystal Abrahams, was fatally shot and two others, Riaan van Rooyen and Lester September, were wounded.[1]

[3] Thereafter, the two appellants were arrested on suspicion of having been part of the group involved in the shooting incident. After the arrest of the first appellant, Sergeant McDonald of the South African Police Services warned him that he was not obliged to make any statement and that if he did it may be used in evidence against him. In this regard Sergeant McDonald testified as follows:

> "Tydens die onderhoudsverklaring . . . toe ek hom nou gewaarsku het van sy regte. Toe vra ek hom of hy vir my 'n verduideliking wil gee, toe sê hy ja. Hy het toe vir my sy weergawe gegee. Ek het dit, soos hy praat het ek dit genotuleer, maar hy wou nie hê dat, ek moes dit in 'n verklaringvorm sit nie. Dit wou hy nie gehad het nie."[2]

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[1] See *S v Abduraghman Thebus and Others,* unreported judgment of the Cape High Court delivered on 14 September 2000, Case SS77/2000.

[2] During the interview statement . . . when I informed him of his rights. At that time I asked him if he wished to provide me with an explanation and he said yes. He then gave me his version. As he spoke I took down notes but he did not want me to record it in statement form. That he did not want. (My translation).

The first appellant readily admitted that after his arrest he was informed of the charges of which he was suspected and warned that he need not make a statement. He, nonetheless, made an oral statement before Sergeant McDonald. In this regard, his evidence is as follows:

> "Ja. So met ander woorde mnr McDonald het vir u gesê daar is getuies wat sê u was betrokke, maar u het geweet dat u eintlik by u tweede vrou was daardie tyd. --- Ja.
>
> Het u dit vir mnr McDonald gesê? --- Ek het gesê die familie was in Hanover Park gewees. Maar ek het nie gesê waar ek was nie.
>
> Enige rede daarvoor? --- Nee, ek het nie rede gehad nie.
>
> So met ander woorde u het vir mnr McDonald gesê die familie was in Hanover Park, maar u het niks sê van uself nie. --- Van myself nie.
>
> En u sê daar was geen spesifieke rede daarvoor. --- Nee."[3]

[4] Thereafter, the first appellant refused to make a written statement to the police. Nearly two years passed before the appellants were brought to trial. Neither of the appellants disclosed his alibi defence until the trial before the High Court.

[5] At the trial, the State led evidence placing both appellants in the vicinity of the shooting. A witness for the State, Gregory Edward Kiel ("Kiel"), testified that he had seen the first appellant standing near a vehicle holding a pick-handle, while the second

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[3] Yes. So in other words Mr McDonald told you that there are witnesses who say that you were involved but you knew that you were actually with your second wife at that time. --- Yes.
Did you tell Mr McDonald? --- I said the family was in Hanover Park but I did not say where I was.
Any reason for that? --- No, I had no reason.
So in other words you told Mr McDonald that the family was in Hanover Park, but you said nothing about yourself. --- About myself no.
And you say there was no specific reason for that? --- No. (My translation).

appellant was retrieving spent cartridges discharged from the firearms of other members of the group. He also testified that the second appellant held a firearm but that he had not seen him shooting. Mitchell AJ found Kiel to be an impressive and forthright witness, whose evidence concerning the first appellant was beyond reproach.

[6] The first appellant testified in support of his alibi defence and called two witnesses. Both witnesses testified that on the date and at the time of the shooting, the first appellant was at a place other than the scene of the shooting. The trial court rejected this alibi defence. It concluded that both appellants had been part of the protesting group and were present at the scene of the shooting. Applying what is commonly referred to as the doctrine of common purpose, Mitchell AJ found both appellants guilty of one count of murder and two counts of attempted murder.

[7] The trial court sentenced each of the two appellants to eight years imprisonment, suspended for a period of five years on certain conditions. Both appellants were granted leave to appeal against their conviction and the State leave to appeal against the sentences.

[8] In May 2002, the SCA heard both appeals. The majority of the SCA (per Lewis AJA and Olivier JA concurring) dismissed the appeal against the convictions and upheld the appeal of the State against the sentences. The SCA ordered that each of the sentences imposed by the High Court be replaced by a sentence of 15 years

imprisonment. In a separate judgement, Navsa JA concurred in some respects with and dissented in others from the majority judgment.

[9] Thereafter, the appellants made an application in terms of Rule 20 for special leave to appeal to this Court against the judgment and order of the SCA. This Court granted leave to appeal and issued directions calling for argument on two constitutional issues. Firstly, in the case of both appellants, whether the SCA failed to comply with its duty in terms of section 39(2)[4] of the Constitution to develop and apply the common law doctrine of common purpose so as to bring it in line with the constitutional rights to dignity,[5] freedom and security of the person[6] and the right to be presumed innocent.[7] Secondly, whether the SCA erred in drawing a negative inference from the first appellant's failure to disclose an alibi defence prior to trial, in violation of his right to silence as contained in the Constitution.[8]

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[4] Section 39 (2) states:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

[5] Section 10 guarantees that "[e]veryone has inherent dignity and the right to have their dignity respected and protected".

[6] Section 12 (1) (a) states that:

> "Everyone has the right to freedom and security of the person which includes the right . . . not to be deprived of freedom arbitrarily or without just cause".

[7] Section 35 (3) (h) guarantees that:

> "Every accused person has a right to a fair trial, which includes the right . . . to be presumed innocent, to remain silent, and not to testify during the proceedings".

[8] Section 35 (1) (a) states that "[e]veryone who is arrested for allegedly committing an offence has the right . . . to remain silent".

The High Court

[10] The trial court was persuaded that the State had made out a proper case to warrant a conviction of both appellants based on the common law doctrine of common purpose as laid down in *S v Mgedezi and Others*.[9] In that regard the trial court held that:

> ". . . the events of that afternoon took place in a sequence which commenced with the gathering at the Raven's home. The evidence shows that some of those persons were armed and that there was no apparent attempt to conceal this from others in the group. The intent was to confront and intimidate persons alleged to be drug dealers. In these circumstances it can hardly be said that any member of the group did not appreciate the possibility that violence could erupt and persons could be killed by the use of the group's armaments. By participating in the further activities of the group, each member signified his acceptance of that possibility. Such possibility became a reality when the shooting took place. There is no doubt . . . that the shots which killed Crystal and wounded Riaan and Mr September came from . . . the group of which [the first appellant] and [the second appellant] were part."

Later in the judgment the trial court observed that:

> "They were present on the scene; they were aware that the shooting was taking place; they were throughout making common cause with the group, including the gunman, and they acted in association with him – [the first appellant] by standing guard and [the second appellant] by collecting the cartridge cases . . . they had the requisite intention, albeit by way of dolus eventualis, to commit murder . . ."

[11] The first appellant denied having been present at the scene of the shooting. In support of his alibi defence, the first appellant testified that at approximately 13h00 on

[9] 1989 (1) SA 687 (A).

the day of the shooting he travelled by taxi from Ocean View to Fish Hoek train station. The purpose of the trip was to visit his second wife, Ms Faranaaz Jacobs, in Parkwood Estate. In the taxi, the first appellant met with a fellow resident of Ocean View, Ms Brenda Van Rooy. He and Ms Van Rooy took the 15h10 train to Wynberg. On arrival in Wynberg, the first appellant went to the local mosque where he led the afternoon prayers. On his version, the first appellant spent the rest of the afternoon and evening with his second wife. He returned to Ocean View only on the following day. In their evidence, Ms Van Rooy and Ms Jacobs corroborated the version offered by the first appellant.

[12] Mitchell AJ rejected as untrustworthy the alibi evidence put up by the first appellant and his two witnesses. The trial court took into account that both witnesses had claimed that they had not discussed their evidence with each other or with anybody else; that Ms Van Rooy was informed one month and Ms Jacobs, one week before the trial that they had to testify about events which had occurred nearly two years earlier and that these witnesses remembered with remarkable detail and accuracy the occurrences of the day in question. Mitchell AJ concluded that the close correlation between the evidence of the two witnesses and of the first appellant had cast doubt on its credibility.

[13] The trial court found that the evidence of the state witness, Kiel, placing the first appellant on the scene of the shooting was satisfactory and adequate to secure a conviction against first appellant. It rejected the first appellant's claim that he chose

to disclose his alibi defence only during his trial and not at any time after his arrest. The trial court reasoned that the first appellant was a man of considerable stature within the Ocean View community. He was the assistant Imam at the local mosque. He was arrested one month after the shooting incident and spent nearly a week in custody before he was granted bail. According to his second wife, the community had known of his arrest and that it concerned the shooting incident in which a young child had been killed. To the first appellant and his second wife these unfounded accusations should have amounted to an obvious error. The trial court rejected the alibi as false and in doing so it took into account, amongst other factors, the unlikelihood that the first appellant would have preferred to remain silent rather than gainsay the "false accusations". The trial court took the view that, before the trial, the first appellant could easily have dispelled the baseless accusations against him by disclosing his whereabouts to the police on the day of the shooting. Moreover, worshippers at the Wynberg mosque, present on the afternoon in question, would have had no conceivable difficulty in confirming that the appellant had led the afternoon prayers.

The Supreme Court of Appeal

[14] Lewis AJA, writing on behalf of the majority of the SCA, held that the reliability of Kiel's identification of the first appellant had to be weighed carefully against his alibi and the testimony of the two witnesses who supported his alibi.[10] The SCA, as did the trial court, held that the close correlation and the detailed precision of

[10] Reported as *S v Thebus and Another* 2002 (2) SACR 566 (SCA).

the evidence of the alibi witnesses, taken together with the evidence of the first appellant, attracted justified suspicion. The SCA found that the version put up by the first appellant and his two witnesses had been "concocted" and "carefully rehearsed". The SCA reminded itself that such suspicion was not enough to dismiss the version as false beyond reasonable doubt. Following the reminder, Lewis AJA remarked that:

> "What is more telling . . . is that the version was raised only at the trial, some two years after the incident."

As a result, the majority concluded that:

> "The only inference that can be drawn from [the first appellant's] failure to advise the police, and from the other witnesses' failure to do so, is that the alibi had no truth in it at all."

[15] The SCA held that the trial court had properly rejected the alibi defence of the first appellant and that the appeal against his conviction had no merit. The majority of the SCA confirmed the convictions without reference to the basis of the conviction being common purpose. In his minority judgment, Navsa JA upheld the finding of the trial court that the requirements of common purpose had been met. Navsa JA found that on the facts the members of the vigilante group who were at the scene were party to a common purpose that rendered them liable for the murder of the child and the attempted murder of two other persons. It was on this basis that Navsa JA confirmed the second appellant's conviction of murder and attempted murder. In this regard Navsa JA states:

> "By coming to Ocean View armed and behaving in the manner described earlier in this judgment members of the vigilante group were demonstrating that they were intent on confrontation and violence. By stopping and standing in the middle of a populated area, firearms blazing away wild-west style, members of the group placed themselves and others in the community in danger. It is clear that members of the vigilante group acted in concert as they went about their business in Ocean View. No member of the group, whether in motor vehicles or in the street, dissociated himself from violent actions perpetrated by others in the group."

[16] The majority judgment accepted the findings of Navsa JA on common purpose. Navsa JA parted ways with the majority by holding that Kiel's identification of the first appellant on the scene of the shooting was not sufficient to found his conviction. Olivier JA and Lewis AJA accepted the testimony of Kiel as a reliable and compelling identification of the first appellant as a participant in the crimes of murder and attempted murder. They placed reliance on the fact that the first appellant and Kiel had known each other since their childhood and that Kiel had called him by his nickname. In contrast, Navsa JA reasoned that Kiel was a single witness and that his testimony was not "satisfactory in all material respects". Moreover, Kiel's identification of two other accused, whom he had claimed were at the scene of the shooting, had been discarded by the trial court as open to doubt and erroneous. But these accused were not known to Kiel. The trial court accepted that Kiel had made an honest but mistaken identification. In the case of the first appellant, however, there was no room for such a mistake as Kiel and the first appellant had known each other since they were children. Thus Kiel's identification of the first appellant carried considerable weight. Navsa JA, as did the majority judgment, held that the alibi

defence of the first appellant was fabricated. However, the learned judge reasoned that the rejection of the first appellant's alibi as fabricated did not redeem Kiel's testimony. Navsa JA concluded that the appeal of the first appellant against his conviction should succeed as there was a reasonable possibility that he had not been present at the scene of the shooting.

Issues

[17] Two substantive constitutional issues fall to be decided in this appeal. The first issue is whether, in regard to both appellants, the SCA failed to develop the common law doctrine of common purpose in conformity with the Constitution, as required by section 39(2) and thereby failed to give effect to their rights to dignity,[11] freedom of the person[12] and a fair trial,[13] which includes the right to be presumed innocent.[14] The second issue is whether the negative inference drawn from the first appellant's failure to disclose his alibi defence before trial has infringed his right to silence.[15]

Common Purpose

[18] The doctrine of common purpose[16] is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with

[11] Section 10.

[12] Section 12.

[13] Section 35(3).

[14] Section 35(3)(h).

[15] Section 35(1)(a).

[16] Also known as "common intent" or in Afrikaans as "*gemeenskaplike opset*" or "*gemeenskaplike doel*." This doctrine is said to have been received into South African law from English law and recognised as part of the

another person or persons the commission of a crime. Burchell and Milton[17] define the doctrine of common purpose in the following terms:

> "Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their 'common purpose' to commit the crime."

Snyman[18] points out that "the essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others." These requirements are often couched in terms which relate to consequence crimes such as murder.[19]

[19] The liability requirements of a joint criminal enterprise fall into two categories.[20] The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or

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common law in *R v Garnsworthy and Others* 1923 WLD 17 at 19. In this regard see also Burchell and Milton *Principles of Criminal Law* 2nded at 393; Kriegler and Kruger *Suid-Afrikaanse Strafproses* 6thed at 404.

[17] Id Burchell and Milton at 393.

[18] Snyman *Criminal Law* 4thed at 261; see also *S v Safatsa and Others* 1988 (1) SA 868 (A) at 894, 896 and 901; *S v Mgedezi* n 9; *S v Banda and Others* 1990 (3) SA 466 (B) at 500-1.

[19] In practice the doctrine finds application in a variety of crimes other than murder and these include treason, public violence, robbery, housebreaking, unlawful possession of a firearm, assault, theft, fraud. For a catalogue of cases which exemplify such application, see Synman n 18 at 262. It is, however, unnecessary to express an opinion, in the context of this case, on whether the principles of common purpose should be applied in a charge of culpable homicide. In *S v Nkwenja en 'n Ander* 1985 (2) SA 560 (A) and in *Magmoed v Janse van Rensburg and Others* 1993 (1) SA 777 (A) at 818D-F it was held that the doctrine is applicable in culpable homicide cases provided the negligence of each accused is not imputed but determined independently.

[20] Id *Magmoed v Janse van Rensburg and Others* per Corbett CJ at 810G:

> "[a] common purpose may arise by prior agreement between the participants or it may arise upon an impulse without prior consultation or agreement."

is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.[21] In the present matter, the evidence does not prove any such prior pact.

[20] The trial court found that the first appellant was a party to an unlawful common enterprise during which the child was murdered. In convicting the accused the court relied on the decision of *S v Mgedezi* in which it was held that for the doctrine to be invoked:[22]

> "[i]n the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."

The appellants contended that the principles enunciated in *S v Mgedezi* should have been developed in accordance with the requirements of section 39(2) of the Constitution, and if this had been done, they would have been entitled to be acquitted.

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[21] See Kriegler and Kruger n 16 at 405; See also *S v Mgedezi* n 9 at 705-6 and *S v Ngobozi* 1972 (3) SA 476 (A).

[22] See n 9 at 705I-706B.

[21] The rules which make up the doctrine of common purpose deal with a number of different situations in which an accused person might be held liable for a crime committed in the course of a common enterprise. Since *S v Mgedezi,* the application of these rules have been refined and developed by various decisions of the SCA.[23] In the present case it is not necessary to consider all of these developments. We are concerned here with a case in which the accused were present at the scene of the crime. What needs to be decided is whether the principles applicable to such a case, as stated in *S v Mgedezi* and developed by the SCA in later cases, calls for further development. It is neither necessary nor desirable to consider other situations. This judgment therefore deals only with the existing law in so far as it is relevant to the facts of the present case.

[22] After *S v Mgedezi* there remains no doubt that where the prosecution relies on common purpose as a basis for criminal liability in a consequence crime such as murder, a causal connection between the conduct of each participant in the crime and the unlawful consequence caused by one or more in the group, is not a requirement.[24] Rules of criminal liability similar or comparable to common purpose are found in many common law jurisdictions, including England,[25] Canada,[26] Australia,[27]

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[23] *S v Petersen* 1989 (3) SA 420 (A); *S v Yelani* 1989 (2) SA 43 (A); *S v Jama and Others* 1989 (3) SA 427 (A); *Magmoed v Janse van Rensburg* n 19 above; *S v Motaung and Others* 1990 (4) SA 485 (A); *S v Khumalo en Andere* 1991 (4) SA 310 (A); *S v Singo* 1993 (2) SA 765 (A).

[24] See *Magmoed v Janse van Rensburg* n 19 at 789G.

[25] In *R v Powell and Another; R v English* [1997] 4 All E.R 545 HL, the House of Lords held that the doctrine of joint enterprise liability still applies in English Law.

[26] Section 21(2) of the Canadian Criminal Code reads:

Scotland[28] and the USA.[29] In all these legal systems, a causal nexus is not a pre-requisite for criminal liability. In civil legal systems, such as France and Germany there appear to be no rules, which, in substance, approximate our rule of common purpose.[30]

Did the SCA fail to develop the doctrine of common purpose in accordance with Section 39(2) of the Constitution?

[23] The main thrust of the appellants' contention is that the pre-constitutional requirements of common purpose unjustifiably limit the appellants' rights to dignity, freedom and security of the person and a fair trial including the right to be presumed innocent. However, the appellants stopped short of asserting that the doctrine of

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> "Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence".

In *R v Logan* (1990) 58 CCC (3d*)* 391 it was found that only the phrase "or ought to have known" is inconsistent with the Charter of Rights and Freedoms because it authorises a conviction for murder or attempted murder based on negligence, and not on the requirement of subjective foresight of the murder. Otherwise, the constitutionality of section 21(2) was confirmed. See also *R v Rodney* (1990) 58 CCC (3d) 408.

[27] See Gillies *Criminal Law* 4th ed (LBC, 1997) at 173-81.

[28] In Scotland there are three ways in which one may be "art and part" of a crime: (1) by counsel or instigation; (2) by supplying materials for the commission of the crime and (3) by assisting at the time of the actual commission of the crime. In cases of agreement, guilt exists because of that agreement. Gordon et al: *The Criminal Law of Scotland* 2000 at 158 para 5.19.

[29] See La Fave *Criminal Law* (West. St Paul 2000) at 623-32.

[30] Sections 25 (perpetration), 27 (accessoryship), 29 (independent punishability of the participant) and 30 (attempted participation) of the Strafgesetzbuch (StGB) draw a clear line between a perpetrator, a co-perpetrator and an accessory. The StGB specifically provides that every participant shall be punished according to his or her own guilt irrespective of the guilt of the other. The French Penal Code (Articles 121-1, 121-4, 121-6 and 121-7) permits the same punishment for a perpetrator, a co-perpetrator and an accomplice. The French Code provides that no one is criminally liable except for his own conduct (article 121-1). Perpetrators are defined according to their own conduct (article 121-4), however, an accomplice may be liable for the same punishment as the perpetrator (article 121-6). In both criminal codes, no provision akin to common purpose is discernible.

common purpose is unconstitutional in its entirety. They submitted that the High Court and the SCA erred in failing to develop, apply and elucidate the following requirements that:

> "(a) there must be a causal connection between the actions of the appellants and the crime for which they were convicted;
>
> (b) the appellants must have actively associated themselves with the unlawful conduct of those who actually committed the crime; and
>
> (c) the appellants must have had the subjective foresight that others in the group would commit the crimes."

[24] Since the advent of constitutional democracy, all law must conform to the command of the supreme law, the Constitution, from which all law derives its legitimacy, force and validity.[31] Thus, any law which precedes the coming into force of the Constitution remains binding and valid only to the extent of its constitutional consistency.[32] The Bill of Rights enshrines fundamental rights which are to be enjoyed by all people in our country. Subject to the limitations envisaged in section 36, the state must respect, protect, promote and fulfil the rights in the Bill of Rights.[33]

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[31] Section 2 of the Constitution provides that:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

[32] Item 2(1) of Schedule 6 retains the validity of "all law that was in force when the new Constitution took effect" subject to consistency with the Constitution.

[33] See sections 7(2) and 7(3) of the Constitution.

The protected rights therein apply to all law and bind all organs of state including the judiciary.[34]

[25] It is in this context that courts are enjoined to apply and, if necessary, to develop the common law in order to give effect to a protected right, provided that any limitation is in accordance with section 36.[35] Section 39(2) makes it plain that when a court embarks upon a course of developing the common law it is obliged to "promote the spirit, purport and objects of the Bill of Rights".[36] In the *Pharmaceutical Manufacturers*[37] case, Chaskalson P observes that:

> "The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims – thus, the command that law be developed and interpreted by the courts to promote the 'spirit, purport and objects of the Bill of Rights'. This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply."[38]

[34] See section 8(1) of the Constitution.

[35] See sections 8(3)(a) and (b) of the Constitution.

[36] See also section 173 which confers on all higher courts, including this Court, the inherent power to develop the common law taking into account the interests of justice; *Pharmaceutical Manufacturers Association of SA and Another; In Re Ex Parte Application of the President of RSA and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 46-9; *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 33-6; *Brisley v Drotsky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) per Cameron JA at para 88-9; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at para 27-9.

[37] Id.

[38] Id at para 49.

[26] The appellants have urged this Court to develop the common law doctrine of common purpose beyond the existing precedent. In *Carmichele*[39] this Court decided that, faced with such a task, a court is obliged to undertake a two stage enquiry. The first enquiry is whether, given the objectives of section 39(2) of the Constitution, the existing common law should be developed beyond existing precedent. If it leads to a negative answer, that would be the end of the enquiry. If it leads to a positive answer, the next enquiry would be how the development should occur and whether this Court or the SCA should embark on that exercise.

[27] Section 39(2) requires that "when" every court develops the common law it must promote the spirit, purport and objects of the Bill of Rights. This section does not specify what triggers the need to develop the common law or in which circumstances the development of the common law is justified. In *Carmichele*[40] this Court recognised that there are notionally different ways to develop the common law under section 39(2), all of which might be consistent with these provisions. It was also held that the Constitution embodies an "objective normative value system" and that the influence of the fundamental constitutional values on the common law is authorised by section 39(2). It is within the matrix of this objective normative value system that the common law must be developed.[41] Thus under section 39(2), concepts which are reflective of, or premised upon, a given value system "might well have to

[39] See n 36 at para 40.

[40] Id at para 56.

[41] Id at para 54.

be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution".[42]

[28] It seems to me that the need to develop the common law under section 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency.[43] The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the "objective normative value system" found in the Constitution.[44]

[29] When there is a constitutional challenge to legislation the test for its constitutional validity is in two parts. Kriegler J, in *In Re S v Walters*[45] delineates the process thus:

> a) "First, there is the threshold enquiry aimed at determining whether or not the enactment in question constitutes a limitation on one or other guaranteed right. This entails examining (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment

[42] Id at para 56.

[43] *Shabalala and Others v A-G Transvaal and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC).

[44] Compare *Carmichele* and *Afrox Healthcare Ltd* n 36 above.

[45] *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC).

to see whether there is any limitation of (a) by (b). Subsections (1) and (2) of s39 of the Constitution give guidance as to the interpretation of both the rights and the enactment, essentially requiring them to be interpreted so as to promote the value system of an open and democratic society based on human dignity, equality and freedom. If upon such analysis no limitation is found, that is the end of the matter. The constitutional challenge is dismissed there and then.

b) If there is indeed a limitation, however, the second stage ensues. This is ordinarily called the limitations exercise. In essence this requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment. Section 36(1) of the Constitution spells out these factors that have to be put into the scales in making a proportional evaluation of all the counterpoised rights and interests involved."[46] (footnotes omitted)

[30] Thus, if the impugned legislation indeed limits a guaranteed right, the next question is whether the limitation is reasonable and justifiable, regard being had to the considerations stipulated in section 36. If the impugned legislation does not satisfy the justification standard and a remedial option, through reading in, notional or actual severance is not competent,[47] it must be declared unconstitutional and invalid. In that event the responsibility and power to address the consequences of the declaration of invalidity resides, not with the courts, but pre-eminently with the legislative authority.[48]

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[46] Id at para 26-7. Also see *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC); 1995 (2) SACR 1 (CC).

[47] For the test whether severance is competent see *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 16 and para 75-6. See also *S v Coetzee and Others* 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC) per Langa J at para 51.

[48] Section 43 of the Constitution. In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 183, Chaskalson P reminds us that:

[31] A different approach is required when a court deals with a constitutional challenge to a rule of the common law. The common law is its law. Superior courts are protectors and expounders of the common law. The superior courts have always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society.[49] That power is now constitutionally authorised[50] and must be exercised within the prescripts and ethos of the Constitution.

[32] In a constitutional challenge of the first type, referred to in paragraph 28, to a common law rule, the court is again required to do a threshold analysis, being whether the rule limits an entrenched right. If the limitation is not reasonable and justifiable, the court itself is obliged to adapt, or develop the common law in order to harmonise it with the constitutional norm.

Causation

[33] The appellants have criticised the doctrine of common purpose principally on the ground that it does not require a causal connection between their actions and the crimes of which they were convicted. During argument, the appellants correctly

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> ". . . there are functions that are properly the concern of the courts and others that are properly the concern of the legislature. At times these functions may overlap. But the terrains are in the main separate, and should be kept separate."

[49] *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 22.

[50] Sections173 and 8(3) of the Constitution.

conceded that in a joint criminal activity, the action of an accused need not contribute to the criminal result in the sense that but for it the result would not have ensued. What was urged on us is to develop the common law by requiring that the action of the accused must be shown to facilitate the offence on some level. Such facilitation would occur when the act of the accused is a contributing element to the criminal result. This argument does not constitute a direct challenge to the principles set out in *S v Mgedezi*.

[34] In our law, ordinarily, in a consequence crime, a causal nexus between the conduct of an accused and the criminal consequence is a prerequisite for criminal liability.[51] The doctrine of common purpose dispenses with the causation requirement. Provided the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequence, the accused would be guilty of the offence. The principal object of the doctrine of common purpose is to criminalise collective criminal conduct and thus to satisfy the social "need to control crime committed in the course of joint enterprises".[52] The phenomenon of serious crimes committed by collective individuals, acting in concert, remains a significant societal scourge. In consequence crimes such as murder, robbery, malicious damage to property and arson, it is often difficult to prove that the act of each person or of a particular person in the group contributed causally to the criminal result. Such a causal prerequisite for

[51] On requirements of factual and legal causation and theories of causation see Snyman n 18 at 73 et seq; Burchell and Milton n 16 at 115; *S v Daniels en 'n Ander* 1983 (3) SA 275 (A) at 331C-D and *S v Mokgethi en Andere* 1990 (1) SA 32 (A) at 39.

[52] *R v Powell and Another; R v English* n 25 at 545H-I; also see *R v Logan* n 26 at 402-3.

liability would render nugatory and ineffectual the object of the criminal norm of common purpose and make prosecution of collaborative criminal enterprises intractable and ineffectual.

[35] The appellants argue that the doctrine of common purpose undermines the fundamental dignity[53] of each person convicted of the same crime with others because it de-individualises him or her. It de-humanises people by treating them "in a general manner as nameless, faceless parts of a group". On this contention, a crime like murder carries a stigma greater than a conviction on an alternative charge or competent verdict such as public violence, conspiracy, incitement, attempt and accomplice liability. The appellants claim that the doctrine of common purpose violates their right not to be deprived of freedom arbitrarily,[54] because this mode of criminal liability countenances the most tenuous link between individual conduct and the resultant liability. The appellants further argue that the doctrine of common purpose violates the presumption of innocence[55] by dispensing with or lowering the threshold of proof for certain elements of a crime. That, the appellants contend, is at odds with the rule that the state must prove all the elements of a crime beyond a reasonable doubt. In the last instance, the appellants submit that the violation of any of their constitutionally protected rights is not justifiable as the primary rationale for

[53] See n 5.

[54] See n 6.

[55] See n 7.

the doctrine of common purpose is convenience of proof in favour of the prosecution.[56]

[36] I am unable to agree that the doctrine of common purpose trenches upon the rights to dignity and freedom. It is fallacious to argue that the prosecution and conviction of a person de-humanises him or her and thus invades the claimed rights. The entire scheme of sections 35 and 12(1) of the Bill of Rights authorises and anticipates prosecution, conviction and punishment of individuals provided it occurs within the context of a procedurally and substantively fair trial and a permissible level of criminal culpability.[57] The essence of the complaint must be against the criminal norm in issue. The doctrine of common purpose sets a standard of criminal culpability. It defines the minimum elements necessary for a conviction in a joint criminal enterprise. The standard must be constitutionally permissible. It may not unjustifiably invade rights or principles of the Constitution. Put differently, the norm may only "impose a form of culpability sufficient to justify the deprivation of freedom without giving rise to a constitutional complaint".[58] However, once the culpability norm passes constitutional muster, an appropriate deprivation of freedom is permissible.

[56] A similar criticism of the doctrine of common purpose is levelled by the writers Burchell and Milton n 16 at 406.

[57] Compare the remarks of Langa DP in *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 37.

[58] Per O'Regan J in *S v Coetzee* n 47 at para 178.

[37] The definitional elements or "the minimum requirements necessary to constitute a meaningful norm"[59] for a common law crime are unique to that crime and are useful to distinguish and categorise crimes. Common minimum requirements of common law crimes are proof of unlawful conduct, criminal capacity and fault, all of which must be present at the time the crime is committed. Notably, the requirement of causal nexus is not a definitional element of every crime.[60]

[38] Thus, under the common law, the mere exclusion of causation as a requirement of liability is not fatal to the criminal norm. There are no pre-ordained characteristics of criminal conduct, outcome or condition. Conduct constitutes a crime because the law declares it so. Some crimes have a common law and others a legislative origin. In a constitutional democracy, such as ours, a duly authorised legislative authority may create a new, or repeal an existing, criminal proscription. Ordinarily, making conduct criminal is intended to protect a societal or public interest by criminal sanction. It follows that criminal norms vary from society to society and within a society from time to time, relative to community convictions of what is harmful and worthy of punishment in the context of its social, economic, ethical, religious and political influences.

[39] In our constitutional setting, any crime, whether common law or legislative in origin, must be constitutionally compliant. It may not unjustifiably limit any of the

[59] See Snyman n 18 at 31-9; Burchell and Milton n 16 at 29-37.

[60] In conduct crimes, a defined conduct is prohibited regardless of its result. Crimes of rape, perjury and incest come to mind. In a consequence crime, any conduct which causes a proscribed outcome is punishable. Murder and culpable homicide are such crimes.

protected rights or offend constitutional principles. Thus, the criminal norm may not deprive a person of his or her freedom arbitrarily or without just cause. The 'just cause' points to substantive protection against being deprived of freedom arbitrarily or without an adequate or acceptable reason and to the procedural right to a fair trial. The meaning of "just cause must be grounded upon and [be] consonant with the values expressed in s1 of the Constitution and gathered from the provisions of the Constitution".[61]

[40] Common purpose does not amount to an arbitrary deprivation of freedom. The doctrine is rationally connected to the legitimate objective of limiting and controlling joint criminal enterprise.[62] It serves vital purposes in our criminal justice system. Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their unlawful and intentional participation in the commission of the crime. Such an outcome would not accord with the considerable societal distaste for crimes by common design. Group, organised or collaborative misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals. Effective prosecution of crime is a legitimate, "pressing social need".[63] The need for "a strong deterrent to violent crime"[64] is well acknowledged because "widespread

[61] *S v Boesak* per Langa DP n 57 at para 38.

[62] *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 23.

[63] *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC); 1995 (1) SACR 568 (CC) at para 41.

[64] See *S v Makwanyane* n 46 at para 117. See also *S v Williams and Others* 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) at para 80.

violent crime is deeply destructive of the fabric of our society"[65]. There is a real and pressing social concern about the high levels of crime.[66] In practice, joint criminal conduct often poses peculiar difficulties of proof of the result of the conduct of each accused, a problem which hardly arises in the case of an individual accused person. Thus there is no objection to this norm of culpability even though it bypasses the requirement of causation.

[41] At a substantive level, the conduct of the appellants, as found by the trial court, answers beyond a reasonable doubt to the pre-requisites of the criminal liability norm set by the rule. Moreover, their complaint is not against the procedural fairness of their trial but against the substantive constitutional compatibility of the rule. It may be added that a person who knowingly, and bearing the requisite intention, participates in the achievement of a criminal outcome cannot, upon conviction in a fair trial, validly claim that his or her rights to dignity and freedom have been invaded.

Presumption of Innocence

[42] I now turn to the appellants' claim that their conviction under the doctrine of common purpose denied them the right to be presumed innocent. Section 35(3)(h) accords to every accused person the right to a fair trial, which includes the right to be

[65] *S v Dlamini; S v Dladla and Others*; *S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 67. See also para 68 where the Court cautions that alarming levels of crime should not be exploited to justify inappropriate invasion of individual rights.

[66] *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC) at para 16-8.

presumed innocent. In *S v Bhulwana; S v Gwadiso,*[67] O'Regan J speaking for the Court, held that:

> "[T]he presumption of innocence is an established principle of South African law which places the burden of proof squarely on the prosecution. The entrenchment of the presumption of innocence in s 25 (3) (c) must be interpreted in this context. It requires that the prosecution bear the burden of proving all the elements of a criminal charge. A presumption which relieves the prosecution of part of that burden could result in the conviction of an accused person despite the existence of a reasonable doubt as to his or her guilt. Such a presumption is in breach of the presumption of innocence and therefore offends s 25 (3) (c)."[68]

[43] Of course, the doctrine of common purpose does not relate to a reverse onus or presumption which relieves the prosecution of any part of the burden. The appellants argued that the substantive effect of the doctrine of common purpose is to dispense with the requirement of a causal nexus between the conduct of the accused and the criminal result. As found earlier, the doctrine of common purposes sets a norm that passes constitutional scrutiny. The doctrine neither places an onus upon the accused, nor does it presume his or her guilt. The state is required to prove beyond a reasonable doubt all the elements of the crime charged under common purpose. In my view, when the doctrine of common purpose is properly applied, there is no reasonable possibility that an accused person could be convicted despite the existence

[67] 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 15.

[68] See also *S v Zuma and Others* n 63 at para 33; *S v Ntsele* 1997 (11) BCLR 1543 (CC); 1997 (2) SACR 740 (CC) at para 3-4; *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC); 2000 (1) SACR 414 (CC) at para 25-6.

of a reasonable doubt as to his or her guilt. In my view, the common purpose doctrine does not trench the right to be presumed innocent.

Active Association

[44] Some text writers[69] have raised two principal criticisms against the doctrine of common purpose. The first is that, in some cases, the requirement of active association has been cast too widely or misapplied. The second criticism is that there are less invasive forms of criminal liability short of convicting a participant in common purpose as a principal. The appellants echoed these complaints.

[45] In my view, these criticisms do not render unconstitutional the liability requirement of active association. If anything, they bring home the duty of every trial court, when applying the doctrine of common purpose, to exercise the utmost circumspection in evaluating the evidence against each accused person. A collective approach to determining the actual conduct or active association of an individual accused has many evidentiary pitfalls. The trial court must seek to determine, in respect of each accused person, the location, timing, sequence, duration, frequency and nature of the conduct alleged to constitute sufficient participation or active association and its relationship, if any, to the criminal result and to all other pre-requisites of guilt. Whether or not active association has been appropriately established will depend upon the factual context of each case.

[69] See Burchell and Milton n 16 above at 406-7.

[46] It was submitted that the findings of the trial court and the SCA were, on the facts, wrong. The appellants did not actively associate themselves with the crimes for which they were convicted. Both courts, it was argued, ought to have found that the appellants took no action to support the members of the group who actually fired their weapons and that the first appellant was merely a bystander and the second appellant was not even present at the time of the fatal shooting. To the extent that these submissions deal only with the factual findings of the SCA, they have no merit. Where there is no other constitutional issue involved, a challenge to a decision of the SCA on the basis only that it is wrong on the facts is not a constitutional matter.[70]

[47] The appellants also submitted that the SCA misapplied the liability requirement of active association as formulated in *S v Mgedezi*[71] and applied in subsequent case law.[72] On this argument, both courts adopted too wide a concept of active association and failed to satisfy themselves that the first appellant was a party to the common purpose prior to the infliction of the fatal shot. There is no merit in this criticism. The trial court and the SCA held that throughout the shooting both appellants were present on the scene and made common cause with the group, including the gunman. The appellants also complained that the legal requirements of active association were misapplied. The application of a rule by the SCA may constitute a constitutional

[70] See *S v Boesak* n 57 at para 15.

[71] See n 9 at 703I-J, Botha JA held that in a common purpose case:

> "The trial Court was obliged to consider, in relation to each individual accused . . . the facts found proved by the State evidence against that accused, in order to assess whether there was a sufficient basis for holding that accused liable on the ground of active participation in the achievement of a common purpose."

[72] See n 23.

matter if it is at variance with some constitutional right or precept.[73] No such case has been made out. There is no constitutional ground in the present case to justify interference by this Court with the credibility findings or application of the requirement of active association by the trial court or the SCA.

[48] The argument on the relative degree of the invasiveness of common purpose in comparison to other forms of liability such as accomplice liability and competent verdicts is, in essence, a proportionality argument. It rests on the assumption that common purpose invades a constitutionally protected right to a degree disproportionate to the need and objective of crime control. In the light of the finding in this judgment that the doctrine of common purpose does not limit any of the rights asserted by the appellants, this contention need not detain us.

Subjective fault

[49] The appellants contend that the trial court and the SCA omitted to apply the existing requirement that the state must prove that the appellants had the subjective foresight that others in the group would commit the crimes of which they were convicted. This complaint rests on the assertion that the evidence does not even prove that they were present and that neither court made any attempt to determine the individual intention of the two appellants. I can find no merit in any of these submissions. This criticism of the factual findings of the trial court and of the SCA is not borne out by the record. Moreover, the appellants have not advanced any need,

[73] *S v Boesak* n 57 at para 15.

nor could I find any, to adapt or elucidate the existing requirement of subjective fault. The common law precedent is, in this regard, clear and consistent with the Constitution. It appears that, that was the approach adopted by both the trial court and the SCA. If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each accused had the requisite *mens rea* concerning the unlawful outcome at the time the offence was committed. That means that he or she must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue.[74]

[50] Despite the evocative history of the application of the doctrine of common purpose in political and other group prosecutions, I am of the view that the common law doctrine of common purpose in murder as set out in *S v Mgedezi* and cases considered in this judgment,[75] does pass constitutional muster and does not, in the context of this case, require to be developed as commanded by section 39(2).

Right to silence

[51] In the present matter, the first appellant disclosed his alibi defence for the first time at trial. He now contends that the trial court and the SCA drew an adverse inference from his failure to disclose his alibi defence until his trial and that such an

[74] See *S v Mgedezi* n 9 at 706A-B; *S v Khumalo en Andere* n 23 at 350; *S v Singo* n 23 at 772. See also *S v Coetzee and Others* n 47 at para 177 for a discussion on an appropriate level of criminal culpability under the Constitution and forms of intent under the common law.

[75] See n 23 above.

inference constitutes an infringement of his right to silence as contained in section 35(1)(a)[76] of the Constitution.

[52] The central issue raised by this appeal is whether an adverse inference may be drawn from a failure to disclose an alibi prior to trial. In this regard three questions arise, being whether it is permissible to: (a) draw an adverse inference of guilt from the pre-trial silence of an accused, (b) draw an inference on the credibility of the accused from pre-trial silence and (c) cross examine the accused on the failure to disclose an alibi timeously, thus taking into account his or her responses.

Scope and objects of the right

[53] The pre-trial right to silence under section 35(1)(a) must be distinguished from the right to silence during trial protected by section 35(3)(h). This Court has authoritatively pronounced on constitutional claims premised on the right to silence during trial.[77] From the various dicta it appears that the objective of the right is to secure a fair trial. Thus, though procedural, this protection is an integral part of the substantive right to a fair trial. The protection of pre-trial silence is buttressed by the constitutional requirement under section 35(1)(b) to inform an arrested person promptly of the right to remain silent and the consequences of not remaining silent.

[76] See n 8.

[77] See for example: *Osman and Another v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC); 1998 (11) BCLR 1362 (CC); *S v Dlamini and Others* n 65; *S v Manamela* n 68; *S v Boesak* n 57 above.

[54] The rights to remain silent before and during trial and to be presumed innocent are important interrelated rights aimed ultimately at protecting the fundamental freedom and dignity of an accused person. This protection is important in an open and democratic society which cherishes human dignity, freedom and equality.

[55] The protection of the right to pre-trial silence seeks to oust any compulsion to speak. Thus, between suspicion and indictment, the guarantee of a right to silence effectively conveys the absence of a legal obligation to speak. This "distaste of self-incrimination," as Ackermann J puts it, is a response to the oppressive and often barbaric methods of the Star Chamber[78] and indeed to our own dim past of torture and intimidation during police custody. It is therefore vital that an accused person is protected from self incrimination during detention and police interrogation which may readily lend itself to intimidation and manipulation of the accused.[79]

[56] In *S v Manamela*[80] this Court affirmed that:

> "'[T]he right to silence, like the presumption of innocence, is firmly rooted in both our common law and statute,' and 'is inextricably linked to the right against self-incrimination and the principle of non-compellability of an accused person as a witness at his or her trial.'"

[78] *Ferreira v Levin NO* n 48 at para 92.

[79] Chaskalson et al *Constitutional Law of South Africa,* Frank Snyckers "Criminal Procedure", Juta, Cape Town at 27-44.

[80] See n 68 at para 35 where the Court confirmed the dicta contained in *Osman* n 77 at para 17.

In *S v Boesak*,[81] Langa DP, speaking for the Court, pointed out that the right to remain silent has different applications at different stages of a criminal prosecution. On arrest a person cannot be compelled to make any confession or admission that may be used against her or him; later at trial there is no obligation to testify. The fact that she or he is not obliged to testify does not mean that no consequences arise as a result. If there is evidence that requires a response and if no response is forthcoming, that is, if the accused chooses to exercise her or his right to remain silent in the face of such evidence, the Court may, in the circumstances, be justified in concluding that the evidence is sufficient, in the absence of an explanation, to prove the guilt of the accused. This will of course depend on the quality of the evidence and the weight given to that evidence by the Court.[82] In *Osman*[83] Madala J held that:

> ". . . the fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."

Inference of guilt

[57] In our constitutional setting, pre-trial silence of an accused person can never warrant the drawing of an inference of guilt. This rule is of common law origin. In *R v Mashelele and Another,*[84] Tindall JA, relying on the English decision of *R v Leckey*[85] formulated the rule thus:

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[81] See n 57.

[82] Id at para 24.

[83] See n 77 at para 22.

[84] 1944 AD 571.

> ". . . if the silence of the accused could be used as tending to prove his guilt, it is obvious that innocent persons might be in great peril; for an innocent person might well, either from excessive caution or for some other reason, decline to say anything when cautioned. And I may add that an accused person is often advised by his legal advisers to reserve his defence at the preparatory examination. It would, also, in my opinion, have been a misdirection to say that the silence of the accused was a factor which tended to show that their explanation at the trial was concocted."[86]

[58] It is well established that it is impermissible for a court to draw any inference of guilt from the pre-trial silence of an accused person. Such an inference would undermine the rights to remain silent and to be presumed innocent.[87] Thus, an obligation on an accused to break his or her silence or to disclose a defence before trial would be invasive of the constitutional right to silence. An inference of guilt from silence is no more plausible than innocence. The majority of the US Supreme Court in *Doyle v Ohio* reminds us that "every post arrest silence is insolubly ambiguous".[88] To hold otherwise, the mandatory warning under section 35(1)(b) will become a trap instead of a means for finding out the truth in the interests of justice.[89]

Inference of credibility and an alibi defence

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[85] 1944 1 All ER 80.

[86] See n 84 at 583-4. See also *S v Zwayi* 1998 (2) BCLR 242 (Ck); 1997 (2) SACR 772 (Ck). Compare *S v Brown en 'n Ander* 1996 (11) BCLR 1480 (NC); 1996 (2) SACR 49 (NC).

[87] For examples of foreign authorities on this point in common law jurisdictions see *Doyle v Ohio* 426 US 610 at 618; *Jenkins v Anderson* 447 US 231 at 238-45; *R v Noble* 114 CCC (3d) 385 at 432-3; *Murray v United Kingdom* (1996) 22 EHRR 29 at 45-7 and 51-4; *Averill v United Kingdom* (2001) 31 EHRR 36 at 42-3.

[88] Id at 617.

[89] *R v Leckey* n 85 at 83.

[59] A distinction may properly be made between an inference of guilt from silence and a credibility finding connected with the election of an accused person to remain silent. In the dissenting judgment in *Doyle v Ohio*[90] a comparable distinction is drawn between the "permissibility of drawing an inference on the credibility of the accused from silence and the impermissibility of drawing a direct inference of guilt". In the latter, the presumption of innocence is implicated. In the former, a court would have regard to the factual matrix within which the right to silence was exercised.

[60] An alibi defence has often generated judicial debate on whether it is an exception to the right to silence. In *R v Cleghorn*[91] the peculiarity of an alibi defence is explained as follows:

> ". . . 'there is good reason to look at alibi evidence with care. It is a defence entirely divorced from the main factual issue surrounding the *corpus delicti*, as it rests upon extraneous facts, not arising from the *res gestae*. The essential facts of the alleged crime may well be to a large extent incontrovertible, leaving but limited room for manoeuvre whether the defendant be innocent or guilty. Alibi evidence, by its very nature, takes the focus right away from the area of the main facts, and gives the defence a fresh and untrammelled start. It is easy to prepare perjured evidence to support it in advance.'"[92]

[90] See n 87 at 635.

[91] 100 CCC (3d) 393.

[92] Id at para 22 from the minority judgment per Major J, which appears not to be inconsistent, on this point, with the approach found in the majority judgment at para 4.

The minority in this case held that the requirement to disclose an alibi was an exception to the right to silence.[93]

[61] More recently, the South African Law Commission[94] has recommended that legislation should be introduced to permit a court to draw an inference from the pre-trial silence of an accused person in certain circumstances. The draft legislation proposes that a court should be authorised to make an inference appropriate to that case from the failure of an accused person to disclose an alibi during or before plea proceedings. The approach to disclosure of an alibi defence in the proposed enactment is not dissimilar to the one adopted by the majority in *Cleghorn.*[95]

[62] Canadian courts treat a failure to disclose an alibi timeously as being a factor which can properly be taken into account in the evaluation of the evidence as a whole:

> "[T]he consequence of a failure to disclose properly an alibi is that the trier of fact *may* draw an adverse inference when weighing the alibi evidence heard at trial."[96]

[63] That a failure to disclose an alibi timeously has consequences in the evaluation of the evidence as a whole is consistent with the views expressed by Tindall JA in *R v*

[93] Id at para 23.

[94] SA Law Commission Project 73: Fifth Interim Report on the Simplification of Criminal Procedure at 120-3. The Interim Report, at 28, relies on the decision of the European Court of Human Rights in the case of *Murray v United Kingdom* n 87 in which it was held that the right to silence is not absolute and that inferences from the silence could be drawn in appropriate instances, as well as on statutes in England and in several states in Australia and the USA.

[95] See n 91 at para 4.

[96] Id.

Mashelele.[97] After stating that an adverse inference of guilt cannot be drawn from the failure to disclose an alibi timeously, Tindall JA goes on to say:

> "But where the presiding Judge merely tells the jury that, as the accused did not disclose his explanation or the *alibi* at the preparatory examination, the prosecution has not had an opportunity of testing its truth and that therefore it may fairly be said that the defence relied on has not the same weight or the same persuasive force as it would have had if it had been disclosed before and had not been met by evidence specially directed towards destroying the particular defence, this does not constitute a misdirection."

[64] As pointed out earlier, an arrested person has the right to remain silent. This, indeed, is part of the warning given to the person including that if he or she chooses to say anything it may be used in evidence against him or her. Drawing an inference on credibility in these circumstances has the effect of compelling the arrested person to break his or her silence, contrary to the right to remain silent guaranteed by section 35(1)(a) of the Constitution. To this extent, drawing an adverse inference on credibility limits the right to remain silent.

[65] The rule of evidence that the late disclosure of an alibi affects the weight to be placed on the evidence supporting the alibi is one which is well recognised in our common law.[98] As such, it is a law of general application. However, like all law, common law must be consistent with the Constitution. Where it limits any of the

[97] See n 84.

[98] See *R v Mashelele* n 84 at 585; *R v Patel* 1946 AD 903 at 908; *S v Maritz* 1974 (1) SA 266 (NC) at 267G; Hoffmann and Zeffertt *The South African Law of Evidence* 4th ed at 179.

rights guaranteed in the Constitution, such limitation must be justifiable under section 36(1). Whether this rule is justifiable in terms of section 36(1) is a question to which I now turn.

[66] I have already alluded to the importance of the right to remain silent. What is also important is that the accused receives no prior warning that his or her failure to disclose an alibi to the police might be used against him or her in evaluating the alibi defence. On the contrary, the accused is warned of his or her right to remain silent and that anything that he or she says might be used against him or her. The absence of a warning that his or her constitutional right to remain silent might be limited is a relevant consideration in the justification analysis. However what weighs heavily with me is the extent of the limitation.

[67] Firstly, the late disclosure of an alibi is one of the factors to be taken into account in evaluating the evidence of the alibi. Standing alone it does not justify an inference of guilt. Secondly, it is a factor which is only taken into consideration in determining the weight to be placed on the evidence of the alibi. The absence of a prior warning is, in my view, a matter which goes to the weight to be placed upon the late disclosure of an alibi. Where a prior warning that the late disclosure of an alibi may be taken into consideration is given, this may well justify greater weight being placed on the alibi than would be the case where there was no prior warning. In all the circumstances, and in particular, having regard to the limited use to which the late

disclosure of the alibi is put, I am satisfied that the rule is justifiable under section 36(1).

[68] The failure to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by her or him for failing to disclose the alibi timeously within the factual context of the evidence as a whole.

Cross-examination

[69] An election to disclose one's defence only when one appears on trial is not only legitimate but also protected by the Constitution. However, a related issue is whether it is permissible to cross-examine an accused on why she or he opted to remain silent on an alibi or indeed on any other defence. Such a line of enquiry is, in my view, permissible. It is quite proper, and often necessary, to probe, in cross-examination, the preference to remain silent. This goes to credit and would not unjustifiably limit the content of the right to remain silent. It may advance "the truth-finding function of the criminal trial"[99] and test the veracity of a belatedly disclosed or fabricated defence.

[70] However, there are limits to such cross-examination. An explanation that the accused chose to remain silent as of right may in a particular context be an adequate

[99] *Jenkins v Anderson* n 87 at 238.

answer. Thus such cross-examination must be exercised always with due regard to fairness towards both the accused and the prosecution and without unduly encroaching upon the right to remain silent or limiting a proper enquiry for the delayed disclosure of a defence.

[71] It seems to me that there is no reason why this court should not have regard to the failure by the first appellant to mention the alibi when he responded to questions put to him by Sergeant McDonald. Had this been a trial before a jury, there may have been a level of concern about that line of cross-examination. Where a jury is concerned it may be difficult for its members to evaluate the nuances involved in credibility findings, if matters which may be prejudicial but capable of explanation are put before them. Moreover a jury is not obliged to deliver an open and reasoned judgment on its factual findings. But in a trial before a judge, in my view, it is quite permissible to ask questions on why the alibi was not mentioned earlier and to take the response thereto into reckoning when evaluating the evidence as a whole. Ultimately it is a matter of what is fair and just in the light of the requirements of a fair trial.

Submissions of the first appellant

[72] The foundational submission of the first appellant is that the majority finding of the SCA rests entirely and precariously on an inference drawn from his silence regarding his alibi. This assertion is not without merit. The majority judgment of the SCA appears to have been premised on the reasoning that the mere suspicion about the version of the first appellant was not in itself enough; what justified his guilt was

that ". . . the version was raised only at the trial, some two years after the incident". The learned judges of appeal then concluded that the appellant's failure to advise the police justified an inference that "the alibi had no truth at all". An inference of guilt from the disclosure of an alibi defence only at trial unjustifiably limited the appellant's right to pre-trial silence. Such an approach has, in effect, imputed guilt from pre-trial silence and thus trenched his constitutional guarantee to remain silent before his trial.

[73] The resultant issue is whether this impermissible approach adopted by the SCA adversely prejudiced or undermined the substantive fairness of the trial. The full record of proceedings before the trial court and the SCA is before us. This Court has had the benefit of full argument and is consequently in no different position from the trial court or the SCA to consider facts which are connected or relevant to the proper adjudication of a constitutional issue. Such evidence, in my view, would itself be an issue connected to a decision on a constitutional matter.[100] Any further remission of this already protracted case would not serve the interests of justice. Moreover, both counsel were agreed that the matter should be brought to finality by this Court. It is thus competent and in the interests of justice for this Court to decide the matter.

Conclusion

[100] Sections 167(3)(b) and (c) of the Constitution.

[74] In my view, the misdirection of the SCA would be relevant only if it would be an issue which materially alters the outcome of the trial[101] or compromises its substantive fairness, to which the appellant is entitled under section 35(3) of the Constitution. Put otherwise, the applicable test is whether, "on the evidence, unaffected by the defect or irregularity, there is proof of guilt beyond reasonable doubt".[102] If this Court were to find that such proof has been established, it must follow that the conviction must stand.

[75] The credibility findings of the trial court pose an insurmountable obstacle to the first appellant's case. The trial court made it clear that the alibi evidence was not credible. Both the trial court and the majority of the SCA correctly held that there was no reasonable possibility that Kiel's identification could be mistaken. The majority of the SCA held that Kiel's identification of the appellant was beyond reproach and that his evidence was reliable and compelling. Both courts, inclusive of the minority judgment of Navsa JA, rejected the alibi evidence as false.

[76] After his arrest, the first appellant was confronted by the police with the allegation that he had been present at the scene of the shooting. After having been warned of his rights he was asked by the police, prior to his arrest, what he had to say about these allegations. He chose to proffer an explanation, albeit a truncated one. His response that the family was in Hanover Park is hardly consistent with the alibi

[101] Compare the earlier common law test of whether by reason of the irregularity or misdirection "a failure of justice has, in fact, resulted". See *S v Harris* 1965 (2) SA 340 (A) at 364A-B. A lucid formulation of the test is offered by Holmes JA in *S v Bernadus* 1965 (3) SA (A).

[102] Id *S v Bernadus* at 305C-F and Kriegler and Kruger n 16 at 831.

subsequently asserted. The only explanation he could give was that he was referring to his family and not to himself. This disingenuous explanation for the failure to disclose the alibi when confronted with the evidence against him can legitimately be taken into account in the evaluation of the evidence. Having regard to the fact that a late disclosure of an alibi carries less weight than one disclosed timeously, the cogency of Kiel's evidence and the unsatisfactory nature of the first appellant's evidence, the trial court was entitled to reject the evidence of the alibi, and to convict the first appellant.

[77] The trial court properly convicted the first appellant on a consideration of the totality of the evidence. The appellant's explanation of why he chose to remain silent, the lateness of the disclosure of his alibi defence, the unacceptable evidence which was tendered by two of his witnesses and the cogency of the evidence tendered by Kiel taken together, entitled the trial court to return a verdict of guilt against the first appellant.

[78] Such is the adversarial nature of our criminal process. Once the prosecution had produced sufficient evidence which established a *prima facie* case, the first appellant had no duty to testify. However, once he had chosen to testify it was quite proper to ask him questions about his alibi defence including his explanation on his election to remain silent. When his evidence was found not to be reasonably possibly true, as did the trial court, he ran the risk of a conviction. Thus, absent a credible version from the first appellant, the version advanced by the prosecution, if found

credible, was likely to be accepted. In *S v Dlamini and Others*,[103] Kriegler J emphasised the importance of freedom of choice in a democracy. However, liberty to make choices brings with it a corresponding responsibility and "often such choices are hard".[104]

Order

The appeals of the first and second appellant are dismissed.

Chaskalson CJ and Madala J concur in the judgment of Moseneke J.

[103] See n 65.

[104] Id at para 93.

GOLDSTONE J and O'REGAN J:

[79] We agree with the order made by Moseneke J, and with his reasons for rejecting the appellants' arguments in relation to the doctrine of common purpose. However, in our view, the Supreme Court of Appeal, in drawing an adverse inference from the first appellant's failure to disclose his alibi, breached his constitutional right to silence. Given that a judgment of the Supreme Court of Appeal is binding on all courts other than this, we think it important that the correct constitutional approach to the question of the drawing of adverse inferences from the silence of an accused be explored in this judgment even though, after careful consideration of the record, we consider that this breach makes no difference to the outcome of the appeal. On a conspectus of all the evidence,[1] but without drawing any adverse inference from his failure to disclose his alibi prior to the trial, we are satisfied that the first appellant was proved to have been guilty beyond a reasonable doubt of all three charges.

[80] The right to silence is entrenched in subsections 35(1)(a) and (b) and section 35(3)(h) of the Constitution as follows:

> "35(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

[1] *R v Hlongwane* 1959 (3) SA 337 (A) at 340H.

(ii) of the consequences of not remaining silent;

. . .

35(3) Every accused person has a right to a fair trial, which includes the right –

. . .

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings"

It is important to note that subsections 35(1)(a) and (b) entrench not only the right to silence, but also the right to be informed of the consequences of not remaining silent.

[81] This Court has acknowledged that the right to silence is firmly rooted in our common law.[2] The precise scope of the phrase, however, both in our law and that in other jurisdictions has remained uncertain.[3] As Lord Mustill noted in *R v Director of Serious Fraud Office, Ex parte Smith,*[4] the right to silence is best understood not as denoting a single right, but a disparate group of immunities. Lord Mustill identified six: an immunity from being compelled on pain of punishment to answer questions posed by anyone; an immunity from being compelled on pain of punishment to provide answers to questions when the answers may be self-incriminatory; a specific immunity from being compelled to answer, on pain of punishment, questions put by police officers when under suspicion of having committed an offence; the specific

[2] *Osman and Another v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC); 1998 (11) BCLR 1362 (CC) at para 17.

[3] There is a wealth of academic writing on the matter, both in South Africa and elsewhere. References to much of this debate can be found in three recently published South African articles: RW Nugent "Self-incrimination in Perspective" (1999) 116 *SA Law Journal* 501; K Van Dijkhorst "The Right to Silence: Is the Game Worth the Candle?" (2001) 118 *SA Law Journal* 26; and C Theophilopoulos "The So-called Right to Silence and the Privilege Against Self-incrimination: A Constitutional Principle in Search of Cogent Reasons" (2002) 18 *SA Journal on Human Rights* 505.

[4] [1993] AC 1 (HL) at 30E – 31B, quoted with approval in *Osman's* case, above n 2, at para 18.

immunity of those accused from being compelled to give evidence in their trial; the specific immunity of those arrested from having questions put to them by police officers; and a specific immunity possessed by accused persons from having adverse comment made on their failure to answer questions before trial or to give evidence at trial. In addition, Lord Mustill noted that there are different underlying reasons for the different aspects or immunities contained within the right to silence.[5]

[82] In each case in which a court considers a constitutional challenge based on the right to silence, it will need to consider which aspect of the right to silence is in issue and whether it falls within the right protected in our Constitution. We disagree therefore with Yacoob J (at para 104) when he says there is only one right to silence, and that there is no difference between pre-trial silence and trial silence. In each case concerned with the right to silence, a court must identify the underlying purpose of the relevant aspect of the right to silence and consider whether it has been infringed in the case before it. In this case, we are concerned with the last immunity described by Lord Mustill – the specific immunity of an accused from having an adverse inference drawn from his or her silence. We must decide whether it is constitutionally acceptable to draw an adverse inference from the failure of an accused to disclose an alibi to the police or to the court in the period before the trial commences in circumstances where the accused was advised of his right to remain silent.

[5] Id 31D – 32D.

[83] Various reasons are given for the principle that adverse inferences should not be drawn from an accused person's silence. One identified by Lord Mustill is the following:

> ". . . the instinct that it is contrary to fair play to put the accused in a position where he is exposed to punishment whatever he does. If he answers, he may condemn himself out of his own mouth; if he refuses he may be punished for his refusal."[6]

In our view, this does not provide a valid foundation for the principle under our constitutional order. This Court has held that an adversarial system of criminal procedure necessarily forces hard choices on an accused, not by the operation of an unfair rule of law, but by the fundamental nature of the adversarial process itself. This Court has held that such choices which flow from the character of the adversarial system do not constitute an infringement of the right to silence.[7] Once the prosecution has produced evidence sufficient to establish a *prima facie* case against the accused, the accused faces the choice of staying silent, in which event he or she may be convicted, or seeking to lead evidence which may or may not be incriminatory. This hard choice faced by the accused is the consequence not of an unfair rule of law, but of the operation of the adversarial system coupled with the absence of a valid defence. In an adversarial system there can be no immunity from facing such choices and having to make such a choice cannot offend the right to silence as entrenched in our Constitution.

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[6] Id 32B.

[7] See *Osman's* case, above n 2 at para 22.

[84] Another explanation commonly given for the rule against adverse inferences is the principle that the state bears the onus of proving every element of an offence without the assistance of the accused. It is clear from our Constitution that the presumption of innocence implies that an accused person may only be convicted if it is established beyond a reasonable doubt that he or she is guilty of the offence. That, in turn, requires the proof of each element of the offence. However, our Constitution does not stipulate that only the state's evidence may be used in determining whether the accused person has been proved guilty. Indeed, our law has always recognised that the question of whether the accused has been proven guilty or not is one to be determined on a conspectus of all the admissible evidence, whatever its provenance. This principle, too, cannot therefore found a valid objection to the drawing of adverse inferences.

[85] A third reason given for the rule against the drawing of adverse inferences is the importance of protecting arrested persons from improper questioning and procedures by the police. Unfortunately, in the past people arrested were coerced by improper police methods to confess (not infrequently, falsely) to crimes. Such practices need to be put firmly behind us. In our view, the need to reduce unconstitutional policing practices is of such importance in the light of our history, that the right to silence should protect an accused person from having an adverse inference drawn from pre-trial silence in the face of questioning from the police. This concern provides an important reason for not drawing adverse inferences from the silence of an arrested

person in the face of police questioning. It is of no relevance to the silence of an accused in court.

[86] A different but equally cogent reason for the rule against the drawing of adverse inferences from the silence of an arrested person relates to the warning given to people when they are arrested. Section 35(1)(b) requires the police to warn people when they are arrested that they have the right to remain silent and of the consequences of not remaining silent and thus a failure to give the warning will infringe section 35(1)(b). In our view, it is constitutionally impermissible to draw an adverse inference from an arrested person's silence once he or she has been informed of the right to remain silent. That warning, as currently formulated, clearly implies that the arrested person will not be penalised for silence. For the person arrested to be told that he or she may remain silent without more, and for that very silence thereafter to be used to discredit the person, in our view is unfair. We are not persuaded therefore by Yacoob J's reliance on section 35(5) of the Constitution.[8] Nor are we persuaded that it can ever be fair to warn a person arrested and give him or her the impression that there is a right to remain silent without qualification, and then to draw an adverse inference from that silence.

[87] The adversarial process imposes many hard choices upon the accused. This is inevitable and appropriate. What is neither inevitable nor appropriate, is that the

[8] At para 108 - 109 of his judgment. Section 35(5) of the Constitution provides that: "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 be detrimental to the administration of justice."

accused should be misinformed of the implications of the course of action he or she adopts. As this Court stated in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*:

> "Each and every one of those choices [relating to what the accused should do in bail proceedings] can have decisive consequences and therefore poses difficult decisions. As was pointed out in *Osman's* case '(t)he choice remains that of the accused. The important point is that the choice cannot be forced upon him or her.' It goes without saying that an election cannot be a choice unless it is made with proper appreciation of what it entails. It is particularly important in this country to remember that an uninformed choice is indeed no choice."[9]

An accused person needs to understand the consequences of remaining silent. If the warning does not inform the accused that remaining silent may have adverse consequences for the accused, the right of silence as understood in our Constitution will be breached.

[88] Moreover, in many cases, the fact of the warning itself will render the silence by the accused ambiguous. It will not be clear whether the accused remained silent because he or she is relying on the right to remain silent, or for another reason, whether legitimate or not. To the extent that the silence is ambiguous, of course, it will have little value in the process of inferential reasoning, especially where guilt must be proved beyond a reasonable doubt.

[9] 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 94.

[89] In this case, the first appellant was warned of his right to remain silent. Thereafter he made a brief statement to the police stating that at the time of the offence his family was at Hanover Park, but when asked if he wished to have that statement reduced to writing, he demurred, as he was entitled to do. Thereafter he said nothing prior to trial. In our view to use this silence against the first appellant either as confirmation of his guilt, as the majority judgment in the Supreme Court of Appeal did, or to discredit him as a witness, is unfair to him and constitutes a breach of his right to silence and his right to a fair trial. We do, however, consider it acceptable to use the statement that he made to the police after being warned concerning his family's presence at Hanover Park. Using such statement to evaluate his evidence does not constitute a breach of his right to silence. Indeed the first appellant was duly warned that any statement he might make may be used against him in his trial.

[90] One further point needs to be made. It should be clear from what we have said, that we do not see that a valid distinction can be drawn in this context between adverse inferences going to guilt, and adverse inferences going to credit. There is of course a conceptual difference between inferences going to credit and inferences going to guilt. But in the context of an alibi, the practical effect of the adverse inference to be drawn for the purposes of credit, namely, that the alibi evidence is not to be believed, will often be no different to the effect of the inference to be drawn with respect to guilt,[10] namely that the late tender of the alibi suggests that it is

[10] The fact that a court concludes that the accused is lying and that the alibi is false does not mean that the accused is guilty and must automatically be convicted. *S v Mtsweni* 1985 (1) SA 590 (A) at 593I says, "[v]eral

manufactured and that the accused is guilty.[11] We disagree therefore with the distinction drawn by Moseneke J between an adverse inference to credit on the one hand and an adverse inference to guilt. Whether an adverse inference is drawn going to guilt or credit, in our view, the accused has been treated unfairly in the light of the warning given.

[91] Moseneke J comes to the related conclusion that it is permissible for an accused person to be cross-examined "on why she or he opted to remain silent on an alibi or indeed any other defence . . .".[12] We do not agree. In the first place, we are of the opinion that no accused person should have to account for the exercise of a right entrenched in the Constitution. This is especially so where that account may be used against the accused. Secondly, it would be unfair to allow such cross-examination in the light of the accused person having been informed of the right to silence without at

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moet daar gewaak word teen 'n afleiding dat, omdat 'n beskuldige 'n leuenaar is, hy daarom waarskynlik skuldig is."

[11] As Mason CJ reasoned in *Petty and Maiden v The Queen* (1991) 173 CLR 95 (HC):

> "We acknowledge that there is a theoretical distinction between the two modes of making use of the accused's earlier silence. However, we doubt that it is a distinction which would be observed in practice by a jury, even if they understand it. And, what is of more importance, the denial of the credibility of that late defence or explanation by reason of the accused's earlier silence is just another way of drawing an adverse inference (albeit less strong than an inference of guilt) against the accused by reason of his or her exercise of the right of silence. Such an erosion of the fundamental right should not be permitted. Indeed, in a case where the positive matter of explanation or defence constitutes the real issue of the trial, to direct the jury that it was open to them to draw an adverse inference about its genuineness from the fact that the accused had not previously raised it would be to convert the right to remain silent into a source of entrapment." (At 100-101).

See also *R v Gilbert* (1978) 66 Cr App R 237 (CA) at 244 where the distinction between an adverse inference to guilt and to credit was rejected, and also the rejection of that distinction by Rupert Cross "The Evidence Report: Sense or Nonsense" [1973] *Criminal Law Review* 329 at 333. All these sources consider the distinction in the context of instructions to the jury, and are therefore in a somewhat different context to the one we are considering. Notwithstanding the difference in context, however, the reasoning remains valid in our context.

[12] At para 69.

the same time being informed that she or he might be requested to account for the positive exercise of the right at the trial. We must emphasise that we are concerned only with cross-examination relating to the pre-trial silence of the accused. Nothing we have said should be understood as precluding other lines of cross-examination designed to test the veracity of the alibi.

[92] The foregoing should make it plain that the constitutional position would be different were there to be a law of general application permitting the drawing of an adverse inference in circumstances where the accused has been properly informed of the consequences of a failure to raise an alibi timeously. No such rule presently exists at common law in South Africa.[13] In our view, such a rule if properly tailored and, in particular, if accompanied by an appropriate revision to the warning issued to arrested persons would still limit the right to silence, but would pass constitutional muster under section 36 of the Constitution.[14] In this case, were the first appellant to have been duly warned that his failure to disclose an alibi timeously could result in an adverse inference being drawn, the common law could have been developed to permit

[13] In *R v Mashelele and Another* 1944 AD 571 at 585, the Appellate Division (per Tindall JA) held that it was permissible for a judge to inform a jury when an explanation or alibi is only disclosed at trial, that the prosecution has not had the opportunity of testing it and therefore it does not have the same weight or persuasive force as if it had been disclosed earlier. The Court specifically held that it was impermissible to use the late disclosure of an alibi to infer a guilty mind on the part of the accused or that the alibi is false.

[14] Section 36 of the Constitution states that:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

the drawing of an adverse inference by the Supreme Court of Appeal and such development would have been a justifiable limitation of his right to silence and to a fair trial. It should be noted that a rule requiring timeous disclosure of an alibi defence has existed at common law in Canada for many years and according to a majority of the Supreme Court of Canada it "has been adapted to conform to Charter norms."[15] Limits on the right to silence have also recently been adopted in the United Kingdom.[16] The European Court of Human Rights has also held that an adverse inference from silence is not necessarily incompatible with article 6 of the European Convention on Human Rights.[17] It appears that rules of this nature are proposed by the SA Law Reform Commission.[18]

[93] We conclude, however, that the right to silence was breached in this case, because an adverse inference was drawn from the failure of the first appellant to disclose an alibi after being informed of his right to remain silent. Nevertheless we are persuaded that the appeal of the first appellant should be dismissed for the record establishes his guilt beyond a reasonable doubt without reliance upon any adverse

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[15] See *R v Cleghorn* 100 CCC (3d) 393 at para 4, per Iacobucci J. The common law rule discussed in *Cleghorn* stems back to the decision of *Russell v The King* (1936) 67 CCC 28 at 32. The rule establishes that the failure of an accused to disclose an alibi prior to the trial is relevant to the weight and credibility to be attached to the alibi. See the discussion in John DR Craig "The Alibi Exception to the Right to Silence" 39 (1996) *Criminal Law Quarterly* 227.

[16] See section 34 of the Criminal Justice and Public Order Act, 1994.

[17] See *Murray v United Kingdom* (1996) 22 EHRR 29; *Condron v United Kingdom* (2001) 31 EHRR 1 and also the discussion by Ian Dennis "Silence in the Police Station: the Marginalisation of Section 34" [2002] *Criminal Law Review* 25.

[18] See SA Law Commission Project 73: Fifth Interim Report on the Simplification of Criminal Procedure (A more inquisitorial approach to criminal procedure – police questioning, defence disclosure, the role of judicial officers and judicial management of trials) August 2002, chapter 8, proposed new section 207A.

inference from his silence. The High Court found Kiel's evidence cogent and persuasive, while rejecting that of the two alibi witnesses as false. There is no basis for rejecting these findings. Moreover, the first appellant, when initially questioned by the police, said that his family had been at Hanover Park at the time of the offence, which is inconsistent with the alibi he subsequently raised. At best for the accused, his statement that "the family was at Hanover Park" is ambiguous and evasive. It is not consistent with the alibi tendered later to the effect the he was with his second wife at Parkwood Estate which is nowhere near Hanover Park. In the light of the rejection of the evidence of the two defence witnesses and the prior inconsistent statement made by the first appellant, the alibi evidence does not in the context of all the evidence in the case (particularly the strong evidence of Kiel) raise a reasonable doubt as to the innocence of the first appellant.

Ackermann J and Mokgoro J concur in the judgment of Goldstone J and O'Regan J.

YACOOB J:

[94] I have read the judgment of Moseneke J (the main judgment) and the concurring judgment of Goldstone J and O'Regan J (the concurrence). I agree with the conclusion in both judgments that the appeal must fail. Like the concurrence I agree with the reasoning and conclusion in the main judgment concerned with

common purpose. I cannot however fully agree with the reasoning or conclusion in either judgment on the right to silence. Hence this separate concurrence.

[95] In the process of arriving at the conclusion that the alibi had to be rejected as a fabrication the majority judgment of the Supreme Court of Appeal (SCA) on the alibi defence delivered by Lewis AJA relied on the first appellant's failure to disclose his alibi to the police or to the prosecution. The first appellant contended that this approach infringed his right to remain silent conferred by section 35(1)(a) of the Constitution.[1] The main judgment and the concurrence hold, each on a different basis, that the reasoning of the majority in the SCA did infringe the first appellant's right to silence but conclude that the first appellant's conviction was nevertheless justified.

[96] Briefly stated the differences between the two judgments are these. The concurrence takes the view that any cross-examination of an accused person on the reasons for the failure to disclose an alibi to the police before the trial, and any reliance on the accused's silence in the process of judicial reasoning that results in the rejection of that alibi is a breach of the right to silence. The main judgment holds that: (a) it is not an infringement of the right to silence to cross examine an accused person concerning the reason why an alibi was not disclosed provided that the cross-examination is fair in the circumstances; (b) it is a justifiable limitation of the right to silence for a judicial officer to take into account the responses thus obtained in conjunction with the failure to disclose an alibi as factors in the process of making an

[1] The section will be set out and discussed later in this judgment.

inference as to the credibility of the accused; (c) it is an infringement of the right to silence to infer the guilt of the accused from the failure to disclose an alibi and (d) the majority in the SCA wrongly did this.

[97] This judgment favours an approach that:

(a) The right to silence properly interpreted in its context has an impact on the way in which a criminal trial should be conducted.

(b) The appropriate protection of the right does not require the cross-examination of an accused person about the reasons for the failure to disclose an alibi to be absolutely protected. Nor does it prohibit a judicial officer from drawing any legitimate inference from the evidence revealed by the cross-examination, the silence of the accused and all the relevant surrounding circumstances.

(c) The over-arching and abiding obligation of a judicial officer in a criminal trial is to ensure a fair trial within the meaning of section 35(3).

(d) It is this obligation that governs the way in which a criminal trial is conducted; dictates answers to complex questions concerning the circumstances and the extent to which cross-examination on the reasons for silence are permissible; and settles whether any inference may be drawn from the silence of the accused and the facts and circumstances related to it as revealed in the trial.

(e) The need to ensure a fair criminal trial is key to determining whether a right has been infringed. The right is infringed only if it is implicated in a way that renders the trial unfair.

(f) Cross-examination of witnesses concerning the reason why an alibi was not disclosed infringes the right to silence only if it renders the trial unfair.

(g) The responses thus obtained may be taken into account by a judicial officer in conjunction with the failure to disclose an alibi in the process of making an inference provided that the way in which the inference is made and the drawing of the inference itself does not render the trial unfair.

(h) Drawing an inference as to guilt or credibility solely from the silence of the accused would render a trial unfair.

(i) The inference drawn by the SCA was entirely fair.

The scope of the constitutional right to silence

[98] Textually, the section 35(1)(a) right to remain silent is conferred on everyone arrested for allegedly committing an offence. Although not expressly stated in the main judgment or the concurrence, the findings of each rests on a proposition that is both central and fundamental to them. That foundation is built on a distinction between the right to pre-trial silence and that right of the accused during trial. The right of a person to pre-trial silence (as distinct from the right to silence during trial) is, properly interpreted, so extensive in its reach that it is breached if silence is used in cross-examination or in the process of any inference by a judicial officer against an accused at trial. In other words the right places a constitutional duty upon a judicial officer charged with the responsibility of conducting a criminal trial in our constitutional setting not to draw an inference (as to guilt alone according to the main judgment or to all inferences according to the concurrence) from that silence.

[99] The scope of the section 35(1)(a) right to silence and whether this right is in essence different from the right to silence component in section 35(3)(h) must be determined in its context. Section 35 is headed "Arrested, detained and accused persons". Each of the three subsections within it describes the rights of a specified category of people. Subsection (1) confers certain rights on everyone arrested for committing an offence; subsection (2) on all people detained including every sentenced prisoner; and subsection (3) applies to a limited category of people designated by the words "every accused person" (emphasis supplied).

[100] The section 35(1)(a) right to silence is contained within the first category. Subsection (1), to the extent relevant, reads:

> "(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;
> (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
> (d) to be brought before a court as soon as reasonably possible,
> . . .
> (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
> (f) to be released from detention if the interests of justice permit, subject to reasonable conditions."

[101] Subsection (2) is concerned with the rights of everyone who is detained including a sentenced prisoner and, by definition, embraces all people arrested for allegedly committing an offence and detained. These rights include the right to be informed promptly of the reason for being detained,[2] to a legal practitioner,[3] to challenge the lawfulness of the detention,[4] to certain minimum conditions of detention[5] and visitation rights.[6] Neither subsection (1) nor subsection (2) is concerned with the trial of an accused person. The rights in subsection (2) however, are available to all accused persons in detention save, as will be pointed out later, where the relevant right is repeated as the right of an accused in subsection (3).[7]

[102] The way in which the trial is to be conducted is particularised in considerable and careful detail in sections 35(3) and 35(5). That detail is sufficiently relevant to the thrust of this judgment for the subsections to be set out in full. Section 35(3) provides:

> (3) Every accused person has a right to a fair trial, which includes the right-
>
> (a) to be informed of the charge with sufficient detail to answer it;
>
> (b) to have adequate time and facilities to prepare a defence;
>
> (c) to a public trial before an ordinary court;

[2] Section 35(2)(a) of the Constitution.

[3] Section 35(2)(b) and (c) of the Constitution.

[4] Section 35(2)(d) of the Constitution.

[5] Section 35(2)(e) of the Constitution.

[6] Section 35(2)(f) of the Constitution.

[7] Compare section 35(2)(b) and (c) with section 35(3)(f) and (g).

(d) to have their trial begin and conclude without unreasonable delay;
(e) to be present when being tried;
(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
(i) to adduce and challenge evidence;
(j) not to be compelled to give self-incriminating evidence;
(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
(o) of appeal to, or review by, a higher court."

Section 35(5) provides:

"(5) 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 be detrimental to the administration of justice."

[103] The three subsections intersect, complement each other and demonstrate a logical pattern when viewed from the point of view of the criminal justice process that might unfold in relation to a person who is suspected of having committed an offence. The first step envisaged is the arrest of a person for allegedly having committed an offence. That person is not yet an accused and the arrest itself does not render him a detainee entitled to the right set out in subsection (2). The rights in subsection (1) and (2) will be applicable to everyone who is arrested and thereafter detained. Every person arrested for allegedly committing an offence has the right, at the first court appearance, to be charged, to be informed of the reason for the detention to continue, or to be released. If she or he is released the process is at an end. Presumably the person may be detained further and informed that the matter is under further investigation. In that event, the person concerned remains a detainee and is entitled to the rights described in subsections (1) and (2). It is only if the person is charged that he or she becomes an accused and has the right to a fair trial in terms of subsection (3).

[104] This aspect introduces the link between subsections (1) and (3). Subsection (1) confers rights upon people who are arrested for allegedly committing an offence and who are subsequently detained but only until they are charged and become accused persons. When they do, subsection (3) takes over and they become entitled to a fair trial and all that that entails. But subsections (1) and (3) represent a continuum. The right to silence encapsulated in subsection (1)(a) applies for what might be called a holding period until the person arrested for the alleged commission of an offence is

charged. As soon as that period is over the person concerned becomes an accused and entitled "to be presumed innocent, to remain silent, and not to testify during the proceedings".[8] The section 35(3)(h) right to silence cannot be said, on a properly generous construction, to be limited by the phrase "during the proceedings" which applies only to the phrase "to testify". In the result, the person arrested for allegedly committing an offence who later becomes an accused person as a result of having been charged enjoys a continuing right to silence from the date of his arrest until the completion of judicial proceedings. The distinction between the pre-trial right to silence and the right to silence during trial is inappropriate in our constitutional jurisprudence. The right to silence is initially conferred by section 35(1)(a) and thereafter by section 35(3)(h).

[105] The right to silence is conferred for the purpose of ensuring that people are protected from self-incrimination in the process of police interrogation. Once the accused is charged, however, the reach of the right to silence must be determined in relation to the object of the grant of the right to silence. That objective is to ensure a fair trial. It is in this context that we must decide in what circumstances the right to silence can properly be said to have been infringed during a criminal trial. The right to silence is not a self-standing right and must be interpreted in the context of the constitutional demand that there be a fair trial.

[8] Section 35(3)(h) of the Constitution.

[106] The accused is entitled to a fair trial. It is the duty of every presiding officer to ensure that this right is fulfilled. The proper exercise of this duty carries a number of implications. Two of these implications are particularly relevant for present purposes. The first is that all courts in the present constitutional era have a duty to ensure substantive fairness instead of being limited to mere procedural fairness as were courts in the pre-constitutional regime. The second is that all courts have a duty to give substance to the notion of a fair trial. Kentridge AJ elaborated these two implications of the fair trial right under the interim constitution as follows:[9]

> "The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraphs (a) to (j) of the sub-section. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire
>
> > 'whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted'.
>
> A Court of appeal, it was said (at 377),
>
> > '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".'
>
> That was an authoritative statement of the law before 27th April 1994. Since that date s 25(3) has required criminal trials to be conducted in accordance with just those

[9] *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC); 1995 (1) SACR 568 (CC) at para 16.

> 'notions of basic fairness and justice'. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions."

[107] Another implication is that all the separate rights in the section must be given meaning in the light of a notion of a fair trial.[10] Although a principal and important consideration in relation to a fair trial is that the trial must be fair in relation to the accused, the concept of a fair trial is not limited to ensuring fairness for the accused. It is much broader. A court must also ensure that the trial is fair overall, and in that process, balance the interests of the accused with that of society at large and the administration of justice. As Kriegler J said:[11]

> "In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems." [Footnotes omitted]

[108] The Constitution confirms that the duty of a judicial officer to ensure a fair trial reaches beyond that of ensuring that the rights of the accused are not or have not been violated. Section 35(5) confirms this. It does not direct that evidence obtained in

[10] *S v Twala (SA Human Rights Commission Intervening)* 2000 (1) SA 879 (CC); 2000 (1) BCLR 106 (CC) at para 9*; Osman and Another v A-G, Transvaal* 1998 (4) SA 1224 (CC); 1998 (11) BCLR 1362 (CC) at para 12*; S v Dzukuda and Others; S v Tshilo* 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 at para 9*; S v Rens* 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC) at para 18.

[11] *Key v Attorney-General, Cape Provincial Division*, and Another 1996 (4) SA 187 (CC); 1996 (6) BCLR 788 (CC) at para 13.

violation of any right in the bill of rights must be excluded regardless. This by definition includes evidence obtained in violation of the rights of the accused. The court has a discretion to admit such evidence if it is fair to do so or if it is in the interests of the administration of justice. As Kriegler J said[12]:

> "The general approach to evidence obtained under constitutionally doubtful circumstances was outlined in *Key v Attorney-General, Cape of Good Hope Provincial Division and Another*:
>
> > 'What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.
> > If the evidence to which the applicant objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise objections to its admissibility. It will then be for the trial Judge to decide whether the circumstances are such that fairness requires the evidence to be excluded.'
>
> It would be as well to repeat that in such cases the flexible approach advocated by Ackermann J in *Ferreira v Levin* and subsequently endorsed unanimously by this Court in *Bernstein v Bester*, is to be adopted.
>
> Although there are differences between the wording of the relevant protections in the interim Constitution and the Constitution, the differences are immaterial with regard to the point now under discussion. The principle remains the same. The question to be asked in *Dlamini* and in *Schietekat* is therefore still not whether, somehow or other, the right to silence was imperilled by the accused having on advice elected to

[12] S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at paras 97-8.

> speak. Under the Constitution the more pervasive and important question is whether the admission of the resultant evidentiary material would impair the fairness of the trial. If it would, the evidence ought generally to be excluded. If not, there is no basis for excluding it. There is no warrant for creating a general rule which would exclude cogent evidence against which no just objection can be levelled. The trial court must decide whether it is a valid objection, based on all the peculiar circumstances of the particular case, not according to a blanket rule that would throw out good and fair evidence together with the bad." [footnotes omitted]

[109] If the judicial officer is entitled in the interests of a fair trial to admit evidence obtained from the accused in contravention of his right to silence as the above quotation from Kriegler J makes plain, it is difficult to see how the same instrument would forbid a judicial officer from either allowing cross-examination on the reasons for the silence or taking into account the silence of the accused and the evidence related to that silence in the making of inferences where all this is done in the effort to ensure a fair trial. The over-arching role of a judicial officer in a criminal trial is to ensure that the trial is fair. There is a duty on the judicial officer to respect, protect, promote and fulfil all fundamental rights.[13] In the exercise of the duty to ensure a fair trial, it would become necessary to balance the rights of the accused, the rights of the victim and society at large. The right to silence of the accused could well become implicated in this balancing exercise when the judicial officer makes decisions concerning the admissibility of evidence, the allowing of cross-examination, as well as the drawing of inferences. Indeed inferences arising out of silence cannot ordinarily be drawn unless there is evidence of the silence of the accused and evidence of the circumstances surrounding that silence. Any investigation around the accused's

[13] Section 7 of the Constitution.

silence cannot be said to infringe his right to silence unless the trial is thereby rendered unfair. The same goes for all decisions concerning the admissibility of evidence as well as the use of silence in the drawing of inferences. The fairness of the trial as an objective is fundamental and key. The right to silence can only be infringed if it is implicated in a way that renders the trial unfair. It is a contradiction in terms to suggest that the right to silence has been infringed if it is implicated in a way that does not compromise the fairness of a trial but enhances it.

[110] The concurrence, without attempting to give a meaning to section 35(1)(a) in its context, comes to the conclusion that the right to silence includes a prohibition on the judicial officer from drawing any inferences from that silence on two bases. The first is that "the need to reduce unconstitutional policing practices is of such importance in the light of our history, that the right to silence should protect an accused person from having an adverse inference drawn from pre-trial silence in the face of questioning from the police questioning."[14] The objective of reducing unconstitutional police practices can better be managed and achieved by a flexible approach in the context of a fair trial than by a blanket rule excluding all inferences regardless of the circumstances. All courts must be sensitive to this need in the process of determining whether or not to allow cross-examination or to use silence as a factor in drawing an inference. The present case is in point. It cannot be suggested that drawing an inference in this case against the first appellant would run counter to the stated objective. Courts must be sensitive to this need. In any event, the silence of the first

[14] Para 7 of the concurrence.

appellant cannot fairly be described as "pre-trial silence in the face of questioning from the police".

[111] A second reason given against the drawing of adverse inferences relates to the warning that is constitutionally required to be given. It will be remembered that the person arrested must be informed of the right to remain silent and of the consequences of not remaining silent. Notably, the person need not be informed of the consequences of remaining silent. I have considerable doubt whether information as to the consequences of remaining silent achieves the best balance in the information to be conveyed. To be sure, the present constitutional position encourages silence on the part of an arrested person. This may well be justified on the basis that the greater perceived evil is not that people under arrest remain silent when they should not, but that they speak when they should not. A complex warning including the consequences of remaining silent might tilt the balance in favour of getting that person to speak. This may not be acceptable. Be that as it may the issue here is one of fairness. It cannot be said in the abstract that the warning contemplated by the Constitution is necessarily fairer than the more complex warning in which the person is informed that silence itself might have consequences. Fairness can never be determined in a vacuum. The fair trial approach with appropriate contextual emphasis is the only realistic and practical route to achieve the fair approach to the silence of the accused desired by the concurrence. As Madlanga AJ[15] in a unanimous judgment of this Court said:

[15] *S v Steyn* 2001 (1) SA 1146 (CC); 2001 (1) BCLR 52 (CC) at para 13.

> "In determining what is fair, the context or prevailing circumstances are of primary importance — there is no such thing as fairness in a vacuum. By 'context' I am referring to such prevailing facts and circumstances as may have a bearing on the content given to a constitutional right. Examples of such facts and circumstances might be socio-economic, political, financial, as well as other resource-related considerations. In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* Ackermann J said:
>
> > "(I)t is salutary to bear in mind that the problem cannot be resolved in the abstract but must be confronted in the context of South African conditions and resources — political, social, economic and human. . . . One appreciates the danger of relativising criminal justice, but it would also be dangerous not to contextualise it." [footnote omitted]

It cannot be suggested that the more limited warning required by the Constitution resulted in any unfairness to the first appellant in this case.

[112] The main judgment relies on the distinction between the weakening of an alibi tendered late on the basis that the police would be denied an opportunity of investigating it on the one hand, and the alibi being reduced in weight on the basis that the accused did not furnish it earlier on the other.[16] Both the reasons for assigning less weight to the alibi are so inter-related that the distinction between them is over theoretical. The same goes for the distinction between inferences as to guilt and inferences as to credit fervently embraced by the main judgment in the effort to determine when the right to silence is infringed and when not. It must be remembered

[16] Para 63 of the main judgment.

that the *Mashelele* judgment[17] was delivered in an effort to achieve fairness in relation to the drawing of an inference in the pre-constitutional regime when the courts perceived their objectives as being the achievement of procedural fairness alone. Within this rather cramped environment, a degree of articulation and movement was thankfully facilitated by these distinctions in those difficult days. Today the position is different. As has been pointed out, courts are required to ensure substantive fairness at trials. Distinctions of the kind resorted to, may be useful tools in the process of determining what is fair. To rely upon them as rigid is not only unnecessary but could stand in the way of the achievement of substantive fairness in the criminal trial.

[113] I conclude therefore that the right to silence is infringed only if it is implicated in a manner that renders the trial unfair. The following however may be stated in general:

(a) It will be unfair and an infringement of the right to silence to draw an inference as to the accused's guilt or credibility from the silence of the accused alone.

(b) Whether it would be unfair in the sense of constituting an infringement of the right to silence for the accused to be cross examined about the reasons for silence, or for the silence of the accused and the evidence revealed by the cross-examination to be used in the process of drawing of an inference depends on the circumstances of each case.

(c) It is not necessarily unfair if, in the final analysis, the silence of the accused in the prevailing circumstances results in the scales being sufficiently tipped

[17] R v Mashelele and Another 1944 AD 571.

against the accused. The silence of the accused might be of very little weight in itself but could conceivably fairly tip the scales against the accused person in conjunction with all the other factors relied upon.

The majority judgment of the SCA

[114] Moseneke J's summary of the approach adopted by Lewis AJA in the SCA is also appropriate and sufficient for the purpose of this concurrence.[18] I gratefully reproduce it:

> "Lewis AJA, writing on behalf of the majority of the SCA, held that the reliability of Kiel's identification of the first appellant had to be weighed carefully against his alibi and the testimony of the two witnesses who supported his alibi. The SCA, as did the trial court, held that the close correlation and the detailed precision of the evidence of the alibi witnesses, taken together with the evidence of the first appellant, attracted justified suspicion. The SCA found that the version put up by the first appellant and his two witnesses had been 'concocted' and 'carefully rehearsed'. The SCA reminded itself that such suspicion is not enough to dismiss the version as false beyond reasonable doubt. Following the reminder, Lewis AJA remarked that:
>
> > 'What is more telling . . . is that the version was raised only at the trial, some two years after the incident.'
>
> As a result, the majority judgment concluded:
>
> > 'The only inference that can be drawn from [the first appellant's] failure to advise the police, and from the other witnesses' failure to do so, is that the alibi had no truth in it at all.' " [footnote omitted]

[18] Para 14 of the main judgment.

[115] The main judgment concludes[19] that the majority judgment of the SCA justified the guilt of the first appellant on the basis of the fact that the version was raised only at the trial some two years after the incident. The main judgment also concludes that the majority judgment justified the inference that the alibi had no truth on the appellant's failure to advise the police of the alibi. I do not agree that the inference drawn by Lewis AJA was one as to guilt. The fact that the version was raised only at the trial some two years after the incident was not used to justify the first appellant's guilt. Lewis AJA simply said that this factor was "more telling". I do not agree that the last quotation from the main judgment in the previous paragraph should be read as if it stands alone in the judgment. Lewis AJA had already found Kiel to be a good witness, held that the correlation in the alibi version rendered it suspicious and concluded that the non-disclosure of silence was "more telling" before this sentence had been written. The inference referred to was quite obviously drawn from the failure referred to in all the circumstances that had been discussed before. In all fairness, the sentence must be read in context. In any event, and even if this sentence were to be interpreted in isolation, the inference was not drawn solely from the failure of the first appellant to advise the police but also from the failure of the other witnesses to do so. Nor was there any inference as to guilt. The inference was as to credit to the effect that "the alibi had no truth in it at all".

[116] For the above reasons I would propose that the appeal be dismissed.

[19] Para 72.

NGCOBO J:

[117] I have read the three draft judgments prepared by my colleagues. I agree with the order by Moseneke J dismissing these appeals. For the reasons advanced by Moseneke J, I also agree that the doctrine of common purpose does not limit any of the rights asserted by the appellants. I therefore agree with his reasons for dismissing the second appellant's appeal. However, in my view, the right to pre-trial silence is not implicated in this case. Consequently, I find it unnecessary to reach the question of whether failing to disclose an alibi defence to the police can ever attract an adverse inference.

[118] After his arrest the first appellant was warned by Sergeant McDonald that he was not obliged to make any statement, but that anything he said might be used against him. Thereafter Sergeant McDonald informed the first appellant that there were witnesses who had placed him at the scene of the crime. The first appellant responded by saying that the family was in Hanover Park. He declined to make a written statement.

[119] At trial, however, the first appellant testified that he was with his second wife at Parkwood Estate on the date of the shooting. He called witnesses in support of this version. As this version of his whereabouts was different from the earlier statement to

Sergeant McDonald, the prosecutor cross-examined him on this apparent inconsistency. The following transpired in the course of that cross-examination:

> "Ja. So met ander woorde mnr McDonald het nie vir u gesê daar is getuies wat sê u was betrokke, maar u het geweet dat u eintlik by u tweede vrou was daardie tyd. --- Ja.
>
> Het u dit vir mnr McDonald gesê? ---Ek het gesê die familie was in Hanover Park gewees. Maar ek het nie gesê waar ek was nie.
>
> Enige rede daarvoor? ---Nee, ek het nie rede gehad nie.
>
> So met ander woorde u het vir mnr Mcdonald gesê die familie was in Hanover Park, maar u het niks sê van uself nie.
>
> En u sê daar was geen spesifieke rede daarvoor. --- Nee".

[120] The inquiry by Sergeant McDonald was directed at establishing where the first appellant was at the time of the commission of the crime. It was not directed at establishing where the first appellant's family was. To respond to such an inquiry by telling Sergeant McDonald where the family was and not where the first appellant was, would have been absurd indeed. The suggestion by the first appellant during cross-examination that in his response to Sergeant McDonald he only meant his family excluding himself was a disingenuous attempt to distance himself from the statement that was inconsistent with his alibi.

[121] On these facts the first appellant's right to pre-trial silence is not implicated. The first appellant was warned of his right to remain silent and of the consequences of

making any statement. In the course of questioning the first appellant, Sergeant McDonald told the first appellant that there were witnesses who had placed him on the scene of the crime. He was asked what he had to say to this allegation. In the face of this allegation, the first appellant did not assert the right to silence. Instead, he chose to make an exculpatory statement to the effect that the family was in Hanover Park at the time of the crime. This statement was inconsistent with his alibi. We are therefore not concerned with a case of an accused who exercised his right to remain silent. But we are concerned with an accused who, despite being appraised of his right to remain silent and of the consequences of not remaining silent, chose to make an exculpatory statement.

[122] Where the accused person, having been warned of the right to remain silent and of the consequences of not remaining silent, chooses to make an exculpatory statement which differs from his or her alibi, this is a legitimate topic for cross-examination. The purpose of such cross-examination is to afford the accused the opportunity to explain the inconsistency. If no satisfactory explanation is forthcoming, this is a proper ground for drawing an adverse inference on credibility. This case simply does not implicate the right to remain silent.

[123] In rejecting the evidence of the first appellant's alibi, the majority of the SCA placed much store by the fact that the first appellant did not disclose his alibi to the police. It concluded that the "only inference that can be drawn from his failure to advise the police, and from other witnesses failure to do so, is that the alibi has no

truth in it at all". Much was made of this passage in this court. It was contended that the conviction of the first appellant "rested entirely" on his failure to disclose his alibi to the police. This, it was contended, infringed the first appellant's pre-trial right to remain silent.

[124] It is true that the passage complained of may well be understood to suggest that the conviction of the first appellant "rested entirely" upon his failure to disclose his alibi to the police. Guilt cannot be inferred from silence only. To do so, would undermine the right to remain silent that is protected by section 35 (1)(a) of the Constitution. To the extent that the majority of the SCA rested the guilt of the first appellant entirely on his failure to disclose his alibi to the police, it erred. However, as pointed out earlier, we are not dealing with an accused who chose to remain silent. The first appellant chose to make a statement after receiving a warning about his rights.

[125] That said, the wrong approach of the majority of the SCA to the guilt of the first appellant does not mean that his conviction must be set aside. On a conspectus of the evidence, the guilt of the first appellant was proved beyond a reasonable doubt.

[126] For these reasons, the conviction of the first appellant must stand.

Langa DCJ concurs in the judgment of Ngcobo J.

For the Appellant:	J Gauntlett SC and DP Borgström instructed by K Kajee and Associates, Cape Town.
For the Respondents:	JA D'Oliveira SC and ADR Stephen on behalf of the Director of Public Prosecutions, Cape Town.