B16. 25/90

SIHLE MABASO	1st Appellant
NHLANHA MABASO	2nd Appellant
and	
THE STATE	Respondent

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

SIHLE MABASO	1st Appellant
NHLANHA MABASO	2nd Appellant

and

THE STATE	Respondent

CORAM: HOEXTER, SMALBERGER, MILNE, EKSTEEN, JJA et NICHOLAS, AJA

HEARD: 9 November 1989

DELIVERED: 26 March 1990

J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA

This is a criminal appeal pursuant to a special entry. In the Witwatersrand Local Division a Court consisting of VERMOOTEN, AJ and two assessors convicted each of the two appellants of (a) attempted robbery with aggravating circumstances; (b) unlawful possession of a firearm; and (c) unlawful possession of ammunition. In respect of the above convictions each appellant was respectively sentenced to (a) fifteen years imprisonment; (b) twelve months imprisonment; and (c) six months imprisonment. In addition the first appellant was convicted of the murder of one Quirino Anastacio Andrade ("Andrade"). In respect of the last-mentioned conviction no extenuating circumstances were found and the first appellant was sentenced to death. Upon an application by defending counsel in terms of sec 317 of the Criminal

Procedure Act, 51 of 1977 ("the Criminal Code") the learned Judge caused a special entry to be made on the record of the proceedings. On the ground of the alleged irregularity or illegality therein set forth the two appellants appeal to this Court against their convictions and sentences aforesaid.

The main events which led up to the trial in the Court below were the following. In King George Street in central Johannesburg there was a business known as the Montenegro Meat Market ("the butchery"). On the evening of 26 June 1987, and while the butchery was open, it was entered by four men ("the intruders") two of whom were armed with loaded pistols. Inside the building Andrade and one Manuel de Jesus Lopes Cunha ("Cunha") were busy counting money. Shots were fired from both pistols and both Andrade and Cunha sustained fatal gunshot wounds. Andrade was killed outright. Cunha died very shortly

afterwards. Immediately after the shooting the intruders fled from the butchery; but they left behind them, lying on the floor of the butchery, spent cartridges which had been ejected from the pistols during the shooting. The policemen investigating the shooting took possession of these cartridges.

Some ten days after the shooting, on 6 July 1987, the first appellant was arrested by the South African Police. In the very early hours of 7 July 1987 the first appellant directed Lieut. de Waal, of the Brixton Murder and Robbery Unit, and other policemen, to a house in Soweto. There the first appellant pointed out the second appellant and one Zodwa Ngcamu ("accused no 3"). The police arrested the second appellant and accused no 3. The first appellant then directed the party of policemen to Dube Hostel where he pointed out one Bafanyana Mbuyisa ("accused no 4"). The police arrested accused no 4. A little later, but still in the small hours of 7 July 1987,

the second appellant took Lieut. de Waal back to the house at which he had been arrested. Lieut. de Waal was the investigating officer in the case and he testified for the State at the trial in the Court below. At the said house, so testified Lieut. de Waal, the second appellant told one Amos to take Lieut. de Waal to a house across the road. Upon his arrival at the latter place, so Lieut. de Waal told the trial Court, a Mrs Paulina Nkosi handed to him a locked cash-box. De Waal then returned to the house at which the second appellant had been arrested, and on the ground in front of the back door he picked up a key. De Waal discovered that the key fitted the lock of the cash-box. Having unlocked the cash-box de Waal found that it contained, **inter alia**, three firearms. The cash-box was handed in at the trial as exh 1. Still in the early hours of 7 July 1987 the second appellant directed Lieut. de Waal to an address in Soweto where the second appellant pointed

out one Sipho Dhlamini ("Dhlamini"), who was also arrested.

On the following day (8 July 1987), and in terms of sec 119 of the Act, five men appeared in the Johannesburg Magistrate's Court before an additional magistrate, Mr P J Bredenkamp ("the magistrate"). The five men were the first and second appellants, the third and fourth accused, and Dhlamini. Subsequently the Attorney-General declined to prosecute Dhlamini; and at the trial in the Court below Dhlamini was called as a witness for the prosecution. Both in the Magistrate's Court and at the trial the first and second appellants were the first and second accused respectively, and accused no 3 and accused no 4 were the third and fourth accused respectively. After the matter had been called it was postponed to 9 July 1987 when the prosecutor put three charges to the accused and the magistrate required each accused to plead thereto.

In terms of sec 119 of the Act the prosecutor put the following three charges to the accused

"Count 1 : Attempted Robbery with Aggravating Circumstances.

THAT Accused Nos 1 - 5 as per J15 (hereinafter called the Accused) are guilty of the crime of attempted robbery with aggravating circumstances as intended in section 1(1)(b) of Act 51 of 1977.

IN THAT, upon or about 26 June 1987 and at or near Montenegro Meat Market, King George Street in the district of Johannesburg the accused did unlawfully assault MANUEL DE JESUS LOPES CUNHA and QUIRINA ANASTACIO ANDRADE, white males by threatening and shooting them with firearms and attempted to take by force and violence from their possession cash, the amount which is to the State unknown, their property or in their lawful possession, aggravating circumstances being present IN THAT the accused wielded dangerous weapons, to wit, firearms.

Count 2 : Murder .....

The said accused are guilty of the crime of MURDER IN THAT upon or about 26 June 1987 and at or near

Montenegro Meat Market, King George Street in the district of Johannesburg the said accused did unlawfully and intentionally kill MANUEL DE JESUS LOPES CUNHA who was in life an adult white male by shooting him with a firearm.

Count 3 : Murder .....
The said accused are guilty of the crime of MURDER IN THAT upon or about 26 June 1987 and at or near Montenegro Meat Market, King George Street in the district of Johannesburg the said accused did unlawfully and intentionally kill QUIRINA ANASTACIO ANDRADE who was in life an adult white male by shooting him with a firearm."

On 9 July and in response to the aforesaid charges the two appellants pleaded as follows. The second appellant pleaded not guilty on all three counts. The first appellant pleaded guilty on count 1 (attempted robbery with aggravating circumstances); guilty on count 2 (murder of Cunha); and not guilty on count 3 (murder of Andrade).

Sec 121(1) of the Act provides that where an

accused under sec 119 pleads guilty to the offence charged, the presiding magistrate shall question him in terms of the provisions of paragraph (b) of sec 112(1). The latter provisions enjoin the questioning of an accused -

> "....with reference to the alleged facts of the case in order to ascertain whether he admits the allegations in the charge to which he has pleaded guilty".

Sec 121(2)(b) provides that if the magistrate is not satisfied that the accused admits the allegations stated in the charge -

> ".... he shall record in what respect he is not so satisfied and enter a plea of not guilty and deal with the matter in terms of section 122(1): Provided that an allegation with reference to which the magistrate is so satisfied and which has been recorded as an admission, shall stand at the trial of the accused as proof of such allegation."

The pleas of the appellants having been recorded, the magistrate explained to the first appellant that he would be questioned -

> "....in order to determine whether you in fact agree with all the allegations concerning these counts on which you pleaded guilty."

and the magistrate asked the first appellant whether he had understood the explanation. The first appellant replied in the affirmative. The magistrate asked the first appellant whether he was pleading guilty on count 1 of his own free will and the first appellant replied that he was. The magistrate asked the first appellant whether he admitted that on 26 June 1987 he had visited "the Montenegro Meat Market, King George Street, Johannesburg". From the answer given it appeared that the first appellant was unaware of the name of the butchery visited by him. To this the first appellant added:-

> "Your Worship, the problem is, I do not know the name it is obviously this one."

In response to further questions the first appellant stated that "All of us" went to the butchery; and he explained that "all of us" comprised -

> ".... myself, that is with the other three accused. Accused 2, 3 and 4. And accused 5 was the driver of the motor vehicle."

The magistrate asked the first appellant why he had gone to the butchery. The answer was -

> "The reason, a black man who is employed at the butchery, who informed us that there is money. That is why we went there your worship."

The magistrate asked the first appellant what had then happened. The first appellant answered that they had entered the premises and demanded money. One of the people in the butchery argued with them, and he (the first appellant) fired two shots. He did so, he said, because a Portuguese man in the butchery wanted to stab him with a knife. He did not know the name of the Portuguese man. The first appellant said that it had been his intention to remove cash from the butchery but that in fact no money was taken. After firing the shots he ran out of the butchery. The magistrate asked the first appellant whether in firing

the shots he had aimed at any particular person. The answer was:-

> "Your Worship, I pointed the fire-arm in the direction of a Portuguese man I am referring to. I do not know if he was hit or shot as such Your Worship."

Having questioned the first appellant in terms of sec 112(2)(b) the magistrate was not satisfied that he admitted all the allegations in the charge and accordingly the magistrate entered a plea of not guilty on count 1. In respect of count 1 the magistrate recorded the following formal admissions:-

> "In the first place that on the 26 June 1987, accused 1 visited an unknown butchery in Johannesburg. In the second place that the accused had a fire-arm in his possession. In the third place that the fire-arm can be regarded as a dangerous weapon. In the fourth place that accused visited the said butchery with the intention to steal money, from that butchery. In the fifth place that accused 1 threatened people inside the butchery with this fire-arm. That he fired certain shots while aiming at a certain person."

The same procedure was followed in respect of count 2. Having questioned the first appellant in terms of sec 112(1)(b) the magistrate was not satisfied that he admitted all the allegations in the charge, and accordingly the magistrate entered a plea of not guilty on count 2. In respect of count 2 the magistrate recorded the following formal admissions:-

> "In the first place that accused 1 visited a certain unknown butchery in the district of Johannesburg on the 26 June 1987. In the second place that accused 1 fired two shots with a firearm at this, the said shots (sic). In the third place when firing these two shots, accused 1 aimed at a certain person. And that, in the fourth place that the said person was a White male."

Thereafter the proceedings before the magistrate were adjourned until the following day, when the magistrate had to deal with the first appellant in relation to the latter's plea of not guilty on count 3. Sec 122(1) of the Act provides that where an accused under sec 119 pleads not

guilty to the offence charged, the court shall act in terms of sec 115; and that when sec 115 has been complied with, the magistrate shall stop the proceedings and adjourn the case pending the decision of the attorney-general. The first two subsections of sec 115 read as follows:-

> "115 (1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding judge, regional magistrate or magistrate, as the case may be, may ask him whether he wishes to make a statement indicating the basis of his defence.
>
> (2) (a) Where the accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute
>
> (b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and shall enquire from

> the accused whether an allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under section 220."

In response to a question by the magistrate the first appellant replied that he was prepared to disclose the basis of his defence on count 3. The record reflects the following exchange between the first appellant and the magistrate:-

> "ACCUSED 1 : Your Worship, I only fired shots and I only killed one person. The other person, I do not know Your Worship.
>
> COURT : Anything else to add?
>
> ACCUSED 1 : That is all Your Worship.
>
> COURT : You say you only killed one person. What do you mean by that?
>
> ACCUSED 1 : I only fired shots in the direction of one person Your Worship."

With the consent of the first appellant the magistrate proceeded to record the following three admissions in

terms of sec 220 of the Act : (1) that on 26 June 1987 the first appellant visited an unknown butchery in Johannesburg; (2) that at the said butchery he fired two shots at a person; and (3) that the person fired at was a White male.

The magistrate then dealt with the pleas of the second appellant. The second appellant's introductory remarks suggested that, although on the previous day he had pleaded not guilty on count 1, he now wished to plead guilty on that count. Thereupon the magistrate explained to the second appellant that he was under no compulsion whatsoever to alter his plea; and the magistrate required the prosecutor again to put all three counts to the second appellant. What then happened in relation to counts 1 and 2 is reflected thus in the record:-

COURT : Accused 2, do you understand the first count?
ACCUSED 2 : I do Your Worship.
COURT : What is your plea to the first count?
ACCUSED 2 PLEADS GUILTY
PROSECUTOR PUTS COUNT 2 TO ACCUSED 2
COURT : Do you understand the second count?
ACCUSED 2 : I do Your Worship.
COURT : What do you plead to it?
ACCUSED 2 PLEADS GUILTY."

In the light of what the second appellant said in response to count 3 when it was put to him, the magistrate entered a plea of not guilty. In respect of counts 1 and 2 the magistrate then questioned the second appellant in order to ascertain whether he admitted the allegations in the charges to which he had pleaded guilty. In response to the magistrate's questions the second appellant said that on 26 June 1987 he was at a butchery in Johannesburg whose name he did not know. He was armed with a firearm. He went to the butchery because an employee of the butchery had told them that there was money there. At the butchery

all four accused demanded money. Someone closed the doors of the butchery. The second appellant threatened the people working in the butchery and shots were fired. The second appellant himself fired one shot but without aiming at anyone in particular. The second appellant said that he did not know whether the shot fired by him struck anybody. The second appellant admitted that he visited the butchery with the intention to steal money by force, violence and threats; but in fact he took no money.

Having questioned the second appellant in terms of sec 112(1)(b) the magistrate was not satisfied that the second appellant admitted all the allegations in the charge on count 1; and accordingly the magistrate entered a plea of not guilty on count 1. The magistrate recorded certain formal admissions made by the second appellant in respect of count 1. The same procedure was followed in respect of

count 2. Having questioned the second appellant in terms of sec 112(1)(b) the magistrate was not satisfied that the second appellant admitted all the allegations in the charge, and accordingly the magistrate entered a plea of not guilty on count 2. The magistrate also recorded certain formal admissions made by the second appellant in respect of count 2. At the invitation of the magistrate the second appellant disclosed his defence on count 3. The gist of it was that the second appellant had fired only one shot in the butchery.

Having dealt with the pleas of the two appellants the magistrate proceeded to deal in turn with the respective pleas of accused nos 3 and 4 and Dhlamini. As far as accused nos 3 and 4 are concerned, and for the sake of completeness, brief mention may be made of the following. Accused no 3 pleaded guilty on counts 1 and 2 only. Accused no 4 pleaded guilty on count 1 only.

Having questioned accused no 3 the magistrate entered pleas of not guilty on both counts 1 and 2; but he recorded as formal admissions against accused no 3 that on 26 June 1987 accused no 3 had gone to the butchery armed with a knife and with intention to steal by violence. Having questioned accused no 4 the magistrate entered a plea of not guilty on count 1; but he recorded as formal admissions against accused no 4 that on 26 June 1987 accused no 4 had gone to the butchery armed with a knife and with the intention of stealing by violence.

After he had dealt with the pleas of each of the five accused the magistrate in terms of sec 122(1) stopped the case against the five accused pending the decision of the attorney-general. However, before adjourning the proceedings the magistrate inquired of each of the five accused in turn whether he desired the services of **pro deo** counsel if the matter should proceed to trial. Both the

first and the second appellants informed the magistrate that they would arrange for their own defence counsel.

The trial in the Court below took place at the end of September 1988. There were four accused : the two appellants and accused nos 3 and 4. There were in the indictment not only the three charges (two counts of murder and one count of attempted robbery with aggravating circumstances) to which the accused had pleaded during the sec 119 proceedings in the magistrate's court, but in addition there were charges of one count of unlawful possession of firearms and one count of unlawful possession of ammunition. Each accused pleaded not guilty on all counts. At the trial each of the four accused was separately represented by **pro deo** counsel. At the conclusion of the State case each accused testified in his

own defence.

For purposes of the appeal only a brief recapitulation of the salient parts of the evidence is necessary. The four accused hailed originally from Kranskop in Natal. The two appellants are brothers. One of the State witnesses was Dhlamini, the erstwhile accused No 5 in the sec 119 proceedings. Dhlamini conducted a taxi service in Soweto. His evidence was to the following effect. At about 6 pm on 26 June 1987 the second appellant and accused no 3 came to his home and sought transport to the city. Dhlamini required and was paid a fare of R20. They proceeded in his taxi to a house where the first appellant and accused no 4 were picked up; and then they travelled on to Johannesburg. At the request of the accused Dhlamini dropped his passengers off in the city on the corner of Plein and Wanderers Streets. This is a

spot not far distant from the butchery. According to Dhlamini it was then dusk.

The only eye-witness to the shooting in the butchery called by the State was a fifteen year-old girl, Nelia Andrade. She was the daughter of Andrade and the niece of Cunha. On the evening of 26 June 1987 she was in the butchery helping her father and her uncle to count the takings. Due to the shock suffered by her at the time Miss Andrade's recollection of the events in question was, quite understandably, somewhat fragmentary and disjointed. At about 8 pm, and at a time when there were a number of Black male persons in the butchery, she saw one of them approach Cunha. The person in question produced a firearm and he pressed Cunha against a door in the butchery. A shot then went off. According to Miss Andrade her father then tried to arm himself with an iron rod, but before he could manage to do anything he fell to the floor. Miss Andrade then

ran out of the butchery and started to scream. She was unable to say how many shots were fired inside the butchery, and she was unable to identify any of the persons who had come into the butchery.

At the time of the shootings two members of the South African Police Force, constables Giliomee and Stapelberg, were on a foot patrol in the vicinity of the butchery. They heard the screams of Miss Andrade; and Giliomee saw four Black men run out of and away from the butchery. Giliomee ran after the fleeing men but was unable to overtake them. Meanwhile Stapelberg had entered the butchery in which he found a distraught Miss Andrade and two men who had been shot. Stapelberg summoned an ambulance and the Brixton Murder and Robbery Unit. A little later Major Eager and other members of the Brixton unit arrived at the butchery. Major Eager testified to the fact that a police sergeant placed the spent cartridges

left lying at the scene of the crime into envelopes which were identified and sealed and then removed by Major Eager. On the following day the sealed envelopes were handed by Major Eager to Lieut. de Waal.

Mention has already been made of the cash-box (exh 1) discovered by Lieut. de Waal. At the trial exh 1 was identified by the State witness Mrs Paulina Nkosi as an article which on a particular night had been entrusted to her safekeeping by the second appellant. Mrs Nkosi said that the appellants lived near her, and that she knew both of them. She put exh 1 under her bed. In the early hours of the very next morning the police arrived at her house in the company of a man called Amos. Mrs Nkosi knew Amos as a person who lodged with the appellants. In response to a question by the police Mrs Nkosi removed exh 1 from under her bed and handed it over to the police.

One of the members of the Brixton Murder and

Robbery Unit who accompanied Lieut. de Waal to Soweto in the early hours of 7 July 1987 was Warrant-Officer W A Steyn. W/O Steyn was called as a State witness. After the first appellant had pointed out the second appellant, so testified W/O Steyn, he searched the second appellant and in the latter's trouser pocket he found a keyholder to which a key was attached. W/O Steyn threw this key, which he identified as exh 2, to the ground. In his evidence Lieut. de Waal identified exh 2 as the key which he picked up in the circumstances already mentioned, and with which he had unlocked exh 1. Lieut. de Waal further testified that the three firearms found by him in exh 1 were respectively: (A) an Astra 9 mm automatic pistol whose magazine contained seven cartridges; (b) a Beretta 6,35 mm automatic pistol whose magazine contained five cartridges; and (c) a Baby Browning automatic pistol with an empty magazine. On 14 July 1987 Lieut. de Waal delivered the

three firearms found in exh 1 and the spent cartridges collected on 26 June 1987 at the scene of the crime to a ballistician at the Police Forensic Laboratories. There the cartridges and the firearms were examined and ballistic tests were performed on the firearms. The report incorporating the ballistician's findings is contained in an affidavit (exh "F") which was produced at the trial in terms of sec 212 of the Act. The contents of exh "F" establish that of the spent cartridges in question, two had been fired from the Astra 9 mm automatic pistol and three had been fired from the Beretta 6,35mm automatic pistol.

Lieut. de Waal testified at a comparatively early stage of the trial. From suggestions made to him during cross-examination it became apparent that in due course each accused in turn would testify that while in the custody of the police he had been the victim of assaults

and a system of torture by the police; and that he had been induced by police violence and police threats to make those damaging admissions which are reflected in the record of the proceedings before the magistrate.

In order to forestall the line of defence thus foreshadowed counsel for the State called no less than twelve of the thirteen members of the South African Police who had been involved in the arrests of the accused and their subsequent custody. Each of these police witnesses denied that he had taken part in any assault upon or torturing of any of the accused; or that he had witnessed any such thing. The thirteenth policeman concerned was not readily available as a witness for the reason that at the time of the trial he was in prison awaiting execution. In addition to the twelve policemen the State called the magistrate and a Miss Mninga who had been the interpreter during the proceedings before the magistrate.

The sec 119 proceedings were electronically recorded. The transcription is a lengthy document running to some 36 pages. It reflects no complaint by any accused of an assault or any other impropriety by the police. During his evidence-in-chief the magistrate said that if any of the accused had voiced any complaint alleging an assault upon him such would have been reflected in the transcribed record. The magistrate went on to explain that in the case of any complaint (of whatsoever nature) by an accused in such proceedings it was his practice not merely to note the complaint but also to go into the matter. During cross-examination it was put to the magistrate on behalf of the first appellant that the latter had in fact raised the matter of assault, and that thereupon the magistrate had silenced him. This the magistrate denied. Counsel for the second appellant asked

the magistrate at what stage of such proceedings it was customary to inform an accused person of his rights to legal representation. To this the magistrate replied:-

> "Die huidige prosedure is, edele, dat by die eerste verskyning reeds vir h beskuldigde meegedeel word dat hy die reg op regsverteenwoordiging het en dat hy so spoedig moontlik moet reëlings tref sou hy regsverteenwoordiging verkies."

In the instant case the magistrate did not so inform the accused at their first appearance before him on 8 July 1987. Indeed, as the transcript shows, the matter of legal representation was not broached by the magistrate until the proceedings were stopped in terms of sec 122(1); and then in relation to representation at a future possible trial. The magistrate went on to explain that an instruction to magistrates to inform accused persons of their right to legal representation at the time of their first appearance had been issued only later. It appears

that the instruction was issued pursuant to the reporting of the decision in S v Radebe, S v Mbonani ("the Radebe case") 1988(1) SA 191(T).

Miss Mninga told the trial Court that at the time of the appearance of the accused before the magistrate she had been an interpreter in the Magistrate's Court for five years. Counsel for the first appellant put to Miss Mninga that during the proceedings before the magistrate the first appellant in fact complained that he had been assaulted. The witness replied that if the first appellant had so complained she would have communicated the complaint to the magistrate.

When the first appellant came to testify he told the trial Court that he knew nothing whatever of the shooting at the butchery on 26 June 1987. He denied that he knew Dhlamini, and he said that Dhlamini was lying. He said that upon his arrest he was taken by the police to

Brixton where he was told to undress. Thereafter he was bound hand and foot to a chair. He was then subjected to electric shocks and a bag was placed over his head which prevented him from breathing. He was told that he had done something wrong at a butchery. His denials were brushed aside and finally he was driven to make a false confessiion. He admitted that after his arrest he had pointed out his fellow-accused, but he explained his conduct in so doing by saying that the police had instructed him to take them to any of his friends - any of his friends would do. In regard to what he had said to the magistrate the first appellant testified:-

> "Ek het skuldig gepleit want ek was gesê om dit te sê."

This instruction, so said the first appellant, had been given to him by a number of policemen including Lieut. de Waal himself. The first appellant further told the trial Court that when he began to tell the magistrate of the

assault perpetrated upon him at Brixton the magistrate silenced him by saying:-

"...dit is nie vrae wat ek hom moet vra nie."

The second appellant's defence was also a complete denial of the State case against him. He told the trial Court that Dhlamini was unknown to him and that he had first set eyes on Dhlamini at Brixton after his arrest. Upon his arrival at Brixton he was tortured by the police. The police told him that he had committed robbery at a butchery. When he denied this he was bound to a chair and told that the truth would be extracted from him. A bag was placed over his head. He was beaten on the back and he was subjected to electric shocks. When he was on the verge of collapsing the bag was removed, and he was told to confess. At that juncture -

"...het ek erken wat hulle my gesê het."

He was then taken to the house in Soweto where he had

earlier been arrested. There he was told to produce the firearms -

"...wat jy gebruik by die stamgevegte."

According to the second appellant he explained to the police that he himself had none, but that he knew of someone who did in fact have firearms. The police told him to point out this person, and he indicated Amos. The police went off with Amos, and when they returned with Amos they had with them a container which he thought was exh 1. While he admitted that Mrs Paulina Nkosi was known to him the second appellant denied that he had ever entrusted exh 1 to her care. The second appellant likewise denied that W/O Steyn had found the key, exh 2, on his person. In regard to the proceedings before the magistrate the second appellant testified that the police had forced him to plead guilty.

In their testimony before the trial Court accused

nos 3 and 4 likewise denied all knowledge of the shooting at the butchery on 26 June 1987. Each claimed to have been assaulted and tortured by the police. Each testified that the statements made by him at the proceedings before the magistrate were prompted by the police.

The State witnesses favourably impressed the trial Court. Of them the trial Judge observed in his judgment:-

> "Hulle het flink en sonder aarseling geantwoord. Kruisondervraging het nie aan hulle geloofwaardigheid afgedoen nie."

The first appellant, on the other hand, was found to be a singularly unsatisfactory witness. He was disbelieved by the trial Court and his version was rejected as false. The trial Court described the second appellant as a mendacious witness who trimmed his sails to the wind. His version was also rejected out of hand. The trial Court was also unfavourably impressed with the testimony given by

accused nos 3 and 4; and their versions were likewise rejected as being untrue.

The convictions and sentences of the appellants in the Court below have already been detailed. It should here be mentioned that accused nos 3 and 4 were dealt with as follows by the trial Court. On the count of attempted robbery with aggravating circumstances each was convicted of attempted robbery without aggravating circumstances; and each was sentenced to five years imprisonment. On the four other counts both accused no 3 and accused no 4 were acquitted and discharged.

In the instant case the attorney-general decided that the four accused should be arraigned in a superior court. Having been advised thereof the magistrate in terms of sec 122(3)(b) of the Act committed the four accused for a summary trial before the Supreme Court. In such a case, where an accused under sec 119 has pleaded not

guilty to the offence charged, sec 122(4) provides that:-

> "The record of the proceedings in the magistrate's court shall, upon proof thereof in the court in which the accused is arraigned for summary trial, be received as part of the record of that court against the accused, and any admission by the accused shall stand at the trial of the accused as proof of such admission."

In the Court **a quo** the record of the proceedings in the magistrate's court was proved and received as part of the record of the trial Court. For the sake of brevity I refer to the record of the proceedings in the magistrate's court as "the sec 119 record." It is not a matter for surprise that in the Court a quo the sec 119 record played a crucial role both in the cross-examination of the accused and, to the extent to which each of the four accused was found guilty in respect of some of the counts, also in the trial Court's reasons for the convictions. On the other hand there was before the trial Court an impressive body of evidence against the accused quite exterior to the sec 119 record and so much of the cross-examination of the accused

as was based thereon. The evidence adduced at the trial has already been reviewed. In my view the trial Court properly accepted the testimony of witnesses such as Const Giliomee, Lieut. de Waal, W/O Steyn, Mrs Nkosi and Mr Dhlamini. To the testimony of such witnesses must be added the damning ballistic evidence. The latter was never challenged, let alone controverted.

The picture which then emerges is this. On the night of the shooting and shortly before it, a taxi conveyed four men from Soweto to a place in Johannesburg close by the butchery. The taxi-driver identified the four men as the four accused. Immediately after the shooting at the butchery four Black men were seen fleeing from it. When some ten days after the shooting the first appellant was arrested, he led the police to three other men. These were his fellow-accused. Two firearms were used in the shooting at the butchery. Ten days later those

firearms were found in a locked cash-box which shortly before the second appellant had entrusted to the care of Mrs Nkosi. A key which fitted the lock in the cash-box was found in the possession of the second appellant. The second appellant it was who led the police to the taxi-driver who identified the four accused as his passengers.

At the conclusion of the trial the trial Judge noted upon the record the following special entry:-

> "Op aansoek van die vier beskuldigdes maak ek ingevolge artikel 317 van Wet 51 van 1977 'n spesiale aantekening op die oorkonde met die volgende bewoording:
>
> > 'Die verhoorregter het verkeerdelik beslis dat die pleitverrigtinge voor die landdros, bewysstuk B, nie tersyde gestel moes geword het nie'.
>
> Vir daardie doel word verlof aan die vier beskuldigdes toegestaan om te appelleer na die Appèlafdeling."

All four accused noted an appeal to this Court. The appeals by accused nos 3 and 4 were formally withdrawn on 31 October 1988.

In this Court the first appellant was represented **pro deo** by Mr van Wyk and the second appellant **pro deo** by Miss Fouche. Substantially the same arguments were advanced on behalf of both appellants. The main contention raised was based on the fact that the magistrate had failed to inform the appellants of their right to legal representation during the sec 119 proceedings. The argument was that because the accused were unrepresented lay persons the magistrate had a judicial duty, at the outset of the sec 119 proceedings, to explain to them their right to legal representation. It was said that the non-observance of his duty represented a gross irregularity vitiating the entire plea proceedings before the magistrate, with the consequence that the trial Court had erred in failing to "set aside" the plea

proceedings before the magistrate. Shorn of the damaging admissions by the appellants reflected in the sec 119 record, so the argument proceeded, the evidential material before the trial Court was insufficient to sustain the convictions of the appellants. Then it was urged that after the magistrate had entered pleas of not guilty and thereupon proceeded to deal with the appellants under the provisions of secs 122(1) and 115, he committed a further irregularity by failing to explain to the appellants: (1) that they were not obliged to answer questions; (2) what the legal effect of formal admissions by them would be; and (3) that there was in fact no obligation upon them to make any admissions. Lastly it was argued that the magistrate had acted irregularly by questioning the appellants in an oppressive and unfair fashion. It is convenient to dispose at once of this last argument. In my opinion it has no merit. An examination of the sec 119

record reveals, so I consider, that the magistrate discharged his duties conscientiously and that he questioned the appellants fairly and dispassionately.

As a prelude to the prosecution of an accused in the Supreme Court the Criminal Code prescribes certain proceedings in the magistrate's court to which reference may be made as "the pre-trial procedure". Chapter 19 of the Act (which embraces secs 119, 120, 121 and 122) provides for the taking of a plea in the magistrate's court on a charge justiciable in a superior court. The pre-trial procedure is initiated by the lodging of a charge-sheet with the clerk of the court (sec 120). Sec 119 provides that when an accused appears in the magistrate's court and the alleged offence may be tried by a superior court the prosecutor may, on the instructions of the attorney-general, put the charge to the accused, whereupon, subject to secs 77 and 85 -

> "..... the accused shall..... be required by the magistrate to plead thereto forthwith."

Where an accused under sec 119 pleads guilty to the offence charged sec 121(1) provides that the magistrate -

> ".... shall question him in terms of the provisions of paragraph (b) of section 112(1)."

Sec 112 falls under Chapter 17 of the Act which prescribes the procedure governing a plea of guilty by an accused at a summary trial. Sec 112(1)(b) enjoins the magistrate, **inter alia**, to -

> "....question the accused with reference to the alleged facts of the case in order to ascertain whether he admits the allegations in the charge to which he has pleaded guilty....."

I revert to Chapter 19 of the Act. If after questioning the accused the magistrate is satisfied that the accused admits the allegations in the charge sec 121(2)(a) provides that the magistrate shall stop the proceedings; and, in terms of sec 121(3), adjourn the proceedings pending the decision of the attorney-general. If the

magistrate is not satisfied that the accused admits the allegations in the charge, sec 121(2)(b) enjoins the magistrate to record in what respect he is not so satisfied, and to enter a plea of not guilty. Sec 121(2)(b) further bids the magistrate to deal with the accused in terms of sec 122(1):

> "Provided that an allegation with reference to which the magistrate is so satisfied and which has been recorded as an admission, shall stand at the trial of the accused as proof of such allegation."

Sec 122(1) provides that where an accused under sec 119 pleads not guilty the court shall act in terms of sec 115; and that when section 115 has been complied with, the magistrate shall stop the proceedings and adjourn the case pending the decision of the attorney-general. Sec 115 falls under Chapter 18 of the Act which prescribes the procedure governing a plea of not guilty at a summary

trial. The provisions of the first two subsections of sec 115 have been quoted earlier in the judgment. For the sake of convenience I quote here sec 115 in full:-

> "(1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding judge, regional magistrate or magistrate, as the case may be, may ask him whether he wishes to make a statement indicating the basis of his defence.
>
> (2) (a) Where the accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute.
>
> (b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an

admission under section 220.

(3) Where the legal adviser of an accused on behalf of the accused replies, whether in writing or orally, to any question by the court under this section, the accused shall be required by the court to declare whether he confirms such reply or not."

The purpose of the pre-trial procedure, the rights of an accused thereunder, and the status and evidential cogency of admissions made by an accused in the course thereof have been considered in a number of decisions by this Court. See S v Seleke en 'n Ander 1980(3) SA 745 (A); S v Sesetse en 'n Ander 1981(3) SA 353 (A); S v Daniels en 'n Ander 1983(3) SA 275(A); S v Nkosi en 'n Ander 1984(3) SA 345(A).In the last-mentioned judgment this Court stressed the significant difference between the respective situations of (1) an accused who, having pleaded

not guilty in sec 119 proceedings, is questioned as to the basis of his defence under sec 115 and (2) an accused who, having pleaded guilty under sec 119, is questioned in terms of paragraph (b) of sec 112(1). It was held that in the latter situation it is unnecessary for a magistrate to advise the accused of his right to remain silent. The reason is that by his plea of guilty the accused has admitted the whole of the State's case. Any warning to the accused at that stage, so it was held, would be contrary to the spirit of sec 119 read with secs 121(1) and 112(1)(b); and it would be calculated to thwart its object.

At this juncture something must be said of the duty of a judicial officer presiding at criminal proceedings to explain to an unrepresented accused his right to legal representation. Our common law recognises as fundamental the right of the individual to legal advice

and to legal representation. The history of the right at common law to legal representation was referred to in S v Wessels and Another 1966(4) SA 89(C). See also the fuller discussion in S Selikowitz's article Defence by Counsel in Criminal Proceedings under South African Law 1965/1966 Acta Juridica 53. Statutory recognition of the right was contained in sec 65 of a Proclamation issued by Lord Charles Somerset on 2 September 1819 (see S v Wessels (supra) at 92C), and it was again recognised in sec 218 of the Criminal Procedure and Evidence Act, 31 of 1917, which provided that:-

> "Every person charged with an offence is entitled to make his defence at his trial and to have the witnesses examined or cross-examined by his counsel, if his trial is before a superior Court, or by his counsel (if any) or his attorney or law agent, if the trial is before an inferior court."

Sec 73 of the Criminal Code provides:-

> "73 (1) An accused who is arrested, whether with or without warrant, shall, subject to

any law relating to the management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest.

(2) An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.

(3) ..... "

The Criminal Code of 1917 contained no provision corresponding to sec 73(1) of the present Criminal Code. The right is, however, a basic and fundamental one. See Mandela v Minister of Prisons 1983(1) 938(A) at 957 D/G. Sec 73(1) entails that an arrested person should have access to his legal adviser and the opportunity of consulting with him privately and confidentially. The right has been cut down on occasion in legislation other than the Criminal Code, but the general principle is clear

and well-established.

Subsec (2) of sec 73 corresponds to sec 218 of the 1917 Criminal Procedure Act, with the difference that whereas sec 218 provided for representation of a person charged with an offence only "at his trial", sec 73(2) entitles him to representation "at criminal proceedings." In terms of sec 1 of the Criminal Code "criminal proceedings" includes a preparatory examination under Chapter 20, but the expression is not otherwise defined. Broadly speaking,the expression would include not only criminal trials but any proceedings in a criminal case, including preliminary and incidental hearings such as applications for bail and remands. It is not open to question that proceedings under Chapter 19 of the Criminal Code are "criminal proceedings" within the meaning of sec 73.

Plainly sec 119 proceedings are pre-trial

proceedings in a criminal case. In terms of sec 120 "the proceedings" (i e the proceedings referred to in sec 119) "shall be commenced by the lodging of a charge sheet with the clerk of the court in question."

The right of an accused to be represented at such proceedings is recognised by sec 122(1), which requires the magistrate, where the accused pleads not guilty, to act in terms of sec 115, which in turn refers (in subsec (3)) to a legal adviser.

It is clear, therefore, that in the present case each of the four accused had a right to be represented by his legal adviser at the sec 119 proceedings. However, none of them exercised that right. In S v Baloyi 1978(3) SA 290(T) at 293, MARGO, J observed, in a passage which was approved by this Court in Volschenk v S A Geneeskundige en Tandheelkundige Raad 1985(3) SA 124(A) at 140 I, that where an accused does not seek legal representation and where no

irregularity occurs by which he is deprived of it, there is no principle of law or practice which vitiates the proceedings. That is the general rule, but there is a gloss upon it : a judicial officer presiding at criminal proceedings has a duty to inform an unrepresented accused of his right to legal representation, and his failure to do so may lead a court of appeal to conclude that there has been a failure of justice and that the conviction should be set aside.

While the existence of the right to legal representation has always received wide recognition in South Africa, it has been correctly pointed out that until the recent past -

> "The content given to this right by the courts, however, has been largely negative. It has been expressed as a right not to be deprived of legal representation rather than a right to demand legal representation (S v Wessels 1966(4) SA 89 (C); S v Blooms 1966(4) SA 417(C); S v Ngula 1974(1) SA 801 (E); S v Mkize 1978(3) SA 1065 (T); S v Baloyi 1978(3) SA 290 (T).....

> The courts have not insisted that judicial officers inform unrepresented accused of their right to representation or ask them whether they wished to be represented. Neither has there been any obligation on judicial officers to ask unrepresented indigent accused whether they wish to apply for legal aid and, if so, to explain to them how to go about it ....."

(The right to counsel : recent developments in South Africa, Evadné Grant, SACJ (1989) 2 at 48/9).

Judicial recognition of the positive content of the right to legal representation was given by the decision of the Transvaal Full Bench in the Radebe case (supra). The judgment of the Court was delivered by GOLDSTONE, J. The learned Judge pointed out (at 194 G/H) that for many years our Courts have insisted that unrepresented accused be told of their rights and, insofar as may be practicable, should be assisted by the presiding judicial officer. Having cited examples of this salutary practice GOLDSTONE, J referred (at 195B) to:-

> "..... a general duty on the art of judicial

officers to ensure that unrepresented persons fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place."

Later in his judgment (at 196 F/I) GOLDSTONE, J went on to say:-

"If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should be given a reasonable time within which to do so. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice. I should make it clear that I am not suggesting that the absence of legal representation <u>per se</u> or the absence of the

> suggested legal advice to an accused person *per se* will necessarily result in such an irregularity or an unfair trial and the failure of justice. Each case will depend upon its own facts and peculiar circumstances."

With these observations I entirely agree.

Since the *Radebe* case the plight of the indigent unrepresented accused has come under close scrutiny in a number of decisions in Provincial Divisions dealing with reviews or appeals from convictions in the magistrate's court. See, for example, *S v Khanyile and Another* 1988(3) SA 795(N); *S v Rudman; S v Johnson; S v Xaso; Xaso v van Wyk NO* 1989(3) SA 368(E); *S v Davids; S v Dladla* 1989(4) SA 172(N); *S v Mthwana* 1989(4) SA 361(N). The last-mentioned four decisions, which are far from being harmonious, focus mainly on the problem whether in addition to explaining to an unrepresented accused his legal right to representation it is further incumbent upon a magistrate to take steps towards securing such

representation for an indigent accused. This is not an issue which arises in the present appeal and it is unnecessary to venture any opinion as to the correctness of any of the sharply divergent views expressed in the said decisions.

In the sec 119 proceedings in the present case the accused were not told before they were called upon to plead that they had a right to legal representation. The first reference made by the magistrate to legal representation was just before he adjourned the proceedings pending the decision of the attorney-general : he asked the accused whether they desired the services of **pro deo** counsel if the matter should proceed to trial. Both of the appellants replied that they themselves would arrange for counsel. (In fairness to the magistrate it should be mentioned that prior to the Radebe case there was no reported decision which laid down specifically that a

judicial officer was under a duty to inform an unrepresented accused that he had a right to legal representation; and the Radebe case was reported months after the sec 119 proceedings had been concluded. It follows therefore that no blame is imputable to the magistrate.)

Where a general duty rests upon a judicial officer to inform an unrepresented accused that he has a right to be legally represented the failure to discharge that duty does not inevitably involve the commission of an irregularity in the judicial proceedings involved. Whether or not an irregularity has been committed will always hinge upon the peculiar facts of the case; and it need hardly be said that much depends upon the extent of the accused's own knowledge of his rights. S v Lwane 1966(2) SA 433(A) dealt with the duty of a judicial officer to explain to a witness his privilege in relation to self-

incrimination. Bearing in mind that distinction the following observations of OGILVIE THOMPSON, JA (at 440 G/H) are nevertheless pertinent also to the duty of a judicial officer to inform an unrepresented accused of his right to representation. Having stressed that the practice of warning a witness against self-incrimination was a well-estabished one, the learned Judge of Appeal expressed the view that the duty so resting upon a judicial officer was not -

> "..... an absolute duty in the sense that its non-observance will always and inevitably render the witnesses' incriminating statement inadmissible against him in subsequent proceedings. For example, a trained lawyer giving evidence could hardly legitimately complain that he had received no caution, even though a conscientious judicial officer might nevertheless elect to administer a caution even to such a witness."

It seems to me that in the instant case the magistrate's failure to inform the appellants of their right to representation before they pleaded would amount to an irregularity only if the appellants were shown to have

been ignorant of that right. I doubt whether the evidence in the present case supports a finding that the appellants were in fact so ignorant. Indeed, the fact that at the close of the proceedings in the magistrate's court the appellants informed the magistrate that they did not require **pro deo** defence and that they would arrange for their own counsel, may to some extent point the other way. However that may be, I shall assume for purposes of the appeal that before they pleaded at the sec 119 proceedings both appellants were unaware of their right to representation at such proceedings; and that, in consequence, the magistrate's failure to inform them thereof represented an irregularity in those proceedings.

The question then is : What was the effect of this irregularity? Did it result in a failure of justice in the trial? That is the contention made on behalf of the appellants. The terms of the special entry made on

the trial record have already been noted. The special entry complains that the trial Judge erred in failing to set aside the sec 119 proceedings. As formulated the special entry is, I think, misconceived. It rests on two wrong assumptions.

The first is the assumption that the judicial officer who presides at the trial to which the sec 119 proceedings were a prelude, is competent to set those proceedings aside. No such power is given to him by the Criminal Code and in my view he has no inherent power to do so. He does not sit as a court of review. (It may be noted, moreover, that the trial will not necessarily be held in a superior court : it may, depending on the directions of the attorney-general, be in a magistrate's or a regional court). Secs 121(5)(aA) and 122(4) direct peremptorily that upon proof the record of the sec 119 proceedings shall form part of the record. The judicial officer who

presides at the trial is not competent to thwart that direction.

The second wrong assumption, so it seems to me, is that the magistrate's omission to inform the accused of his right of representation has the consequence that the proceedings are "vitiated", in the sense of being rendered invalid or ineffectual. I do not think that the word "vitiated" is an apt one. In the Radebe case GOLDSTONE, J pointed out that such an omission may result in an unfair trial and a consequent failure of justice,but he was careful to guard himself from being taken to suggest that the absence of legal representation per se would necessarily result in an irregularity or an unfair trial; and he emphasised that each case depended upon its own facts and peculiar circumstances.

The real issue which arises in the present appeal does not, I think, relate to the validity of the sec 119 proceedings. It concerns the use to which the record of

those proceedings may be put in the adjudication of an ensuing trial. The real and substantial question for decision may be stated thus: Whether by reason of the magistrate's irregular omission to inform the accused of their right to legal representation the trial Court committed an irregularity in permitting cross-examination of the accused with reference to the sec 119 record and in relying upon such record as part of the proof of the guilt of the accused.

The sec 119 record contains evidentiary material relevant to the guilt of the accused. It consists of two pleas of guilty on two of the counts; admissions made by the accused in the course of answering questions by the magistrate in terms of sec 121(1) read with sec 112(1)(b) of the Criminal Code; and informal admissions made by the accused in the course of the magistrate's inquiry in terms of sec 122(1) read with sec 115. Standing on a different

footing are the formal admissions which the accused agreed could be recorded in terms of sec 115(2)(b).

By a plea of guilty, an accused incriminates himself fully; he acknowledges that he committed or participated in the commission of the offence; and he admits all the essential allegations in the charge. (See S v Nkosi (supra) at 353.) The object of questioning in terms of sec 121(1) read with sec 112(1)(b) is not further incrimination but to test the accused's plea of guilty in order to ascertain whether he understands the elements of the offence and whether he does in truth admit all the allegations in the charge. The object of the questioning is to prevent the entering erroneously of a plea of guilty.

Where the magistrate, after such questioning, is not satisfied that the accused admits the allegations in the charge, he is required in terms of sec 121(2)(b) to enter a plea of not guilty, and to proceed in pursuance of

sec 122(1) to act in terms of sec 115. Nevertheless, the fact that the accused has pleaded guilty, and his answers in response to the magistrate's questions, remain on the record and constitute evidentiary material.

An accused who pleads not guilty may make statements in the course of the procedure laid down by sec 115 : he may make a statement indicating the basis of his defence; he may say what allegations in the charge he admits or denies, and answer questions the object of which is to ascertain what allegations in the charge are in issue; and he may agree that any allegation not placed in issue may be recorded as an admission, which is then deemed to be an admission under sec 220. See generally on sec 115 S v Seleke en 'n Ander (supra) at 753-754, which emphasises that the section does not contemplate any form of cross-examination. On the contrary, it envisages an attempt to establish what allegations are really in

dispute, with questions aimed at clarification, if necessary. And even though the accused does not agree to any admission made by him being recorded as an admission, it stands as part of the evidentiary material contained in the record. See S v Sesetse en h Ander (supra) .

From what has already been said it appears that the object of the sec 119 procedure is partly to identify the cases where the accused acknowledges his guilt (which may render a trial unnecessary) and partly (in cases where the accused pleads not guilty) to ascertain and clarify the issues actually in dispute.

The general rule is that all relevant evidence is admissible unless it is hit by a specific rule of the Law of Evidence. The contents of the sec 119 record in the present case are not inadmissible by reason of any of the rules relating to confessions and admissions. Although it was argued that the evidence contained in the sec 119

record was inadmissible because the magistrate questioned the accused in an oppressive and unfair manner, that argument has already been rejected.

I have had the advantage of reading the judgment prepared by my Brother MILNE. He concludes that since the magistrate committed an irregularity by not informing the appellants before they pleaded of their right to representation, their pleas of guilty in the sec 119 proceedings were inadmissible at their trial. I respectfully disagree with that conclusion.

In my opinion no issue of admissibility here arises. In argument before us it was urged that if the magistrate had informed the appellants of their right to representation, and if as a result thereof the appellants had taken legal advice before pleading they might well have pleaded not guilty in the sec 119 proceedings. That is no doubt a possibility. It is also perfectly true that had

the sec 119 proceedings taken such a course the appellants at their subsequent trial would have enjoyed the tactical advantage of not being haunted by their earlier pleas of guilty. But I have great difficulty in understanding why such a state of affairs should render inadmissible their pleas of guilty during the sec 119 proceedings.

In considering the admissibility of those pleas it may be useful, I think, to compare the privilege of a witness to decline to answer incriminating questions with the rights of an accused when he is required by law to plead to a criminal charge. The privilege of a witness against self-incrimination is based upon the maxim of our law **nemo tenetur se ipsum accusare.** Lwane's case (supra) affirms the important principle that, in the interests of fairness to a witness, he should be informed in advance that he enjoys this privilege. At 439 F/G of the judgment in Lwane's case OGILVIE THOMPSON, JA remarked:-

> "Having regard to the composition of our population, the vast majority of those who enter the witness-box are persons who are likely to be wholly ignorant of the rights conferred by sec 234 of the Code. In the main, even wholly uneducated persons recognise the duty to testify if subpoenaed, but it is highly improbable that any save a very small percentage of such persons are aware that they are entitled to decline to answer incriminating questions."

The ratio of Lwane's case is that an unsophisticated lay witness will probably be unaware of his privilege; and that fairness requires that he should be made aware of it before he incriminates himself. Entirely different considerations apply, so I consider, in relation to an accused called upon to plea in sec 119 proceedings.

In regard to the privilege against self-incrimination the position of an accused of necessity differs from that of a witness. The roots of the privilege lie in strong public aversion in England to the inquisitorial methods of the Courts of the Star Chamber.

Under its procedure those who were charged with an offence were interrogated on oath. Dislike of this procedure (see Cross on Evidence 5th ed (1979) at 275/6) -

> ".....contributed to the rule that the accused could not testify in a criminal case, and the idea that no one could be obliged to jeopardise his life or his liberty by answering questions on oath came to be applied to all witnesses in all proceedings in the course of the seventeenth century."

The reason for the rule that the accused could not testify at his own criminal trial was that no one should be obliged to give himself away.

In England the accused was made a competent witness for the defence at every stage of the proceedings by the Criminal Evidence Act 1898. In the Cape Colony the accused was made a competent witness by the Administration of Justice Act which was repealed by the 1917 Criminal Code. Statutory developments thereafter are described

thus by Hoffman & Zeffertt, The SA Law of Evidence, 4th ed (at 35/6):-

> "When the accused was made competent to give evidence in his own defence, it was obvious that he could not be treated simply as another witness. For one thing, if he could claim the ordinary witness's privilege against self-incrimination he would be immune from any form of cross-examination. On the other hand, if he could be cross-examined to credit like other witnesses, the prosecution would be able to elicit incidents of past misconduct which they would not have been allowed to prove in chief. In the Cape Colony the accused was made a competent witness by the Administration of Justice Act 1886. The Statute dealt with the first point by providing that if the accused gave evidence he would not claim any privilege against self-incrimination but it did nothing about the second .....
>
> In England the accused was made a competent witness by the Criminal Evidence Act 1898. Section 1(e) of this statute dealt with the privilege against self-incrimination in the same way as the Cape Act, but s 1(f) gave the accused a limited privilege against cross-examination to credit. With minor alterations s 1(f) was incorporated in the Transvaal and Orange River Colony Evidence Proclamation of 1902, and was extended to all provinces in 1917. It is now s 197 of the Criminal Procedure Act 1977....."

The privilege against self-incrimination is now dealt with in South Africa by sec 203 of the Criminal Code. It reads:-

> No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he would not on the thirtieth day of May, 1961, have been compelled to answer by reason that the answer may expose him to a criminal charge."

Privilege against cross-examination of an accused affecting his credit is dealt within sec 197 of the Criminal Code. Subject to four qualifications listed therein - which are not relevant for present purposes - sec 197 reads as follows:-

> "An accused who gives evidence at criminal proceedings shall not be asked or required to answer any question tending to show that he has committed or has been convicted of any offence <u>other than the offence with which he is charged,</u> or that he is of bad character, unless -
> (a)..... (b)..... (c)..... (d) ....."
> (Emphasis added)

Under cross-examination an accused is obliged to answer questions. From the provisions of sec 197 it is self-evident that an accused cannot during his cross-examination claim the privilege in respect of the very offence with which he is charged. See Hoffmann & Zeffertt, op cit, at p 36 footnote 48.

Under sec 119 an accused is obliged to plead forthwith. But here too his response relates exclusively to the very offence with which he is charged; and logically there is no room whatever for the privilege against self-incrimination. Any attempt to import it at this stage of the proceedings would represent a complete stultification of the requirement to plead. There is a further and compelling consideration which must not be overlooked. At the very heart of the privilege against self-incrimination lies the notion of testimonial compulsion. In Rex v Camane 1925 AD 570 INNES, CJ

remarked at 575:-

> "Now it is an established principle of our law that no one can be compelled to give incriminating evidence against himself. He cannot be forced to do that either before the trial, or during the trial."

In the case of an accused called upon to plead under sec 119, however, the essential attribute of testimonial compulsion is entirely lacking. At that stage of the proceedings the accused has simply to exercise a choice between two alternatives. He may, through a plea of guilty, choose the course of inculpation; but he may just as well elect, by pleading not guilty, to exculpate himself. His choice is entirely uncoerced and unfettered. The fact that the accused is obliged to plead does not mean that he is compelled or forced to plead guilty. His choice between a plea of guilty and a plea of not guilty is an untrammelled one.

The scenario conjured up by counsel for the

appellants in argument (the possibility that if the appellants had had legal advice this might have induced the appellants to plead not guilty at the sec 119 proceedings) raises the question not so much of the right of an accused to legal representation in criminal proceedings (which is dealt with in sec 73(2) of the Criminal Code), as his right to consult his lawyer (which is dealt with in sec 73(1)). The latter right is not specific to criminal proceedings : it arises immediately upon arrest. There is much to be said for the view that a person should be informed of this right immediately upon arrest, and perhaps this is a matter which might enjoy the attention of the Legislature. But to the best of my knowledge it has never been suggested that a failure so to inform an accused may render inadmissible an admission made by an accused to the police; or a pointing out by him; or a confession made by him to a magistrate. I do not think

that there is any relevant distinction to be drawn between those cases and sec 119 proceedings. Also analogous, I think, are cases where there has been non-compliance with the Judges' Rules, in particular the rules that the police should not question suspects without cautioning them that they are not obliged to answer; and that the police should not question suspects in custody at all. Such practices were conceived by the judges to be unfair, and the rules were devised, partly at any rate, to give suspects greater protection than that which they enjoyed under the common law. It is trite, however, that a failure to obey the rules is not per se sufficient to cause a statement made by the accused to be inadmissible, although it is a circumstance to be taken into account by the court in considering whether the statement was made freely and voluntarily. See Rex v Holtzhausen 1947(1) SA 567(A).

In sec 119 the Legislature has enjoined that the

accused shall be required by the magistrate "to plead to (the charge) forthwith." The magistrate's observance of that injunction without informing the accused of his right to consult a lawyer does not, in my opinion, have the result that the admission of the sec 119 record at the subsequent trial will operate unfairly against the accused.

It cannot be rightly said that it is unjust or inequitable that an accused's statement at sec 119 proceedings should be admitted against him at his trial merely because he was not informed of his right to legal representation. The link between the failure to inform and his plea of guilty is entirely speculative and remote. **Remotae causae non spectantur.** Moreoever, there is no unfairness in admitting a man's statements, not otherwise inadmissible against him. When he is called upon to plead, the facts alleged in the charge are peculiarly within his own knowledge, and if his election to plead guilty results

in the loss of the tactical advantage which a denial might have brought him that is not an unfairness which the law can recognise.

So much for the first limb of the argument based on the special entry. The further argument (based on the magistrate's failure to explain to the appellants their rights when they were dealt with under sec 122(1) and sec 155) may be dealt with very shortly. The questions put to the appellants under sec 115 broke no new ground and related to matters already raised at the time of the plea. The magistrate's omission did not render the incriminating statements by the appellants inadmissible at the trial. Although the admissions made before the magistrate could not be treated as sec 220 admissions, they nevertheless ranked as part of the evidentiary matter before the trial Court. See S v Sesetse (supra); S v Daniels en 'n Ander (supra) at 300 F. Consequently there was no unfairness to

the appellants in this connection. At the trial it was open to the appellants to try to show that the statements in question were untrue. They did so try.

In my opinion the irregularities during the sec 119 proceedings of which the appellants complain did not have any effect on the admissibility at the trial of the record of the proceedings. The appeal on the special entry falls to be dismissed.

G G HOEXTER, JA

EKSTEEN, JA)
NICHOLAS, AJA) Concur

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Case No 60/89
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SIHLE MABASO First Appellant

NHLANHA MABASO Second Appellant

and

THE STATE Respondent

CORAM: HOEXTER, SMALBERGER, MILNE, EKSTEEN JJA et NICHOLAS AJA

DATE OF HEARING: 9 November 1989

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J U D G M E N T

MILNE JA/.....

MILNE JA:

I have had the privilege of reading the judgment prepared by my Brother Hoexter but I am with respect constrained to differ from his conclusion.

I agree that the special entry, as formulated by the trial court, was misconceived because the judicial officer who presides at the trial to which the sec 119 proceedings were a prelude, is not competent to "set aside" those proceedings. I do not think it is necessary for the decision of this appeal to decide whether the magistrate's failure to inform the appellants of their right to be legally represented "vitiated" the s 119 proceedings. Subject to that qualification, however, I agree that the real and substantial question for decision in this appeal is correctly stated as follows:

"Whether by reason of the magistrate's irregular omission to inform the accused of their right to legal representation the trial court committed an irregularity in permitting cross-examination of the accused with reference to the sec 119 record and in relying upon such record of part of the proof of the guilt of the accused."

The appellants were, in my judgment, not rightly convicted because the sec 119 record was improperly allowed in by the trial court and this constituted a fatal irregularity. It is correct that secs 121(5)(a) and 122(4) provide that the sec 119 record "shall be received as part of the record". They also provide for admissions made in such proceedings to stand (subject to a proviso in the case of sec 121(5)(a)). These sections must, however, be taken to refer to such part of the record as is admissible in law. It cannot, for example, be supposed that if in the course of questioning the magistrate elicited admissions from the accused of their previous convictions the

provisions of sec 122(4) would render such admissions admissible - and proven - against the accused. The question remains therefore whether the failure to inform the appellants of their rights renders the sec 119 record inadmissible. Had the appellants been aware of their rights, or if they would not have exercised their rights even if they had known of them the omission would not have rendered the record of the sec 119 proceedings inadmissible. I think, however, that it is reasonably clear that they were not aware of their right to be legally represented at the sec 119 proceedings. Doubts were at one time expressed as to whether counsel could play a useful role at such proceedings so the right to be represented there could hardly be said to be common knowledge. The fact that at the end of those proceedings the appellants, in answer to the magistrate's question as to whether they would require pro deo counsel at the trial, said that they would arrange for

their own counsel is not an indication that they were so aware: if anything, it suggests that they were not. If they wanted to be represented by their own counsel and knew that counsel could represent them at the sec 119 proceedings then one wonders why they were not so represented or, at the very least, why they did not seek an opportunity to be so represented. The fact that some six weeks after the termination of the sec 119 proceedings the second appellant was represented by counsel in a bail application takes the matter no further except to emphasize the likelihood that they would have sought legal representation earlier had they been aware of their right to do so. In any event, the evidence makes it clear that neither of the appellants was aware of his right to apply for Legal Aid. My Brother Hoexter in his judgment approves of the passage in S v Radebe, S v Mbonani, 1988(1) SA 191 (T) at 196H-I to the effect that the accused should be informed in appropriate

cases that he is entitled to apply to the Legal Aid Board for assistance. I agree. It is clear, therefore, that the appellants were not properly advised of their rights and that they were not aware of such rights.

The appellants had the right to remain silent when questioned by the magistrate in terms of sec 115. S v Daniels en 'n Ander 1983(3) SA 275 (A) at 299F-H. They also had the right to remain silent when questioned by the magistrate in terms of sec 112(1)(b). S v Nkosi en 'n Ander 1984(3) SA 345 (A). In that case this Court held that a magistrate who questions such an accused is not obliged to warn him of his right to remain silent but it is clearly implied that he has such a right and I do not understand this to be questioned. It must also be assumed that the appellants were not aware of this right. There is nothing in the record to the contrary. It may well be that

had the appellants been apprised of their rights and been represented they would have adhered throughout the preliminary proceedings to a plea of not guilty in respect of all the charges and not made any admissions. This must necessarily remain in the realm of speculation but similar considerations did not prevent this Court from holding in S v Lwane 1966(2) SA 433 (A) at 442A-D that the failure of the magistrate to warn a witness at a preparatory examination that he was not obliged to answer incriminating questions rendered the witness's statements at the preparatory examination inadmissible when he subsequently became an accused. See also S v Shabangu 1976(3) SA 555 (A) at 558F, where Jansen JA said

"The case against the appellant on the merits certainly appears to be formidable and to have fully justified the conviction. But, on the other hand, it is impossible to say what effect a properly conducted defence could have had on the ultimate result ".

A similar notion is expressed in a decision of the US

Supreme Court in Hamilton v Alabama 368 US 52. In that case the petitioner was arraigned without counsel in Alabama for a capital offence to which he pleaded not guilty and subsequently he was convicted and sentenced to death. His conviction was reversed by the Supreme Court, it being held at p 55

"when one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted ... In this case ... the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defences available to him and to plead intelligently."

(I shall, at a later stage, deal with the question of whether decisions of the US Supreme Court are of assistance in determining the issue which arises in this appeal.)

I cannot, with respect, agree that there is any difference in principle between the witness who is not warned of his right not to answer incriminating questions

and the accused who is not advised of his right to legal representation. True, the choice between a plea of guilty and a plea of not guilty is an untrammelled one, but in the case of an unlettered and unsophisticated layman the choice is a totally uninformed one. While the standard of literacy in the Republic is no doubt increasing, a great many people who come before the courts are illiterate and unsophisticated. The vast majority have no knowledge of legal procedure. This is recognised by the legislature. The primary object of questioning an accused person who has pleaded guilty at sec 119 proceedings is to protect him from the consequences of an incorrect plea of guilty. It can, and frequently does happen, that an unrepresented accused pleads guilty when, on his version, he should have pleaded not guilty. It is a matter of daily occurrence. It happened in this very case. Having questioned the first appellant, the magistrate was not satisfied that he had

admitted all the allegations in the charge and accordingly entered a plea of not guilty on count one. The same happened in respect of count two. It also happened with regard to the second appellant. In the majority of cases where the accused is unrepresented he is asked to plead and pleads through the medium of an interpreter. The interpreter reads the charge to the accused and then asks him "Do you admit or deny it?". Quite frequently the accused says "I admit it" when all that he intends to admit is one stark central fact: for example, that he struck the deceased on the head with a stick. Whether he was justified in so doing, or whether that caused the death of the deceased, or what his intention was in so doing, are matters that, in all probability, do not even enter his head. The charge may involve a number of complex legal notions which are not only quite outside the experience of the accused, they are quite beyond his comprehension. Perhaps one might

illustrate the complexity of the questions which may arise with regard to plea when one considers the difficulty of establishing whether or not a statement of an accused person amounts to a confession. It has been held that what is meant by a confession is an unequivocal acknowledgement of guilt "the equivalent of a plea of guilty before a Court of law." Rex v Becker 1929 AD 167 at 171. Highly trained lawyers and judges not infrequently differ as to whether what was said amounts to a plea of guilty. When he pleads, an untrained person who is possibly illiterate is being asked to do the opposite process - to decide whether on his version of the facts, he is guilty. Let us take what might be thought to be a simple case namely a charge of murder. Does the accused know that there are certain absolute defences? Does he know that the State has to prove an intent to kill? Does he know what an intent to kill means? Does he know anything of the doctrine of common purpose or,

more importantly from the point of view of his plea, its limitations? To remove the enquiry to another plane, does he know that he is entitled to take the attitude that the State must prove its case and that if it fails to do so, he is entitled to the benefit of the doubt? Does he know that in order to put the State to the proof he should plead not guilty? Does he know that he can tender a plea of guilty to a lesser offence? There may also be situations where it is clearly in the interests of the accused to plead not guilty but to make certain admissions. A great deal may depend on the precise way in which these admissions are worded. All these matters are neatly summed up in the words quoted above from Hamilton v Alabama

"Only the presence of counsel could have enabled this accused to know all the defences available to him and to plead intelligently" (my underlining)

- or, as it was put in Powell v Alabama 287 US 45 (1932) at

"He [the accused who is here assumed to be the intelligent and educated layman] requires the guiding hand of counsel at every step in the proceedings against him."

One of the obvious ways in which counsel can guide and one which is of vital relevance to this case, is to advise him of his right to remain silent. As already mentioned, it has been held in Nkosi's case that where the accused pleads guilty and is questioned by the magistrate, the magistrate is not obliged to warn him of his right to remain silent. I have some difficulties with that decision. The rationale of the decision in Nkosi's case is that the necessity of such an explanation is obviated by the fact that through his plea of guilty the accused has admitted the whole of the State's case and that any warning to the accused would be contrary to the spirit of sec 119 read with secs 121(1) and 112(1)(b) and would be calculated to thwart its object. But the object of questioning in terms of these sections is to prevent the entering erroneously of a plea of guilty. As

Jansen JA put it in Nkosi's case supra at 353H-I

"Die ondervraging sou juis kon dien om 'n verkeerde pleit bloot te lê."

No doubt it is technically correct to say that "by die pleit van skuldig het die beskuldigde reeds die Staat se hele saak erken" but the very section that the court was there considering, fully recognised that an accused person might well plead guilty when that was "'n onregverdigde pleit" and provided for protection of the accused against the consequences of this. It seems to me, with respect, illogical to say that there is no reason to protect the accused against "further self-incrimination" simply because he has already incriminated himself by pleading guilty, when the section is, according to Jansen JA, intended to protect the accused against the consequences of an incorrect plea of guilty. If he is to be protected by a plea of not guilty being entered (as happened in this case) then he is no

longer "ten volle geïnkrimineer". I am, furthermore, not much impressed with the argument that an explanation of his right to remain silent might result in the incorrectness of the plea of guilty not being exposed. I do not think it would be beyond the wit of man to work out a formula which would remove any such tendency. For example, if the magistrate were to add to the explanation that the accused was not obliged to answer such questions, something to the following effect:

"But my object in putting these questions to you is to determine whether you really do intend to admit all the allegations against you or whether you are possibly making a mistake."

Assuming, however, as I must, that the decision in Nkosi's case is correct, then it is all the more vital that the accused should be aware of his right to legal representation at such proceedings. If he does not know of his privilege and the court is not obliged to tell him then who else is to

tell him but a legal representative?

In White v Maryland 373 US 59 the facts were similar to those which arise in this case. The petitioner, who had been arrested on a charge of murder, was taken before a Maryland magistrate for a preliminary hearing and he pleaded guilty without having the advice or assistance of counsel. Counsel was later appointed for him and he pleaded not guilty at his formal "arraignment"; but the plea of guilty made at the preliminary hearing was introduced in evidence at his trial and he was convicted and sentenced to death. The Supreme Court rejected a submission that under Maryland law there was no requirement nor any practical possiblity to appoint counsel for a petitioner at the preliminary hearing, and, relying upon the remarks in Hamilton v Alabama referred to above, reversed the conviction. This is an appropriate stage to deal with the

question of whether American cases dealing with the due process clause of the Fourteenth Amendment are, to any extent, useful aids in considering what constitutes a fair trial in our law. In my view, they are useful aids (and no more than that) in considering this question. In a nutshell, my reasons for saying so are the following:The due process clause of the Fourteenth Amendment to the United States Constitution stipulates that

"[N]or shall any State deprive any person of life, liberty or property without due process of law."

"Due process" is no more well-defined than a fair trial but they embrace much the same field. Due process is embodied in the Fourteenth Amendment to the US Constitution and a fair trial is a requirement of our common law. What is regarded as necessary to due process is therefore of assistance in deciding what is a fair trial. The whole question was fully and carefully examined by Didcott J in S v Khanyile & Another 1988(3) SA 795 (N) at 808F-810B and S

v Davids; S v Dladla 1989(4) SA 172 (N) at 182C-184G and I fully agree with his comments in this regard. I would, however, like to expand slightly on a statement in Khanyile's case at 802E that

"The Sixth Amendment concerns proceedings in the Federal Courts." [This amendment expressly provides, inter alia, that in all criminal proceedings the accused is entitled to the assistance of "counsel"]

This statement is correct. Barron v Baltimore 7 Peters 243 (1833) held that the Sixth Amendment does not bind the States. About a hundred years later the situation became more complicated, however, because of the intense judicial debate as to whether the due process clause of the Fourteenth Amendment "incorporated" the provisions of the first eight Amendments to the US Constitution. See **ABRAHAM: Freedom & the Court (4th ed)** pp 28-91 and **GUNTHER: Cases and Materials on Constitutional Law (10th ed)** pp 459-501. The right to counsel in capital cases was extended to the State courts on the basis of a breach of the due process clause of

the Fourteenth Amendment. Eventually on 18 March 1963 it was held in Gideon v Wainwright, Corrections Director 372 US 335 that even in a non-capital case in a State court the refusal to provide counsel constituted a violation of the due process clause. Problems of "incorporation", need not concern us and although White v Maryland was decided some six weeks after Gideon's case, the court did not refer to it but relied solely on what was said in Hamilton v Alabama in the passage set out above. As Didcott J points out in S v Davids supra at 183I the position is essentially the same in our common law,

"Our courts also will not enter into the merits, having held repeatedly that actual guilt can never be determined from an examination of evidence which might have presented another picture had a lawyer run the defence."

For the sake of clarity I should perhaps add that I do not regard the provisions of s 73(2) of Act No 51 of

1977 as being the equivalent to the Sixth Amendment to the US Constitution. S 73(2) recognises the right of an accused person "to be represented by his legal adviser at criminal proceedings" provided that his legal adviser is not prohibited by any law from appearing at those proceedings. This section, however, postulates a representation procured by the accused himself - and that, and that alone, is what was decided in S v Chaane en Andere 1978(2) SA 891 (A) on the question of legal representation. (See the reasoning of Rabie JA at p 897B).

Logically speaking, I agree that the right to consult a lawyer arises immediately upon arrest and that there is much to be said for the view that a person should be informed of this right immediately upon arrest. I do not think that it is necessarily a matter which would have to be dealt with by the legislature. It is correct that it has

never been suggested so far as I know, that in our law

"a failure so to inform an accused may render inadmissible an admission made by an accused to the police or a pointing out by him; or a confession made by him to a magistrate."

It is not without interest that in Miranda v Arizona 384 US 436 (1966) at 471-3 it was held that if a person in custody is to be subjected to interrogation he must, at the outset, be clearly informed, inter alia,

"that he has the right to consult with a lawyer and to have the lawyer with him during interrogation .... [and] also that if he is indigent a lawyer will be appointed to represent him."

The effect of a failure to inform an accused of his right to legal representation (in which I would include the obtaining of legal advice) upon the admissibility of admissions made by an accused to the police or a pointing out by him or confession may have to be considered in the future.

For these reasons I conclude that the record of

the sec 119 proceedings was inadmissible. That record was vital to the State case. Both the appellants testified and they denied most, if not all, of the evidence so cogently summarised by my Brother Hoexter as "The picture which then emerges". It is impossible to say whether the evidence of the appellants would have been rejected had the record been excluded. The rejection of their evidence was crucial to their conviction and it is therefore not possible to say that, on the evidence and findings of credibility unaffected by the irregularity, there is proof of guilt beyond reasonable doubt. I would accordingly uphold the appeals and set aside the convictions and sentences in respect of both the appellants.

I have come to the above conclusions reluctantly. I say reluctantly because I have a strong feeling that the appellants were indeed guilty of the offences with which

they were charged. That is, of course, not the test. The test is whether they were rightly convicted. As Holmes JA said in S v Lwane supra cit at 444C

"... the pragmatist may say that the guilty should be punished and that if the accused has previously confessed as a witness it is in the interests of society that he be convicted. The answer is that between the individual and the day of judicial reckoning there are interposed certain checks and balances in the interests of a fair trial and the due administration of justice."

In S v Mushimba en Andere 1977(2) 829 (A) at 844H Rumpff CJ dealt with the concept of justice in this connection and said the following

"Die 'geregtigheid' waarna hier verwys word, is nie 'n begrip wat veronderstel dat die beskuldigde noodwendig onskuldig is nie. Geregtigheid wat geskied het in hierdie sin is die resultaat van 'n bepaalde eienskap van verrigtinge aandui. Die eienskap toon aan dat aan vereistes wat grondbeginsels van reg en regverdigheid aan die verrigtinge stel, voldoen is."

He goes on to say that whether an irregularity is of such a nature will depend on the circumstances of each case

"en sal altyd 'n oorweging van publieke beleid vereis."

In my judgment, public policy requires that before a man condemn himself out of his own mouth in preliminary court proceedings he should be fully advised of his right to remain silent and as to whether it is in his interests to do so. The proper person to advise him of this is a legal adviser and public policy requires that he should be advised of his rights in this regard as well.

A J MILNE
Judge of Appeal

SMALBERGER JA: Concurs