Case No 18/90

IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION.

In the matter between:

CHARLES BRIAN RUDMAN First Appellant

RICARDO JOHNSON Second Appellant

and

THE STATE Respondent

CORAM: CORBETT, CJ, VAN HEERDEN, E M GROSSKOPF, EKSTEEN, JJA et NICHOLAS, AJA

HEARD: 22 August 1991

DELIVERED: 27 September 1991

Case No 658/89

IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION

In the matter between:

PAULOS MTHWANA Appellant

and

THE STATE Respondent

CORAM: CORBETT, CJ, VAN HEERDEN, E M GROSSKOPF, EKSTEEN, JJA et NICHOLAS, AJA

HEARD: 22 August 1991

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J U D G M E N T

NICHOLAS, AJA....

NICHOLAS, AJA

These three matters, which have their main ground of appeal in common, were heard together.

The first appeal is that of **Charles Rudman**, who was convicted in the Port Elizabeth Magistrates Court of housebreaking with intent to steal and theft and then referred for sentence to the Regional Court, where he was declared an habitual criminal. The second appeal is that of **Ricardo Johnson**, who was convicted in the Port Elizabeth Magistrates Court of assault with intent to do grievous bodily harm and sentenced to imprisonment for six months. The hearing of their appeals to the Eastern Cape Division was consolidated, together with that of an appeal and review proceedings by one **Wilson Xaso**. Rudman's appeal against his conviction was upheld to the extent that the verdict was altered to one of guilty of theft, but his appeal against the sentence was dismissed, as was

Johnson's appeal against conviction and sentence. The judgment (per COOPER J, JENNET and JANSEN JJ concurring) is reported: **S v Rudman; S v Johnson; S v Xaso; Xaso v van Wyk NO and Another;** 1989(3) SA 368 (ECD). The case will be referred to as **S v Rudman.** The third appeal is that of **Paulus Mthwana**, who was convicted in the Durban Magistrates Court of housebreaking with intent to steal and sentenced to imprisonment for two years. His appeal to the Natal Provincial Division was dismissed (per HOWARD JP, with BOOYSEN and COMBRINK JJ concurring.) The judgment is reported: **S v Mthwana** 1989(4) SA 361 (N).

The main question argued in this Court is one of procedure: whether an indigent accused person - that is, one who does not have the means to pay for his own defence - is entitled to be provided at his trial with legal representation, if necessary at the expense of the State. No such rule had ever been recognized in South Africa

until it was proclaimed by DIDCOTT J, with FRIEDMAN J concurring, in a review case - **S v Khanyile and Another** 1988 (3) SA 795 (N), which will be referred to as **S v Khanyile.** In **S v Rudman** the Eastern Cape Division disagreed with **S v Khanyile.** In **Nakani v Attorney-General, Ciskei & Another,** 1989(3) SA 655 (CkGD) HEATH J, with whom LIEBENBERG AJ concurred, also disagreed. In **S v Davids; S v Dladla** 1989 (4) SA 172 (N) (which will be referred to as **S v Davids**) DIDCOTT J (with BRISTOWE J concurring in a separate judgment) stood his ground, saying (at 184 G-H) that having considered the criticisms levelled at the **Khanyile** decision by COOPER J in **S v Rudman,** and in the arguments in the cases before him, he found himself far from feeling persuaded that it was jurisprudentially unsound. NIENABER J filed a dissenting judgment. In **S v Mthwana,** again, HOWARD JP did not agree with the **Khanyile** decision, but agreed with the dissenting

judgment of NIENABER J in **S v Davids.**

In **S v Khanyile** DIDCOTT J based his judgment on what he perceived to be a fundamental principle of the South African law of criminal procedure, namely, that the trial should be fair. He was to say later in **S v Davids** at 178 C - E:

> "An irregularity is no esoteric idea, but one encompassing every flaw in the way a criminal trial is run which renders it truly unfair. Ogilvie Thompson, JA summed it all up when, dealing in **S v Alexander and Others** 1965 (2) SA 796 (A) with the subject, he said (at 809 C-D): 'The basic concept is that the accused must be fairly tried.' Much the same was heard recently from Milne JA, whose judgment in **S v Tyebela** 1989 (2) SA 22 (A) contained this sentence (at 29 G-H): 'It is a fundamental principle of our law, and indeed of any civilised society, that an accused person is entitled to a fair trial'"

(The **dicta** in **S v Alexander** and **S v Tyebela** will be quoted again later in this judgment, but in their contextual setting). The standard of fairness appears from sippets taken from passages in judgments and

articles quoted by DIDCOTT J: "..a concept.... encompassing notions of basic fairness and justice", "comprising common and fundamental ideas of fairness and right", "in accordance with the universal sense of justice", "the ideas underlying the rule of law and the concept of justice which are the bases of all civilised systems of criminal administration", and the standards "fundamental and essential to a fair trial". On this basis and with the support of copious quotations, mostly from judgments delivered in the United States Supreme Court, DIDCOTT J said ultimately that he would have been prepared on grounds of principle and policy to formulate a coherent general rule. This rule, as I have extracted it from p 810 of the **Khanyile** judgment, is this. Every person accused of a crime has the right, whether or not he himself is able to get a lawyer, to be defended by one. It is "fundamental and essential to a fair trial" that he should be allowed to

exercise that right, and if he desires and cannot himself afford legal representation, he should be provided with it. A denial of the right makes the trial per se unfair and any conviction which follows will inevitably be upset. The learned judge recognized, however, that such a rule would not be feasible, and so he adopted a compromise, laying out guidelines for determining the cases in which legal representation was most clamant - those in which the trial of an unrepresented accused would be "palpably and grossly unfair". (see pp 815 - 816). He explained the rationale of the compromise in **S v Davids** at 184G to 185A:

> "A compromise was deemed necessary, one reached between the principle that the representation of accused persons was vital to the fairness of all trials in which it was wanted, or all of any consequence at least, and the stark reality that our current resources could never cope with the load they would have to bear if the principle were put into immediate and universal practice. The result may be regretted by those who think that the decision should somehow have gone the whole hog... All that matters at present is this. A compromise imposed on the operation of the

> principle by the hard facts of contemporary life meant that, for the time being some of its energy was unusable and had to remain in storage. But neither the principle itself nor its jurisprudential foundation suffered any damage in the process."

Underlying the compromise solution (to which I shall return later), the postulate remains that under our law a person accused is entitled, at any rate in serious cases, to legal representation at his trial, even though he is unable himself to get a lawyer. That postulate is the primary issue in this appeal.

Counsel for the appellants submitted that the decisions in **S v Khanyile** and **S v Davids** were correct and that the judgments to the contrary should be overruled. Taking their cue from **S v Khanyile**, they submitted the following as a correct formulation of the question to be decided by this court:

> "1.1 Whether the accused persons who

1.1.1 faced serious charges;

1.1.2 because of indigency or ignorance of their rights did not obtain legal representation; and

1.1.3 as a result were required to defend themselves in person;

can be said to have had a fair trial; and if not

1.2 Whether in the circumstances of each of the cases, it can be said that a failure of justice resulted from the unfairness of the proceedings."

Mr **Chaskalson,** leading counsel for the appellants, allowed in argument that 1.2 is tautologous. That is correct. In their ordinary popular meaning which is appropriate to the present discussion, the words "fairness" and "justice" and, it may be added, "equity", are synonyms, as are their respective adjectival forms. The Concise Oxford Dictionary gives: **fair** - just, equitable; **justice** - just conduct; fairness; **just** - acting or done in accordance with what is morally right

or proper; **equity** - 1. fairness; **equitable** - fair, just. The concession apart, I do not think that counsel's formulation of the question is a correct one. The first enquiry must be whether on the facts stated in item 1.1, there was an irregularity at the respective trials. If there was not, **cadit quaestio.** If there was an irregularity, a question would then arise under the proviso to ss(3) of s309 of the Criminal Procedure Act, 1977, which deals with the powers of a provincial or local division of the Supreme Court in appeals from lower courts. The proviso reads:-

> "Provided that, notwithstanding that the provincial or local division is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to such division that a failure of justice has in fact resulted from such irregularity or defect."

In s322(1) of the Act, which is concerned with the powers

of the court hearing an appeal from a provincial or local division, there is a similar proviso, and there were similar provisos in the relevant sections of the Criminal Procedure and Evidence Act, 1917 as amended and the Criminal Procedure Act, 1955. Until the amendment of the 1917 Act by Act 37 of 1948, an appeal to the Appellate Division from a provincial or local division lay only on a special entry made under s370 or a question of law reserved under s372. No appeal lay on the facts except upon a question of law reserved alleging that there was no evidence upon which the trial court could have reached the challenged conclusion. Sections 370(1) and 371(1) provided:

> "370 (1) If any accused person, who has been tried upon any indictment in a superior court, thinks that any of the proceedings in connection with or during his trial before that court are irregular or not according to law, he may, either during his trial or after his conviction, apply to that court to direct a special entry to be made on the record showing the nature of the

proceedings alleged to be irregular or illegal and such a special entry shall, upon such application, be made."

"371 (1) If such a special entry is made on the record as is hereinbefore provided, the person convicted may appeal to the court of appeal against his conviction on the ground of the irregularity or illegality of the proceedings as stated in such special entry:"

In **Rex v Thielke** 1918 AD 373 INNES CJ said at 376 that:-

"...having regard to the wording of the clause, and to the general principles of South African practice, I am of opinion that the matters with which sec. 370 was intended to deal were irregularities or illegalities of procedure. The law requires that trials shall be initiated and conducted with certain formalities and in accordance with certain rules and principles of procedure. And any irregular or illegal departure from these would be covered by sec 370."

SOLOMON JA said at 382 that in s 370:-

".....the Legislature had in view purely matters of procedure, and intended to provide a remedy against any departure from the rules of law and practice regulating the procedure in criminal trials. Such a departure would constitute 'an irregularity or illegality of the proceedings' within the meaning of sec. 371, the former

> expression referring more particularly to the established practice of the Courts, the latter to the rules which have been expressly laid down on the subject of procedure in criminal cases."

(See also **Rex v Nafte** 1929 AD 333 at 340.) In **The State v Mofokeng,** 1962(3) SA 551 (A), WILLIAMSON JA was concerned with s.364 of the 1955 Criminal Procedure Act which, he said, was almost identical with s.370 of the 1917 Act. After quoting from **Rex v Thielke** (see the dictum by INNES CJ above) he said at 557 G-H that s.364 of the 1955 Act, like its predecessor,

> "....must be read as conferring a right to apply for a special entry only in relation to any irregular or illegal departure from those formalities, rules and principles or procedure in accordance with which the law requires a criminal trial to be initiated or conducted."

In **S v Alexander and Others** (1) 1965(2) SA 796(A), OGILVIE THOMPSON JA said at 809 C-D:-

> "....what requires to be emphasized is that, to fall within the ambit of sec 364(1) of the Code (or of its predecessor, sec 370(1) of Act 31 of 1917) the irregularity complained of must relate

> to 'proceedings' (or 'procedure') in connection with (or during) the trial itself. The basic concept is that the accused must be fairly tried. Before an irregularity within the meaning of sec 364 of the Code can be said to have occurred, that which is complained of must be associated with the trial in a degree imperilling that basic concept. As was said by WILLIAMSON JA in **S v Mofokeng,** 1962(3) SA 551 (AD) at p 557, the section is confined to 'any irregular or illegal departure from those formalities, rules and principles or procedure in accordance with which the law requires a criminal trial to be initiated or conducted.'"

Similarly, BOTHA JA said in **S v Xaba** 1983(3) SA 717 (A) at 728 D-E:-

> "Generally speaking, an irregularity or illegality in the proceedings at a criminal trial (sc within the ambit of s.317 of the Criminal Procedure Act, 1977) occurs whenever there is a departure from those formalities, rules and principles of procedure with which the law requires such a trial to be initiated or conducted (see **R v Thielke** 1918 AD 373 at 376; **S v Mofokeng** 1962 (3) SA 551 (A) at 557G). The basic concept underlying S 317 (1) is that an accused must be fairly tried (see **S v Alexander and Others** (1) 1965 (2) SA 796 (A) at 809 C-D; and cf S **v Mushimba en Andere** 1977 (2) SA 829 (A) at 844 H)."

S v Tyebela 1989 (2) SA 22(A) was a case in which general leave to appeal had been granted. One of the grounds was summarized by MILNE JA as follows:-

> "(b) the trial judge had descended into the arena and had so conducted himself that, in effect, the appellant had not had a fair trial."

MILNE JA said at 29G-H:

> "It is a fundamental principle of our law and, indeed, of any civilised society that an accused person is entitled to a fair trial. **S v Alexander and Others** (1) 1965 (2) SA 796 (A) at 809 C-D; **S v Mushimba en Andere** 1977 (2) SA 829 (A) at 842B and 844H. This necessarily presupposes that the judicial officer who tries him is fair and unbiased and conducts the trial in accordance with those rules and principles or the procedure which the law requires."

Although these cases (apart from **Tyebela's** case) were concerned with appeals on special entries to the Appellate Division, the dicta are equally apposite to criminal appeals from lower courts to the Supreme Court in cases where it is contended that there were irregularities

of procedure in connection with the trial.

The **dicta** in **S v Alexander** and **S v Tyebela** which were quoted by DIDCOTT J in **S v Davids** at 178 C-E do not, when viewed in their contextual setting, afford any support for the learned judge's basic premise that the touchstone in a procedural appeal is whether the trial was unfair. OGILVIE THOMPSON JA made it clear in **S v Alexander** that s.364(1) of the 1977 Act, like s.370(1) of the 1917 Act, is confined to irregularities or illegalities of procedure; and in **S v Tyebela** MILNE JA said that the entitlement to a fair trial presupposes that it be conducted in accordance with the rules and principles in the procedure which the law requires. The court of appeal does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice", or with "the ideas underlying.....the concept of justice which are the basis of all civilised systems of criminal

administration." The enquiry is whether there has been an irregularity or illegality, that is, a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. It is true that those formalities, rules and principles have been designed to ensure a fair trial, but DIDCOTT J was in error when he said that an irregularity encompassed every flaw in the way a criminal trial is run which renders it truly unfair.

Nothing which I have said should be regarded as being in any way depreciatory of the vital importance of a fair trial in South African practice. Our common law is informed by a broad equitable spirit, and in administering the law and in the exercise of its functions the Court pays due regard to considerations of equity in the broad general sense of the word. (Cf the remarks of KOTZé J in **Hassan Khan v Immigration Officer** 1915 CPD 655

at 661, and in the judgment **a quo** set out in the report of **Bothwell v Union Government (Minister of Lands)** 1917 AD 262 at 269). In **Bank of Lisbon and South Africa Ltd v De Ornelas and Another** 1988(3) SA 580(A), JOUBERT JA said at 606A:

> "Roman Dutch law is itself inherently an equitable legal system. In administering the law the Dutch Courts paid due regard to considerations of equity but only when equity was not inconsistent with the principles of law. Equity could not override a clear rule of law."

One of the cases which the learned judge of appeal cited in support of this **dictum** was **Kent v Transvaalsche Bank** 1907 TS 765, where INNES CJ said at 774:

> "The Court has again and again had occasion to point out that it does not administer a system of equity, as distinct from a system of law. Using the word "equity" in its broad sense, we are always desirous to administer equity; but we can only do so in accordance with the principles of the Roman-Dutch law. If we cannot do so in accordance with those principles, we cannot do so at all."
>
> In dealing with a case submitted for automatic

review, FEETHAM JP said in **Rex v Mbamali & Xaba** 1938 NPD 2 at 9:-

> "....justice does not mean some standard of equity existing in the mind of the Court independent of the actual provisions of the law; we have to administer 'justice' in accordance with the law; we have no choice."

It was said in **Rex v Rose** 1937 AD 467 at 476-7:

> "Now the term justice is not limited in meaning to the notion of retribution for the wrongdoer; it also connotes that the wrongdoer should be fairly tried in accordance with the principles of the law."

And in terms of s.10(2)(a) of the **Supreme Court Act**, 1959 a person appointed as a judge is required before commencing to exercise the functions of his office to take an oath or make an affirmation that :-

> "I..... will in my capacity as a judge of the Supreme Court of South Africa **administer justice** to all persons **alike** without fear, favour or

> prejudice, and, as the circumstances of any particular case may require, **in accordance with the law and customs of the Republic of South Africa...**" (My emphasis).

When the question concerns the law as it should be ideally (**de lege ferenda**), notions of basic fairness and justice, of common and fundamental ideas of fairness and right, are of course a prime consideration. But where, as now, the enquiry concerns the law as it is (**de lege lata**) this is not so.

I turn then to the question whether there is any rule or principle in the South African law of criminal procedure which entitles a person accused to be afforded legal representation in cases where he is himself unable to obtain it by reason of his indigence.

For over 130 years there has been in operation in South Africa a system, apparently unique, by which every conviction and sentence by an inferior court which falls within the categories determined by legislation from time

to time, has been subject to review by a judge of the Supreme Court. This system has been of vital importance in the administration of justice in a country in which many accused persons are either wholly or partially illiterate and the great majority of them are undefended. Cf. an article entitled "On the System of Automatic Review and the Punishment of Crime" in (1962) 79 SALJ 267. The first reference which the authors of that article were able to find was that contained in Cape Act No 20 of 1856, which dealt with the court of resident magistrates. It provided in sections 47 and 48 that in the cases there mentioned the magistrate was required to send the record by the next available post to the Registrar of the Supreme Court. The proceedings were then laid before a judge and if he found them to be in accordance "with real and substantial justice," he issued a certificate to that effect, thereby confirming the proceedings. If, however, he decided that

he could not issue the certificate, he would refer the matter to the Supreme Court which might then quash or amend the proceedings. These provisions were adopted in due course by the other South African colonies. In the Transvaal and Orange Free State the earliest reported cases were in 1903 and in Natal in 1918. Similar provisions are contained in S.304 of the Criminal Procedure Act, 1977, which provides that the certificate to be endorsed by the judge is that "the proceedings are in accordance with justice." If the judge does not so certify, then the matter is considered by a full court.

During the long period in which the system has been in operation, it was never suggested before **S V Khynile** that accused persons, who were themselves unable to obtain legal representation, were entitled to be provided with it, or that a criminal trial conducted without such representation was irregular or illegal. The silence of numerous judges over many generations is

eloquent testimony that there has never been such a rule.

(cf. NIENABER J's judgment in **S v Davids**, where he said - 199E-G - that "a point so conspicuous, emerging from one of the fundamentals of fairness, if good, could never have been overlooked by generations of Judges dealing with a multitude of cases, duplicating the very situation described in **S v Khanyile** ....")

In support of their submission that there is no such rule, counsel for the State relied on two decisions of this court, namely, **R v Mati and Others** (1960(1) SA 304(A) and **S v Chaane en Andere** 1978(2) SA 891 (A).

In **R v Mati**, SCHREINER JA said at 306H - 307A:

> "There is no rule of law that a person who is being tried for an offence that may, if he is convicted, result in a death sentence must, unless he objects, be defended by counsel. But it is a well established and most salutary practice that whenever there is a risk that the death sentence may be imposed, either where that

> sentence is compulsory unless other factors are present, as in the case of murder, or where the death sentence is permissible by law and the circumstances make its imposition a reasonable possibility, the State should provide defence by counsel if the accused has not made his own arrangements in that behalf. It is disquieting to think that under our system of procedure, of which we are in general justly proud, it is possible for an accused to be convicted by a Judge sitting alone and be sentenced to death after a trial in which by reason of his poverty he has had to conduct his own defence."

In **S v Chaane en Andere** 1978(2) SA 891(A), RABIE JA dealt at 896 with a submission based on the fact that an appellant had not, up to the stage when he was convicted on a charge of murder, had a legal representative. It was argued that the trial judge had refused to appoint a **pro deo** advocate to act on his behalf, that this refusal was irregular, and that all the proceedings should, so far as this appellant was concerned, be set aside. The learned judge of appeal said (at 896 H - 897 C):

> "Wat eersgenoemde betoog betref, d w s dat al die verrigtinge tersyde gestel moet word, het mnr **De**

Vos hom beroep op art 73 van Wet 51 van 1977, waarvan sub-arts (1) en (2) soos volg lui:

> '(1) 'n Beskuldigde wat in hegtenis geneem is, hetsy met of sonder lasbrief, is, behoudens enige wetsbepalings betreffende die bestuur van gevangenisse, vanaf sy inhegtenisneming geregtig op die bystand van sy regsadviseur.
>
> (2) 'n Beskuldigde is geregtig om by strafregtelike verrigtinge deur sy regsadviseur verteenwoordig te word, indien bedoelde regsadviseur nie ingevolge 'n wet verbied word om by die betrokke verrigtinge te verskyn nie.'

Daar is aangevoer dat daardie sub-artikel so vertolk moet word dat dit vir 'n Hof verpligtend is om vir 'n beskuldigde 'n **pro deo** advokaat aan te stel wanneer die doodvonnis regtens moontlik is en dat 'n versuim om dit te doen die verrigtinge onreëlmatig maak. Art 73 is egter nie vir so 'n vertolking vatbaar nie. Dit bepaal dat 'n beskuldigde, in die gevalle wat daarin genoem word, geregtig is op die bystand van "sy" regsadviseur, maar dit sê nie dat die Staat of die Hof verplig is om vir hom 'n regsadviseur aan te stel nie. Die advokaat se betoog is dus onhoudbaar. Dit is, soos goed bekend, baie jare

> reeds die praktyk dat die Staat vir 'n behoeftige beskuldigde 'n **pro deo** advokaat aanstel wanneer daar 'n gevaar bestaan dat die doodvonnis by skuldigbevinding opgelê kan word, maar dit is nie 'n regsreël nie (vgl **R v Mati and Others (supra)** te 306H), en die versuim om 'n advokaat aan te stel het dus nie op sigself die gevolg dat òf die verhoor en skuldigbevinding, òf die oplegging van die doodvonnis, onreëlmatig is nie."

As I read the judgment in **R v Mati**, it does not provide express support for counsel's submission. SCHREINER J said, it is true, that the situation there under discussion was not covered by a rule of law. But it was covered by a well-established and most salutary practice. It is, however, implicit in the judgment that the practice is confined to potentially capital cases and does not apply generally.

Similarly, the judgment in **S v Chaane** is inconsistent with the existence of any practice that, apart from capital cases, the State appoints counsel to act

on behalf of an accused.

In **S v Baloyi** 1978(3) SA 290(T) MARGO J said at 293 F-G after referring to a number of cases,

> "These cases all deal with the right of an accused to legal representation where he wishes it. However, where he does not seek it, and where no irregularity occurs by which he is deprived of it, there is no principle or rule of practice of which I am aware which vitiates the proceedings."

Although he went on to say (293 **in fin** - 294A):

> "There are cases where, because of the gravity of the charge or the complexity of the matter, the accused ought, in the interests of justice to be represented, even though he cannot afford it. In such cases, if a **pro deo** defence is not provided, it would be the duty of the Court to refer the matter to one of the legal aid bodies or to invoke the assistance of one or other of the professional bodies to appoint a legal adviser to act without remuneration."

I do not understand this as qualifying in any way the first sentence above quoted. That sentence was approved by this court in **Volschenk v President, SA Geneeskundige en**

Tandheelkundige Raad 1985(3) SA 124(A) at 140I, and in **S v Mabaso and Another** 1990(3) SA 185 (A) at 202 F-G and it must be regarded as correctly stating our law.

DIDCOTT J said in **S v Davids** at 179 B - D that the result of **S v Khanyile**

> "....was not the fashioning of a brand new right, but the elaboration and development of one well embedded in our law, the right to a fair trial or to narrow that down to the component of it which interests us now, the right to be represented on trial."

For the reasons given above, I disagree. The law is clear: no such right has ever been recognized either by statute or in the practice of the courts. The **Khanyile** rule was a new departure, which could not claim legitimacy by reference to the "right to a fair trial" which, as I have pointed out above, is not the test of an irregularity or illegality.

Mr **Chaskalson** urged that this court should itself adopt the **Khanyile** rule. Our law, he said,

has now reached a stage in its development where it is necessary for accused persons to be provided with legal representation when the interests of justice require it. Affirmation of the **Khanyile** rule would be a cautious move forward to bring our criminal procedure closer to the standards of fairness observed in countries of Europe, North America, and the Commonwealth, and "would enable the courts to work out incrementally, on the facts of each case, when absence of legal representation has resulted in a failure of justice." It would enable the courts to develop the law, consistently with available resources, and over a period of time permit them to follow a path similar to that taken by the United States Supreme Court, in its progression from the rule in **Betts v Brady** (1941) 316 US 455 via **Gideon v Wainwright** (1963) 372 US 335 to **Argersinger v Hamlin** (1972) 407 US 25.

Counsel for the State objected that **judicis est**

jus dicere sed non dare. The maxim is now not a prescriptive formula but a counsel of caution. Judges do make law. (See Chapter IX, entitled "Judicial Law-Making", in Hahlo & Kahn, **The South African Legal System and its Background.**) "Our judges have always stressed the self-evident truth that a legal system, like any human institution, cannot stand still." (Hahlo and Kahn, **The Union of South Africa: the Development of its Laws and Constitution**, p 46. See pp 46 - 47 where the learned authors refer **inter alia** to **Henderson v Hanekom and Another** (1903) 20 SC 513 in which DE VILLIERS CJ said at 519 that "there must, in the ordinary course, be a progressive development of the law keeping pace with modern requirements.") In the field of procedure, judicial creativity is less inhibited than it is in the field of substantive law. WILLIAMSON J observed in **Lenz Township Co (Pty) Ltd v Munnick and Others** 1959(4) SA 567(T) at

574A that the South African Supreme Court undoubtedly has inherent power in civil cases to regulate procedural matters. That the same is true in criminal cases is evidenced by the observation of SOLOMON JA in **Rex v Thielke** 1918 AD 373 at 382 that in s370 of the Criminal Procedure and Evidence Act, 1917, the expression "irregularity" refers more particularly to the established practice of the courts, and the expression "illegality" to the rules which have been expressly laid down (**quaere**, by statute) on the subject of procedure in criminal cases. The Supreme Court's power to regulate procedure in criminal cases is exemplified by the numerous reported cases which formulate and implement the rules which have been evolved for the assistance of undefended accused persons and to reduce the risk of an unfair trial. In **S v Rudman** COOPER J set out (at 377E to 379A) a number of these rules. In the following quotation from his judgment I have omitted

the numerous cases cited by the learned judge in support:-

> "Before the accused is called upon to plead the presiding judicial officer is obliged to examine the charge-sheet, ascertain whether the essential elements of the alleged offence(s) have been averred with reasonable clarity and certainty and then give the accused an adequate and readily intelligible exposition of the charge(s) against him. Unless the charge-sheet contains an appropriate reference to it and the factual basis for bringing it into operation, the accused should be informed by the presiding judicial officer or the prosecutor of the operation of any presumption he may have to rebut, and the prosecutor should inform the court and the accused of the content of the evidence he intends to lead. Again, where it is competent for a court to convict an accused of an offence other than the one alleged in the charge-sheet a judicial officer may be obliged to inform an undefended accused of the competent verdict - eg where an undefended accused is charged with theft or with housebreaking with intent to steal and theft the presiding judicial officer should explain to the accused the competent verdicts, viz that he may be convicted of contravening s36 or s37 of Act 62 of 1955 or of contravening s1 of Act 50 of 1956 unless the contravention is an alternative charge or the prosecutor indicates that the State's case is restricted to the

offence(s) alleged in the charge-sheet.

At all stages of a criminal trial the presiding judicial officer acts as the guide of the undefended accused. The judicial officer is obliged to inform the accused of his basic procedural rights - the right to cross-examine, the right to testify, the right to call witnesses, the right to address the court both on the merits and in respect of sentence - and in comprehensible language to explain to him the purpose and significance of his rights.

During the State case a presiding judicial officer is at times obliged to assist a floundering undefended accused in his defence. Where an undefended accused experiences difficulty in cross-examination the presiding judicial officer is required to assist him in (a) formulating his question, (b) clarifying the issues and (c) properly putting his defence to the State witnesses.

Where, through ignorance or incompetence, an undefended accused fails to cross-examine a State witness on a material issue, the presiding judicial officer should question - not cross-examine - the witness on the issue so as to reduce the risk of a possible failure of justice.

If, at the close of the State case, an undefended accused is not discharged, the presiding judicial officer is obliged to inform him of his rights and in clear and unequivocal terms explain the

> courses open to him. The judicial officer is obliged to inform the undefended accused in clear and simple language of any presumption the prosecutor is relying on, the implications thereof and the manner in which it can be rebutted.
>
> The judicial officer should assist an undefended accused whenever he needs assistance in the presentation of his case and should protect him from being cross-examined unfairly."

Another rule, not included in this list, was laid down in **S v Radebe; S v Mbonani** 1988(1) SA 191(T) by GOLDSTONE J, VAN DER MERWE J concurring. The learned judge referred at 194H - 195D to a number of cases which, he said, "are but examples of a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place". He said (at 196 F-I):-

> "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 **per se** or the absence of the suggested 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."

S v Radebe has been followed in most provinces, and in the case of **S v Mabaso and Another** 1990(3) SA 185(A) at 203 D-G HOEXTER JA expressed his entire agreement with the passage just quoted.

The maxim **judicis est jus dicere sed non dare** is not therefore, an obstacle to the adoption of the **Khanyile** rule. Nor do I think that a bar is constituted by the fact that in terms of the law as it is, no irregularity is committed when legal representation is not provided for an indigent accused. To keep pace with changed circumstances and new insights and perceptions, changes in procedural rules may become necessary. GOLDSTONE J referred in **S v Radebe** at 192H to the "evolutionary process of broadening and extending the right to legal representation." Since 1959, when **R v Mati** was decided, there have been growing awareness and sympathy for the plight of the undefended accused person. In 1969 the **Legal Aid Act** 22 of 1969 was enacted. Before the Act a number of private and partially State-funded legal aid bureaux had tried but failed to provide legal aid on a consistent and permanent basis. A national Legal Aid

Scheme was established by the Department of Justice in 1962, but it failed, partly because all legal services were to be provided on a voluntary basis. It was only with the Act that State-funded legal aid was placed on a statutory footing. (N. C. Steytler's **The Undefended Accused** (1988) p.16.) From an inauspicious start in the financial year 1972-1973, the legal aid system has grown steadily, if not spectacularly. In that year 465 applications for legal aid in criminal proceedings were received and 251 were referred to attorneys. These figures rose to 5898 applications and 3071 referrals in the year ending 31 March 1984. (Steytler, **op cit** pp 17-18). In the year 1 April 1988 - 31 March 1989, 13529 applications were received, of which 9669 were referred to attorneys; and in the year 1 April 1989 - 31 March 1990, 11667 applications were granted in criminal cases. (**Reports of the Legal Aid Board** for the respective

financial years.) The fifth and final report of the Commission of Enquiry into the Structure and Functioning of the Courts (known as "the Hoexter Commission"), had some pertinent conclusions:

> "Any state that prides itself on a democratic way of life should not regard legal representation of parties before its courts as pure luxury or a fortuitous benefaction of the Government, but as an essential service. Indispensable to the achievement of the democratic ideal in any modern state is access to its courts for all its inhabitants .... For any person who has to appear in court without counsel, whether as an accused in a criminal trial or as a litigant in a civil action, the excellence of his country's judicial system is small comfort and any claim by the State that the courts are open to all has a hollow ring. Modern administration of justice is intrinsically complex, and the best guarantee of proper adjudication of a case lies in proper legal representation of the parties concerned" Vol I, Part II, p.175, para 6.4.1.)

> "There should be set as a goal the provision of legal representation to accused persons of limited means through a comprehensive legal aid scheme available to the accused in all serious cases in all courts (and not merely in Supreme Court trials involving capital offences.")
> (**Ibid**, p.197, para 7.13(a))

GOLDSTONE J said in **S v Radebe** at 196 D - F:-

> "The desirability, if not the necessity, of legal representation, especially where persons stand to lose their liberty, has become ever more widely appreciated in South Africa in more recent years. Concern has been voiced by spokesmen of the Government and of the organised profession, both attorneys and advocates. The Legal Aid Board has broadened the categories of criminal offences and the situations in which it will make provision for legal representation in criminal cases. The Legal Resources Centres which have been operating for some years now in the larger cities have also on occasion provided such assistance, as have law clinics which are operated by most, if not all, law schools in South African universities. Private practitioners, too, on occasion have answered calls on behalf of impecunious persons accused of criminal conduct. Thus the availability of legal representation for impecunious accused has considerably broadened."

The formulation of the rule in **S v Radebe** was itself the result of the evolutionary process. DIDCOTT J said in **S v Khanyile** (at 799 C-D) that writers in law journals and the like had often pleaded for a firm rule along those lines. (Reference may be made in this regard to an article by

Evadné Grant at p.50 **in fin** of 1989(2) **SA Journal of Criminal Justice,** - referred to hereinafter as **the Journal.)** The learned judge said that his recollection of records read on appeal and review is that, while some magistrates made a point of telling accused persons that they were entitled to legal representation if they could get it and offering them the opportunity to obtain it if they wanted one, the practice was far from universal. According to p.5 of the Legal Aid Board Report for 1981-2, the Department of Justice had agreed in 1982, after representations by the Legal Aid Board,

> "...to request prosecutors and possibly also magistrates to inform undefended accused appearing on charges of an involved nature of the Board's services, and to give them an opportunity to acquire such services should they wish to do so."

It is not clear, however, that the proposal was ever adopted to any great extent (see the article by Professor McQuoid-Mason in **the Journal** at p.58). Perhaps the most

influential of all the writings on the necessity for legal representation for the needy is **S v Khanyile** itself. If one accepts the premise on which the judgment is based, its trenchant and persuasive appeal for the provision of legal assistance to undefended persons is irresistible. DIDCOTT J said of it in **S v Davids** at 174 D-E:

> "A good deal of the (**Khanyile**) judgment was cast as and amounted to a judicial plea addressed to all for whose attention it was meant, to the legal profession, the Department of Justice, the Treasury, Parliament and the taxpayer. It was a plea for a vast enlargement of the legal services made available as a public duty to people who were criminally charged but too poor to pay for them, in the funds supplied for the services and consequently in their facilities and personnel, so that a comprehensive scheme might evolve catering for every prosecution of moment that was brought against a pauper and answering the call of justice for the offer each time of a lawyer's help."

To such a plea most people concerned with the proper administration of justice in South Africa would say amen.

I do not think, therefore, that this court would

be precluded by the present state of the law on the point from adopting the **Khanyile** rule.

It does not follow, however, that the rule is such that it ought to be affirmed by this court, and it is necessary to examine it more closely.

DIDCOTT J said of **S v Khanyile** at 813E) that "The only solution to the problem (sc. of providing legal representation to those who need it) is, of course, a huge enlargement of our legal aid scheme, enabling it to cater adequately for every criminal trial where help may be necessary". This would require in the first place "an immense increase in the funds of the scheme." In the second place, any major expansion of the scheme would require "lawyers galore".

The learned judge showed himself to be neither dismayed nor intimidated by the cost aspect. While recognizing that the taxpayer would have to bear the burden

of the increase, and understanding his reluctance to shoulder it, DIDCOTT J trusted even so that "his sense of public duty will rise to the occasion, overcoming all resistance", and that he will appreciate the bitterness and anti-social feelings of a man, his family, his friends and others in his circle, prompted by a belief that he has not had a fair trial. (See **S v Khanyile** at 813 E - I).

In regard to the second problem, that of legal manpower, DIDCOTT J said that the country has far too few lawyers to cope with all the cases in which representation should ideally be provided.

> "Were this Court to insist in the meantime on a lawyer for the defence in every trial of any consequence, the requirement could not be met. And, were it to rule that no such trial might lawfully proceed without one, criminal work in Natal would be thrown into chaos, ... "
> (at 814B-C).

The situation, he said (at 814 H),

> ".....precludes us from proclaiming a coherent rule and compels us to dictinguish invidiously between instances of unfairness, finding some more egregious and others less."

A line had therefore to be drawn, separating the trials vitiated by a lack of legal representation and those that are not. As a start, DIDCOTT J excluded the least serious cases (those so petty that the average person involved in them who was able to afford a lawyer would in all probability not seek one) and the most serious cases, including such cases as murder and treason, tried in the Supreme Court, in which **pro deo** counsel were assigned to those wanting legal representation (at 814-815). He then asked, with reference to the "dense mass" of trials lying between the two extremes, how one identifies those in which "the call for representation is the most demanding and the lack of it the most debilitating." He said (at 815) that there were three facets to be considered:

(a) The inherent simplicity or complexity of the cases, both on the law and on the facts.

(b) "The personal equipment of the individual standing trial ..... how mature, sophisticated, intelligent and articulate he looks and sounds, in short what impression he gives of his general ability to fend for himself in a case with those dimensions."

(c) The gravity of the case, having regard to the nature of the offence charged, and the possible consequences to the accused of a conviction - the possible sentence and the other adverse consequences which might follow upon a conviction. Imprisonment is certainly a serious consequence, but "a heavy fine may comprise a penalty more crippling to some than a brief spell in gaol is to others...."

Having enquired into these matters, the judicial officer trying the case should ask himself whether their cumulative effect is such that the accused would be placed "at a disadvantage palpable and gross, that the trial would be palpably and grossly unfair, were it to go ahead without a

lawyer for the defence" (at 816B). If the judicial officer should give an affirmative answer to that question,

> ".....he should refer the case at once to those administering the legal aid scheme or to one or another of the various associations of lawyers that are willing and keen nowadays to offer assistance **pro bono.** He should decline to proceed with the trial, furthermore, until representation is procured through some such agency" (At 816 C-D).

And if the trial ends in a conviction, and the matter comes to be considered by the Supreme Court on appeal or automatic review, the three facets will be looked at afresh, but the question will then be whether in the judgment of the court of appeal the trial was indeed palpably and grossly unfair. If that is its conclusion, it should set aside the verdict without hesitation.

In regard to a stoppage of the trial by the judicial officer, DIDCOTT J had earlier in his judgment in **S v Khanyile** quoted from a Canadian judgment in the course of which SEATON J said:

> "If a trial judge concluded that he could not conduct a fair trial without defence counsel, and his request for counsel were refused, he might be obliged to stop the proceedings until the difficulties had been overcome. Our law would not require him to continue a trial that could not be conducted properly." (at 801 G-I)

In **S v Davids** (at 190 D-G) DIDCOTT J said that the **Khanyile** judgment did not mean or contemplate that if representation were not obtained, the judicial officer must refuse to hear the trial.

> "What (**S v Kanyile**) envisaged, all that it envisaged the only time it alluded to the stoppage of a trial (at 816 C-D), was a halt in such until representation had been obtained, if necessary after reference to and in collaboration with those lawyers who showed an interest in **pro bono** work. That this would indeed be managed was taken quite for granted."

If, however, the prosecutor should resolutely proceed with the prosecution when the accused was unrepresented,

> "(The) judicial oficer will have no option in that situation but to go ahead with the trial and complete it. He cannot indefinitely postpone it or adjourn its hearing. He cannot leave it in

> in the air, together with everyone involved in it. Nor has he any power or discretion to decline forever to deal with and determine it. Sooner or later he must dispose of it instead. Yet his doing so may prove not to be the end of the matter. Should a conviction ensue, the case may travel further. It may come to this Court on appeal or, if a magistrate tried it, on review. And, if it is not reviewable automatically, the magistrate can always send it here on special review. Indeed, he ought to do that whenever he doubts the fundamental fairness of the trial. This Court, with the full picture before it, will then decide the issue for itself" (At 190 F - H).

In considering whether the rule should be adopted by this court, two questions arise; one of principle, the other of feasibility.

As to the question of principle, that part of the rule which has just been referred to would be coercive, if not with intention, then at any rate in effect. Its adoption would constitute notice to the Government that if legal aid on the required scale is not provided, the prospect will have to be faced of numerous criminal trials

being delayed and many convictions being upset on appeal because of the failure to provide the accused person with legal representation.

The Supreme Court has no power to issue a **mandamus** on the Government to provide legal aid, and it should not adopt a rule the tendency of which would be to oblige the Government to do so.

The second question is whether the **Khanyile** rule would work in practice. If it is not feasible, any attempt to implement it would jeopardize the whole administration of criminal justice in South Africa.

Counsel for the appellants contended that if the State wishes to put a person on trial, it has an obligation to ensure that he is given a fair trial: it cannot by its own omission force the courts into a situation in which they are required to conduct unfair trials.

This is fallacious. The conclusion does not

follow from the premise. What an accused person is entitled to is a trial initiated and conducted in accordance with those formalities, rules and principles of procedure which the law requires . He is not entitled to a trial which is fair when tested against abstract notions of fairness and justice.

Counsel submitted further that there is no reason to believe that the State is not in a position to mobilize sufficient resources to meet the demands of the **Khanyile** rule.

DIDCOTT J said in **S v Khanyile** at (813I) that in pressing the claims made on the public purse by the acute demand for legal aid, he did not lose sight of the fact that "the raising of money is by and large no business of the Courts." I do not understand the qualification "by and large". The sanction of Parliament is needed for the imposition of taxation and the authorization of

expenditure, though it is true that bills authorizing these are dominated by the will of the Government and in particular by the views of the Treasury. In this the courts of law have no role to play, save to recommend. In any event, whether or not the State is in a position to provide the funds to meet the demands of the **Khanyile** rule, is beside the point. The priority of calls for legal aid, as against calls for social welfare, housing, education and health facilities, and so on, is a matter for the Government, not the courts.

The question of feasibility can conveniently be considered with reference to two phases: the present and immediate future, and the longer term.

In terms of the **Khanyile** rule, if the case is one where legal representation is imperatively called for, the presiding judicial officer should "refer the case at once to those administering the legal aid scheme or to one or

another of the various associations of lawyers that are willing and keen nowadays to offer assistance pro bono." The contribution which those other than the Legal Aid Board can make is miniscule in proportion to the demands which will be made if the **Khanyile** rule is implemented. That contribution can, for present purposes, be left out of account.

While no figures are available to the court, it is clear beyond peradventure that for the present and in the short term at any rate, the Legal Aid Board and its representatives and agents would not be able to grant all or any appreciable number of the spate of applications for legal aid which would result, however sympathetic they might be to applications referred by judicial officers.

In terms of s.9(1) of the **Legal Aid Act**, the funds of the Board consist of (a) moneys appropriated by Parliament in order to enable the Board to perform its

functions, and (b) moneys received from any other source. In practice the funds appropriated by Parliament have been the only source of the Board's funds: despite appeals by the Board, the private sector has made no contribution. The funds available to the Board have always been markedly insufficient to supply even the present needs.

Professor McQuoid-Mason pointed out in an article in **the Journal** (at p.62) that "at present" the Legal Aid Board operates under severe financial constraints, and that only a small percentage of the legal aid budget is spent on criminal cases. In a postscript in **The Undefended Accused** (at 242) Professor Steytler appreciates that, **rebus sic stantibus,** the Legal Aid Board would not be able to meet the demands which would be made upon it and that other innovative measures would be called for. He wrote:-

> "The rule in **Khanyile** will, no doubt, put pressure on the courts, the legal profession and State funding. The Legal Aid Board faces a mammoth task of providing assistance for all cases referred to it by the courts. This challenge calls for innovative measures to cope with limited financial and manpower resources. As has been argued ....., the available financial resources can be used more productively by the appointment of public defenders and raising money from other sources. To alleviate the manpower shortage use should be made of public defenders, the various associations of practitioners who are willing to assist, advocates doing their pupillage and senior law students. What may seem difficult now, or even impossible, may in a few years be regarded as 'workable' and essential ".

It is plain that the rule could not be implemented overnight, not only because of the financial constraints on the Legal Aid Board, but also because of the intolerable administrative strain and burden which would be placed on the Board's organisation and its agents and representatives by the flood of applications which would ensue. Furthermore, if the rule should be implemented without the necessary ground work being done and the necessary infra-

structure created, the business of the courts, both of district and regional magistrates, would be dislocated and disorganised. There would result consequences such as those which DIDCOTT J perceived would result from the implementation of a general rule that legal representation should be made available to all in need of it: the criminal work of the court would be thrown into chaos, some prosecutions being delayed inordinately until lawyers became available and others being withdrawn.

And convictions and sentences would be set aside on appeal or review in cases in which the judicial officer, although recognizing that the accused required legal representation under the **Khanyile** rule, had no option but to engage in what might turn out to be an exercise in futility and go ahead with the trial and complete it notwithstanding the lack of such representation, because he could not "indefinitely postpone it or adjourn its hearing,

or leave it in the air" and he had no "power or discretion to decline forever to deal with and determine it."

Such a consummation is not to be contemplated.

I turn to the second phase - the feasibility of the **Khanyile** rule in the long term.

The **Khanyile** rule has as its aim the provision of legal representation for those accused for whom the need for it is most clamant. Like the rules listed by COOPER J (see above) its aim is the achieving of a fair trial. But it differs in an important respect from those rules. They relate solely to the internal procedure of the court: they impose upon the judicial officer duties which he must perform inside the court-room. The **Khanyile** rule, while also relating to the court's internal procedure, has an extra dimension which takes the matter beyond the court-room into the field of politics in its meaning of the science dealing with the form, organisation and

administration of a state. Politics, Bismarck observed in a frequently quoted aphorism, is the art of the possible. If the court enters the field of politics it will generally have to be informed by evidence and guided by the opinions of skilled persons.

What is required to answer the question is a feasibility study, based on detailed and comprehensive statistical and other information and expert analysis and assessment thereof. Presumably such a study would deal **inter alia** with the following:

(a) The number of cases which would be involved if the rule were to be implemented, classified according to their nature and their geographical distribution.

b) The availability of lawyers to provide the services required, taking into account the fact that not all lawyers do criminal work.

(c) The solution to the problem which should be adopted (i.e., the referral or the public defender system). (In his article, in the **Journal**, Professor McQuoid-Mason wrote at pp 62-63:

> "A cost-effective solution for the problem would be for the Legal Aid Board to employ public defenders. As has been pointed out elsewhere, the referral system of legal aid is costly - probably about three times as expensive as a salaried lawyer scheme ... Salaried lawyers can probably handle about three times as many cases as referral lawyers for the same outlay of funds. In addition salaried lawyers build up a reservoir of legal expertise and specialisation in the problems handled by them. Public defenders could operate from the Legal Aid Board offices or similar offices under its auspices in court buildings....")

(d) The infrastructure necessary for the operation of the scheme of choice; and a programme for

establishing it.

(e) The effects of the implementation on the courts, including the increases in personnel and court buildings and other facilities which may be necessary.

(e) The estimated annual cost of the scheme of choice.

(f) The views of the Legal Aid Board on its ability to operate the proposed scheme; the necessary enlargement of its infra-structure; the time and manpower it will require to achieve this; and necessary amendments to the Legal Aid Guide, including possibly the means test.

Regard would also have to be paid to the attitude of the Government and the Treasury: what priority could be afforded to an expanded legal aid system? What funds were likely to be available? A change of heart would be

required. Professor **Steytler** is not sanguine about the prospect. He wrote (**op cit** p.22):

> "Through the years, Parliament has shown little concern for the position of the indigent accused and has exhibited reluctance to extend legal aid to all accused persons. Concern for increased spending on legal aid, particularly in criminal matters, is not a politically popular cause and major increases in funding may not be forthcomming in the foreseeable future."

Nothing in the nature of a feasibility study was placed before us. The information on which appellants' counsel based their submission that the **Khanyile** rule would work in practice, was partial, fragmentary and quite insufficient to enable a reasoned assessment to be made of its feasibility.

For the above-mentioned reasons, this court should not in my opinion adopt the rule formulated in **S v Khanyile.**

I turn finally to a consideration of each of the three appeals.

S v Rudman

The facts are set out in the judgment in **S v Rudman** 1989(3) SA 368 (ELD) at 385.

Counsel for the appellant did not argue that the conviction should be disturbed.

In regard to sentence, the appellant's record was summarized by COOPER J (at 386 E-G) as follows:

> "The appellant's 66 previous crimes involving dishonesty were committed over a period of nearly 15 years. For these crimes he was sentenced to varying terms of imprisonment - the first completely, others partly suspended - and to imprisonment for corrective training in terms of s.334**ter** of Act 56 of 1955 and for the prevention of a crime in terms of s.334**quat** of Act 56 of 1955. In 1982 when the appellant was sentenced to one month's imprisonment on each of 50 (sic) counts of credit card fraud, he was warned that

> he was in danger of being declared an habitual criminal On 27 January 1987 he was released unconditionally from prison. Within four months of his release the appellant committed the present crime. "

In passing sentence on 9 May 1988, the regional magistrate told the accused that he had no doubt that imprisonment was the only proper sentence. It was clear from his list of previous convictions that he was a person who habitually committed crimes and that the community needed to be protected against him. He had already been warned that he could be declared an habitual criminal, but this warning had had no effect. The magistrate was of the opinion that a sentence as provided in s.286 of Act 51 of 1977 was the proper sentence. The accused was then declared an habitual criminal.

It was submitted on Rudman's behalf that it did not appear from the record that the regional magistrate told him, before sentence was passed, that he had it in

mind to impose the indeterminate sentence; and that th failure to give him such a warning constituted an irregularity. The record was electronically recorded and there is no reference to such a warning, so I shall assume that a warning was not given.

The statute makes no mention of any warning, but it was recognized in **R v Edwards** 1953(3) SA 168 (A); **R v Swarts** 1953(4) SA 461 (A) that the usual practice is not to impose the indeterminate sentence unless the accused has previously been warned. There are a number of cases in which the effect of a failure to give a previous warning has been considered, but it is unnecessary to refer to them because a previous warning was given in **S v Rudman.** It appears from his form SAP 69 that on 28 July 1982 he was convicted on 56 counts of fraud involving credit cards. The sentence reads:-

> "Op elk van die klagtes - 1 maand gevangenisstraf en beskuldigde word gewaarsku dat by 'n latere

skuldigbevinding hy in gevaar sal verkeer om as h gewoontemisdadiger verklaar te word."

None of the cases suggest that an undefended accused, having been previously warned should be told again after the conviction that the regional magistrate contemplates passing the indeterminate sentence. But even if the omission to tell him that is to be regarded as an irregularity, it does not appear that in Rudman's case a failure of justice resulted therefrom. It is unlikely that he could have forgotten the warning given in 1982, especially since he had on 11 April 1988 admitted his previous convictions at the hearing before the district magistrate.

There is no merit in this appeal. It is dismissed.

S v Richard Johnson

The facts are set out in the judgment in **S v Rudman** at 386-387.

One of the grounds of appeal, which was added by way of an amendment to the notice of appeal, was based on the magistrate's failure to inform the accused of his right to legal representation and to apply for legal aid.

It does not appear from the record that the magistrate did so inform the accused, but it is implicit in the magistrate's remarks in dealing with the amended notice of appeal that this information was not given to him. The magistrate said **inter alia**

> "The accused did not have a legal adviser. It is quite clear he knew he had this right but could not afford an attorney and therefore conducted his own defence .....As far as I could establish there is no rule of law that the court must inform the accused that he is entitled to secure assistance from the Legal Aid Board or Legal Resources Centre."

(Not surprisingly, the magistrate was apparently unaware of

the judgment in **S v Radebe.** The judgment was published in the law reports in January 1988. The accused was convicted on 6 July 1987).

Did the magistrate's failure to inform the accused in terms of **S v Radebe** constitute an irregularity? In **S v Mabaso** at 204 G, HOEXTER JA said that it seemed to him 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 concurred in the judgment of HOEXTER JA, but on reflection I am not sure that this **dictum** is entirely correct. I am inclined to think that the better view is that a failure to inform an accused of his right to representation is an irregularity unless it is apparent to the magistrate, for good reason, that the accused is aware of his rights (e g from his own statement or from the

circumstances - for instance, that the accused is an attorney). Certainly it is the safer course always to inform the accused of his rights. But the difference between the two views does not appear to be one of substance: whichever view be adopted, the result would be the same.

I shall assume that there was an irregularity at Johnson's trial. It was then for him, as appellant, to show that a failure of justice resulted from the irregularity. He could have done so, for example, by submitting to the court of appeal and to the magistrate for his comments an affidavit setting out that he was unaware of his rights, and that if he had been informed of them he would have tried to secure representation, at least through the Legal Aid Board. There was no such affidavit before the court of appeal, and consequently it has not been shown that the irregularity resulted in a failure of

justice.

The appeal is dismissed.

S v Mthwana

The facts are fully set out in the judgment 1989(4) SA 361(N) at 362H to 364C.

On the evidence there was no doubt that Mthwana was rightly convicted, and the appeal turned entirely on the correctness or otherwise of the **Khanyile** rule.

At p.365I HOWARD JP referred with approval to the statement by NIENABER J at the beginning of his judgment at p.193D of **S v Davids:**

> "For criminal proceedings to be vitiated and a conviction to be quashed there must first be an irregularity. An irregularity occurs whenever there is a departure from those formalities, rules and principles of procedure with which the law requires such a trial to be initiated or conducted. (**S v Xaba** 1983(3) SA 717 (A) at 728D). An irregularity will thus be committed

> if a rule of practice, procedure or evidence, or a precept of natural justice recognised in our law, is disregarded."

The learned judge-president concluded his judgment (at 371I) by saying:-

> "In this case the magistrate committed no irregularity. The appellant was duly apprised of his right to procure legal representation and of his right to apply for legal aid if he could not afford to pay for a lawyer. An application for legal aid was made on his behalf and he was afforded an adequate opportunity to engage a lawyer (paid or unpaid) of his own."

The court a **quo** was clearly right. The appeal is dismissed.

In the result all three of the appeals are dismissed.

H C NICHOLAS AJA

VAN HEERDEN J)
E M GROSSKOPF J) Concur
EKSTEEN J)

Case No 18/90

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

CHARLES BRIAN RUDMAN..... First Appellant

RICARDO JOHNSON..... Second Appellant

and

THE STATE..... Respondent

CORAM: CORBETT, CJ, VAN HEERDEN, E M GROSSKOPF, EKSTEEN, JJA, et NICHOLAS, AJA.

HEARD: 22 August 1991 * 23/8/91

DELIVERED: 27 September 1991

Case No 658[illegible]/89

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

PAULOS MTHWANA..... Appellant

and

THE STATE..... Respondent

CORAM: CORBETT, CJ, VAN HEERDEN, E M GROSSKOPF, EKSTEEN, JJA, et NICHOLAS, AJA.

HEARD: 22 August 1991 * 23/8/91

DELIVERED: 27 September 1991

J U D G M E N T/....

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CORBETT CJ

I am in full agreement with the judgment of my Brother Nicholas and I concur in the orders made in the three appeals.

The ideal for which Didcott J (and the Judges who agreed with him) strove in the cases of S v Khanyile and Another 1988 (3) SA 795 (N) and S v Davids; S v Dladla 1989 (4) SA 172 (N), viz the provision of free legal representation to all indigent persons accused of serious crime who desire such representation, is unquestionably a most worthy one. Indeed it is a sine qua non of a complete system of criminal justice; and any system which lacks it is flawed.

As Nicholas AJA has explained, however, it is an

ideal which under present circumstances in South Africa is not capable of attainment. All the same the ideal should never be lost sight of and it should continue to guide and stimulate all who are concerned with the improvement of our criminal justice system.

Ultimately, as my Brother's analysis shows, it depends on how much the State is able and willing to provide for the funding of public defender, legal aid and such-like schemes and for the establishment of the additional infrastructure required. The many clamant demands on the public purse are well-known. It becomes a question of deciding on priorities. I trust that those charged with such decisions will not forget the undefended accused.

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CORBETT, CJ

VAN HEERDEN JA)
E M GROSSKOPF JA)
EKSTEEN JA) CONCUR
NICHOLAS AJA)