210/92

Case No 611/90

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal of:

MARTIN STANLEY MAGMOED ..... APPELLANT

and

1. **PIETER JANSE VAN RENSBURG**
2. **CHRISTIAN LOEDOLFF**
3. **SALMON PIENAAR**
4. **DOUW GERBRAND PRINS VERMEULEN**
5. **ANDRE SWART**
6. **JAMES SAYER**
7. **FRANK VAN NIEKERK**
8. **JACOBUS JOHANNES BURGER**
9. **ALBERTUS MYBURGH SMIT**
10. **ANDRE JOHAN SMIT**
11. **WILHELM KARL FRIEDERICH PUCHERT**
12. **ALEXANDER JACOBUS ROSSEL**
13. **PIETER MARIUS DU TOIT** .....RESPONDENTS

CORAM: CORBETT CJ, BOTHA, F H GROSSKOPF, JJA, NICHOLAS et KRIEGLER AJJA.

DATES OF HEARING: 21, 22 and 23 September 1992.

DATE OF JUDGMENT 25 November 1992.

J U D G M E N T

CORBETT CJ:

The events with which this case is concerned occurred in Thornton Road, Athlone (a suburb of Cape Town) at about 17h00 on 15 October 1985. It was a time of serious civil unrest in the Athlone area, and elsewhere; and Thornton Road was one of the trouble spots. In order to deal with the situation authorities concerned with unrest prevention and control, viz the South African Police, the South African Railway Police and the South African Defence Force, had established a joint operational centre at nearby Manenberg. At this centre daily meetings were held and operations were planned. On the day in question it was decided at such a meeting to send a railway delivery truck to patrol certain unrest areas, including Thornton Road. On the truck, which was driven by a sergeant in the Railway

Police, were nine passengers, all members of either the Police or the Railway Police. In circumstances which I shall later describe in greater detail a shooting incident occurred in Thornton Road. In the course of this incident the passengers on the truck who were all armed with shotguns, fired a number of shots in the direction of persons gathered in groups in and near Thornton Road. As a result of the shooting three persons were killed and at least 15 wounded. One of the persons killed was a 16-year-old youth, Shaun Magmoed ("the deceased").

The Attorney-General of the Cape having issued a certificate of **nolle prosequi**, the father of the deceased, Martin Stanley Magmoed ("the appellant") instituted a private prosecution in the Cape of Good Hope Provincial Division in terms of which the ten policemen on the truck at the time of the shooting (fourth to thirteenth respondents inclusive) and three senior

officers alleged to be concerned with the planning of this operation (first, second and third respondents) were indicted with murder, alternatively culpable homicide. The case was heard by Williamson J and assessors. After a protracted trial lasting over four months, in which none of the respondents was called to give evidence, all the respondents were acquitted on both charges.

Thereafter the appellant, being dissatisfied with the outcome of the trial, made application in terms of sec 319 of the Criminal Procedure Act 51 of 1977 ("the Act") for the reservation of certain questions of law for the consideration of the Appellate Division. For reasons which have been reported (see Maqmoed v Janse Van Rensburg and Others 1990 (2) SACR 476 (C)) Williamson J refused the application. The appellant then applied on petition in terms of sec 319(3), read with sec 317(5) of the Act, to this Court for an order directing that the

questions of law be reserved. Acting under sec 319(3), read with sec 317(5) and sec 316(8)(d), this Court made the following order on the application:

> "1. The application for the reservation of questions of law in terms of section 319, read with section 317(5) of Act 51 of 1977, is referred to the Appellate Division for consideration in terms of sections 319(3), 317(5) and 316(8)(d) of the said Act.
>
> 2. In the event of the application being granted in respect of any of the questions of law sought to be reserved, counsel are requested to be prepared forthwith to argue the appeal on the question or questions of law reserved.
>
> 3. A full record, as if on appeal, must be prepared and lodged for hearing of argument on the application. The record must include the present petition with such annexures as do not in any event form part of the record on appeal."

The matter now comes before us in terms of this order.

Regard being had to the procedures involved, this Court is accordingly required to decide in relation to each of the questions which the appellant seeks to have reserved as questions of law (1) whether there are good grounds for granting the application to have the question reserved as a question of law; (2) assuming the answer to (1) to be in the affirmative, whether the question of law should be answered in favour of the appellant or not; and (3) in the event of the question being answered in appellant's favour, what relief the appellant should be granted.

The petition asks for six questions of law to be reserved. Questions 1 and 2 deal with the correctness of rulings given by the trial Judge on the admissibility of certain evidence; questions 3 and 5 may be ignored since appellant no longer seeks their reservation; and questions 4 and 6 relate to the merits of

the trial Court's decision to acquit the respondents. It will be convenient to start a consideration of the application with question 4.

Before doing so, I should mention en passant that there was before us at the hearing a petition by appellant for condonation of his failure to lodge the appeal record within the required time limit. The application was not opposed by the respondents and was granted at the inception of the hearing.

QUESTION 4

This question, as formulated in the petition and as amended in a minor respect by appellant at the hearing before us, reads as follows:

> "Whether as a matter of law the trial court was correct in concluding on the basis of its factual findings and the uncontroverted evidence summarised in Annexure "C" hereto that no unlawful common purpose on the part of any of the

Accused was established beyond reasonable doubt either

(a) in the sense of an agreement prior to the vehicle leaving the joint operational centre to carry out a punitive and illegal expedition entailing acts of assault, culpable homicide or murder; or in the absence of any prior agreement

(b) in the sense of acts of association by the Accused present on the truck with the conduct of each other in perpetrating acts of assault, culpable homicide or murder."

The facts as found by the trial Court and the uncontroverted evidence, all of which is summarized in annexure "C" to the stated case, may be stated as follows:-

The railway delivery truck to which reference has already been made was ordered to patrol the Athlone area, including Thornton Road, in pursuance of a decision taken at the joint operational centre by first, second and third respondents. The truck was to all outward

appearances an ordinary railway delivery vehicle; but on the loading platform there were three large wooden crates and crouching in these crates, hidden from view, were seven policemen armed with shotguns and side-arms (respondents nos 4, 5, 7, 8, 10, 12 and 13). Another policeman (respondent no 11), similarly armed, was hiding under a short canopy immediately to the rear of the cab of the truck. The truck was being driven by a policeman (respondent no 9) and a policeman (respondent no 6) was sitting in the passenger seat. Respondents 6 and 9 were both wearing khaki-coloured dustcoats. Respondent no 6 was also armed with a shotgun. Because outward appearances concealed its real inwardness the truck was likened to the wooden horse which in ancient times led to the fall of Troy.

The shooting incident took place near the T-junction formed where St Simons Road enters Thornton Road. The latter road runs north/south. After

entering Thornton Road the truck proceeded along Thornton Road, past the T-junction, for some distance in a northerly direction. It then turned and came back. When it again reached the T-junction it was stoned by members of a crowd estimated at between 50 and 200 persons. Thereupon the hitherto concealed policemen on the back of the truck stood up and commenced firing with shotguns; as also did the passenger in the front of the truck. The shooting lasted some 17 seconds, with the consequences already described. What actually happened at the time of the shooting is portrayed on a video film which was put in as an exhibit at the trial. This film was shot mainly by a cameraman employed by CBS News, a Mr C D N Everson; but it also contains an insertion of film taken from a different angle by another CBS cameraman, a Mr W de Vos. The trial Judge included in his judgment a description of what appears on the video film and this is incorporated in annexure "C". The description reads as

follows:

"An orange truck, of the type frequently used by the railways, is seen proceeding down Thornton Road in a northerly direction at a relatively low speed. Wooden crates are visible on the rear of the truck. The truck resembles an ordinary railway delivery vehicle going about its usual business. This would also have been the impression created to those who were present in the vicinity at the time the truck passed. No people are visible in the rear of the truck. As the truck passes the three shops on the western side of Thornton Road it has to manoeuvre past a parked car on the left-hand side of the road in front of the shops and it then moves back into the left lane so as to avoid an approaching motor car. There are no barricades, burning objects or other obstructions visible in Thornton Road. The approaching traffic appears to move freely. There are furthermore no crowds of people visible in the vicinity. There are a few people visible on the stoep of the café and a few others behind the wall of a house adjoining 102 Thornton Road. The truck proceeds past

the intersection with St Simons Road without any incident.

The next sequence of footage shows the same truck returning down Thornton Road, this time moving in a southerly direction. (We know from the Minute of the inspection in loco Exhibit 51 that the truck turned around at Denchworth Close, approximately 800 metres away from the intersection of Thornton and St Simons Roads). This piece of footage is a continuous shot with no edits or stoppages. The entire incident from the time the first object hits the windscreen to the last shots being fired is seen and heard.

At the time of the return of the truck a group of people, approximately 30 according to our estimate, are seen standing and milling around at the corner of St Simons and Thornton Roads. This group appears to comprise youths, some of whom have stones in their hands. Cars are seen moving freely past this group. There is another group of people on the eastern side of Thornton Road, some distance away and to the north of the intersection with St Simons Road. The truck is seen proceeding at a slow speed back down Thornton Road. There is a white car travelling immediately behind the truck.

There are two people visible in the cab of the truck, being the driver and a passenger. No people are at this stage visible on the rear of the truck. Again, no barricades, burning objects or other obstructions are visible in Thornton Road and the truck's passage is unhindered.

Just as the truck enters the intersection of St Simons Road an object is seen striking the bottom of the windscreen of the truck between the driver and his passenger. Thereafter other objects and stones are seen striking the windscreen and body of the truck. The truck moves to the right of the road before it comes to a stop approximately in line with the southern corner of St Simons Road. Prior to it stopping people are seen standing up in the crates on the rear of the truck. They are armed with shotguns and they commence firing while the truck is still moving. They do so 2½ seconds after the first object strikes the vehicle. They do so without identifying themselves to the crowd, without giving the crowd any verbal warning or instruction and without firing any warning shot. The first two people to appear are a person on the driver's side of the truck dressed in a khaki

uniform and a person on the passenger side of the truck dressed in a blue uniform. A third person, dressed in a similar khaki uniform, then appears on the driver's side of the truck. Thereafter other people are seen standing up. All of them have shotguns and are seen firing. It appears that in the case of most of them careful aim is not being taken during the firing. The weapons are, however, plainly pointed at the crowd and are directed slightly downwards. A shotgun is also seen protruding from between the crates about halfway up the height of the crates on the passenger side of the truck. The passenger in the front of the truck is seen pointing his shotgun out of the open window. The driver of the truck, who had ducked down when the first stones were thrown, although part of his body is still visible, later sits up while the shooting continues. The passenger is seen sitting up holding his shotgun.

The passenger opens the passenger door of the truck and gets out, still holding his shotgun and is seen running down St Simons Road. The passenger is dressed in a brown dust jacket and appears to have a piece of white cloth tied around his head. Two further

shots are fired after the passenger climbs out. Those on the back of the truck remain standing, apparently no longer firing because the guns are pointed skywards. During the firing a small boy is seen sitting on his bicycle near the truck.

As already noted, Everson established that the lapse of time from the first stone striking the windscreen to the first shot being fired was just over 2½ seconds. Thereafter the time lapse from the first shot until the last shot is 14-2/3 seconds."

Save in one small respect, which need not be elaborated, the trial Court accepted this description.

Annexure "C" continues by stating that the deceased was killed by shots fired by one or more of the respondents who were on the back of the truck, but that it is impossible to identify who fired the fatal shot or shots. These shots were fired in a forwards and downwards direction and at the time the deceased was facing away from the direction of fire. A number of innocent

bystanders (i e persons not involved in stone-throwing) were shot and the probabilities point strongly to the deceased having been one of these. No warning of any kind was given by the respondents prior to their opening fire. All of the respondents who fired shots (i e all those on the truck save the driver) did so with shotguns. In all 39 rounds were fired. Six of the respondents used AAA ammunition and three used birdshot. AAA is a relatively heavy shot and is so obviously dangerous to life that it is an irresistible inference that each and every one of the respondents subjectively knew of its lethal potentiality.

I have hitherto presented the contents of annexure "C" in my own fashion using the language of the document. The last nine paragraphs, which consist partly of comment on or inference from the evidence relating to the shooting, I quote verbatim (the respondents being referred to therein as "the accused"):

"18 Ordinary police methods of controlling the unrest at the time were ineffective and the situation had got out of hand.

19 There is a substantial body of evidence which points to the existence of the purpose of the operation being illegal, namely, a punitive expedition. There are strong indications of a common purpose on the part of the Accused to act illegally.

20 There was an almost immediate and concerted response to the stoning with all the Accused on the truck, save for the driver, appearing with their shotguns and firing, on their own admission, at the crowd. Immediately upon the commencement of the firing the crowd fled.

21 The whole intent of the operation was so obviously to present the would-be stone throwers with an apparent soft target that the truck was likely to be attacked.

22 It is so obvious that it must have been anticipated by all the Accused that there

would be an armed response to an attack.

23 There exists a very high degree of probability that an armed response to any attack was visualised and indeed intended by all the Accused.

24 The response which took place was in its totality clearly excessive.

25 Shots were still fired when it was clear that the stoning had stopped and all danger had been averted.

26 There appears to have been an indiscriminate firing into a crowd that must inevitably have comprised amongst its numbers many innocent people."

These paragraphs are all based upon statements made by Williamson J in the course of his judgment.

I turn now to that judgment and the trial Court's reasons for acquitting the respondents. I think that they may be fairly summed up as follows:

(1) As the respondents did not give evidence at the trial, the only direct evidence indicating the purpose of the operation and the reasons why they opened fire is to be found in sworn statements made by them shortly after the shooting. From these statements (which were put in at the trial) it appeared that the operation was planned in order to apprehend stone-throwers and other instigators of violence and unrest, particularly the ring-leaders; and that they opened fire because they felt that their lives, and particularly the lives of the unprotected occupants of the cab, were in danger.

(2) That this was one of the objects of the operation seemed reasonable enough, but the "burning question" was whether it was the only purpose of the operation; or whether there

was, as alleged by the prosecution, an additional, "more sinister" and illegal purpose, namely that of a punitive expedition which was to take the form of an armed response to any attack upon the truck.

(3) Having regard to the unusual nature of the operation, the way it was carried out, the fact that the response which took place was in its totality "clearly excessive" and the general circumstances, there was "a very (high) degree of probability" that an armed response in the nature of an illegal punitive action was visualized and intended.

(4) On the other hand, it was clear that a vicious and murderous attack was launched on the truck by the stone-throwers. Accordingly an armed response within limits was justified.

(5) If the respondents had harboured a common

purpose to murder, one would have expected, with 39 shots fired, a greater loss of life than in fact occurred.

(6) There was a "certain improbability" in high-ranking officers planning an operation which to their knowledge was illegal.

(7) The excessive reaction of the respondents did not of itself establish beyond a reasonable doubt that there was this illegal common purpose.

(8) Due weight had to be given to the circumstance that none of the accused went into the witness box to explain why they acted as they did.

On the basis of these considerations the trial Judge concluded:

> "Although there are strong indications of a common purpose to act illegally we are not satisfied that this has been proved with the degree of certainty which

> the criminal law requires. There is a reasonable possibility that the operation was planned and contemplated within legal limits and that what in fact happened was not the result of a common purpose to punish and deter, but was an over-reaction to a manifestly dangerous situation. Thus, although the probabilities favoured the prosecution case, they do not do so with such a strength that we have a moral certainty that each and every accused shared a prior common purpose to use excessive and unreasonable force. This means that the cornerstone of the prosecution case has not been proved and that the accused are entitled to their acquittal."

The fourth "question of law" which the appellant seeks to have reserved relates essentially to the trial Court's finding as to an unlawful common purpose, either in the sense of an agreement, prior to the vehicle leaving the joint operation centre, to carry out an illegal punitive expedition entailing acts of

assault, culpable homicide or murder or, in the absence of such prior agreement, in the sense of acts of association by the respondents present on the truck with the conduct of each other in perpetrating acts of assault, culpable homicide or murder; and it asks the question as to whether "as a matter of law" on the basis of the facts set out in annexure "C" the trial Court was correct in concluding that no such common purpose had been established beyond a reasonable doubt.

In his judgment on the application to reserve question 4 as a question of law Williamson J stated (see reported judgment, 1990 (2) SACR at 479f):

> "In essence this question is an attempt to frame, as a point of law, something which is essentially a matter of fact."

Sec 319 does not permit of the reservation of a question which in reality is a question of fact (see S v Khoza en Andere 1991 (1) SA 793 (A), at 797 B; cf Attorney-

General, Transvaal v Kader 1991 (4) SA 727 (A), at 739 D - 740 J); and the first matter to be decided is whether or not question 4 genuinely raises a question of law.

In support of his contention that it does Mr Gauntlett, on appellant's behalf, referred to the well-known dictum of De Villiers CJ in Queen v Judelman (1893) 10 SC 12, at 15:

> "Whether certain facts constitute a definite crime is a question of law."

Like many legal aphorisms this statement must be seen in its context and requires some elaboration.

In Judelman's case, a jury trial, the appellant had been convicted of theft. He appealed on the ground that, assuming the facts deposed to on behalf of the prosecution to be true, there was no evidence of theft on his part. It was argued by the Crown that this was not such a question of law as could be reserved for consideration of the court of appeal. De Villiers CJ

disagreed with this contention, stating (at 15):

> "It is evident that the question of the credibility of the witnesses for the prosecution does not enter into the present inquiry. Assuming their evidence to be true, was the jury justified in convicting the prisoner of theft? If any inferences could be legitimately drawn from that evidence it was the province of the jury to draw them."

Having considered the prosecution evidence, the learned Chief Justice concluded that as it was impossible to say that there was "no legal justification" for the jury's inference that the appellant had stolen the goods in question, the question reserved should be answered in favour of the Crown.

The dictum in Judelman's case, supra, to the effect that the question whether certain facts constitute a definite crime is one of law, was referred to by Feetham JA in R v Patel 1944 AD 511. In that case

an accused charged with the common law offence of bribery had been acquitted by a magistrate. On an appeal by the Attorney-General the Transvaal Provincial Division (Barry JP and Ramsbottom J) answered certain questions of law set out in a case stated by the magistrate in favour of the Crown and referred the case back to the magistrate.

The accused appealed to this Court and his counsel raised the preliminary point that the questions set out in the stated case were questions of fact and not law.

After quoting, with approval, the dictum in Judelman's case Feetham JA said (at 518):

> "The magistrate was seeking to apply the definition of the common law offence of bribery as contained in Gardiner and Lansdown (4th ed., vol. 2, p. 985), which is quoted in full in the first of the two extracts from the judgment of BARRY, J.P., given above. That definition was accepted as correct in the case of Rex v. Muller (1934, N.P.D. 140) on which, as appears from the reference made to it in

> his statement of case, the magistrate relied. The first question of law stated by the magistrate, read in its context, is a question as to the correct interpretation of that definition in its application to the facts of the case with which the magistrate was dealing. The statement of case shows that the magistrate, in arriving at his decision to acquit the accused, adopted a narrow interpretation of the term 'official functions' used in the definition, and the point raised by the first question is whether that narrow interpretation was correct."

In my view, Judelman's case and Patel's case themselves indicate the proper ambit of the dictum. It is a genuine question of law (a) whether the evidence against an accused was such that there was a case to go to the jury or that there were grounds upon which the jury could legally convict the accused of the crime charged; or (b) whether the proven facts bring the

conduct of the accused within the ambit of the crime charged. Category (a) above is more relevant to question 6 and I shall consider it more fully when I come to deal with that question. As the quotation from the judgment of Feetham JA indicates, category (b) involves an enquiry as to the essence and scope of the crime charged by asking whether the proven facts in the particular case constitute the commission of the crime. This is clearly a question of law. But, in my opinion, a question of law is not raised by asking whether the evidence establishes one or more of the factual ingredients of a particular crime, where there is no doubt or dispute as to what those ingredients are.

This distinction is, in my view, well illustrated by the case of S v Petro Louise Enterprises (Pty) Ltd and Others 1978 (1) SA 271 (T). There three accused were charged with the contravention of sec 2(b) of the Prevention of Corruption Act 6 of 1958. They

were acquitted by the magistrate on the basis that the State had failed to prove beyond a reasonable doubt by means of evidence admissible against them that they had paid certain sums of money to one B (in the words of sec 2(b)) "as an inducement or reward for doing.... or having done.... any act in relation to his principal's affairs or business" (see at 277 H). The State appealed against the acquittal on a so-called question of law, which was whether on the undisputed facts the only reasonable inference to be drawn was that the accused paid the amounts in question as an inducement or reward for doing or for having done any act in relation to his principal's affairs or business; and, accordingly, whether they were guilty as charged. The Court (Botha and Van Dyk JJ) held that this was not a question of law and refused to entertain the appeal. In the course of his judgment Botha J distinguished, inter alia, Patel's case, supra, as follows (at 279 B-C):

> "Here there is no doubt, nor was there any doubt in the court a quo regarding the elements of the offence with which accused Nos. 1, 2 and 3 had been charged, nor is or was there any doubt as to the precise scope, nature or interpretation of the elements of the offence. The magistrate found that one of the elements of the offence had not been proved, viz. that the accused had made the payments to Bosch as an inducement or reward for causing or having caused the payment of his principal's investment funds to accused No. 1. In the circumstances of this case, this was a finding of fact, pure and simple."

It was argued by counsel for the State that the question whether a given inference was the only reasonable inference to be drawn from certain facts, was a question of law (see at 279 F). In regard thereto Botha J said (at 280 B-F):

> "I am unable to accept counsel's widely-based and generalised proposition

that in all cases the question whether a particular inference is the only reasonable possible inference to be drawn from a given set of facts is a question of law. To accede to the proposition in such general terms would, I consider, open the door to the possibility of large numbers of appeals being brought under sec. 104 of Act 32 of 1944, contrary to the limited scope of that section which I conceive the Legislature contemplated. One example of those possibilities that were canvassed during the argument will suffice. Suppose that an accused is charged with an offence of which a specific intent is an element, e.g., assault with the intent to do grievous bodily harm. On the evidence, the magistrate finds that such intent is not the only reasonable inference to be drawn from the facts, and consequently he convicts the accused of common assault. I cannot for one moment imagine that the Attorney-General will have a right of appeal upon the footing that an intent to do grievous bodily harm was the only reasonable inference to be drawn from the facts."

I am in full and respectful agreement with this analysis.

Finally in regard to the Petro Louise case, I should point out that Botha J made it clear (at 281 B-C) that -

> "The expression 'only reasonable inference' has been used in this judgment in the context of the well-known rules relating to inferences in criminal cases, as enunciated in Blom's case **supra**. In that context, the expression is unrelated to a totally different question that may arise in cases of this nature, viz. whether any reasonable Court could have arrived at the finding reached by a magistrate. That question does not call for discussion in the present case."

Mr Gauntlett also submitted that questions of law are often formulated on the basis of whether on the facts found in a particular case an accused was entitled to rely on a particular defence; and in this connection

he quoted cases such as S v Goliath 1972 (3) SA 1 (A), which deals with the questions whether and if so in what circumstances compulsion can constitute a complete defence to a charge of murder; Ex parte Die Minister van Justisie: In re S v Van Wyk 1967 (1) SA 488 (A), which deals with the questions whether and if so in what circumstances it is permissible to kill or injure another in defence of property; and R v Ndara 1955 (4) SA 182 (A), in which was investigated the scope of self defence and was held (I quote the headnote) that -

> "The mere fact that a person who has committed a crime for which he may be arrested without a warrant is running away from the scene of his crime pursued by those who saw him do it, does not change him into a threatened innocent with the right to use violence against those who are trying to effect his arrest."

I do not regard these cases as in any way detracting from what I have stated above in regard to the Judelman

dictum. They are all clearly cases where the facts raise questions of law as to the validity and/or ambit of a particular defence to a criminal charge. That, on the other hand, the establishment of a defence such as self-defence may raise a purely factual question and not a legal one is illustrated by the case of S v Coetzee 1977 (4) SA 539 (A).

I turn now more specifically to the facts of this case. It was Mr Gauntlett's submission that just as the question as to whether certain facts constitute a crime or a defence to a crime is a legal one, so also is the question as to whether the facts establish common purpose one of law. The submission is in my view unsound. In discussing it I shall refer only to the first type of common purpose mentioned in sub-para (a) of question 4 inasmuch as counsel conceded that sub-para (b) postulated a most improbable state of affairs.

Murder and culpable homicide have this in

common: each involves the unlawful causing of the death of another human being (the deceased). They differ in that in the case of murder intention in the form of one or other of the three types of **dolus** (**dolus directus, dolus indirectus** or **dolus eventualis**) must be present to the mind of the person executing the unlawful killing; whereas in culpable homicide all that is required is negligence. But in both there must in fact be a causal connection between the conduct of the accused (intentional in the one case, negligent in the other) and the death of the deceased; that is, unless it is a case involving common purpose (see S v Safatsa and Others 1988 (1) SA 868 (A); S v Motaung and Others 1990 (4) SA 485 (A)).

A common purpose was described in Motaung's case (at 509 A) as -

> "... a purpose shared by two or more persons who act in concert towards the accomplishment of a common aim."

Where the accomplishment of the common aim involves the commission of a crime, then, depending on the circumstances, all parties to the common purpose who participated in the accomplishment of the common aim become criminally liable irrespective of who amongst them actually perpetrated the crime. This is a legal consequence which the law attaches to participation in the common purpose (see Safatsa's case, supra, at 896 D-E, 898 A). And, of course, as in the present case, where a group of persons are alleged to be associated in the commission of a crime but it cannot be established which of them actually perpetrated the crime, the prosecution must perforce rely on the doctrine of common purpose in order to fix anyone with criminal liability.

Common purpose arises most frequently in the cases of murder involving groups of two or more perpetrators, but the doctrine is also applicable in

cases of culpable homicide (see S v Nkwenja en 'n Ander 1985 (2) SA 560 (A)). Where it appears that the accomplishment of the common aim involved, either directly or indirectly, the unlawful killing of another human being and where it appears that a participant (A) knew this or foresaw it as a possibility and yet persisted in his participation reckless of the consequences, then if an unlawful killing did ensue such a participant will be guilty of murder irrespective of the fact that another participant actually perpetrated the murder and irrespective of the fact that there was no causal connection between his (A's) own conduct and the death of the deceased. Similarly, where the accomplishment of the common aim was not directed at an unlawful killing and the participants did not foresee this as a possible result of their participation, but acted negligently in the execution of their common aim and death resulted, they will all be guilty of culpable

homicide, irrespective of who inflicted the fatal injury and without need for a causal connection in each case.

A common purpose may arise by prior agreement between the participants or it may arise upon an impulse without prior consultation or agreement. As I have indicated, however, in this case we are concerned with a question relating to the former type of common purpose. It is seldom that there is direct evidence of such an agreement. Usually the Court is asked by the prosecution to infer it from the proven facts. But the fact that in a particular case the prosecution relies upon inference to prove the agreement to accomplish a common aim does not make the question as to whether the prosecution succeeded in establishing this inference beyond a reasonable doubt one of law. As was often pointed out in the field of income tax appeals on a question of law, facts may be classified as primary, i e those facts which are directly established by the

evidence, and secondary, i e those facts which are established by way of inference from the primary facts (see Willcox and Others v Commissioner for Inland Revenue 1960 (4) SA 599 (A), at 602 A-B; Secretary for Inland Revenue v Geustyn, Forsyth & Joubert 1971 (3) SA 567 (A), 572 E-F). I have no doubt that an inference drawn from proven facts that the accused had by agreement formed a common purpose which embraced, say, the possibility of an unlawful killing is an inference of fact, and not one of law. It is a secondary fact. It is seldom in a case of murder that there is direct evidence of the perpetrator's actual state of mind. Consequently whether the unlawful killing was accompanied by **dolus** in one of its forms on his part is normally a matter of inference from the primary facts. Clearly this is an inference of fact and any question as to whether the trial Court correctly decided this issue is a question of fact. I can see no difference between this

and the issue, also to be determined by inference, as to whether a number of accused formed a common purpose which embraced both an unlawful killing and **dolus** in one of its forms. It is true that the legal consequences of a common purpose may be said to fall within the sphere of a rule of law, but in a case such as this the rule itself and its scope are not in issue. What is in issue is the factual foundation for the application of the rule. That is a question of fact. And, I might add, it was so regarded in Safatsa's case, **supra**, at 901 D.

In Morrison v Commissioner for Inland Revenue 1950 (2) SA 449 (A), also an income tax appeal, Schreiner JA drew a distinction between legal and factual inferences. He said (at 455):

> "Ordinary parlance does not limit the word 'facts' to what is provable by direct evidence, but allows it to cover some of the conclusions reached by inference from what is directly provable. When a distinction is drawn, as it sometimes is

> between legal inferences and inferences of fact the distinction, I am disposed to think, is between those inferences that appear to be so general in their nature as to be applicable to other cases, and those that appear to be special to the case in question."

If this test be applied to the present case, it is clear in my view that the existence or non-existence of an agreed common purpose was a matter of inference special to the case in question.

For these reasons I conclude that Williamson J correctly decided that question 4 could not competently be reserved as a question of law in terms of sec 319 of the Act. The application to have question 4 reserved as a point of law must accordingly be dismissed.

QUESTION 6

This question, as reformulated, reads as

follows:

> "Whether any reasonable court could have found on the basis of the factual findings summarised in Annexure 'C' hereto and the uncontraverted evidence that none of the Accused was guilty of the offence of culpable homicide or murder."

Williamson J held (see reported judgment 1990 (2) SACR at 480 b-c) that the question related essentially to "a value judgment on the facts" and that consequently the application for its reservation had to be refused. He added that even if the question was properly to be regarded as one of law its prospects of success were so remote that the reservation thereof would be an "exercise in futility".

This question raises, in effect, an alternative ground of appeal to that formulated under question 4. It accepts that the trial Court's decision as to the common purpose and, therefore, the guilt of the

respondents was a decision of fact; but it raises, in effect, as a question of law (so-called) whether any reasonable court could have acquitted the respondents. The first matter to be considered is whether such a question may be raised in terms of sec 319 of the Act. This entails some investigation of the history of statutory provisions enabling a question of law arising in a criminal trial in a superior court to be reserved for consideration by the court of appeal.

I commence with sec 372 of Act 31 of 1917, which was the first Criminal Procedure and Evidence Act passed after Union and which consolidated the provincial laws in this field. Sec 372 of this Act provided as follows:

> "(1) If any question of law arises on the trial in a superior court of any person for any offence that court may, of its own motion or at the request either of the prosecutor or of the accused, reserve that question for the consideration of the court of

appeal.

(2) When the superior court reserves any such question and the accused is convicted, the court shall state the question or questions reserved and shall direct such case to be specially entered in the record and a copy thereof to be transmitted to the registrar of the court of appeal.

(3) The grounds upon which any exception or objection to an indictment is taken shall, for the purposes of this section, be deemed to be a question of law."

There are a number of important points to be made with regard to this section and Act 31 of 1917 in general.

Firstly, in terms of Act 31 of 1917 the usual criminal procedure in a superior court was trial by jury (see sec 165). Exceptions were certain types of cases ordered to be tried by a special criminal court (sec 215) and cases where the accused wished to be tried without a jury, in which event the Judge could summon to his

assistance two assessors to sit with him and act "in an advisory capacity" (sec 216).

Secondly, sec 372, relating to the reservation of a question of law, and secs 370 and 371, relating to a special entry at the instance of the accused in respect of a procedural irregularity, were the only provisions in terms of which an accused convicted in a superior court could have his conviction taken on appeal to the Appellate Division. A convicted accused had no general right of appeal on factual issues, even with leave. As far as the prosecution was concerned, it was confined to the procedure provided by sec 372.

Thirdly, it was held in the case of R v Herbst 1942 AD 434 that a question of law could only be competently reserved at the instance of the prosecution if the accused had been convicted of the charge laid against him. It could not be raised by the prosecution in the case of an acquittal since it was never intended

that any question of law should be reserved unless such reservation was made in favour of the accused (at 436). See also R v Gani and Others 1957 (2) SA 212 (A), at 222 B; R v Solomons 1959 (2) 352 (A), at 359 F.

Fourthly, in R v Lakatula and Others 1919 AD 362 it was held that if at the close of a trial by jury (resulting in a conviction) it was contended by the accused that there was no legal evidence upon which the jury were entitled to have convicted, that was a point of law which might be reserved under sec 372. Commenting on this decision and other cases where this rule has been applied, Greenberg JA, in R v Slabbert and Prinsloo 1945 AD 137, at 144 et seq, pointed out that these were all cases where the evidence upon which the accused were convicted was circumstantial evidence and where the question resolved itself into one whether the inference of guilt drawn by the jury (or the Judge or Judge and assessors) from the evidence adduced was one which the

jury or its equivalent was entitled to draw. Greenberg JA went on to explain how it came about that a question of this kind should be considered a question of law:

> "A question as to whether a particular conclusion of fact can properly be drawn from a proved set of circumstances is one in the answering of which an utter ignorance of law is no disqualification. The question whether the proved facts justify the inference that the accused killed the deceased can be answered by a person who has reasoning powers but has never seen the inside of a law book. It is a question of logic and not of law. Wigmore (2nd ed., Vol. 5, para. 2,487) says:
>
> > 'But we come now to a peculiar set of rules which have their source in the bipartite constitution of the common law tribunal. Apart from the distinction between Judge and jury these rules need have no existence,'
>
> and he proceeds then to deal with the burden of producing evidence, firstly, to satisfy the Judge and then to satisfy the jury.

> It is as a result of this separation of functions (a separation which in the Criminal Procedure Act of 1917 is enjoined by secs. 203 and 205) that the question whether the jury were entitled to draw a conclusion of fact from a proved set of circumstances came to be regarded as a question of law. That it is so regarded under English law is clear from Ryder v Wombwell (L.R. 4 Exch. Cases, 32). WILLES, J., delivering the judgment of the Court, says (at p. 38):
>
> > 'But there is in every case..... a preliminary question which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies'".
>
> (My emphasis.)

Secs 203 and 205 of Act 31 of 1917 defined the respective duties and functions of Judge and jury. Generally, it was provided that the Judge was to decide

all matters of law and the admissibility of evidence and that the jury was to decide all questions of fact and to return the verdict which on their view of the facts ought, according to the direction of the Judge, to be returned. It was the function of the Judge to decide, as a matter of law, at the conclusion of the prosecution case whether there was legal evidence upon which the jury could convict and, if there was not, he could withdraw the case from the jury and direct a verdict of not guilty (sec 221(3)). If the Judge decided not to do so because he thought that there was sufficient evidence to go to the jury, then at the end of the trial (but not before then) the accused, if convicted, could apply for reservation as a question of law the issue as to whether in truth there was no legal evidence upon which the jury were entitled to convict. (See R v Lakatula, supra, at 363-4.) In such a case the test to be applied by the court of appeal was -

> ".... not whether this Court would have drawn the inference which the jury drew, but whether no reasonable man could have drawn that inference."

(per Tindall JA in R v Sikepe and Others 1946 AD 745, at 751).

Fifthly, in R v Slabbert and Prinsloo, supra, it was held that upon a question of law reserved under sec 372 as to whether there was evidence upon which the jury or the Court was entitled to convict the accused, it was not competent to take the point that the jury or the Court should have accepted the evidence of one witness in preference to that of another: questions of credibility could not be raised (at 147, 150; see also R v Kubuse and Others 1945 AD 189, at 197.) Greenberg JA pointed out (at 150), however, that in an extreme case the rigours of this interpretation could be mitigated by resort to the extraordinary jurisdiction described in R

v Kalogeropoulos 1945 AD 38 in terms of which the Appellate Division could grant special leave to appeal in order to prevent "substantial and grave injustice".

In 1935, by sec 36 of the General Law Amendment Act 46 of 1935, Act 31 of 1917 was amended by the introduction, as an alternative to trial by jury, of trial by a Judge or Judge and assessors. Such assessors were to be members of the court, but, broadly speaking, the Judge continued to be the sole arbiter of all questions of law, questions of fact being decided by the Judge and the assessors.

In 1948, by the Criminal Procedure Amendment Act 37 of 1948, a fundamental change in the appellate procedures from the decision of a superior court in a criminal case was introduced, viz an accused convicted of an offence before such a court was granted a full right of appeal against his conviction, provided he obtained leave to appeal either from the trial Judge or on

petition to the Chief Justice. As a result of this amendment the procedures relating to a special entry and a point of law reserved lost much of their former importance as far as the accused was concerned since the new right of appeal embraced factual, legal and procedural matters. However, special entry remained the appropriate remedy where the procedural irregularity or illegality was not apparent from the record. (See R v Nzimande 1957 (3) SA 772 (A), at 773 in fin - 774A; cf Sefatsa and Others v Attorney-General, Transvaal and Another 1989 (1) SA 821 (A), at 843 H-I.)

As far as the prosecution was concerned, however, the reservation of a question of law remained the only avenue of approach to a court of appeal. I have previously drawn attention to R v Herbst, in which it was held that the prosecution could not reserve a question of law in the event of an acquittal. Act 37 of 1948 introduced certain amendments to sec 372 and sec 374

of Act 31 of 1917 (sec 374 dealing with the powers of the Court of appeal on a question of law reserved) which, in the manner explained by Ogilvie Thompson JA in R v Solomons 1959 (2) SA 352 (A), at 359 D-H, had the effect of enabling a question of law to be reserved at the request of the prosecutor in the case of an acquittal; and at the same time of providing the machinery, and the only machinery, to be put into operation by the Court of appeal where the question was answered in favour of the prosecutor (see also R v Gani and Others supra, at 222 B-D).

Another consequence of the amendments introduced by Act 37 of 1948 was the disappearance of the extraordinary criminal jurisdiction referred to in R v Kalogeropoulos, supra (R v Milne and Erleigh (6) 1951 (1) SA 1 (A), at 6 A-D; Sefatsa's case, supra, at 833 G - 834 F).

In 1955 a new Criminal Procedure Act 56 of 1955

was enacted. Sec 366 of this Act is in substance the same as sec 372 of Act 31 of 1917, as amended in 1948, and sec 369 in substance re-enacts sec 374 of the 1917 Act, as amended. In 1977 the 1955 Act was replaced by the current Criminal Procedure Act 51 of 1977, where the corresponding sections are 319 and 322. For present purposes there is no material difference between these sections and their predecessors.

It was submitted in the present matter on behalf of the appellant that just as it was competent for the accused (in the days before a full right of appeal existed) to request the reservation, as one of law, of the question as to whether there was legal evidence upon which the jury or other trier of fact could properly or reasonably have convicted, so also was it competent for the prosecution to request the reservation, as one of law, of the question as to whether having regard to the weight of the evidence adduced the jury or other trier of

fact could properly or reasonably have acquitted the accused. In other words, what is sauce for the accused should be sauce for the prosecutor.

Appellant's counsel were not able to refer us to any case where such a question of law had been reserved at the instance of the prosecution; nor, so far as I am aware, has the issue as to whether such a reservation is competent ever been decided by the courts of this country. The lack of any such precedent in the 70 or so years since Lakatula's case, supra, was decided is in itself a factor of some significance. But there are, in my opinion, more weighty reasons why counsel's submission cannot prevail.

As Greenberg JA made clear in the case of R v Slabbert and Prinsloo, supra (see the passage which I have quoted above), the question as to whether a jury could properly or reasonably have inferred the guilt of the accused from the evidence adduced is not inherently a

question of law, but it came to be treated as such by reason of the separation of functions between Judge and jury (questions of law being decided by the Judge and questions of fact by the jury) and the function of the Judge to decide whether there is any evidence upon which a jury could properly convict the accused. The further question as to whether, having regard to the evidence and the directions of the Judge, the verdict should be guilty or not guilty was always a function of the jury (see sec 205 (a) of Act 31 of 1917) and, accordingly, a question of fact. There is thus, in my view, no historical or juristic basis for equating the position of an accused who complains that there was no evidence upon which the jury could reasonably or properly have convicted him with that of a prosecutor who complains that the evidence submitted to the jury was so strong that the jury could not reasonably have acquitted the accused.

I consider that it may be inferred that the

principle laid down in Lakatula's case, supra, was adopted at least partly, because of a concern that the absence of a right vested in the accused to appeal against a conviction on the facts could lead to injustice. Hiemstra, Suid-Afrikaanse Strafproses, 4 ed, p 775 states that before there could be an appeal purely on fact, the provision in sec 372 was used, by way of a device ("kunsgreep"), to appeal on the facts by clothing a factual question as a question of law by asking whether there was legal evidence to support the conviction. The concern of the Courts that the limited right of appeal accorded an accused should not lead to miscarriages of justice is also evidenced by the extraordinary jurisdiction described in R v Kalogeropoulos, supra.

The procedures of our criminal justice system and the decisions of our Courts evince a general policy of concern for an accused person in a criminal case. This is illustrated by, for example, the rule that he

should be fairly tried (in the sense explained in S v Rudman and Another: S v Mthwana 1992 (1) SA 343 (A), at 376 J - 377 D); the general principle that he should not be convicted unless his guilt is established by the prosecution beyond a reasonable doubt; the rule that he should not be placed in double jeopardy by being tried again after he has been acquitted or convicted; and the various rules which exclude certain types of evidence on the ground that it was improperly obtained or is of doubtful relevance or cogency or would be unduly prejudicial to the accused.

I am unable to detect a similar concern in our law for the interests of the prosecutor. Indeed the various measures to protect the interests of the accused and to ensure that he is not wrongly convicted place, pro tanto, limitations on the power of the prosecution to obtain a conviction. There are two further indicia of this general approach. I have already referred to R

v Herbst, supra, in which this Court interpreted sec 372 of Act 31 of 1917 (in its original form) as permitting only reservations of questions of law in favour of the accused. I would also refer to the cases of R v Brasch 1911 AD 525 and Rex v Gasa and Another 1916 AD 241, which were decided prior to Act 31 of 1917 coming into operation. In these cases effect was given to a general practice in South Africa, and also in England, that, in the absence of special statutory provision, the Crown was not entitled to appeal against an acquittal. In his judgment in Gasa's case Solomon JA referred to sec 1 of Act 1 of 1911 which allowed the Appellate Division to grant leave to appeal against "any judgment" in both civil and criminal matters. He continued (at 246):

> "In view, however, of the practice to the contrary, which we must presume was present to the minds of the Legislature, the conclusion to which I come is that it was never intended by these general words to interfere with the long-established

> practice that an acquittal by a competent Court in a criminal case is final and conclusive, and that it cannot be questioned in any subsequent proceeding. Effect can be given to the section by limiting the right to grant leave to appeal to applications by convicted persons. And that, in my opinion, is what was intended, for I do not feel much doubt that if the Legislature had intended to confer the right upon the Crown in cases of acquittal, it would have done so in clear and express terms. To hold otherwise would be to open the door to appeals of all kinds, which I am satisfied was never contemplated by the Legislature".

(See also Attorney-General (Transvaal) v Levy and Another 1925 AD 378; R v Adams and Others 1959 (3) SA 753 (A), at 764 A-F.) As to English law see Benson v Northern Ireland Road Transport Board 1942 AC 520 (HL); and Walker and Walker, The English Legal System, 5 ed, at 506, describing The Criminal Justice Act 1972 which for

the first time gave the prosecution a limited right of appeal on a point of law following an acquittal on indictment.)

The remarks of Solomon JA in Gasa's case, **supra**, about the consequences of allowing an appeal against an acquittal are particularly pertinent in the present case. It seems to me that if the Court were to accede to appellant's contention it would be opening the door to appeals by the prosecution against acquittals, contrary to the traditional policy and practice of our law.

For these reasons I am of the opinion that it is not competent for the prosecution to raise as a question of law in terms of sec 319 of the Act the enquiry as to whether on the evidence placed before the trial Court a reasonable court could not have acquitted the accused.

The only authority which appears to provide any

support for the argument of appellant's counsel on this aspect of the case is R v Lusu 1953 (2) SA 484 (A). In this case the Railway Administration had reserved certain waiting rooms at the Cape Town railway station for the exclusive use of what were then termed "Europeans". In so doing the Administration purported to act under certain provisions of the Railway Act empowering the Administration to reserve any railway premises for the exclusive use of a particular race or class of persons. In terms of the Act (and a certain regulation) it was an offence for someone who was not a European to enter, remain in or make use of premises so reserved. The respondent, who was not a European, was charged in the magistrate's court with having committed this offence. The magistrate found that the respondent had in fact entered, remained and made use of the reserved premises; but acquitted him on the ground that the action of the Administration in reserving the waiting rooms in question

had resulted in partial and unequal treatment to a substantial degree as between Europeans and non-Europeans, the facilities provided for non-Europeans being substantially inferior to those provided for Europeans, and that accordingly, on the authority of R v Abdurahman 1950 (3) SA 136 (A), the action of the Administration was void.

Acting in terms of sec 104 of the Magistrates' Court Act 32 of 1944 the Attorney-General required the magistrate to state a case for consideration by the Cape Provincial Division, as a question of law, whether the correct interpretation of the statutory provisions concerned was not such that the Administration might when so reserving premises exercise "unfettered discretionary rights and powers", even where the exercise thereof might result in partial and unequal treatment to a substantial degree as between different races and classes of persons. The Cape Provincial Division, by a

majority, answered the question adversely to the Attorney-General and dismissed the appeal. An appeal to this Court under sec 105 of Act 32 of 1944 was dismissed, one member of the Court dissenting. Centlivres CJ, who delivered the majority judgment, after setting out the facts, stated (at 487 in fin - 488 B):

> "At the outset I should point out that the question which we have to consider is a question of pure law. Presumably that question was framed deliberately in the language in which it is couched. It does not ask the Court to consider, what would also have been a question of law, viz: whether there was evidence on which it could reasonably be held that the action of the Administration in reserving waiting rooms at Cape Town Railway Station resulted in partial and unequal treatment to a substantial degree as between European and Non-European. Had such a question been raised it would have been necessary to consider the evidence but that question not having been raised we must accept as a fact that the action of

> the Administration has resulted in partial and unequal treatment to a substantial degree as between Europeans and non-Europeans."

(For convenience I shall call this latter question "the hypothetical question".)

It is to be noted that these remarks are purely **obiter** and, therefore, not binding on this Court. Counsel for the Attorney-General at no time asked the Court to consider the hypothetical question; nor was the issue as to whether the hypothetical question could be raised by the Attorney-General as a matter of law in any way debated before the Court. Had this been done a number of points could have arisen: e g whether the principles relating to the statement of a case under sec 104 of Act 32 of 1944 were the same as those pertaining to the reservation of a question of law under sec 372 of Act 31 of 1917; to what extent this Court was entitled, in

considering the evidence, to evaluate conflicting testimony; and whether a consideration of the hypothetical question did not involve a value judgment, in which questions of degree would have to be weighed in the light of particular circumstances, and therefore a question of fact (cf Attorney-General, Transvaal v Kader, **supra**, at 740 F–I). In all the circumstances I am not persuaded by this dictum that the conclusion which I have reached in regard to the ambit of sec 319 is incorrect.

Furthermore, I should briefly refer to the third passage quoted above from the judgment of Botha J in the Petro Louise case, **supra**. Here the learned Judge was careful to leave open the issue as to whether the "totally different question" referred to by him could properly have been raised under sec 104 of Act 32 of 1944 (see further at 1978 (1) SA, at 281 C–D).

In argument reference was made to cases dealing with appeals on a question of law in income tax matters

and also to the manner in which the courts distinguish questions of law and fact in the field of arbitration. In general I do not, however, find these authorities helpful in the interpretation of sec 319.

I accordingly conclude that question 6 could not competently be raised by the appellant under sec 319 of the Act and that the application for its reservation must be dismissed.

Before proceeding to the next aspect of the case there is, however, one general observation that I wish to make. Having read the evidence in this case, and particularly having several times viewed the video film, I am left with feelings of shock and dismay at the conduct of the policemen concerned with the execution of this operation. Even on the respondents' own version their reaction to the situation in which they found themselves was, in my view, grossly excessive. Moreover, as the trial Court found, there were "strong indications"

of the common purpose to act illegally alleged by the prosecution. And another Court seized of the case on the merits may well have concluded that these strong indications, taken in conjunction with the failure by the accused to enter the witness box, were cogent enough to secure the conviction of the respondents, or some of them. These considerations must not, however, be allowed to obscure one's perception of the legal and policy issues involved in permitting sec 319 to be utilized in the manner the prosecution in this case wishes to use it; or to weaken one's resolve to maintain what appears to be sound legal practice.

QUESTION 1

This question, as amended at the hearing in a small respect, reads as follows:

> "Whether the trial court was as a matter of law correct in ruling that all the evidence of Accused 2, 4, 5, 6, 7, 10 and

11 given at the inquest into the death of Michael Cheslyn Miranda and two others in Case Number 493/87/8 was inadmissible at the trial in circumstances where:

(a) The record of the proceedings of the aforesaid inquest was admitted as exhibit 3 at the trial (on the qualified basis that each of the Accused admitted that such record could be handed in and used by the prosecution during the trial without formal proof thereof as being a true and correct record of the evidence and proceedings of the aforesaid inquest, but without admitting the truth of the contents of the record).

(b) Those parts of the evidence contained in the said record set out in Annexure "A" hereto were of an incriminating nature.

(c) Each of the aforesaid Accused were at all times during the inquest individually represented by Counsel, who was briefed to appear on their behalf and on behalf of the Minister of Law and Order.

(d) The nature and ambit of the evidence given by the aforesaid Accused at the inquest, the nature and terms of the objections actually made by their

> Counsel, and the circumstances in which it was received by the inquest magistrate appear fully from the said record, and are for convenience not repeated here."

It appears that an inquest, at which viva voce evidence was heard, was held in respect of the three persons fatally injured in the shooting. The hearing commenced on 7 December 1987 and on 3 March 1988 the magistrate who conducted the inquest announced his finding. It was to the effect that the death of the deceased was caused by the negligence of the fourth respondent "en sy manskappe".

As the question indicates, respondents nos 2, 4, 5, 6, 7, 10 and 11 gave evidence at the inquest. At the trial the prosecution sought to put in the inquest record as evidence of incriminating admissions made by these respondents relevant to the issues in the case. The parts of the evidence containing such incriminating

material are set forth in the annexure "A" which is referred to in par (b) of question 1 and which consists of 29 pages of schedules.

The defence objected to this evidence on the ground that it was inadmissible in that in each case it tended to incriminate the respondent concerned. The trial Judge ruled that the evidence was inadmissible and gave full reasons for his ruling. (These have been reported, see Magmoed v Janse van Rensburg and Others 1991 (1) SACR 185.) Before considering these reasons, it is convenient to summarize the relevant principles of law.

In the sphere of the law of evidence a privilege may be described as a personal right to refuse to disclose admissible evidence (see Hoffmann and Zeffertt, The South African Law of Evidence, 4 ed, at 236). One such privilege is that against self-incrimination. In terms thereof a witness may refuse to answer a question

where the answer may tend to expose him to a criminal charge. (See sec 203 of the Act.) The privilege is that of the witness and generally must be claimed by him. Where the privilege is claimed, the Court must rule thereon. Before allowing the claim of privilege the Court must be satisfied from the circumstances of the case and the nature of the evidence which the witness is called to give that there is reasonable ground to apprehend danger to the witness from his being compelled to answer (see the test laid down in R v Boyes (1861) 1 B & S 311, at 330, approved in Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd [1939] 2 All ER 613, at 617 H, which in turn was endorsed by the House of Lords in Rio Tinto Zinc Corporation and Others v Westinghouse Electro Corporation [1978] A C 547 (HL) at 612, 647; also S v Carneson 1962 (3) SA 437 (T), at 439 C - 440 A). The witness should be given considerable latitude in deciding what is likely to prove

an incriminating reply. As Steyn CJ pointed out in S v Heyman and Another 1966 (4) SA 598 (A), at 608 C - D:

> "The avoidance of incriminating replies may not be a simple matter by any means. As observed in Q. v. Boyes 1861 L.J.R 301 (referred to in S v Carneson, 1962 (3) S.A. 437 (T) at p. 439) a question which might at first sight appear a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering."

In similar vein are the remarks of Lord Denning MR in In re Westinghouse Uranium Contract [1978] A C 571 (CA), at 574 E - F:

> "There is the further point: once it appears that a witness is at risk, then 'great latitude should be allowed to him in judging for himself the effect of any particular question': see Reg. v. Boyes (1861) 1 B. & S. 311, 330. It may only be one link in the chain, or only corroborative of existing material, but

> still he is not bound to answer if he believes on reasonable grounds that it could be used against him."

It is common cause that this privilege is available to a person called as a witness in inquest proceedings (see in this connection S v Ramaligela en 'n Ander 1983 (2) SA 424 (VH), at 429 E-F).

According to English law there is no rule of law requiring the Judge to warn a witness that he is not obliged to answer incriminating questions, though in practice this is often done. Moreover, the absence of a warning and the fact that the witness answered incriminating questions in ignorance of his rights do not prevent such incriminating evidence being used in subsequent criminal proceedings brought against him (see Cross on Evidence, 7 ed by C Tapper, at 423; Phipson on Evidence 14 ed at 536). In this country the position is somewhat different. As was held in S v Lwane 1966

(2) SA 433 (A), the rigour of the rule of English law is in our law qualified by the established rule of practice of our Courts that it is the duty of the presiding judicial officer to inform a witness of his right to decline to answer an incriminating question (at 440 in fin, 443 D and 444 B). This practice arose because it was recognized that in this country many persons who enter the witness-box, particularly the uneducated, are likely to be wholly ignorant of the right to decline to answer incriminating questions (at 439 F-H, 443 D-G). As to the effect of a failure to perform this duty, it was held in Lwane's case, supra, at 440 in fin - 441 A, that -

> "The effect of non-observance of that rule upon the admissibility in subsequent proceedings of an incriminating statement made by an uncautioned witness falls, in my judgment, to be determined upon the particular facts of the case. In any such enquiry, the nature of the incriminating statement and the ascertained, or presumed, knowledge of his rights by the

> deponent will always be important factors."

(per Ogilvie Thompson JA, delivering the main judgment). In a separate concurring judgment Holmes JA put the position slightly differently (at 444 F):

> "Non-observance of the aforesaid duty is an irregularity which ordinarily will render the incriminating evidence inadmissible in a prosecution against the witness."

The rationale for the stricter approach of the English law would appear to be the belief that most persons are aware of their rights in this regard and where they are not **ignorantia juris non excusat** (see R v Coote (1873) 17 E R 587, at 592). This reasoning has lost much of its force in this country since the decision of this Court in S v De Blom 1977 (3) SA 513 (A) in which it was held that the concept that ignorance

of the law is no excuse had no application in determining criminal culpability ("skuld") in our law (see 529 A-H).

Where a witness objects to answering a question on the ground of the privilege against self-incrimination and the judicial officer wrongly overrules the objection and compels the witness to answer the question, then his reply, if incriminating, will not be admissible in subsequent criminal proceedings against him (see Coote's case, **supra**, at 591, quoting R v Garbett (1847) 169 E R 227; Hoffmann & Zeffertt, **op cit** at 243).

After that digression concerning the law, I return to the facts of this case. Each of the respondents who gave evidence at the inquest was warned by the presiding magistrate before he commenced giving evidence. A typical warning was in these terms (see reported judgment in 1991 (1) SACR at 187 g):

> "Die hof wil u net vooraf waarsku dat sekere vrae dalk aan u gevra kan word wat daarop kan neerkom dat u voel dat indien u

> antwoord daarop gee dit u miskien kan inkrimineer en u is geregtig dan om te weier om daarop te antwoord. Die hof vermoed dat die advokaat namens die Minister van Wet en Orde sal ook, indien hy bewus word van so 'n vraag, namens u beswaar aanteken."

"Die advokaat" referred to was Mr Veldhuizen who, as par (c) of question 1 indicates, represented the Minister of Law and Order, and the individual respondents called to give evidence, at the inquest.

What occurred when the first respondent to give evidence at the inquest (the sixth respondent) was examined by the prosecutor is fully described in the judgment of Williamson J on the admissibility issue. As this has been reported (see 1991 (1) SACR, at 190 g - 192 i) and as my judgment is already assuming excessive proportions, I do not propose to repeat what Williamson J has accurately described. I shall merely try to sum it

up.

The very first question asked of the sixth respondent was objected to on grounds of self-incrimination by both the witness and Mr Veldhuizen. The objection was overruled and an answer was given which is listed in annexure "A" to question 1 as an item of incriminating evidence. In the first few pages of sixth respondent's evidence the same thing occurred on three or four more occasions and then came the general ruling which is set forth in the reported judgment at 192 c-g, which was broadly to the effect that the witness could object to a question only where the answer involved direct incrimination of himself in unlawful conduct. (I shall call this "the general ruling".) Again, as a result of this ruling, an answer was extracted from the witness which is listed in annexure "A". Thereafter three further objections were taken, two appear to have been upheld, one overruled.

The next witness was the tenth respondent. In his case only one objection was taken to a question by the prosecutor. It was overruled by the magistrate and the answer given is listed as incriminating in annexure "A". In the case of the remaining respondents who gave evidence no objections were raised.

The reasons of Williamson J for ruling the evidence given by all the respondents who gave evidence at the inquest (apart from the ninth respondent, whose evidence was not of an incriminating nature) may be summed up as follows:

(1) The magistrate's general ruling wrongly restricted the ambit of the privilege against self-incrimination as laid down in Heyman's case, supra.

(2) Objections were raised by or on behalf of the sixth respondent and they were overruled and in the light of the general ruling and the

approach of the Magistrate there was little point in persisting with such objections throughout his evidence.

(3) In the case of the other respondents it would similarly have been pointless to repeat the same type of objection. While it might have been wiser to have objected fully, no good purpose would have been served because of the magistrate's general ruling and approach.

(4) He concluded (at 193 e-f):

> "Counsel in a very real sense was by virtue of the prior ruling helpless to protect his clients and they must obviously have known that they were now obliged to answer virtually all the questions relating to matters referred to in their statements. I consider that the incorrect ruling that the magistrate gave as to what was to be regarded as incriminating tainted the whole proceedings before him and rendered the position of each witness untenable as far as being meaningfully able to protect himself against self-incrimination."

(5) The only just way to redress the situation was to rule all the evidence inadmissible.

Question 1 raises the broad issue as to whether the trial Judge was correct in ruling that the evidence in question was inadmissible. Williamson J refused to reserve this question as, in his view, the essential attack upon the ruling was based not on an alleged mistaken or wrong view or application of the law, but on the factual finding that none of the respondents had in the circumstances disclosed waived his privilege against self-incrimination. Accordingly, the question sought to be reserved was in substance not a question of law, but a question of fact "masquerading" as a question of law (see reported judgment 1990 (2) SACR at 478 h-j).

The admissibility of evidence may well turn solely on an issue of fact. An obvious example of this is the case where the admissibility of an extra-curial

statement by the accused is in issue and this depends on whether it was made freely and voluntarily and without undue influence or whether it was induced by some form of physical coercion. This is a question of fact; and the only way in which it could be raised by an accused person as a point of law reserved would be to pose the question as to whether there was any legal evidence upon which the Judge could properly have found that the prosecution had discharged the onus on this issue (see R v Nchabeleng 1941 AD 502, at 504; R v Ndhlangisa and Another 1946 AD 1101, at 1103-4). Admissibility may, on the other hand, turn purely on a question of law, e g whether a certain statement constitutes a confession (see R v Becker 1929 AD 167, at 170; R v Viljoen 1941 AD 366, at 367). Furthermore, in a particular case admissibility may depend upon both law and fact.

It seems to me that the decision of Williamson J on the admissibility of the inquest evidence falls into

the last-mentioned category. In effect he found (i) that the failure, after a certain stage in the proceedings, on the part of the respondents (and their counsel) to object to answering incriminating questions was the result not of a free election to do so, but of their having been discouraged or inhibited from so objecting by the general ruling of the magistrate and his approach to this issue; and (ii) that this rendered the evidence of the respondents inadmissible. Finding (i) is clearly one of fact or of factual inference; whereas finding (ii) is a matter of law. As formulated, question 1 does not raise the question as to whether there was any legal evidence upon which finding (i) could have been made. And, in any event, for reasons broadly similar to those stated in regard to question 6, I do not think that such a question can be raised at the instance of the prosecution. Consequently only finding (ii) can be the subject-matter of a reservation of a

point of law. This is not quite how the appellant approached question 1 in argument, but on this basis the application does raise a question of law in terms of sec 319.

It was strenuously argued by counsel for the respondents that the question of law was not material in that even if this Court should uphold it this would not have "a practical effect upon the conviction of the accused" (cf Attorney-General, Transvaal v Flats Milling Co (Pty) Ltd and Others 1958 (3) SA 360 (A), at 373 D-E). I have considered this argument, but have come to the conclusion that the question of law is material and that the application for its consideration should be granted. It is not necessary to elaborate upon this conclusion for when it comes to the merits of the question I am of the view that it must be answered against the appellant.

Proceeding on the basis of the factual finding or inference stated under (i) above, I am in respectful

agreement with Williamson J that it renders all the inquest evidence inadmissible. This is obviously not a case of the absence of a warning: there were warnings and indeed the respondents were represented by counsel. But what happened is that the magistrate's ruling and general attitude made it clear that objections to the kind of evidence that the respondents were expected to give would not be upheld. In a sense this was more unfair to the respondents than no warning; and in effect it placed them in the same position as they would have occupied had they objected and their objections been over-ruled. This "taint", as it was described by the trial Judge, would tend to affect the whole proceedings. Certainly the prosecution, on whom the onus rested (cf R v Melozani 1952 (3) SA 639 (A), at 643 H) did not attempt to show that any portions of the evidence should be treated differently.

For these reasons I conclude, with reference to

question 1, that the trial Judge correctly ruled the inquest evidence to be inadmissible.

QUESTION 2

This question reads:

> "Whether the trial court was as a matter of law correct in ruling that the evidence of Accused 4 at the criminal prosecution of the State v Errol Surja and 12 Others under Case Number SHC377/85 was inadmissible at the trial, in circumstances where:-
>
> (a) The record of the proceedings of the aforesaid prosecution was admitted as exhibit 2 at the trial (on the basis that each of the Accused admitted that such record could be handed in and used by the prosecution during the trial without formal proof thereof as being a true and correct record of the evidence and proceedings of the aforesaid prosecution, but without admitting the truth of the contents of the record).
>
> (b) Those parts of the evidence contained in the said record set out in Annexure "B" hereto were of an incriminating nature.

(c) The nature and ambit of the evidence given by Accused 4 and the circumstances in which it was received by the court appear fully from the said record and are for convenience not repeated here."

The criminal prosecution here referred to took place in the regional court over the period July/August 1986, i e prior to the inquest hearing. It related to the same shooting incident in Thornton Road. The accused were all alleged to have been stone-throwers and were charged with public violence. The fourth respondent was one of the main witnesses for the prosecution. The accused were discharged at the end of the State case.

The appellant sought to use the evidence given by fourth respondent in the regional court as a series of incriminating admissions in the present case. The trial Judge ruled that this previous evidence was inadmissible. It is clear that at no time before and during his giving

evidence before the regional court was fourth respondent warned about self-incrimination; nor was he personally represented by counsel. The trial Judge ruled that, applying Lwane's case, the evidence should not be admitted (see reported judgment 1991 (1) SACR at 193 i to 194 b). In the course of stating his reasons the learned Judge said:

> "I do not know whether or not the accused because of his position necessarily had knowledge of the rights conferred on him by s 203. I am certainly not prepared to assume that he did. I would not be surprised if some recently qualified advocates were also ignorant of this protection. The evidence in its totality given by accused No 4 is of an incriminating nature. It would be very difficult for anyone but a trained lawyer to appreciate in advance the ultimate thrust and importance of what might at first blush not seem to be an incriminating question. After considering the matter I can see no good reason why the principle

> laid down in Lwane's case should not apply. Here again it is almost impossible to sort out the objectionable from the unobjectionable and no good purpose would be served by attempting to do so."

In refusing the application for the reservation of question 2 the trial Judge advanced the same reasons as in regard to question 1. In fact he dealt with the two questions together. In essence then his refusal in respect of question 2 was based on the view that it was purely a question of fact.

As I shall show when I come to deal with the merits of the question I consider that it is one of law. Again respondent's counsel disputed the materiality of the regional court evidence of the fourth respondent and submitted that it did not take the case against fourth respondent substantially further than the sworn statements made by him, which were put in as evidence against him in the Court a quo. I am not persuaded by this

argument. A comparison of the relatively terse statements made by fourth respondent and the 170-odd pages of evidence given by him before the regional court convinces me that had the latter been admitted against the fourth respondent it would have made a considerable evidential impact and, inter alia, may well have influenced the conduct of the defence case. In this regard it must be borne in mind that the trial Court considered that the prosecution had adduced a strong case and found it a "most difficult case to decide".

Accordingly, the application for the reservation of question 2 should be granted. I now turn to consider the merits of the question. I have already quoted the passage from the judgment of Williamson J stating his reasons for ruling the regional court evidence to be inadmissible. The reasons seem to me, with respect, to misinterpret and misapply Lwane's case and, therefore, to contain errors of law.

The ruling appears to be based on three considerations:

(a) that it could not be assumed that fourth respondent had been aware of his rights;

(b) that it would be difficult for anyone other than a trained lawyer to appreciate in advance the ultimate thrust and importance of what might at first blush seem not to be an incriminating question;

(c) that there was no good reason why the principle in Lwane's case should not be applied.

I shall deal with these in turn.

As to (a), there was no direct evidence before the Court a quo concerning the fourth respondent's actual knowledge, or ignorance, of his rights at the time when he testified. The absence of such evidence is not, however, in itself conclusive of the issue of admissibility. In Lwane's case approval of the rule of

practice requiring a witness to be cautioned was, as I have indicated, based upon the consideration that in this country the vast majority of persons who enter the witness box are likely to be ignorant of the privilege against self-incrimination. Accordingly proof that an uncautioned witness was actually aware of his rights would ordinarily render the incriminating evidence admissible, despite non-observance of the rule of practice. But that is not the only ground on which such evidence can be held to be admissible. In both of the judgments delivered in Lwane's case it was made clear that the effect of non-observance of the rule was dependent on the particular facts of the case. In this regard I draw attention to the passage from the judgment of Ogilvie Thompson JA quoted above, in which one of the factors mentioned by him was the deponent's "ascertained, or presumed, knowledge of his rights" (my emphasis); and to a passage from the judgment of Holmes JA (at 444

F-G) where the learned Judge referred to a witness's knowledge of his rights merely as an example of a case in which a failure to caution would not result in unfairness and in the evidence being inadmissible. In dealing with the facts of that case Ogilvie Thompson JA pointed out **inter alia** (at 441 A - 442 D) that the appellant was an uneducated man who had not had any legal assistance at the time when he gave evidence; that it was not suggested that he was at all material times anything but ignorant of his rights; and that, therefore, he fell, **prima facie**, "well within that class of persons who should, when the situation arises, invariably be warned that they are not obliged to answer an incriminating question".

In the present case the facts are wholly different. The fourth respondent held the rank of lieutenant in the Railway Police when he testified before the regional court. In the absence of any indication to

the contrary, it is safe to assume that he was not ignorant of the judicial process. He had been in charge of the operation which gave rise to the prosecution and he was called by the prosecutor as a witness of major importance in the State's case against the accused. It is reasonable to assume that the prosecutor was available and willing to advise him on his rights, if he were in any doubt on that score. It is in any event highly unlikely that he was ignorant of his right to refuse to answer incriminating questions. Prima facie he fell well outside the class of persons who require to be cautioned in that regard. That being so, and failing direct evidence of his state of mind at the time, the trial Judge could assume that he had been aware of his rights.

As to (b), this was not a case of a particular answer or statement. The fourth respondent was called upon to give evidence generally about an incident in

which it must have been obvious to him that, to say the least, the legality of his actions and those of his men would be placed in issue. Yet he did so apparently without any hesitation or reluctance. A perusal of the record of fourth respondent's evidence shows that he could not have been in any doubt about the "ultimate thrust and importance" of the potentially incriminating questions that were put to him. The possible unlawfulness of the conduct of him and his squad was exploited to the full by the legal representatives of the accused when they cross-examined him. The object of this cross-examination (which altogether runs to 150 pages of the record) was plainly to discredit the fourth respondent by seeking to show that the shooting by him and his men had been unnecessary, unreasonable and thus unlawful. In his evidence-in-chief the fourth respondent had mentioned two reasons why the squad had fired into the crowd: because their lives were in danger

and because they wanted to arrest the stone-throwers. Under cross-examination these reasons were immediately challenged by the attorney appearing on behalf of the first two accused; and in the ensuing questions it was made clear that the defence did not accept the reasons advanced and that the defence case was that the true reasons were to disperse the stone-throwers, to teach them a lesson and to cause them to desist from their stone-throwing activities. This was the general tenor of the cross-examination. In this setting an evaluation of any particular question in isolation is not significant. From the flow and thrust of the cross-examination as a whole it must have been manifest to fourth respondent that he was accused of having acted unreasonably, improperly and unlawfully and that the object of the questions was to get him to incriminate himself.

As to (c), Lwane's case made it clear that the

rationale underlying the privilege against self-incrimination is the encouragement of persons to come forward to give evidence in courts of justice by protecting them as far as possible from injury or needless annoyance in consequence of doing so (see 438 G and also 444 E). While this reason is pertinent in the case of the ordinary citizen, it is less appropriate in the case of a police officer who is obliged by virtue of his office to give evidence concerning matters arising from the execution of his police duties, particularly where the incriminating questions relate to the propriety and/or lawfulness of the manner in which he performed those duties. Of course, if he refuses to answer the questions the Court must perforce uphold his privilege to do so. But in the event of his answering such questions (not having been cautioned) there is less reason in his case than in other cases to exclude the evidence. Moreover, the propriety of police conduct is a matter of

public concern, and public policy requires that such conduct should, as far as possible, be open to scrutiny in the courts. This factor, where applicable, also tends to countervail the rationale for excluding self-incriminating evidence. These considerations lead to the conclusion that, contrary to the view of the trial Judge, there were sound reasons for holding the evidence in question to be admissible; and that it serves the due administration of justice to do so.

For these reasons I am of the opinion that in all the circumstances the evidence should have been admitted. That being so the next question is: to what relief is appellant entitled? It seems to me that the only relief which this Court is empowered to grant is a setting-aside of the fourth respondent's acquittal and the ordering of a re-trial **de novo** before another Judge and assessors (cf S v Rosenthal 1980 (1) SA 65 (A), at 82 H; see also S v Seekoei 1982 (3) SA 97 (A), at 103 G-H).

As the cases quoted indicate this Court has a discretion in the matter. Although the charges preferred against the fourth respondent are very serious there are a number of factors which persuade me to exercise this discretion against ordering a trial **de novo**. The original trial, as I have indicated, was a complex and lengthy one. The events with which the case is concerned occurred about seven years ago and the recollections of eye-witnesses must by now have dimmed considerably. And this applies to fourth respondent as well. At the hearing of this appeal I did not gain the impression from appellant's counsel that the prosecution was keen to have a trial **de novo**. On the contrary it was suggested by counsel (as I understood the submission) that the Court could order the re-opening of the case in order that the excluded evidence be admitted and the respondents be given the opportunity to lead further evidence, if so advised. A trial **de novo** would involve only the fourth respondent

and none of the other respondents. The fourth respondent would thus again be placed in jeopardy and there is no certainty that the trial would result in a conviction. In view of these circumstances I am of the view that the discretion of this Court should be exercised against an order for a trial *de novo*. Accordingly there is no need to set aside fourth respondent's acquittal.

As to costs: I do not think that the appellant's very limited success warrants an order for costs in its favour. The respondents do not ask for costs.

It is accordingly ordered as follows:

(1) The applications to have reserved in terms of sec 319 of the Criminal Procedure Act 51 of 1977 questions 4 and 6 are dismissed.

(2) The applications to have reserved in terms of sec 319 questions 1 and 2 are allowed.

(3) The answer to question 1 is: "Yes it was."

(4) The answer to question 2 is: "No it was not."

(5) In terms of sec 319, read with secs 322 (4) and 324 of the Criminal Procedure Act 51 of 1977, no order is made in consequence of the answer given to question 2.

(6) There is no order as to costs.

M M CORBETT

BOTHA JA)
F H GROSSKOPF JA) **CONCUR**
NICHOLAS AJA)
KRIEGLER AJA)