***IN THE SUPREME COURT OF APPEAL***
***OF SOUTH AFRICA***

Case No: 369/98

In the matter between:

**THE DIRECTOR OF PUBLIC PROSECUTIONS :**
**NATAL**

**Appellant**

and

**SANDILE MAGIDELA**
**First Respondent**

**THEMBA NGWANE** **Second Respondent**

**CORAM :** **GROSSKOPF, HARMS, OLIVIER JJA, MELUNSKY and MPATI AJJA**

**HEARD :** **9 NOVEMBER 1999**

**DELIVERED :** **17 MARCH 2000**

**JUDGMENT**

**QUESTIONS RESERVED IN TERMS OF SECTION 319 OF ACT 51 OF 1977 - WHETHER PROPERLY RESERVED - DUTY OF COURT TO INFORM ACCUSED OF RIGHT TO SILENCE**

**MELUNSKY AJA/**

MELUNSKY AJA:

[1] The appellant is the Director of Public Prosecutions, Natal. On 22 August 1997 the two respondents, who were each represented by *pro Deo* counsel, appeared before Magid J and assessors in the Southern Circuit Local Division of the Natal High Court charged with the murder of Angela Maria Maharaj ("the deceased"). The first respondent pleaded guilty but a plea of not guilty was entered after he had explained that he was present when the deceased was killed, but that he did not kill her. The second respondent pleaded not guilty.

[2] During the hearing a trial within a trial took place for the purpose *inter alia* of considering the admissibility of records of proceedings which had previously been held in the Magistrate's Court in terms of s 119 of the Criminal Procedure Act, 51 of 1977 ("the Act"). One of the witnesses called by the State in those proceedings was Mr Winter, a magistrate of Port Shepstone. He testified that on 7 March 1996 the first respondent appeared before him for the purpose of pleading in terms of the section to the aforesaid charge of murder. The Magistrate informed the first respondent that he had the right to legal representation to which the first respondent replied that he wanted to conduct his own defence and that he did not wish to apply for legal aid. The Magistrate explained the nature of the s 119 proceedings to the first respondent and the charge was then put to him. The first respondent confirmed that he understood the charge and pleaded guilty. Mr Winter proceeded to question him in terms of s 112(1)(b) of the Act after he had explained the nature and effect of the subsection to him.

[3] On 18 March 1996 the second respondent also appeared before Mr Winter for the purpose of pleading under s 119 of the Act. The Magistrate followed the same procedure in the case of the second respondent as he did in relation to the first respondent, save that he informed the second respondent about his right to legal representation after he had explained the nature of the s 119 proceedings to him. The second respondent declined legal representation and pleaded guilty. Thereupon the Magistrate explained the import of s 112(1)(b) to the second respondent and went on to question him in terms of the

subsection. The Magistrate was satisfied that both respondents, in response to the questions put to them, admitted the allegations in the charge. Accordingly he stopped the proceedings against them, as he was obliged to do in terms of s 121(2)(a) of the Act. The appellant thereafter arraigned the respondents in the High Court for trial - and not for sentence - under s 121(3)(b).

[4] During the hearing of the trial within a trial in the court *a quo*, counsel for the first respondent, while cross-examining Mr Winter, put the following question to him:

> "Now at no stage prior to the accused being asked to plead and all these explanations that you've given him did you deem it necessary to inform the accused that he also has a right to remain silent, did you?"

Mr Winter agreed that he

> "did not explain that to him pertinently or explicitly in those words."

After counsel had suggested to the witness that he did not warn the first respondent of his right to remain silent because he had already fully incriminated himself by his plea of guilty, the learned judge intervened in the questioning of the witness. The record then reads:

> "Magid J: But it's quite clear Mr Winter - Mr Winter, you concede that at no stage did you tell the accused, when you were questioning him under 112(1)(b), or in terms of the form relating to

112(1)(b), did you tell him he didn't have to answer the questions. In other words that he had a right to remain silent. I'm not sure that he has a right to remain silent in those circumstances but that's a legal debate which we will have later. Did you tell him at any stage that he didn't have to answer any of your questions? -- M'Lord, in those words, no, I didn't deem it necessary for a number of reasons which you may not want to hear.

In those words or in any other words, because you in effect told him he had to answer the questions, didn't he? -- My humble opinion, if I may for a moment, is ...(intervention)

Let's just go back to what the form says. You told him you were going to ask him some questions to satisfy yourself that he had - that he intended to plead guilty to the offence. In other words, that he admitted all the elements of the offence. Isn't that right? -- Yes, M'Lord, that is correct.

And by inference he had to answer the questions in order to enable you to decide whether he's pleaded guilty - whether he admitted all the elements of the offence. -- Well, M'Lord, yes, but he could also give exculpatory responses naturally.

Oh, yes, of course, I understand that. -- And as a result I ... (intervention)

But at no stage did you say to him, 'You have the right to keep quiet altogether'? -- M'Lord, no, that is something which one would expect - I would expect to do under section 115 with a plea of not guilty."

[5] Counsel for the second respondent merely put to Mr Winter that he did not

"explain the (second respondent's) right to remain silent to him."

To this the witness replied:

"M'Lord, no, only the explanation regarding 112(1)(b). I did not say to him he doesn't have to answer my questions."

I have quoted from the record at some length because of the opening remarks of the learned judge in his judgment on the admissibility of the records of the s 119 proceedings. He said:

> "We have just completed the State case in a trial within a trial relating to the admissibility of the record of section 119 proceedings. In those proceedings I gather, for this is my decision, that the two accused pleaded guilty and were then questioned in terms of the provisions of section 121 of the Criminal Procedure Act, read with section 112(1)(b) of the Criminal Procedure Act.
>
> It is apparent on the evidence of Mr Winter, the Magistrate before whom the two sets of plea proceedings were taken, that the rights of the accused to legal representation were fully explained to them respectively before their pleas were taken. It is equally clear from Mr Winter's evidence, which is challenged by nobody and quite rightly so, that he did not, *before taking their pleas*, explain to the accused that they had a right to silence. On the basis of this narrow point, Mr Strachan for accused No 1 and Mr Dicken for accused No 2 submit that the record of the proceedings in terms of section 119 of the Criminal Procedure Act are inadmissible and should be excluded." (Emphasis added.)

[6] The trial judge went on to rule that the records of the s 119 proceedings were inadmissible for reasons which I shall later set out. The remaining evidence, in the view of the court *a quo*, was insufficient to support the convictions of the respondents. In the result the first respondent was acquitted after he had closed his case without leading evidence and the second respondent was discharged at the close of the State's case.

[7] At the request of the prosecutor, Magid J subsequently reserved the following questions for the consideration of this Court in terms of s 319 of the Act:

1. Whether the respondents had the right to remain silent after they had pleaded guilty during the proceedings conducted in terms of s 119 of Act 51 of 1977; and
2. whether there was a duty to inform the respondents of such right after they had pleaded guilty; and
3. whether the Magistrate's failure to do so necessarily rendered the record with its contents of the said proceedings inadmissible at the subsequent trial of the respondents.

[8] One of the matters raised by counsel for the respondents was whether the questions were properly reserved in terms of s 319(1). To decide this point it is necessary to deal with the requirements of the section. For the purposes of this appeal the following requirements are relevant:

1. Only a question of law may be reserved;
2. The question of law must arise "on the trial" in a superior court;
3. The reservation may be made by the court of its own motion or at the request of the prosecutor or the accused in which event the court should "state the question reserved" and direct that it be entered in the record.

[9] The provisions of s 319 and its predecessors have been the subject of judicial interpretation over the years and in order to see whether the requirements of the section were complied with in this case it is important to consider how the section has been construed. The first requirement is not complied with simply by stating a question of law. At least two other requisites must be met. The first is that the question must be framed by the judge "so as accurately to express the legal point which he had in mind" (*R v Kewelram* 1922

AD 1 at 3). Secondly, there must be certainty concerning the facts on which the legal point is intended to hinge. This requires the court to record the factual findings on which the point of law is dependent (*S v Nkwenja en 'n Ander* 1985 (2) SA 560 (A) at 567B-G). What is more, the relevant facts should be set out fully in the record as part of the question of law (*S v Goliath* 1972 (3) SA 1 (A) at 9H-10A). These requirements have been repeatedly emphasised in this Court and are firmly established (see, for example, *S v Khoza & Andere* 1991 (1) SA 793 (A) at 796E-I). The point of law, moreover, should be readily apparent from the record for if it is not, the question cannot be said to arise "on the trial" of a person (*S v Mulayo* 1962 (2) SA 522 (A) at 526-527). *Non constat* that the point should be formally raised at the trial: it is sufficient if it "comes into existence" during the hearing (*R v Laubscher* 1926 AD 276 at 280; *R v Tucker* 1953 (3) SA 150 (A) at 158H-159H). It follows from these requirements that there should be certainty not only on the factual issues on which the point of law is based but also regarding the law point that was in issue at the trial.

[10] Before considering whether there was proper compliance with the provisions of s 319, it is necessary to have regard to certain other provisions of the Act and to the grounds upon which the learned judge ruled that the

proceedings in terms of s 119 were inadmissible. Section 119 authorises a prosecutor to put a charge to an accused person in a magistrate's court when so instructed by the director of public prosecutions, notwithstanding that the alleged offence may be tried by a superior court or is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of the magistrate's court. When the charge is put, the accused

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

If the accused pleads guilty the magistrate, in terms of s 121(1), is required to question the accused pursuant to s 112(1)(b)

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

[11] In *S v Nkosi en 'n Ander* 1984 (3) SA 345 (A) the question for decision was whether the Magistrate was obliged to inform the accused of their right to remain silent after they had pleaded guilty but before being questioned in terms of s 112(1)(b). It was held at 353D-E that it was not necessary for the Magistrate to advise the accused of this right as, by their pleas of guilty, they had already admitted the State's case; that the purpose of questioning the accused was not primarily directed to self-incrimination but to protecting them against the consequences of an unjustified plea of guilty; and that any warning

to the accused at that stage would conflict with the spirit of ss 119, 121(1) and 112(1)(b) and the scheme of the Act. This passage was reaffirmed in the majority judgment in *S v Mabaso and Another* 1990 (3) SA 185 (A) at 201C-E but was criticised in the minority judgment of Milne JA (with whom Smalberger JA concurred) at 213B-H.

[12] In the court *a quo* Magid J referred to his own judgment in *S v Langa* 1996 (2) SACR 153 (N) in which he held, following the majority judgment in *S v Mabaso*, that the Magistrate's failure to advise the accused of their right to legal representation and their right to remain silent before pleading in terms of s 119 of the Act, did not render the record of the proceedings inadmissible. He concluded, however, that *S v Langa* was wrongly decided on the basis of the decision in *S v Maseko* 1996 (2) SACR 91 (W) in which Borchers AJ held, *inter alia*, that in the light of s 25 (3)(c) of the Constitution of the Republic of South Africa Act 200 of 1993 (the "interim Constitution") the ratio in *S v Nkosi* was no longer "sound reasoning" (at 94f). She decided that statements made in terms of s 112 (1)(b) of the Act by an unrepresented accused who had pleaded guilty in terms of s 119, were not admissible unless the accused was informed of "his rights not to incriminate himself and ... of the consequences which may flow from doing so" (at 97b).

[13] Magid J went on to say the following:

> "I am in respectful agreement with the judgment of Borchers AJ in his conclusion that the phrase 'plea proceedings' in section 25(3)(c) of the interim Constitution cannot be interpreted only to mean the proceedings which follow upon a plea of not guilty and not to include the proceedings following upon a plea of guilty.
>
> I am therefore of the opinion that the judgment of Borchers AJ in Maseko's case was correct and that my judgment in the case of Langa, to the extent that it appears to refer to the failure to advise an accused person of his right to remain silent, is wrong. As it is common cause in this case that the accused were not advised of their right to remain silent during the plea proceedings, it seems to me that I must uphold the point taken by counsel for the defence and rule that any admissions which may have been made in the course of the section 119 proceedings, are inadmissible."

The learned Judge was apparently unaware of the contrary view expressed in *S v*

*Damons and Others* [1997] 1 All SA 53 (W).

[14] Section 25(3)(c) of the interim Constitution provided for every accused person to have the right to a fair trial, which included the right

> "(c) ... to remain silent during plea proceedings or trial and not to testify at the trial."

The Constitution of the Republic of South Africa Act, 106 of 1996 ("the new Constitution") superseded the interim Constitution with effect from 4 February 1997. In this Court both counsel correctly submitted that the reserved questions had to be answered in the light of the provisions of the interim Constitution which was in force when the plea proceedings in terms of s 119 took place. For present purposes the provisions of the new Constitution are not strictly relevant and it is not necessary to deal with the differences in expression between the interim and present Constitutions.

[15] Although constitutional issues require some consideration in this appeal, the outcome depends largely upon an interpretation of the provisions of the Criminal Procedure Act and how those provisions are to be applied to the facts of this matter. In terms of item 17 of the Sixth Schedule to the new Constitution, it is clearly in the interests of justice for this Court to determine the matters in dispute.

[16] It will be recollected that Magid J intimated in his judgment quoted in para 4 above that the question that was in issue was whether the records of the s 119 proceedings were inadmissible on the grounds that the Magistrate did not,

*before* taking the respondents' pleas, explain to them that they had a right to silence. This was not a question reserved in terms of s 319. Although the learned judge approved of the decision in *S v Maseko* he nowhere stated explicitly in his judgment that he regarded the issue for determination to be whether the respondents should have been informed of their right to silence *after* pleading and before being questioned in terms of s 112(1)(b) of the Act. However he did say that the respondents

> "were not advised of this right to remain silent *during the plea proceedings"*

and he went on to rule that

> "*any admissions* which may have been made in *the course of the section 119 proceedings* (were) inadmissible."

[17] It would appear from the judgment, therefore, that the question which seems to have exercised the learned judge's mind was whether the respondents should have been informed of their right to silence before pleading. In the result there must be considerable doubt on whether, in stating the questions of law, the learned judge accurately expressed the legal point which he had in mind during the hearing. This might have been a matter of importance if the questions of law had been reserved on the motion of the judge (See *S v Khoza* at 796E-I) but it is of less significance where, as here, the questions were reserved

at the request of the prosecutor. It is permissible for a judge to reserve questions of law which were not dealt with in his judgment, provided that they arose "on the trial" of the accused. It is clear from the evidence in the court *a quo* that the Magistrate was questioned on whether he had informed the respondents of their right to remain silent after their pleas of guilty. It is arguable that to this extent the questions reserved did indeed arise "on the trial" of the respondents but it is not necessary to decide this point.

[18] The more substantial issue concerns the learned judge's apparent acceptance of the proposition that the mere failure to inform the respondents that they had a right to silence *ipso facto* resulted in an unfair trial and, in consequence, rendered the s 119 records inadmissible. Although s 25(3)(c) of the interim Constitution provided that one of the requirements of a fair trial was that an accused person had the right to remain silent during plea proceedings, it did not provide that he or she was entitled to be informed of this right (cf s 25(1)(a) and (b); s 25(2)(a) and (b); and s 25(3)(b) and (e)). Despite this omission fairness would, in general, require that he or she should be so informed (cf *S v Khan* 1997 (2) SACR 611 (A) at 620c). Moreover a right to a fair trial is broader than the list of specific rights set out in paras (a) to (j) of s 25(3) (*S v Zuma and Others* 1995 (2) SA 642 (CC) para 16). Where the issue of admissibility of evidence arises under the interim Constitution, therefore, the decisive question is whether the admission of the evidence would violate the accused's right to a fair trial (*S v Marx and Another* 1996 (2) SACR 140 (W) at 144g-j).

[19] The decision in *S v Nkosi* and the majority judgment in *S v Mabaso* may have to be revisited in the light of constitutional advances which require criminal trials to be conducted according to the notions of basic fairness and justice (see *S v Ntuli* 1996 (1) SA 1209 (CC) at para 1) but this is not the appropriate occasion to reconsider the earlier decisions of this Court. I will, however, assume, what appears to be reasonable, that the provisions of the interim Constitution required a judicial officer, in general, to inform an unrepresented accused of the right to silence during plea proceedings. It is only necessary to add in this regard that to inform an accused person of the right to silence after he or she has pleaded guilty may serve little purpose but there is no need to decide at what stage in the plea proceedings the accused should be

so informed.
[20] Where the learned judge *a quo* erred, in my view, was his apparent acceptance of the fact that the failure to have informed the respondents of their right to silence resulted in the denial of a fair trial. It is not every breach of the provisions of the interim Constitution that automatically leads to the trial being unfair as fairness is an issue that has to be decided on the facts of each case. (See *Key v Attorney-General, Cape Division and Another* 1996 (4) SA 187 (CC) at para 13; *S v Khan* at 618 b-d). The factual background to the appearances of the respondents before the Magistrate, which was covered by the evidence of the State witnesses in the court *a quo*, was not referred to in the judgment of the learned judge. It appears from the evidence that both respondents were informed on more than one occasion by members of the South African Police Services that they had the right not to make any statement relating to the alleged offence. Indeed, and as I understand the evidence of Captain Myburgh in the court *a quo*, he informed the first respondent shortly before the latter's court appearance on 7 March 1996 that he was not obliged to make a statement to the magistrate. The position regarding the second respondent does not appear to be as explicit. He was, however, according to the evidence, advised on two occasions on 17 March that he need not make any statement to the police concerning his alleged involvement in the murder of the deceased but he volunteered that he would make a statement in court. On the following day, and shortly before he was taken to the magistrate's court, the second respondent was warned by Captain Myburgh "in terms of Judge's Rules, in terms of the old Constitution section 25" . Implicit in this alleged warning was an intimation to the second respondent that he was not obliged to make a statement to the magistrate.

[21] The learned judge excluded the evidence of the proceedings under s 119 of the Act at the close of the State's case of the trial within a trial because of the Magistrate's failure to advise the respondents of their right to remain silent. In the result the respondents were not required to testify. Magid J did not consider whether the police evidence was credible and acceptable or whether the information allegedly conveyed to the respondents by the police was sufficient to enable them to understand and appreciate their legal rights during

the plea proceedings. These are not matters that can be decided by this Court, particularly in the absence of the respondents' evidence. All that can be said is that it is reasonably possible that, despite Mr Winter's failure to inform each respondent of his constitutional rights, one or both might have been aware of their right to remain silent. If either respondent was so aware, Mr Winter’s omission may not have affected the fairness of the hearing. The points of law which were reserved depended upon the fairness of the hearing before the Magistrate and this hinged on the surrounding factual issues. In the absence of factual findings by the trial judge it is not possible for this Court to decide on the fairness of the trial or to provide meaningful answers to the questions reserved under s 319.

[22] In the result no order is made.

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L S MELUNSKY
ACTING JUDGE OF APPEAL

Concur : GROSSKOPF
HARMS
OLIVIER JJA
MPATI AJA