



**REPORTABLE**

CASE NO: SA 05/2012

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**DEON ENGELBRECHT**

**Appellant**

and

**THE STATE**

**Respondent**

**Coram:** SHIVUTE CJ, MARITZ JA and MAINGA JA

**Heard:** 01 November 2012

**Delivered:** 14 July 2017

**Summary:** Appellant was convicted in the High Court of murder solely on the single evidence of a confession which the appellant had made to a justice of the peace. The appeal was against conviction only directed at the admissibility of the confession. The attack on the confession was two pronged, first that the requirements of s 217(1), (that the confession was made freely and voluntarily by the appellant whilst in sound and sober senses and without having been unduly influenced thereto) were not met and secondly that appellant's rights to legal representation were not explained and therefore that the admission of the

confession infringed the appellant's right to a fair trial granted by Art 12(1)(a) and (f) of the Constitution.

Held that the alleged confession on which the trial court relied for its conviction was not a confession as the statement did not amount to unequivocal acknowledgement of guilt, rather it was an admission in terms of s 219A.

Held, further that on the evidence the requirements of s 217(1) or that of s 219A as the court found the statement to be an admission were met.

Held, further that while the justice of the peace warned the appellant of his right to legal representation, he failed to record the response of the appellant to the warning and he was a poor witness in his oral evidence on that point, he could not recall whether the appellant wanted a legal representative of his own choice or that funded by the State.

Held, further that a court has a discretion to allow or exclude unconstitutionally obtained evidence or evidence in conflict with the constitutional right for reasons of public policy. No strictly exclusionary rule is adopted in exercising the court's inherent power in ensuring a fair trial.

Held, further that it is now settled law that an accused person under arrest depending on the facts of each case, in particular the personality and the characteristics of the particular accused should be comprehensively informed of his/her right to legal representation, which includes the right to apply for legal aid.

Held, further that failure to inform the accused properly of his right to consult there and then with a legal representative violates a fundamental right of the accused.

Held, further that in as much as there is no hard and fast rules possible in regard to adequacy of warnings related to legal representation, the least that the justice of the peace should have done is to record the appellant's reaction to the warning.

Held, further that the statement of the confession speaks for itself, the justice of the peace failed to meaningfully advise the appellant of his right to legal representation.

Held, further that the admission of the confession relied on by the trial court to convict the appellant infringed the appellant's right to a fair trial granted by Art 12(1) of the Constitution.

Held, further therefore that the admission of the confession had to be excluded.

Held accordingly that the appeal by the appellant against his conviction had to succeed and both the conviction and sentence had to be set aside.

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### **APPEAL JUDGMENT**

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MAINGA JA (SHIVUTE CJ concurring):

[1] This appeal was heard by a full bench of this court (Shivute CJ presiding) on 01 November 2012. The Chief Justice allocated the writing of the judgment to

Maritz JA (who has since retired). In the years that followed after the hearing until his retirement in 2014 and beyond his retirement he did not produce a draft judgment for consideration despite promises to do so. I have since been informed that due to medical conditions Maritz JA is in no position to perform his judicial functions. Being one of the three judges who heard the appeal, the mandate is on me to prepare a judgment hoping that the Chief Justice would signify his agreement in the judgment, in which event it would constitute the majority judgment of this court.

[2] The appeal concerns conviction only.

[3] The appellant was convicted in the High Court (main division) of murder and was sentenced to 15 years imprisonment. He appealed to this court with leave of the court below. The attack on the conviction is directed solely to the single evidence of the admissibility of a so called confession upon which appellant was convicted, which he made to Inspector Oelofse on 23 December 2003. It will become apparent below why I refer to the confession as 'so called'. The ground upon which the attack on the conviction is founded is in this form.

(a) The learned judge erred and/or misdirected himself by finding the confession made by the appellant to be admissible as evidence against him while the State did not prove beyond reasonable doubt that –

- (i) The appellant's rights were properly explained to him;
- (ii) Appellant was not unduly influenced in making the confession;

- (iii) The appellant was in his sound and sober senses when he made the confession; and
- (iv) The appellant made the confession freely and voluntarily and that there is no evidence outside the confession that the appellant committed the offence.

[4] The ground upon which reliance is placed to attack the admissibility of the so called confession raises two related enquiries, first, whether the requirement of s 217(1) of the Criminal Procedure Act 51 of 1977 has been met and secondly, whether in all the circumstances appellant has had a fair trial.

[5] Given the fact that only the admissibility of the confession is in dispute, the facts, therefore, will necessarily not be fully repeated here. It suffices merely to summarise salient facts which emerge from a detailed finding of facts by the court below and they are:

During the afternoon of 23 December 2003 and at or near the Gammams Training/Sports field in the Southern Industrial area in Windhoek, Richard Renton and the deceased purchased dagga and a quarter tablet of mandrax from a red house opposite Gammams Training Centre. Some 170 metres away from the red house they sat and indulged in the drugs they had bought. While on that scene the appellant arrived and asked to join them and also partook in the smoking of the drugs. When they had finished smoking, Renton and the appellant left the scene. Deceased remained on the scene. Some 600 metres away from the red house Renton and the appellant parted ways. Renton went to a nearby Service Station

where he bought food. He thereafter proceeded to a nearby park where he eventually fell asleep under a tree. He was awoken by Elton Bormann who enquired from him where the deceased was. Renton informed Elton that he left him near a railway line close to the red house. They decided to go and look for him at the spot where Renton had left him. As they approached the scene they saw someone who was lying on the ground covered with an empty bag of cement. Renton removed the bag and it was the deceased. He felt his pulses but there was none, he was dead. They went to the Service Station and called the Police. When the Police (W/O Sy) arrived they took them to the scene. While on the scene appellant also arrived. Upon enquiry appellant denied to having been with the deceased earlier on. Renton observed scratch marks on his left cheek and neck and he asked appellant how he sustained the scratch marks. Appellant's reply was that he tried to rob some white people and in the process he was scratched by a wire. The police contacted Inspector Nelius Becker and DW/O Kathema who also arrived on the scene. DW/O Kathema took photographs and compiled a photo plan. The deceased was half naked, his trousers were pulled to the knees. On the scene there was one heavy concrete kerb stone weighing 18.75 kg and one piece of paving brick weighing 0.80 kg both blood stained. Deceased had a big open wound at the back of the head.

[6] The medical report by Dr Simasiku Kabanje a Principal Medical Officer in the Forensic Department of Windhoek Central Hospital reveals that the death of Christo Moshoeshoe, a male aged 14 years took place on 23 December 2003 at about 15h00. The chief post-mortem findings were skull fracture, left parietal, temporal and base craemia for middle and left intrific cavity, brain laceration and

oedema. The cause of death is head injury, skull and base craemia fracture, brain laceration. The doctor further testified that the injuries on the deceased were blunt injuries caused by heavy objects with high energy and were consistent with the two blood stained concrete kerbstone and paving brick found on the scene as the objects used to inflict the injuries.

[7] Renton informed the Police that appellant was the last person in the presence of the deceased. Insp Becker instructed W/O Sy to take appellant to the mortuary and further to Katutura hospital. Insp. Becker met with the appellant at the mortuary. He interviewed the appellant after he had explained to him his right to remain silent and to legal representation. Insp Becker interviewed the appellant to get an explanation about the fresh injuries on his body and the blood stains on his trouser and especially that it was reported that the appellant was with the deceased earlier on in the day. Appellant elected not to remain silent and as a result he proceeded to interview him. Appellant made certain admissions and thereafter he was taken to the hospital for examination. Insp Becker contacted Insp Oelofse to come to the offices of the Serious Crime Unit to take a confession from the appellant, which Insp Oelofse did.

[8] From the summary of the evidence, it is apparent that there was no evidence that the appellant committed the crime. The fact that when he returned to the scene that afternoon, he had injuries which he did not have that morning or that he lied about how he sustained the injuries is not sufficient to conclude that he committed the offences. The State relied solely on the confession statement appellant made to Insp Oelofse.

[9] At the trial, State counsel attempted to hand up the confession in evidence but counsel for the appellant objected thereto. A trial within a trial ensued. The State called Insp Oelofse and recalled Insp Nelius Becker. Appellant also testified. Insp Becker repeated his evidence that led up to the taking of the confession. According to Insp Becker, appellant informed him that he had taken drugs earlier in the day. He denied making any promise, confronting appellant with any evidence of the scene of the crime or threatening him. He however did inform appellant that truthfulness is looked upon favourably by the courts. Appellant never reported to him that he was assaulted. He elected to give a statement freely and voluntarily.

[10] A justice of the peace Insp Oelofse testified and confirmed that on 23 December 2003 at about 18h30 he received a call from Insp. Becker to assist with taking down a confession. He proceeded to the offices of the Serious Crime Unit and arrived at 19h00. Appellant was brought to him by W/O Sy. He started taking down the confession at 19h05. He cautioned the appellant according to the Judge's Rules, particularly he cautioned him that he was not obliged to make a statement and further that if he did, the statement would be used in evidence. He further cautioned him that he was entitled to a legal representative of his own choice. It does not appear that he cautioned him that if he could not afford a legal representative of his own choice, the State would pay for one, which is one of the issues the objection to the confession is founded. Appellant understood the caution and choose to make a statement. Insp Oelofse further questioned the appellant on circumstances which led up to appellant making the statement. These



were questions such as, whether he was influenced to make a statement, promised anything if he were to make a statement, whether he made a statement verbal or written in regard to the incident to any person, whether he was assaulted or had injuries, whether he expected any benefits after he made the statement, whether he was under influence of alcohol or drugs, etc. To the question of expected benefits appellant's reply was 'yes to ease the case, to ease the case for myself'. This reply it is contended appellant was influenced to make a statement which is also one of the issues of the objection to the confession. As to the question whether appellant was under the influence of alcohol or drugs, the reply was that he was under the influence of drugs. But Insp Oelofse made observations that 'deponent looks sober'. He was asked when last he had used drugs. He replied 'this morning'. Further appellant was asked whether he still wanted to make a statement to which he answered in the affirmative. He was asked finally where he obtained the knowledge about which he wished to make the statement. The reply recorded is, 'I was not informed'.

[11] Just before the confession is reduced to writing, the following appears 'Hereafter the statement is voluntary made by the deponent which statement is written down in the deponent's own words and in his presence whilst making the statement without any questions being put to the deponent except questions being, asked to clarify indistinct or incomprehensible statements'.

[12] Insp Oelofse further testified that he spoke Afrikaans with the appellant and translated their conversation into English.

[13] The confession is recorded in this form:

'We were three persons, myself and the third person. They found me at the red house, in the Tsumeb river, they asked me if there is any mandrax tablets. They were referred to another person. The deceased, and the third person walked to the red house. I after a short while also walked to the red house. I found the deceased and the third person at the house busy smoking. I joint them and started to smoke. It was a quarter of a tablet. The deceased got his cream, and smoke. He then fell from his seat, an empty 20 liter canister. He stood up and walked from us exiting the gate. The deceased again fell down next to the fence. I think he wanted to "shit". I noticed him standing up and walking further. He exit the small gate, and about four steps further fell down. After we smoked our part, we walked, in the same direction. We found the person lying on the ground. His pants were off. I think he wanted to "shit" since I saw "shit" on his buttocks. I told the deceased friend, the third person that we should take him to the grass. He replied no, it is ok, that he will come and look for him later. The third person, and myself left to Fleiss garage, South Gate Service Station. After arrival I was told by the third person that the deceased had a twenty dollar on him. We turned back in our tracks and went back to the person, deceased. We searched the deceased jacket but could not find anything. We then went back to Fleiss. Half way I decided to go back. I walked up to the deceased, I got an idea, in that I must sodomise the person. I carried the deceased up to the back of the train tracks. I sodomised the deceased. He at first agreed that I can sodomise him, but after I finished he started to swear at me. I took a stone and threw it against his head. He as a result fell down. I than took a bigger stone and threw it on his head. I threw him three times with a pavement block and threw it on his head. I noticed him lying still. I took a bag "going" and pulled it over him. I then left to town. I came back around 15h00 – 16h00. I was found by the third person. I was pointed out by the third person. I was taken to the mortuary for samples and things. I was brought to the police station where I am giving the confession.'

[14] The versions of Inspectors Becker and Oelofse were contradicted by that of appellant. He confirmed that he was with the deceased and a third person (Renton). They smoked dagga together. Appellant and Renton left the scene but

parted ways. He went his ways and returned to the red house. As he was approaching the red house he saw the police and civilians at the place where he, the deceased and Renton were earlier on. On the scene Renton pointed at him and W/O Sy accused him of sodomising and killing the deceased. W/O Sy said that he had blood and injuries on him. He informed W/O Sy that he tried to rob a person and in the struggle the person scratched him. W/O Sy said he was lying and he was trying to remove himself from the scene. It was at that point Insp Becker joined the conversation. W/O Sy took him to Insp Becker and informed Insp Becker that appellant raped and killed the deceased. Insp Becker introduced himself and told appellant that it would be wise for appellant to cooperate and 'admit these things that were said and make things easier for himself'. Appellant then thought he would just give a statement and they would not threaten or assault him but release him. Insp Becker put him on his vehicle and they drove to the mortuary where blood was drawn from him and they took urine. At the mortuary Insp Becker informed him again that he should make things easier for himself and that he should explain things that were said on the scene, if he does not he would hand him over to the 'paraparas' who assault and torture people. At the offices of the Serious Crime Unit, Insp Becker called him and told him that if he does not cooperate he will make things difficult for himself, but if he does cooperate the sentence would be light and his case would be dealt with promptly. Insp Becker did not inform him of his right to remain silent or the right to legal representation. He was thereafter taken to Insp Oelofse who told him that he did not have time for him and should just answer questions put to him. Oelofse also did not inform him of his right to remain silent but informed him of his right to legal representation. He informed Insp Oelofse that he wanted someone to represent him. Oelofse asked

him whether he would apply to the Directorate of Legal Aid to which he answered in the affirmative but he continued asking him questions. Appellant was asked what he meant by his response ‘. . . to ease the case’. He said he gave that answer to the question because Insp Becker had told him that it would not be wise or help for appellant to go and change his version with Insp Oelofse. In a leading question by appellant’s legal representative, appellant said he expected benefits and that he would not have made that statement if he did not expect any benefits. Counsel for appellant further asked him why he made a statement to Insp Becker, his reply was that because Insp Becker was forcing him and telling him that it would be wise of him to rather admit that he raped and killed the deceased. He was further asked what he understood when Insp Becker said it will make the case easier for appellant. Appellant said he understood that to mean he would get a sentence lesser than 10 years and the matter would be dealt with expeditiously. Appellant was asked why he answered to a question put to him by Insp. Oelofse that he was under the influence of drugs. His reply was that he was drowsy but upon a question he said he last smoked dagga between 13h00 and 14h00. He was asked as to his experience previously how long after the smoke would the drugs still have an effect on him. Initially he said two to three hours but changed to three to four hours. The court, given that reply, remarked that, if he last smoked the dagga at 14h00 it would be five hours to the time the confession was taken. In cross-examination he changed to between 10h00 and 12h00 which corresponds with the time he gave to Insp Oelofse.

[15] At the end of the trial within a trial the confession was ruled admissible. Insp Oelofse was recalled to read the confession into the record as per para [13] above. The defence closed its case without leading any evidence.

[16] The question which arises is whether the requirement of s 217(1) were satisfied.

[17] The trial court found that the state witnesses (Inspectors Becker and Oelofse) were credible and that they had no reason to falsely implicate the accused. That there were few instances where they readily conceded what they had done or not, for example, both Inspectors admitted that they did not advise the appellant that if he could not afford a lawyer of his own choice, he could apply to legal aid. They also admitted that the appellant told them that he had smoked drugs earlier in the day. In regard to the appellant the trial court found that his evidence was littered with lies, contradictions and improbabilities. I agree. Appellant was proved to be a poor witness. The trial court was correct not to attach credence to his testimony on any of the disputed aspects of the enquiry. He claimed that Insp Becker told him to cooperate and admit the crime and that if he did not cooperate with Insp Becker he would make things difficult for himself, and if he cooperated the sentence would be light and that his case would be dealt with expeditiously. He denied being cautioned of his common law and constitutional rights and yet in cross-examination he admitted that he was informed of his constitutional rights including the right to apply for a state funded legal representative and that he did indicate to Insp Oelofse that he wanted to apply for a legal representative funded by the State but Insp Oelofse continued to ask him

questions. Insp Oelofse must have told him that he had no time for him and did not explain much about his rights and did not inform him of his right to remain silent and that he was assaulted before he gave the confession. When confronted in cross-examination about the allegations he made against the two Inspectors, and why the allegations were not put to the Inspectors when they testified, his reply is that he forgot to inform him. He denied having heard questions put to him in circumstances that led to him making a statement. He, for instance, did not hear the caution that he was not obliged to make a statement and added that maybe Insp Oelofse skipped that question. But he admitted most of the questions and answers favourable to his case. When asked about the question put to him whether he understood the warning Insp Oelofse gave him to which he had said 'yes', his reply was 'I am not sure whether Oelofse informed me or did not inform me about my rights'. He was asked why he did not inform his current legal representative, he laid the blame on his two previous legal representatives who had allegedly forced him to plead guilty on the strength of the confession. When asked why he did not tell Insp Oelofse that Insp Becker promised him a lighter sentence, his reply was that he had wanted to inform Insp Oelofse but Insp Oelofse stopped him. He testified that Insp Oelofse was against him and that the two Inspectors concocted against him.

[18] Appellant lied about how he sustained the injuries on his body. On the scene he said he struggled with white people, when a wire scratched him. During cross-examination he said he wanted to rob a black lady. He insisted that he was stoned or drugged and yet he recalls every little detail from the event since he met

the deceased and Renton that morning of 23 December 2003 to the time he made the confession.

[19] Sections 217 and 219A of the Criminal Procedure Act 51 of 1977 provides for the admissibility of confessions and admissions respectively.

**'217 Admissibility of confession by accused**

(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence.'

**'219A Admissibility of admission by accused**

(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence.'

[20] It must be shown or the prosecution should prove that the confession has been freely and voluntarily made by the deponent in his sound and sober senses and without having been unduly influenced in making the statement. In *S v Shikunga & another* 1997 NR 156 (SC) at 164A-D Mahomed CJ put it as follows:

'At common law, a confession made by an accused person is not admissible against him or her unless it is established that it was freely and voluntarily made, and that he or she was in sound and sober senses and not unduly influenced thereto. This is a crucial requirement in a fair system of justice. It goes to the heart of the rights expressly protected by art 12 of the Constitution. A statute which

invades that right subverts the very essence of the right to a 'fair trial' and the incidents of that right articulated in Art 12(1)(a), (d) and (f). Section 217(1)(b)(ii) constitutes such an invasion. (*S v Zuma & others* 1995 (2) SA 642 (CC) at para [33] at 659.)'

[21] In the case of an admission it must be shown that the admission was voluntarily made.

[22] The trial court relied on the confession to convict the appellant but on a careful examination of the statement, in my opinion, does not amount to a confession. A confession is 'an unequivocal acknowledgment of guilt, the equivalent of a plea of guilty before a court of law'. See *R v Becker* 1929 AD 167 at 171. In *S v Mofokeng* 1982 (4) SA 147 (T) at 149B Eloff J said:

'It has to be borne in mind that:

"The logical conclusion from these cases is that, in crimes which require *mens rea*, an account by the accused of his actions, however detailed and damning, will hardly ever amount to a confession (unless) there be something in the surrounding circumstances to indicate that what was said amounted to an unequivocal admission of guilt) because it would always be possible to give some further explanation which would negative the mental intent."

(Hoffmann and Zeffert *South African Law of Evidence* 3 ed at 181.)

[23] In the statement made by the appellant, the part relevant to the murder charge reads as follows:

'After arrival I was told by the third person that the deceased had a twenty dollar of him. We turned back in our tracks and went back to the person, deceased. We searched the deceased jacket but could not find anything. We then went back to Fleiss. Half way I decided to go back. I walked up to the deceased, I got an idea, in



that I must sodomise the person. I carried the deceased up to the back of the train tracks. I sodomised the deceased. He at first agreed that I can sodomise him, but after I finished he started to swear at me. I took a stone and threw it against his head. He as a result fell down. I than took a bigger stone and threw it on his head. I threw him three times with a pavement block and threw it on his head. I noticed him lying still. I took a bag "going" and pulled it over him. I than left to town. I came back at around 15h00 – 16h00. I was found by the third person. I was pointed out by the third person. I was taken to the mortuary for samples and things. I was brought to the police station where I am giving the confession.

When did the incident took place? It was between 13h00 and 14h00 today. All I can say is that I was under the influence of drugs.'

[24] The underlined sentences cannot amount to a confession, at most it is an unequivocal admission of assault on the deceased. In fact he gave a defence that he was under the influence of drugs. Nevertheless I am satisfied that the assault on the deceased caused his death given the findings of the medical report above. To have directed heavy concrete slab at the head of the deceased not once but three times appellant foresaw that death would ensue. I am also, given the first enquiry, satisfied that the admission on which the court below relied for a conviction was voluntarily made by the appellant.

[25] This brings me to the second enquiry. This relates to the constitutional right of the appellant to be comprehensively informed of the right to legal representative which includes the right to be informed to apply for a State funded legal representative. This ground occupied more than three quarters of counsel for the appellant's time when he addressed court. The enquiry turns on the constitutional admissibility of a confession or an admission as I have found the

statement of the appellant to be an admission. The question is whether in all the circumstances of this case appellant received a fair trial.

[26] The accused or the appellant in this case bore the *onus* of proof in regard to the alleged constitutional infringement of his right. See *S v Soci* 1998 (2) SACR 275 (ECD) at 288h and 289d.

[27] There has been a number of decisions in this court and the High Court on the effect of the admissibility of self-incriminatory acts by an accused following upon infringement of the right to legal representation. *S v Kau & others* 1995 NR 1 (SC); *S v Shikunga & another* 1997 NR 156 (SC); *S v Bruwer* 1993 NR 219 (HC); *S v Kukame* 2007 (2) NR 815 (HC); *S v Malumo & others* 2007 (1) NR 72 (HC); *S v Malumo & others* (2) 2007 (1) NR 198 (HC); *S v De Wee* 1999 NR 122 (HC).

[28] The principle gleaned from some of these decisions is that a court has a discretion to allow or exclude unconstitutionally obtained evidence or evidence in conflict with a constitutional right for reasons of public policy. See *S v De Wee*, at 127I; *S v Kukame* at 837I; *S v Malumo & others* at 215 para 88. See also *S v Soci* at 292I; *S v Khan* 1997 (2) SACR 611 (SCA) 619a-g. No strictly exclusionary rule is adopted in exercising the court's inherent power in ensuring a fair trial.

[29] The correct approach adopted in considering evidence obtained in conflict with constitutional rights was spelt out, though in a different context, in *S v Shikunga & another*, at 170F-171A-D by Mahomed CJ, after the learned Chief

Justice conducted a thorough survey of the approaches in four other jurisdictions, namely, Canada, United States, Jamaica, Australia, as follows:

'There can be no doubt from these authorities that a non-constitutional irregularity committed during a trial does not *per se* constitute sufficient justification to set aside a conviction on appeal. The nature of the irregularity and its effect on the result of the trial has to be examined. Should the approach be different where the error arises from a constitutional breach? That question assumes that the breach of every constitutional right would have the same consequence. In my view that might be a mistaken assumption and much might depend on the nature of the right in question. But even if it is assumed that the breach of every constitutional right has the same effect on a conviction which is attacked on appeal, it does not follow that in all cases that consequence should be to set aside conviction. I am not persuaded that there is justification for setting aside on appeal all convictions following upon a constitutional irregularity committed by a trial court.

It would appear to me that the test proposed by our common law is adequate in relation to both constitutional and non-constitutional errors. Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits. Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has been tainted by such irregularity. Where this question is answered in the negative the verdict should stand. What one is doing is attempting to balance two equally compelling claims – the claim that society has that a guilty person should be convicted, and the claim that the integrity of the judicial process should be upheld. Where the irregularity is of a fundamental nature and where the irregularity, though less fundamental, taints the conviction the latter interest prevails. Where however the irregularity is such that it is not of a fundamental nature and it does not taint the verdict the former interest prevails. This does not detract from the caution which a court of appeal would ordinarily adopt in accepting the submission that a clearly established constitutional irregularity did not prejudice the accused in any way or taint the conviction which followed thereupon.'

See also *S v Kandovazu* 1998 NR 1 (SC).

[30] Compare Mahomed CJ's observations above to that of Kriegler J in *Key v Attorney General, Cape Provincial Division & another* 1996 (4) SA 187 (CC) at 195G-196D paras 13 and 14 where the following was said:

[13] In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavor by international human rights bodies, enlightened legislature and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.

[14] If the evidence to which the applicant objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise objections to its admissibility. It will then be for the trial Judge to decide whether the circumstances are such that fairness requires the evidence to be excluded.

[31] In *S v Melani & others* 1996 (1) SACR 335 (E) Froneman J referred to the position in New Zealand on the same question in *R v Kirifi* (1992) LRC (Crim) 55 (NZCA) where the following is stated:

‘It seems to us that, once a breach of s 23(1)(b) has been established the trial Judge acts rightly ruling out a consequent admission unless there are circumstances in the particular case satisfying him or her that it is fair and right to allow the admission into evidence. What such circumstances might be is not a matter upon which the court is now required to give any ruling.’

[32] Relevant to the question under consideration are the provisions of Art 12 of the Namibian Constitution. Article 12(1)(a) provides that in the determination of any criminal charges against them, all persons are entitled to a fair hearing by an independent, impartial and competent court or tribunal established by law. Article 12(1)(f) provides that no persons shall be compelled to give testimony against themselves . . . .

[33] This case has its own peculiar circumstances. It is apparent from the pro forma form Insp Oelofse used that appellant was cautioned of his right to legal representative. But there is no answer recorded whether appellant wanted to make use of a legal representative there and then. In fact that caution is lumped together with other warnings, namely, that the appellant had nothing to fear and he should therefore speak the truth, that he was not obliged to make a statement and that if he does, the statement would be taken down and used in evidence. These warnings form the first paragraph of the document. What followed are questions to determine why appellant wanted to make a statement. The first question was, ‘do

you understand the warning I gave you?' The answer was 'yes.' The second question was, 'do you nevertheless still wish to make a statement?' The reply was 'yes, I can make one'. In cross-examination Insp Oelofse readily conceded that the pro forma document had no provision for the question that in the event an accused cannot afford a legal representative of his choice, he could apply for a State funded one. Insp Oelofse further conceded that he did not put such a question to the appellant. Upon the question by the court, Insp Oelofse said he would have proceeded taking down the confession even where appellant had indicated that he wanted legal representation. Insp Oelofse put the blame on the different versions of the pro forma documents that were available for the purposes of confessions; he said they vary as to the contents. Oelofse was the police officer who took a confession in *S v Kukame* above. However in *S v Kukame*, the form Insp Oelofse used had the necessary details that would be required to inform an accused regarding legal representation. Insp Oelofse in that case continued to take down the confession when the accused had indicated that he wanted legal representation. In that case he blamed the sequence of the questions on the pro forma document.

[34] In the present case, the appellant, denies and admits that he was informed of his right to legal representation. In his evidence in chief in the trial-within-trial, he states that when he was taken to Insp Oelofse, Oelofse at the outset must have told him that he did not have time for him and he should only answer questions that he was going to put to him. The examination of appellant on the issue of legal representation by his counsel proceeded as follows:

'Can you remember what did Oelofse tell you with regard to your rights? Oelofse did not explain much about my rights. He took out his card or an identification card of his and said that he was a police officer and then started asking me questions.

Did he tell you that or let me ask you that did he tell you that you had the right to remain silent and a right to a lawyer? That I was not told by him.

Did you at any stage indicated to him that you want a lawyer or you did not want a lawyer? Yes, he asked me such a question and then I told him that I wanted someone to represent me.

What question? What do you refer to such a question? He asked me if I was able to afford or if I could afford a lawyer.

Yes and I told him that I do not have money.

Yes and he asked me if I would be able to apply from the Directorate of Legal Aid and I told him yes. I will apply from them.

And then what did he say? Then he further started asking me questions.'

[35] The examination of the appellant by his counsel suggests that he was not informed of his right to legal representation but in the same vein he states that Insp Oelofse asked him all the necessary questions regarding legal representation and that notwithstanding the answers he gave thereto, Insp Oelofse continued to ask him questions. In cross-examination appellant was given the confession document and shown the warning on legal representation. He confirmed that portion and continued to say, 'but I think I was may be just not asked about it'. The public prosecutor took the appellant through the first paragraph of the document. Appellant admitted being informed of everything in that paragraph except legal representation and the caution of not being obliged to make a statement. This sounds in my view selective as to what appellant was informed and what not.

[36] The law on the issue of legal representation is that an accused person under arrest depending on the facts of each case, in particular the personality and the characteristics of the particular accused, see *S v Soci* at 289I; *S v Bruwer* at 223C, should be comprehensively informed of his/her right to legal representation, which includes the right to apply for legal aid. Where he has made the choice to be represented before making a statement he/she must be given the opportunity to engage his/her lawyer and the interrogation or the taking down of the confession/admission should be halted until he/she has consulted with his/her lawyer and indicated that he/she still wants to make a statement. The failure to inform the accused properly of his right to consult there and then with a legal representative violates a fundamental right of the accused.

[37] In *S v Kukame* at 834C Van Niekerk J referred with approval to the sentiments of Labe J in *S v Vumase* 2000 (2) SACR 579 (W) at 581 where it was stated that there is no duty on a policeman to advise an accused to obtain legal representation before making a statement. This statement should be understood in the broader context in which it was made by Labe J and in the context in which it was adopted by Van Niekerk J. It was in the context when the learned Judge said the following:

[62] Mr Dos Santos also took issue with the fact that accused was not specifically explained that he had a right to a lawyer, but I think the import of the two questions 'Do you have a lawyer?' and 'Do you want a lawyer?' is clear. By answering 'Not now', the accused clearly understood that he could have access to a lawyer if he wanted to. In his evidence he said that, although he knew that he had a general right to legal representation and specifically at the trial, he did not know that he needed a lawyer at the stage of the interview. This is something



different to wanting a lawyer. The fact that he might have needed a lawyer is something he could only realise with hindsight, perhaps after having consulted with his lawyer. Even if Scott had expressly advised him of his right to legal representation he would not then have realised that he needed a lawyer. I agree with what was stated in *S v Vumase* 2000 (2) SACR 579 (W) at 581, namely that there is no duty on a policeman to advise an accused to obtain legal representation before making a statement.

[63] To conclude, in my view, the accused was sufficiently informed of his rights when he made the admissions to Scott.'

Van Niekerk J was satisfied that accused knew he had a right to legal representation and that the requirements of the Constitution on the right to legal representation had been met and accused's trial could not have been less fair because the interrogating officer did not inform accused of his right to legal representation. Understood in that context I would have no quarrel with the statement. As I understand the authorities on this point, the arrested suspect must be seen to understand that he has a right to consult a legal adviser and nothing more. This is that where the accused knows that he/she has a right to legal representation, there is no duty on a policeman to inform him of that fact and may continue to take a statement from the accused if the accused wishes to make one.

Labe J put it thus at 581d-582a:

'The Constitution requires that an accused person should be advised of his rights in such a way that he is made aware of the contents thereof in a meaningful way. The Constitution does not require that an accused person be further advised on the best way to exercise such rights. See *R v Cullen* (1993) 1 LRC 610 (NZCA) at 613g-I where this was said:

“We entirely accept that the fundamental rights conferred or confirmed by the New Zealand Bill of Rights Act 1990 are not to be regarded as satisfied simply by some incantation which a detainee may not understand. The purpose of making a suspect aware of his rights is so that he may make a decision whether to exercise them and plainly he cannot do that if he does not understand what those rights are. For purposes of this case we are content to accept the formulations adopted by the Supreme Court of Canada in *Evans v R* (1991) 4 CR (4<sup>th</sup>) 144, 160, 162: when considering whether there has been a breach of the New Zealand Bill of Rights Act, what must govern is the substance of what the suspect can reasonably be supposed to have understood, rather than the formalism of the precise words used. If on the facts, it is reasonable to infer that the suspect understood what he had been told, the police are not required to go further.”

Both the duties of the presiding officer at a trial require to be carried out in a fair way. But those duties are not the same. The fact that a judicial officer may in certain cases be obliged to advise an accused person that he should avail himself of legal representation in order that the accused person be afforded a fair trial does not mean that the police officer taking a statement has, in order to be fair, to advise an accused person to obtain the services of a legal representative before he makes a statement. The giving of a statement by an accused person to the police often serves to facilitate a police enquiry. An accused's statement is important investigative tool, of which the police are entitled to avail themselves. Unlike the position of a judicial officer, who is an umpire who oversees the fairness of the proceedings before him, the police are in an adversarial position *vis-à-vis* an accused and as such the rules of fairness differ. A balancing of the rights of the State against the rights of an arrested person must be achieved in a way that is fair to both sides. In my opinion if a police officer is satisfied on reasonable grounds that an accused understands his rights fully he does not have to go further to advise him to obtain the services of a legal representative. To do so would in most cases render nugatory the right to ask an accused whether he wants to make a statement and to obtain such a statement.’

[38] In *S v Bruwer* at 223D Strydom JP put it thus:

'I am also mindful of the fact that reference in our Constitution to a fair trial forms part of the Bill of Rights and must therefore be given a wide and liberal interpretation. However, I fail to see how it can be said, even against this background, that a trial will be less fair if a person who knows that it is his right to be legally represented is not informed of that fact. Whether the fact that an accused was not informed of his right to be legally represented, resulted in a failure of justice is, as in most other instances where a failure of justice is alleged, a question of fact.'

[39] I agree with the sentiments expressed in *S v Vumase and S v Bruwer* above. In this case except for the warning of the right to legal representation, nothing else appears on the form. As already stated, what the appellant must have responded to the warning was not recorded. The accused himself denies and admits that he was informed of his rights on this point. Insp Oelofse has no idea as to what the appellant must have replied to the question of legal representation. I have no doubt that appellant was untruthful especially that he was selective in what he must have been informed and what not. In as much as appellant had the onus of proof in regard to the alleged constitutional infringement of his rights, Oelofse, although he did not deliberately deprive the appellant of his right but worked on the form as was provided to him, without providing where it was inadequate, I must resolve the benefit of the doubt in favour of the appellant. The trial court held that appellant was informed of his constitutional rights after it found that his version was littered with lies, contradictions and improbabilities. This finding is based on the lies appellant told about how he sustained the injuries on his body, the allegation of assault on appellant but he failed to inform his lawyer about the assault and appellant's version that he was under the influence of drugs when he made the statement to Insp Oelofse.

[40] I have no doubt that he was untruthful in all these instances and many more but on the issue of the rights to legal representation the statement speaks for itself. All that is recorded on that point is, 'the deponent was informed that he has the right to a legal representative'. How the appellant responded to that warning is not recorded and Insp Oelofse was a poor witness on that point in his oral testimony. There are no hard and fast rules possible in regard to adequacy of such warnings, *S v Soci* at 289J, but Insp Oelofse at the very least, should have recorded appellant's reaction to the warning. The authorities referred to above state that the arrested accused should be advised of his rights meaningfully so that he/she may make a decision whether to exercise them. That was not the case here, therefore the appellant's constitutional right to legal representation was violated. It then follows necessarily that the confession on which the trial court relied to convict the appellant must be ruled inadmissible. Appellant did not receive a fair trial since there was no other evidence other than the confession to convict the appellant. The conviction should be set aside.

[41] It is sad that those that are guilty should walk free due to blunders occasioned by the police officers in the investigation of crimes. In *S v Tjihorero & another* 1993 NR 398 (HC) at 404H Strydom JP as he then was, remarked as follows:

'Lastly, I wish to refer to the prescribed roneoed form which was used by Chief Inspector Terblanche when he took the statement of accused 1. Officers and magistrates using this form are, when the answers given to them by a particular deponent are not clear or need further elucidation, entitled and must ask further

questions in order to clear up such uncertainties, as long as the questions and answers thereto are also written down.'

[42] The judgment in the *Tjihorero* matter was delivered on 23 October 1993 and the remarks above were made then, but a decade and two months when the offence which forms the subject matter of this appeal was committed it appears that the Police Force was still using the same prescribed roneoed form and the justices of the peace in authority to take down confessions still committed the same mistakes as was when the *Tjihorero* matter was registered. It is just not acceptable.

[43] In the result I make this order.

1. The appeal succeeds.
2. The ruling admitting the confession admissible is set aside and substituted for the following order:  
  
    'The confession is ruled in admissible.'
3. The conviction and sentence are set aside.

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**MAINGA JA**

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**SHIVUTE CJ**

**APPEARANCES:**

Appellant:

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Instructed by Legal Aid

Respondent:

B L Wantenaar

Instructed by Prosecutor-General

