IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 1/8/2005
CASE NO.: A2093/03

In the matter between:

THE STATE

and

PIKE RAYMOND HLONGWANE AND TWO OTHERS

JUDGMENT

POSWA J:

When judgment was given on appeal, in this matter, I expressed agreement with the outcome, in all respects and with regard to each of the three 3 appellants, as set out in the judgment by my brother, De Villiers J. I shall refer to Mr Hlongwane, the fourth accused person in the Regional Court, as the first appellant, to Mr Thabethe, the fifth accused person in the Regional Court, as the second appellant and to Mr Mahlangu, the first accused person in the Regional Court, as the third appellant. I find it appropriate to remark about the

'~I~ third appellant's surname. He is referred to as either "Mhlanga," "Mhanga" or "Mahlangu," depending on what or where one is reading at the given time. He appears as "Mhanga" on the cover page to the transcript of the proceedings in the Regional Court, so also in the heads of argument prepared by his counsel, Mr Leballo, and in the charge sheet. He appears as "Mahlangu" on the front page of the transcript of the proceedings and where his name is given at the

commencement of his evidence. Because his name is written as "Mahlangu" at the commencement of his evidence I assume that "Mahlangu" is the correct surname. It is not uncommon for "African" names to be spelt, let alone pronounced, incorrectly, a practice that has not shown signs of declining ten (10) years after 1994. In my view, the right to human dignity, i.e. "inherent dignity and the right to have [one's] dignity respected and protected," envisaged in s 10 of the Constitution Act 108 of 1996, includes the right to be appropriately addressed. Those in government or in the civil service should be taking a leading role in implementing this part of the Constitution.

Returning to the appeal, itself, the facts are contained in the judgment by my brother, De Villiers, J. I shall confine myself to the aspects in respect of which I wish to make further comments. Both De Villiers J and I indicated that I would be submitting a separate judgment on certain aspects of the case.

The first aspect is the question of the failure by, Inspector Abednego Ghule, a member of the investigating team, to warn the third appellant, Mr Mahlangu, of his right, in terms of s 35(1)(b) of the Constitution Act of South Africa (the Constitution), before questioning him about the case. This was on the occasion when he, in the company of inspectors Sekhula and Nyalunga, went to the third appellant and arrested him. Ms Rosenblatt, who appeared for the respondent, submitted that there was no clarity as to whether the third appellant was under arrest when questioned by Inspector Ghule. It is, in my view, clear from Inspector Ghule's initial evidence, on this aspect, that the third appellant was under arrest. His evidence in this regard, when being cross-examined by Mr Maboea, Mr Mahlangu's legal representative before the Regional Court, reads;

> "CROSS-EXAMINATION BY MR MABOEA: Mr Ghule *when you arrested the accused* with whom were you? When *you arrested* the accused with whom were you? ---- I was with Mr Mahlangu, with inspector Sekhula, and inspector Nyalunga came later when we were going to accused 1.
>
> So you were only four? ---- At that point in time we were four. *Even when you arrested accused* 1 you were four? --- That is correct.

And how many cars were you using? - We used two cars.
What type of cars were they? --- Are you referring to the model or are you referring to the colours of the cars?

Whether they were sedans or bakkies or vans? --- The other one was an open van and the other one was closed van.

Where exactly did you arrest accused 1? ---- *We found him on his ~ay to his home.*

COURT: Is *it in other words you arrested him on the road? ---- That is correct."*

Whereabouts? --- Come again your worship?
Where about? ---- In Tweenfontein.

MR MABOEA: When you find him on his way home where, did you first go to his, were you also going to his home or did you go to his home first and met him on the way when coming from his home? --- We *arrested him on the road whilst* we *were going to his home.*

When you find [sic] him were you following him or how did you find him on the way?

COURT: I do not follow the question, was he, do you want to know whether he was driving in the same direction as they were or was he coming from the opposite direction?

MR MABOEA: Yes whether he was coming from the opposite direction or whether he was going the same direction? ---- *Where* we *arrested accused* 1 *it was in sort of* a *[sic] intersection* and we had to stop in the intersection and accused 2 showed us the accused that we are going to his home, it is just there next to the intersection that we stopped

And you, it was *you who arrested accused* 1? - That *is correct."* p104Line8p1 05Line17. [Emphasis added].

I should point out that Inspector Ghule's evidence regarding where Mr Mahlangu [first accused person and third appellant] was arrested did not remain as clear as in the above excerpt. He later contradicted himself . extensively in that regard (p113-p117 of the transcript). Whilst the Inspector

repeatedly said. in his evidence during cross-examination by Mr Maboea, that he arrested the third appellant at the intersection, when he and his colleagues came across him, it transpired that, in his, Inspector Ghule's, statement he said that he took the third appellant and other suspects to the police station where he *"arrested* them and read and explained to them their rights, at the *police station* and the exhibits were handed in." P113. [Emphasis added]. When he was confronted with his earlier evidence that he arrested the third appellant at the intersection and that he warned him of his rights there (p107 to p108), Inspector Ghule suddenly changed to say that he warned the third appellant at the intersection but that, because

> "there is a certain form that we complete at the police station and that form *was not completed at the intersection* and so we *had to explain again the rights of the suspects ....* I have explained to them of (sic) their rights when I *arrested them initially* and when we arrived at the police station *I further explained to them (sic) of their rights* because that form was not there." P114. [Emphasis added].

That was not the end to contradictions in Inspector Ghule's evidence on this aspect viz. when and where the suspects were arrested and when and where they were warned of their rights regarding making or not making statements. Having clearly gave the absence of the "form" at the scene of the arrest as the cause for a further warning at the police station, he now said that he was referring to there being no "form" at the police station and that he, nevertheless, "explained their rights to them again." P114 Line2-19.

Inspector Ghule's evidence on when and where the third appellant and the other suspects were arrested and warned is so riddled with contradictions and absurdities that it is, in my view, unacceptable that he completed his evidence and that the case was finalised without him being made aware of the impropriety of his and. in fact, his colleagues' conduct and the unacceptable unfairness with which they had handled the arrested persons. I should point out that even the warning that Inspector Ghule says was given at the time the third appellant and the other suspects were, respectively, found, is not only confusing but is unlikely to have been given, in the case of the third appellant in any event, at the intersection. I make this remark on the assumption that

my view with regard to Inspector Ghule's evidence and the absence of a warning to the third appellant are incorrect. Regarding this alleged warning, the following was said;

> "What exactly did you, which rights did you explain to him ... I have explained to the accused of his rights that he can give the statement *when* we *arrive at the station* or he can keep quiet if he so wish (sic). And furthermore if he is going to give a statement it would be under oath and that will be the evidence before court. And the other evidence that I have explained to him is if he has got money t0 pay for a lawyer he can get himself a lawyer, or alternatively if he doe not have money to pay for a lawyer he can apply for a lawyer from Legal Aid," P108Line7-16. (Emphasis added) .

As will appear later, the type of evidence given by Inspector Ghule exhibits, in my view, the very type of conduct the arresting police had been guilty of prior to enactment of the Constitution, which should be eradicated. The courts, especially judges, can and should, in my view, spare no moment available for them to express their indignation

The failure to warn a suspect occurred also in Mr Thabethe's, the second appellant's, case. He was dealt with by Inspector Abel Mdou. As in the third appellant's, Mr Mahlangu's, case, there appeared to be uncertainty during argument before us as to when and by whom the second appellant was arrested. Just as it is, in my view, clear from what I have extracted from the record of the proceedings, that Inspector Ghule arrested the third appellant, Mr Mahlangu, so is it evident that Inspector Mdou arrested the second appellant, Mr Thabethe. The second appellant's arrest is not mentioned in so many words. It seems to me, however, when the *modus operandi* during the encounter between members of the investigating team and the second appellant is taken into account, that the second appellant was arrested when Inspector Mdou and his colleague(s) found him at 11th Avenue. I have extracted, in full, the excerpt of the encounter between the second appellant and the police, so as to leave nothing to imagination;

"Inspekteur 13 September 2000, was u aan diens daardie aand? --- Dit is korrek.

Wat was die doel dat u daardie aand aan diens gewees het. en wat was die planne, wat sou u daardie aand gaan doen het? -' Op daardie dag het ons vroeg in die oggend werk toe gegaan en ons moes 16:00 huis toe gegaan het maar voor ons huis toe kon gegaan het *daar* was *sekere inligting wat ons gekry het* dat ons moet op daardie selfde dag gedurende die aand, *'n sekere ondersoek moet gaan doen.*

Wat was die inligting, waste ondersoekwerk moes nou gedoen word? ---- Die inligting wat ons gekry het is dat daar was twee mense wat vuurwapens vanaf Cullinan gevat het. Ons *het toe 16:00 huis toe gegaan en teruggekom 22:00 die aand*

Ja? ---- Ons het nou toe in die lokasie ingegaan by 11 de Avenue.

HOF: 11 de Laan? --- 11 de Laan.

AANKLAER: Waste lokasie is dit, die lokasie se naam, 11 de Laan waar? ---Alexandra.

Goed ja? -- By 11de Laan het ons nou beskuldigde 5 daar gekry. Hy het ons nou toe gevat na sy ander vriend wat hy met hom gewees het.

HOF: En nou wat gebeur nou tussen jou en beskuldigde 5? --- Soos ek all klaar vir die hof verduidelik het dat *die inligting wat* ons *gekry het is dat twee mense wapens het* en ons het toe na 11de Laan toe gegaan waar ons nou beskuldigde 5 gekry het, en hy het ons nou saam gevat na die tweede beskuldigde.

Ja maar was daar 'n gesprek tussen jou .en beskuldigde 5 wat daartoe gelei het dat julle na die ander man toe gaan? -- Ons het hom gevra dat waar is hierdie ander vriend van horn wat Biza is, wat saam gewees het.

AANKLAER: Goed voor u verdergaan, hoe kom u in die huis in? ---- Ons het daar ingekom by 11 de Laan, ons het geklop, ons het bloot gesê dit is polisie wat klop hy het oopgemaak.

Sa u vir hom hoekom is u hier, wat maak u daar, wie is u, wat sa u alles? ---- Na die vyfde beskuldigde die huis oopgemaak het ons het hom toe gesê dat ons is op soek na wapens *wat hulle gevat het van Cullinan af.*

> Ja? ---- Hy het ons toe gesê dat hy nie die vuurwapens by hom het nie ons moet na 8iza toe gaan, wat sy vriend is. *Ons het toe altwee van hulle na die polisiestasie toe geneem.*
>
> Wie is nou altwee? --- Dit is nou beskuldigde 5 en Biza.
>
> HOF: Nou hoe kom julle by Biza uit? ---- Beskuldigde 5, hy het mos vir ons gesê dat hy nie die vuurwapens by hom het nie, dat ons na Biza toe gaan." p168Line 8-p169Line25. [Emphasis added].

There is, in my view, no doubt, in respect of both the second appellant, Mr Thabethe, and the third appellant, Mr Mahlangu, that:

(a) each one of them was approached as a suspect, after members of the investigating team had received information linking him with the case - in other words, the police were not paying them social visits, they were engaged in the investigation of the case;

(b) each one of them was arrested where he was found;

(c) each one of them was questioned about the case;

(d) each one of them uttered something in response to such question(s);

(e) none of them was warned of his right to remain silent and of the consequences of not remaining silent, as provided in s 35(1)(b) of the Constitution, as well as his right "not to be compelled to make any confession or admission that could be used" against him, as provided in s 35(1)(c) of the Constitution.

It was Mr Leballo, on behalf of the second and third appellants, respectively, who, before us, raised the question of non-compliance with the provisions of s 35(3), prior to each of the appellants in question responding to questions put to him by the police. Although Mr Leballo had not raised this aspect in his

Heads of Argument. he was allowed to address the Court thereon, in the light of its significance. In any event, Mr Maboea, the attorney who represented the third appellant, Mr Mahlangu, before the Regional Court, pertinently raised the pOint in his cross-examination of Inspector Ghule (pi 07 to pii7). It seems, to me, that the only reason that the respondent's (the State's) counsel, Ms Rosenblatt and her predecessor Advocate Marriott, did not deal with the point is that the State does not attach significance to this kind of conduct or omission on the part of members of the SAPS, or that it did not in the present case. Mr Leballo, himself, did not initially attach significance to this aspect.

Mr Leballo referred the Court to the case of S v *Thebus* 2003(6) SA 505 (CC), particularly the judgment of Yacoob J. The judgment of the majority of the Court, *per* Goldstone J and O'Regan J; Ackermann J and Mokgoro J concurring, is, in my view, more pertinent on this aspect. Addressing the question of the drawing or otherwise of adverse inferences from the failure -of an accused person to give evidence and, instead, choosing to remain silent in spite of the existence of incriminating evidence against him or her, the learned judges said the following;

> "A third reason given for the rule against the drawing of adverse inferences is *the importance of protecting arrested persons from improper questioning and procedures by the police. Unfortunately, in the past people arrested were coerced by improper police methods* to *confess (not infrequently, falsely)* to *crimes. Such practices need to be put firmly behind us. In our view, the need to reduce unconstitutional policing practices is of such importance in the light of our history, that the right to silence should protect an accused person from having an adverse inference drawn from pre-trial silence in the face of questioning from the police.* This concern provides an important reason for not drawing adverse inferences from the silence of an arrested person in the face of police questioning. It is of no relevance to the silence of an accused in court.
>
> [86] A different but equally cogent reason for the rule against the drawing of adverse inferences from the silence of an arrested person relates to the warning given to people when they are arrested. Section 35(1)(b) requires the police to warn people *when they are arrested* that they have the right to remain silent and of the

> consequences of not remaining silent and thus a failure to give the warning will infringe s 35(1)(b). In our view, it is constitutionally impermissible to draw an adverse inference from an arrested person's silence once he or she has been informed of the right to remain silent. That warning, as currently formulated, clearly implies that the arrested person will not be penalised for silence. For the person arrested to be told that he or she may remain silent without more, and for that very silence thereafter to be used to discredit the person, in our view is unfair. We *are not persuaded therefore by Yacoob, J's, reliance on* s 35(5) *of the Constitution.* Nor are we persuaded that it can ever be fair to warn a person arrested and give him or her the impression that there is a right to remain silent without qualification, and then t6 draw an adverse inference from that silence." paras [85] and [86], at 543B-G/H. [Emphasis added].

The respect in which the learned judges disagreed with Yacoob, J, is where he stated that

> "the duty of a judicial officer is to ensure", not only that "the rights of the accused are not or have not been violated." Because s 35(5) of the Constitution "does not direct that evidence obtained in violation of any right in the Bill of Rights must be excluded regardless," the sub-section, so the learned Judge decided, "by definition includes evidence obtained in violation of the rights of the accused. The court has a discretion to admit such evidence *if it is fair to do* so or if it is in the interest of *the administration of justice."* (Emphasis added).

It is not surprising, in my view, that the majority judgment rejected Yaccob, J's view or interpretation of an arrested person's right(s) in terms of s 35(1)(b), i.e. to be warned of his right to silence when questioned by the police and the possible adverse consequences of his or her electing to talk. I do not appreciate how the police can be given a carte blanche to violate this or any other right in the knowledge that judicial officers will know when and when not to permit evidence thus obtained to have a bearing on the outcome of the case against the arrested and, subsequently, accused person i.e. where there is other evidence on which the accused person can be convicted. I have difficulty with the notion that, where there has been a violation of the arrested person's right in terms of s 35(1)(b), it can be said of such violation that "it is fair to do so."

The second aspect relates to the identification parade. It concerns only the second appellant, Mr Thabethe. He was brought before an identification

parade, where he was positively identified by the state witness, Renier Bruwer, as one of the robbers and as the one who assaulted him in the manner described in his evidence. I raised the question as to whether the identification parade complied with the requirements of the procedure set out in the Police Rules concerning identification parades. The aspect I had in mind relates to the need to ensure that the suspect is "more or less similarly dressed" to the others on the parade. The photograph of the parade depicts the second appellant, Mr Thabethe, in a bright-blue overall. No other participant wore attire of that colour or a colour that somewhat resembles it. It is true that another person in the line-up wore what appears to be an overall of some jaded brown or dark grey colour - my description of its colour may be inaccurate, but it certainly is a different colour and is nowhere near as bright as the second appellant's overall. It is, perhaps, appropriate for me to quote the relevant Police Rule, Rule 8, which reads;

> "The suspect and persons in the parade should be more or less of the same build, height, age, and appearance and should have more or less the same occupation and *be more or less similarly dressed".* (My emphasis).

When I asked Ms Rosenblatt whether the parade had not breached the practice that has been followed by the police for a considerable time, she, at first, argued that one of the people in the picture is clad in a bright-red top or jersey, arguing that the latter person and the one whose attire I earlier described had as much a chance as did the second appellant of being selected by the witness, if the witness was not sure of the appearance or features of the robber who assaulted him. When I drew her attention to the fact that the courts have endorsed the need for the police to endeavour to avoid a suspect being clad in attire that so distinguishes him or her from the rest of the persons in the line-up that he sticks out, she then argued that the correctness of the identification parade had not been challenged by the second appellant's legal representative during the trial which; at first glance seems correct. I say so because Mr Skosana, on the second appellant's behalf, categorically said, when asked the Magistrate as to whether "the regularity of this identification parade is going to be in dispute," it was not

'.

going to be in dispute. P1 9L 15-L 19. He also did not disagree when the Magistrate repeated that a little later. P21 L25. It appears, however, that Mr Skosana had a different understanding of "the regularity of the identification parade" from the Magistrate's, because he cross-examined Renier in a manner that questioned the propriety of the parade. He asked, for instance;

> "Before the parade you say there were a number of things you discussed with the investigation or the police official, what were those things? ... /Did you discuss anything regarding the persons who were on the identity parade? ' ... Were there no suggestions made to you about the persons or a person you could possibly point out? ... I find it strange that you can only remember a lot of things about accused 4 and you cannot say anything about the other two people?" P24L24-P25L25.

I should add that Renier's performance at the identification parade was, in my view, unconvincing. He says of that occasion;

> "Toe ek daar instap toe het ek redelike, *ek het redelike idee gehad wie dit* was, maar ek het drie keer gestap *net* om *seker te maak* dat ek die regte ou uitkies." P17L 16L18. {Emphasis added].

The significance of ensuring that the suspect is not made to stick out is highlighted by Renier's evidence that he had a "reasonable idea" of who the person was looking for was and that he, nevertheless, wanted "to make sure" that he pointed out the correct person suggests that he might have had a problem if there had been others, who resembled the second appellant.

The third aspect I raised with Ms Rosenblatt was the fact that the police searched the premises of some of the accused persons during their absence from their premises. There is no evidence to indicate that the police who entered such premises without the relevant appellants' permission or knowledge ever contemplated lawful entry into the premises. Similarly, there is no evidence as to why such authorisation was not sought before the searched were conducted. (See s 20 21 and s 22 of the Criminal Procedure Act.) Ms Rosenblatt's argued is that it is not always possible for the police, who operate under conditions of extreme urgency, to seek authorisation (as envisaged in s 21 of the Criminal Procedure Act), as that can often lead to the disappearance of the object that they seek to recover and to use as evidence

against the suspect. These submissions also carried favour with the majority of the Court. I find myself in respectful disagreement. There is a clear procedure, outlined in s 21, in terms whereof a police official who seeks to conduct a search may and must obtain a search warrant from a magistrate or a justice;

> "if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article [as qualifies to any of the three categories listed in s 20(a), (b) is in the possession or under the control of or upon any person or upon or all any premises within his area of jurisdiction." s 21(1)(a).

Ms Rosenblatt's submissions, in respect of non-compliance- with the requirements of Rule 8 of the Police Rules and failure to obtain search warrants, miss the gravamen of the issue raised in each instance. With regard to the identification parade, it should be enough to say that, many decades before the advent of the Constitution, the police in this country, following their counterparts internationally, made rules that were to guide their members in ensuring that identification parades were reliable and fair. Courts in this country endorsed such rules, in acknowledgement of the fact that "dock identification" is generally unreliable (see *R v Rasool* 1932 NPD 112; *R v Sebeso* 1943 AD 196; *R v·Mputing R v Velekaze [probably Vilakazi] 1947(1)* SA 162). Because of the danger of a witness's identification of a suspect in court, in the dock, becoming fortified by the earlier identification at the identification parade, it became imperative that these Police Rules be closely adhered to. In that regard Schreiner, JA stated the following, in *R v Kola* 1949(1) PH H100 (A);

> "But an identification parade, though it ought to be a most important aid to the administration of justice, may become a grave source of danger if it creates an impression which is false as to the capacity of the witness to identify the accused without the aid of his compromising position in the dock. Unsatisfactory as it may be to rely upon the evidence of identification given by a witness not well acquainted with the accused, if that witness has not been tested by means of a parade, it is worse to rely upon a witness whose evidence carries with it the hall-mark of such a test if in fact the hall-mark is spurious. Of course an identification parade is not necessarily useless because it is imperfect. In some respects the quality of the parade must necessarily be a question of degree."

The dictum in *R v Kola (supra)* recently received support from the judgment of Scott JA, in S *v Mohlathe* 2000(2) SACR 530 (SCA) , para [29], at 541a-d, where the following is stated;

> "Common sense dictates that the non-suspects participating in an identification parade should be similar to the suspect in general appearance. Indeed, as appears from the identification parade form which was used on this occasion, it is a matter of police practice that the non-suspects be 'of about the same height, build, age and appearance' as the suspect and that *they be similarly dressed .*• Where the parade includes several suspects whose general appearance is markedly different, whether on account of height, build, age or otherwise, *care should be taken* to *ensure that there are sufficient non-suspects whose general appearance approximates that of each* of *the suspects.* In such circumstances it may be advisable to hold more than one parade, particularly if the number of non-suspects that would be required would result in the parade being unduly large and cumbersome. If the number of non-suspects whose general appearance approximates that of each suspect is too few, or if there are other features of the parade which may materially influence an identifying witness, the probative value of the identification will be greatly reduced. The danger in such a case is, of course, that, because the identification is made at a parade, it carries with it an assurance of reliability which is unjustified. (See R *v Kola* 1949(1) PH H100 (A).)" [Emphasis added].

As pointed out in R *v Kola (supra)* it is not always possible to maintain the standard of identification parades at the desired level. That, in my view, is the case with every aspect of life, including constitutional rights. It is trite that in the .;8:JJl Bill of Rights chapter rights are qualified by the limitation contained in s 36 of the Constitution. In the case of evidence obtained from an arrested person or an accused person, in violation of his or her right in terms of s 35 of the Constitution, respectively, such evidence is not automatically excluded but only "if the admission of that evidence would render the trial unfair or [would] otherwise be detrimental to the administration of justice" (s 35(5) of the Constitution). In my view, when a stated position is given subject to qualifications or limitations, departure from the norm should be exceptional and ought to be frowned upon by the courts. Such qualifications or limitations do not become the norm. The police may not,

(a) **simply have identification parades that do not comply with the normal procedure set out in the Police Rules;**

(b) **simply conduct searches without complying with the provisions of sections 20 and 21 of the Criminal Procedure Act, in this instance, ss 20 and 21; and may not**

(c) simply question suspected people they arrest without due regard to their rights in terms of s 35(3) of the Constitution .

I am aware of the conflict of opinion between the view held, on the one hand, by Claassen J, in *S v Mathebula and Another* 1997(1) SACR 10 (W), Froneman J, in *S v Melani and Others* 1996(1) SACR 335 (E); Van Deventer, J, in *S v Mhlakaza and Another* 1996(2) SACR 187 (C), and, on the other hand, the view held by Spoelstra J, in *S v Shaba and Another 1998(1)* SACR16 (T), l Bozalek J, in *S v Orrie and Another* [2005J 2 All SA 212(C) leveson, J, in *S v Ngwenya and Others* 1998(2) SACR 503; and Borchers J, in *S v Monyane and Others* 2001(1) SACR 115 (T) with *regard* to the **application or otherwise of the rights afforded an arrested person in terms of s** 35(1) to a suspect who is questioned before he or she is technically arrested. Seeing that, *(a)* I am of the view that the second and third appellants in the **present case were arrested persons when they were questioned by the police** and (b) I am in *agreement* with majority judgment with *regard* to the conviction being confirmed I do not find it necessary for me to enter deep into this dispute, I am aware that my comments in these respects are *obiter.* I do, however, find the reasoning in the earlier group of cases _ in which such rights **are extended to suspects who are not yet arrested _ persuasive. How else** would "the importance of protecting arrested persons from improper **questioning and procedures by the police," which is mentioned in *S v Thebus** and Another (supra),* para [85] be realised, if "improper questioning and procedures" are allowed to continue, in the case of "suspects" up to, literally, **just a second before the suspect is declared under arrest?**

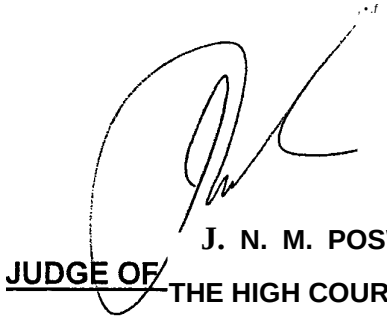
In this regard, I find the remarks by J. H. Combrink, in *S v Nkabinde 1998(8)* BCLR 996(N), at 1001 E, very apt. He says the following in respect of a fair trial:

> "In the past. our criminal procedure system contained elements of an inquisitorial nature, although it was predominantly adversarial.
>
> "Through our new Constitution those inquisitorial elements in the Criminal Procedure Act are being systematically hunted down and erased. where found to be inimical to the tenets of the Constitution, which is aimed at providing a mechanism to ensure that any accused person brought before a court will receive a fair trial. Under this system a fair trial is *not only determined by what takes place in the trial itself.* That lack of bias and fairness must also be *reflected in the investigations which precede* the *indictment and trial.* In every democratic society, of which our young democracy is one, there, of necessity, exists a certain tension between the need, on the one hand, to investigate and prosecute a criminal acts and, on the other, the need to protect every individual, including an accused person, against excessive zeal on the part of organs of the State in their prosecution of the task to bring an accused criminal to book. What is required of a judge is to endeavour to strike a balance between those two poles. If there is balance, there is a fair trial. If there is not, then there is none.
>
> The protection which the Constitution affords an accused person must not be confused with maudlin sympathy for the criminal. The mechanisms guaranteeing a fair trial, as contained in the Constitution which, if properly applied, leaves [sic] the police with ample latitude within which to function effectually and to bring a criminal before the courts on proper cause. At the end of the day, a verdict of guilty cannot be returned if the court concludes that the trial, for whatever reason, has not been a fair one." (Emphasis added).

With regard to the question whether what the respective appellants said amounted to confessions, i.e. unequivocal admissions of guilt, or merely admissions, I align myself fully with the reasoning by my brother De Villiers J in that regard. I go further, however, and emphasise that it makes no difference whether what each of these appellants uttered was a confession or an admission, seeing that s 35(1)(b) countenances neither of the two types of statements made without proper warning [S *v Thebus (supra)].*

With regard to the search without a warrant, I am of the view that it is important for the Courts to ensure that the police are constantly aware that

they are required, at all times, to conduct themselves in a manner compatible with the post-1993 era. That, in my view, means that they should have fair conduct paramount in their minds, regardless of whether the Constitution expresses itself or not in respect of such conduct. In other words the police should not always or ever be hunting for loopholes in the Constitution, through which they may act unfairly during their investigations, with impunity. I find it inappropriate that time should be sent on deciding whether unfair conduct on the part of the police, in their investigations, falls this or other side of the Constitution's boundaries. They should act fairly, implicitly.



J. N. M. POSWA

JUDGE OF THE HIGH COURT