CASE NO 455/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

S J HENDRICKS APPELLANT

and

THE STATE RESPONDENT

CORAM: HEFER, STEYN et MARAIS JJA

HEARD: 11 MAY 1995

DELIVERED: 30 MAY 1995

J U D G M E N T

MARAIS JA/

MARAIS JA:

Appellant was arrested on Friday 19 February 1993. That very day he made a statement to a magistrate. He spent the week-end in custody and appeared in the Regional Court on Monday 22 February 1993. At that stage three charges and an alternative charge had been brought against him. The first (Count 1) was a charge of housebreaking with intent to steal and theft allegedly committed on 11 February 1993 at the home of Mr Stephen H. in Port Elizabeth. The second (Count 2) was a charge of housebreaking with intent to rob and robbery allegedly committed on 19 February 1993 at the same address, it being alleged that the person who was robbed was Mrs C.H.. The third (Count 3) was a charge of attempted rape of Mrs C.H. allegedly committed at the same time as the aforesaid robbery was allegedly

committed. The alternative charge was one of indecent assault based upon the same incident.

Appellant was asked whether he wished to be legally represented and the possible availability of legal aid was explained to him. He elected to defend himself. The charges were then put to him by the prosecutor. He pleaded guilty to the three charges, adding that he had not taken all the articles listed in the first charge. The regional magistrate proceeded to question him in terms of sec 112(2)(l)(b) of Act No 51 of 1977 (the Act) in order to ascertain whether he admitted the allegations in the charges, and to satisfy himself that appellant was guilty of the offences to which he had pleaded guilty. Appellant proceeded to describe in some detail what he had done. The regional magistrate was satisfied that appellant did admit the allegations in the first charge (subject to the qualification that not all

the articles listed in the charge sheet were admitted to have been stolen), the prosecutor indicated that he accepted the qualification, and the plea of guilty remained standing. The regional magistrate was not satisfied that appellant's pleas of guilty to the second and third charges were borne out by the admissions made by him, and he entered pleas of not guilty to those charges. The alternative charge does not appear to have been put to appellant. As a fact, his explanation of what he had done to complainant amounted to an admission of the particular allegation made against him in that charge. Indeed, his explanation showed that he had also committed other indecent acts which had not been particularised in the alternative charge.

Appellant was not asked thereafter whether or not he was prepared to allow anything said by him during the process to stand as an admission made in terms of sec 220 of the Act, but the effect of the

proviso to sec 113(1) of the Act was that factual allegations adverse to himself made during the enquiry for which sec 112 provides, "stand as proof in any court" of those allegations, provided of course that they are not allegations which the court is satisfied are incorrectly admitted allegations. See S v Ncube 1981(3) SA 511(T) at 513 E-G. The allegations adverse to appellant which he admitted, could not have been regarded as incorrectly made admissions, and they therefore stood "as proof" against him in the trial.

The prosecutor at this juncture introduced another charge, namely, one of rape (Count 4). Whereas he had previously been accused of attempting to rape, alternatively, indecently assaulting Mrs C.H. at her home on 19 February 1993, he was now accused of raping her on that occasion. The record does not show that appellant objected to the charge of rape being brought against him at

that stage. Indeed, he pleaded guilty to the charge. What he had said earlier in connection with the other charges was plainly inconsistent with his plea of guilty to the charge of rape, because he had denied specifically then that he had had intercourse with complainant or that he intended to do so. Not surprisingly, the regional magistrate questioned him pertinently on this aspect of the matter after he had pleaded guilty to the charge of rape and, having elicited a specific denial that appellant had sexual intercourse with complainant on that occasion, the regional magistrate, in terms of sec 113 of the Act, altered appellant's plea to one of not guilty to the charge of rape.

The hearing of viva voce evidence thereupon commenced. By the end of that day (Monday 22 February), complainant and a policewoman had testified. The policewoman had responded to a radio call and encountered complainant in an allegedly hysterical and

tearful state. Complainant is alleged to have complained to her that she had been raped. Both were cross-examined by appellant. The burden of appellant's cross-examination of complainant was devoted to the issue of penetration (actual or attempted) which was the only central issue in dispute by that stage. The day concluded with appellant raising the matter of a possible grant of bail and indicating that he wished to apply for legal aid because of the introduction of the charge of rape. He said "I feel misled not by anyone else but myself. I feel I should have someone who is more qualified". The regional magistrate declined to grant bail at that stage and indicated that he would be prepared to reconsider the question on 26 February 1993. He thereupon remanded the case to that date.

On 26 February the regional magistrate was informed that the application for legal aid had not been successful. He telephoned

an official of the legal aid board and recommended the grant of legal aid to appellant. His intervention bore fruit and an attorney appeared later that day to represent appellant. No evidence was heard on that day and the case was remanded to 3 March for the hearing of an application for bail. The trial itself resumed on 26 April 1993. On that day, the district surgeon who had examined complainant, testified. He was cross-examined by appellant's attorney with specific reference to the issue of penetration. The prosecutor closed the State's case and appellant testified. He denied penetration or any attempt to have sexual intercourse. The defence case was closed without any application having been made by appellant's attorney for the recall for further cross-examination of complainant and the policewoman referred to earlier. Argument ensued and judgment was reserved.

On 29 April 1993 the regional magistrate delivered his

judgment. He convicted appellant upon Counts 1, 2 and 4, and, because the allegations in Count 3, and the alternative to it, related to what be considered to be preparatory acts intimately associated with the act of rape (Count 4) of which appellant had been convicted, he acquitted him on Count 3 (and, impliedly, the alternative to Count 3). After hearing evidence both in mitigation and in aggravation of sentence, and considering the submissions made to him, the regional magistrate sentenced appellant to 2 years imprisonment on Count 1, 4 years imprisonment on Count 2, and 10 years imprisonment on Count 4. He ordered the sentence imposed in respect of Count 1, and 2 years of the sentence imposed in respect of Count 2, to run concurrently with the sentence imposed in respect of Count 4. Appellant was thus sentenced effectively to 12 years imprisonment. On 3 May 1993 appellant addressed from St Alban's

prison in Port Elizabeth a letter to the Regional Court complaining of his conviction and sentence upon the charge of rape (Count 4). He attacked the conviction upon its merits. He raised no complaint about any procedural aspect of the trial and made no suggestion that he had suffered any prejudice by reason of the promptitude with which he was brought to trial, or the raising of the charge of rape after he had pleaded to the other charges, and made the statements which he did during questioning in terms of sec 112(1)(b). The letter was regarded as an application for a judge's certificate granting leave to appeal to appellant in terms of Rule 67(1) of the Magistrates' Courts Act No 32 of 1944 and it was forwarded to the Eastern Cape Division. Leave was granted to him to appeal against only the conviction of rape.

Appellant appears to have been able to engage the services of attorneys thereafter because there appears in the record a

notice of appeal dated 8 December 1993. Although stated to be only against "the conviction of the appellant", one of the grounds of appeal was that an excessively harsh sentence had been imposed and that insufficient weight had been given to the personal circumstances of the accused. No leave to appeal against the sentence had been granted by the learned judge who granted a certificate in terms of Rule 67(1), and in so far as the notice of appeal purported to initiate an appeal against the sentence, it was grossly out of time. No application for condonation of the failure to note timeously an appeal against the sentence was made. There was therefore no procedurally valid appeal against the sentence before the Eastern Cape Division. It is of some significance that, once again, no point was made in the notice of appeal of the addition of Count 4 at the particular juncture at which it was added, and no suggestion was made that appellant had suffered

any prejudice because of the promptitude with which he was tried.

When the appeal was heard by the Eastern Cape Division, counsel appears to have represented appellant at the request of the court, and not upon the instruction of the attorneys who filed the notice of appeal to which reference has been made. He raised for the first time the contention that confronting appellant with the charge of rape (Count 4) after he had pleaded to the other charges and had been questioned thereanent in terms of sec 112(l)(b), was fatally irregular because of the provisions of sec 81(1) of the Act, and therefore vitiated his conviction upon that charge. That provision prohibits the joining of further charges in the same proceedings after "evidence has been led in respect of any particular charge". The Eastern Cape Division considered that no evidence had been led within the meaning of the provision, so that the preferring of the charge of rape was not

irregular. It added that, even if it had been irregular, no prejudice had resulted, and that, in the absence of prejudice, the irregularity could not avail appellant. The court proceeded to consider the merits of the appeal and concluded that penetration had been proved beyond reasonable doubt, so that the appeal against the conviction should fail. Despite the fact that there was no procedurally valid appeal against the sentence before the court, the court observed that the sentence, "though robust", was proper in the circumstances. The appeal was dismissed. On 8 April 1994, some five months after the Eastern Cape Division had given its judgment, appellant applied to that division for condonation of his failure to apply timeously for leave to appeal to this court, and for leave to appeal against both the conviction of rape and the sentence imposed. Yet a further point was raised; it was alleged that "[t]he proceedings as reflected in the reconstructed record

indicate that the [appellant] did not receive a fair trial". When the application was argued, this ground of appeal was elaborated upon. The alleged unfairness was said to flow, firstly, from the fact that what was described as the "reconstructed" record had been improperly reconstructed; secondly, from the fact that appellant was brought to trial with undue haste; and thirdly, from the belated addition of the charge of rape. The technical propriety of adding the charge of rape was also raised again, as were the merits of the conviction. In the result, the court granted limited leave to appeal to this court only on the question whether the addition of the charge of rape was irregular, if so, whether it rendered the proceedings pro tanto null and void, or merely voidable if prejudice resulted, and, if the latter, whether there was any such prejudice. A petition to the Chief Justice resulted in appellant being granted leave to appeal generally against the

conviction for rape, thus enabling him to canvass the merits of the conviction in this court. I turn now to the submissions advanced before us. The allegedly irregular joinder of the charge of rape (Count 4).

Sec 81(1) of the Act reads:

(1) "Any number of charges may be joined in the same proceedings against an accused at any time before any evidence has been led in respect of any particular charge, and where several charges are so joined, each charge shall be numbered consecutively".

Counsel for appellant contended that what had been said by appellant during the phase of the case when he was being questioned in terms of sec 112(1)(b) "in order to ascertain whether he admit[ted] the allegations in the charge[s] to which he..... pleaded guilty", coupled with the fact that the prosecutor had accepted appellant's qualified plea of guilty on Count 1, amounted to the leading of evidence within the meaning of sec 81(1). It followed, so

he submitted, that the addition of the charge of rape after that had happened, was irregular, despite the failure of appellant or his attorney to object to that being done. He invited us to hold that the irregularity was of so fundamental a kind that it precluded any enquiry into whether or not any prejudice had been occasioned, and that the resultant proceedings were pro tanto void. It was contended alternatively that even if the proceedings were not ipso facto rendered void, the belated addition of Court 4 rendered the trial pro tanto unfair, and the conviction and sentence liable to be set aside. I understood counsel to mean by this that appellant had, or might have, been prejudiced.

In order to impress upon us the importance in a fair criminal trial of an accused knowing, before he or she is asked to plead, precisely what crimes are alleged to have been committed, and

how they are alleged to have been committed, so that an informed election as to how to plead, and how to meet the State's case can be made, counsel referred us to a number of apposite dicta in the reported cases. The principle is uncontentious and, subject to one exception, I see no need to cite those dicta. In S v Thipe 1988(3) SA 346(T) at

pages 349J to 350B, Schabort J said:

> "Saamgelees met die vereiste van art 81(1) dat samevoeging van aanklagte die aflê van getuienis moet voorafgaan, is dit klaarblyklik die uitgangspunt van die Wet dat 'n persoon wat voor die strafhof gedaag word voor aanvang van sy verhoor die presiese bestek van sy potensiële blootstelling aan skuldigbevinding en straf in die saak moet kan weet. Eers in die lig van sodanige sekere kennis sou 'n aangeklaagde sy posisie behoorlik kon oorweeg; sou hy kon besluit oor die raadsaamheid om regsverteenwoordiging te bekom; oor die strategic van sy verdediging, oorhoofs en in besonderhede, en les bes, oor die dienstigheid om skuldig te pleit met die oog op

strafversagtiging of, byvoorbeeld, om die verhoor vir persoonlike redes gou agter die rug te kry". If all that the learned judge meant to convey by these remarks was that

a prosecutor may not, at any stage of a criminal trial, confront an accused belatedly and without forewarning, with an additional charge, and then insist upon the accused pleading to it and proceeding with his or her defence instanter, there can be no quarrel with that. If, on the other hand, he intended to suggest that no further charge or charges of which no prior timeous notice has been given to the accused, may be added by the prosecutor at any stage of a criminal trial even although the acccused is not obliged to plead to it, or to present the defence to it, instanter, I am unable to agree with the suggestion. For reasons which I shall elaborate in due course, I think it is plain that sec 81(1) explicitly sanctions the raising by the prosecutor without forewarning

of additional charges against an accused even after the accused has pleaded to the charges originally brought. The raising of such additional charges may, or may not, precipitate a postponement of the trial, but the plain and unambiguous language of sec 81(1) shows that it is procedurally competent for the prosecutor to add further charges right up to the moment before evidence commences to be led. That moment is usually, if not always (a question to which I shall return), a moment which will only arrive after the recording of the accused's plea. If, by the use of the words "voor aanvang van sy verhoor", the learned judge meant before a start is made in the presentation of evidence that is another matter, but it would leave open, and unanswered, the question which concerns us in this case, namely, what the legislature intended to convey by the use of the words "before any evidence has been led in respect of any particular charge". As a fact,

a witness had already testified viva voce at the behest of the prosecution before the further charge was added in Thipe's case, supra, and, in those circumstances, the joining of that charge was undoubtedly forbidden by sec 81(1).

The nub of the argument advanced by counsel for appellant was that while a plea of guilty, or not guilty, simpliciter would not amount to the leading of evidence within the meaning of sec 81(1), anything further said in explanation or elaboration of the plea by an accused, or by his legal representative and confirmed by him, would amount to that. It is the validity of that proposition which is the issue.

Counsel for appellant developed the argument by pointing to the evidentiary use which the Act permits to be made of statements made by the accused during that phase of the proceedings which is

designed to ascertain what his or her plea truly is, and, if one of guilty, whether he or she is indeed guilty. He drew attention to the proviso to sec 113(1) of the Act, the relevant portion of which, I quoted earlier in this judgment. Sec 115 of the Act, which deals with the procedure applicable where the accused pleads not guilty, also makes provision for the accused to be invited to formally admit allegations which have not been placed in issue in the course of any accompanying statement indicating the basis of the defence, or in response to questions put by the court in order to establish which allegations in the charge are in dispute. He is of course not obliged to do so, and must be so informed, and warned of the implications of doing so, but, if he does consent to do so, the admissions must be recorded, and they are deemed then to be admissions under sec 220 of the Act. It is trite that the effect of such admissions is to relieve the

State of the burden of adducing evidence to prove the admitted allegations.

S v Sesetse en 'n Ander 1981(3) SA 353(A) at 374A. The admissions are statutorily ordained by sec 220 to be "sufficient proof of such facts. Even if the accused declines to consent to what has been said during the process being recorded as an admission, to the extent that what has been said is adverse to his or her interests, it constitutes evidential material which may be used against the accused in considering whether or not guilt has been proved. S v Daniels 1983(3) SA 275(A) at 300 E-F; S v Sesetse en 'n Ander, supra, at 375H -376D. The short point is that what is said by the accused when pleading to the charge, may, depending on the circumstances, yield material upon which the prosecution will be entitled to rely in discharging the burden of proof which rests upon it. That is the basic

foundation upon which the contention of counsel for appellant rests. It follows inexorably, so he argues, that such material must be regarded as "evidence . . . led in respect of [the] particular charge" within the meaning of sec 81(1).

Whether one describes that material as "evidence", "bewysmateriaal", or "evidential", or "evidentiary", or "probative material", the question will remain: is it evidence within the meaning of sec 81(1)? It is trite that the meaning to be given to particular words is influenced by the context in which they are used and that the same word may not always have the same meaning in a statute. If the purpose which a particular provision is designed to achieve is manifest, a word appearing in it which is capable of a variety of meanings will be assigned the meaning most apt to attain the manifest purpose of the provision. Public Carriers Association v Toll Road

Concessionaries 1990(11 SA 925(A) at 943A - 944B; South African Transport Services v Olgar and Another 1986(2) SA 684(A) at 697D; Hleka v Johannesburg city Council 1949(1) SA 842(A) at 852-3. That does not mean of course that one may indulge in what is no more than speculation as to the aim sought to be achieved and run the risk of wrongly attributing to the legislature an object which it may never have had in mind. If the object of the legislation is wrongly understood, a wrong interpretation of the words used is likely to be the result. Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530 at 555.

Is it apparent for what purpose the words "at any time before any evidence has been led in respect of any particular charge" were inserted in 1977 into a provision the rest of which had been in existence in substantially the same form since 1917? At first blush

they might appear to be designed solely to limit a pre-existing and more extensive power to join charges. Yet that is not actually so. The history of the provision shows, I think, that it was primarily intended to confer greater power than had existed previously. In successive Criminal Procedure and Evidence Acts (sec 125 of Act No 31 of 1917; sec 312 of Act No 56 of 1955) provision was made for any number of counts to be joined in the same charge. However, the provisions were silent on the question of when, if at all, the power of the prosecution to add a further count came to an end in criminal proceedings. It appears to have been thought that the power did not extend beyond the commencement of the proceedings. In 1936 in R v Mabuzi Justice Summary 647//36(EC) Gane J said:

> ".....the procedure adopted was irregular. Our law contains no provision by which a new count can be added to an

indictment during the progress of the case, nor by which an additional charge on a separate charge sheet can be propounded in a case already begun, and the trial of both charges then continue pari passu." (Cited in Ferreira, Strafproses in die Laer Howe, 2nd edition at page 275 Cf R v Janawarie en ander 1954(1) PH H 74(0)). I have been unable to find any other case decided while this provision

in the Act of 1917 and the Act of 1955 was in operation, and which throws any direct light on the question. Obliquely relevant, is the decision of Rex v Kataleki and Another 1948(2) SA 207(EDL).

Gardner J and Hoexter J dealt with a case in which A and B were charged with the theft of sheep, and after three witnesses had testified against them, C was arrested and joined as a co-accused in the same trial. Gardner J said:

> "Now it appears that at the trial three small boys were called for the prosecution when the case opened against A and B. They

gave certain incriminating evidence against A and B. At the conclusion of their evidence C was arrested and put into the dock, and then the three boys were recalled. And on this occasion they gave no evidence incriminating A and B, that is the present two appellants. The question arises whether the magistrate was entitled to rely upon the evidence given by the small boys in the proceedings that he heard against A and B for the purpose of convicting in this case. To us it appears that the proceedings against A and B were entirely separate and, when the case started against A, B and C, the proceedings had to begin de novo. And, consequently, when it so began, the evidence of the boys vanished and all that was left were the statements made by the police of findings at the kraals of A and B. Neither counsel has been able to produce direct authority on the point, but it seems to be quite clear that the proceedings were separate, and Mr van der Walt, who appeared for the Crown, has so fairly pointed out that sec 220 of Act 31 of 1917 clearly stipulated that the witnesses shall, save as is otherwise provided by the Act, give their evidence viva voce in the presence of the accused. It is clear too that the evidence given

by the boys against the three accused must be given in open Court, and on this occasion they gave no evidence incriminating the accused". (At page 209.) That was a case of the joinder of an accused, and not a further count,

in mid-trial, but it illustrates the problems which can arise if the power to join other persons or counts is not sensibly restricted.

In 1977, Act No 51 of 1977 was enacted and sec 81(1) supplanted the provisions in the Acts of 1917 and 1955 which had been silent on this question. As has been seen, the power to add counts (now styled charges) was no longer confined to the period before the taking of the accused's plea as the court in Mabuzi's case, supra, might be taken to have impliedly held. It was plainly to extend beyond that. Quite how far beyond that, is the question. That a limit was intended to be set, is also plain. What mischief would have resulted if a limit had not been set? The most obvious mischief would

appear to be (he kind of problem which arose in Kataleki's case supra, in connection with the joinder of another accused in mid-trial. Evidence given in the trial prior to the raising of the further charge, but in some way relevant to it, would not have been given at a time when the accused was facing such a charge. Technically, it could not be taken into account in considering whether or not the further charge had been established. There may have been no cross-examination upon aspects of the already given evidence, which were critical to the newly brought charge, because they were unimportant to the charges originally brought. Witnesses might have to be recalled for further cross-examination. The plea procedures for which the Act provides, and which can entail questioning of the accused by the court, might have to be carried out in the middle of a trial after a substantial amount of evidence has been led. It is, in my view, also inherently

undesirable to subject an accused person whose trial is well and truly under way, to the disruptive and unsettling impact of having to apply his mind to, and deal with, yet further charges which the prosecution wishes to level at him as the trial progresses. These considerations all seem to me to be legitimate concerns of which the legislature is likely to have been aware. Hence, no doubt, the imposition of a limit upon the power to join charges. It is obvious that the moment at which the power ceases, was intended to be some moment <u>after</u>, and not <u>before</u>. the putting of the originally brought charges to the accused. If the legislature had intended the power to cease as soon as the accused was called upon to plead, it would have employed language very different from that which it did employ. However, the language which it has employed, shows that it certainly envisaged that, at some time after the accused had been called upon to plead, a moment would be reached

after which it would no longer be desirable or expedient to allow charges to be joined. It has chosen to describe that moment as the last moment "before any evidence has been led in respect of any particular charge". Those words must be sensibly interpreted. They cannot be read to mean that the power to join charges ceases only after all the evidence has been led in respect of any particular charge, because that would entail ignoring the word "any". Nor, for the same reason, can they be read to mean, for example, that if the first witness called by the State has not yet completed giving his evidence in chief, it remains open to the prosecution to interrupt his testimony in order to join another charge. It seems plain that what was meant, was the moment before evidence commences to be led.

The question which yet remains to be answered, is whether the legislature intended the words "evidence has been led" to

include what an accused has said during that part of the proceedings which is devoted to ascertaining what he or she pleads to the charges, and what the issues between the prosecution and the accused which require to be tried, are. I have come to the conclusion that they do not, for these reasons.

In both juristic and statutory usage, the word trial has come to be used as an appropriate description for criminal proceedings in which a verdict is required to be given, and, if the verdict be guilty, a sentence imposed, irrespective of whether or not any triable issue has been raised by the accused's plea. In colloquial usage it may have a narrower meaning and be confined to a proceeding in which a triable issue of fact has been raised by an accused's plea. Rex v Keeves 1926 AD 410 at 413; R v Tucker 1953(3) SA 150(A) at 159 G-H. None the less, it has always been recognised that there are distinct

phases of a trial. I leave aside the preliminary extracurial aspects of a trial and confine myself to what happens in court when the proceedings commence. The charges are put to the accused and he or she is required to plead to the charges. The nature of the pleas raised may differ greatly. A plea that the court has no jurisdiction, or a plea of autrefois convict or autrefois acquit will raise issues very different from those raised by a plea of not guilty. The accused may have to adduce evidence in support of a particular plea before the prosecution does so. The accused may even bear a fully fledged onus of proof if he raises a particular plea. If any such pleas are upheld, there will be no trial of the merits of the charges at all. Viva voce evidence may have been led by both the prosecutor and the accused in respect of such pleas. If the pleas (which are in the nature of special pleas not going to the merits of the charge) fail, could it ever have been

intended that, because evidence has been led in respect of those pleas, no further charges may be joined, even although the accused may not yet have pleaded on the merits to the originally preferred charges? The answer, I think, is no. The words "in respect of any particular charge" in sec 81(1) show, in my view, that what the legislature had in mind, was evidence relevant to a particular charge, and not evidence relevant only to special pleas of the kind I have mentioned. That shows that the legislature was not only alive to the distinction between the various phases of criminal proceedings, but aware that even within a particular phase (here, the pleading phase), there are sub-phases which necessitate a qualification of the language it uses, so that its sweep is not too broad, and so that it does not curtail prematurely, and unnecessarily, the power to join charges.

The object of the plea phase of criminal proceedings

admittedly extends beyond merely identifying what it is that is in issue between the prosecution and the accused. Provision is made, for example, in sec 115(2)(b), for the elimination of the need for the prosecution to prove allegations which have not been placed in issue by a plea of not guilty, and which the accused has consented to being recorded as admissions. The process can therefore also serve to narrow the issues in respect of which evidence will have to be adduced. But what requires to be emphasised, is that all this occurs in the context of a phase of the proceedings which is anterior to the actual trial of the issues which emerge from it. No evidence of any kind may be placed before the court during that phase. If the accused has pleaded guilty, and the replies given under questioning in terms of sec 112(1)(b) satisfy the court that he or she is guilty, and a conviction follows, those replies are not converted by some mysterious alchemy

into "evidence". They remain what they were: simply unsworn responses to questions put by the court in a situation where the accused has not sought, by his or her plea, to put anything in issue, but the statute nevertheless requires the court to satisfy itself of the correctness of the plea of guilty by appropriate questioning of the accused.

Where the accused pleads not guilty, it may be that a position is ultimately reached during the plea phase where what the accused has said in explanation of plea, or some of it, is recorded as an admission which relieves the prosecution of the burden of proving in the ensuing trial the allegation so admitted, but that is not because the admission is properly classifiable as "evidence led in respect of any particular charge", nor because it is in fact an admission specifically made in terms of sec 220 of the Act and therefore

regarded as "evidence". S v Mjoli and Another 1981(3) SA 1233(A) at 1243 C-D and 1247 - in fine. It is because the legislature has artificially bestowed a status upon it which is sui generis, by providing in sec 115(2)(b) that the admission made "shall be deemed to be an admission under section 220". But for the deeming provision, it could not properly have been regarded as such. Deeming provisions are common in legislation and they are usually an indication that resort is being had to a fiction. Chotabhai v Union Government and Another 1911 AD 13 at 33, 59.

As was pointed out by counsel for the State, there are many provisions in the Act in which the word "evidence" is used, for example, secs 81(1), 87(1), 88, 115A, 118, 150, 157(1), 174, 196(2) and (3), 209, 210, 219, 256 to 270, and 272. In some of these provisions the word is used in conjunction with other words which are

identical to those used in that part of section 81(1) with which we are concerned, or bear some resemblance to them without being identical. I list below some examples and give as shortly as possible the context in which the relevant words appear.

sec 87(1) - "at any stage before any evidence in respect of any particular charge has been led" -when an accused may ask for particulars or further particulars of a charge.

sec 115A - "made before any evidence is tendered" - when a request may be made by the prosecutor in the magistrates' court for the accused to be referred for trial to a regional court.

sec 118 - "and no evidence has been adduced yet" - when a trial may be continued before another judicial officer if the judicial officer who commenced hearing it is not available.

sec 150 - "before any evidence is adduced" - when the

> prosecutor may make an opening address, sec 157(1) - "at any time before any evidence has been led in respect of the charge in question" -when the prosecutor may join another accused. The absurd consequences which would follow if one were

to interpret these expressions as including anything of evidential value or which relieves the State of the onus of proving a particular allegation it has made against the accused, even although it came into existence during the pleading phase of the proceedings, are readily apparent. An accused who pleads not guilty and intends to ask for particulars of the charge, would lose his right to such particulars if he were to admit one of the allegations in the charge during questioning by the court in terms of sec 115. The accused in such a case would also, wittingly or unwittingly, have succeeded in preventing the

prosecutor, if the prosecution had been minded to do so, from requesting the magistrate to refer the accused for trial in a regional court. The accused would also have made it impossible for his trial to be continued before another judicial officer if the judicial officer who conducted the plea proceedings were to become unavailable subsequently. The accused would also have succeeded in preventing the prosecutor from making an opening address. He would also have made it impossible for the prosecutor to join another accused. These things would not have come about as a consequence of anything done by the prosecutor. They would have come about as a consequence of what the court and the accused did during the recording of the accused's plea to the charge, a process over which the prosecutor has virtually no control. If, on the other hand, one interprets the words in issue as meaning once the prosecutor has commenced to place before

the court the evidence which he desires to place before the court, these absurdities do not arise, and the exercise of his own powers will not be frustrated by what the accused may choose to say during the plea proceedings. Similarly, the accused's right to further particulars of the charge will not be lost merely because the accused, when asked to plead, candidly admits one of the allegations in the charge.

It is not difficult to see why once the leading of evidence has commenced, no further charge or accused persons may be joined, and no other judicial officer may continue to hear the matter if the judicial officer who commenced hearing the trial is no longer available. In these instances there is an easily discernible reason for the limitation. One cannot join additional accused persons who have not heard some of the evidence which has already been given viva voce. An accused is entitled to see and hear the witness giving

evidence so that he can make appropriate submissions regarding the demeanour of the witness when the stage of argument is reached. Giving such an accused an opportunity of cross-examining a witness who has given his evidence in chief, and may even have been cross-examined in the absence of the accused, does not adequately compensate for the disadvantage arising from not having seen and heard the witness testify. Reading the evidence of such a witness to the accused or providing the accused with a transcript of the evidence given in his absence is, for the same reason, not a sufficient cure. It is basic to the concept of a fair trial in South Africa that, save in exceptional circumstances clearly and unambiguously prescribed by constitutionally competent statute, evidence upon which the State intends to rely in support of the charge against the accused, must be adduced in the presence of the accused.

One cannot allow a substitute judicial officer who has not heard the evidence given earlier in a trial, to hear the rest of the evidence given in the trial, and then purport to evaluate all the evidence given and return a verdict. The reason is obvious. Some of the witnesses have not been seen or heard by that judicial officer and the accused may be deprived of the potential benefit which may have accrued to him if the demeanour of those witnesses had been unsatisfactory and indicative of unreliability. That being the obvious mischief which the limitation is designed to prevent, there is no good reason to include within the concept of "evidence. . . .led in respect of the charge" (sec 157(1)) or "evidence . . adduced" (sec 118), what may have emerged during the plea taking phase of the case. No question of the demeanour of a witness arises and there is no need for either an accused who is joined later, or a substitute judicial officer,

to know more than what was said during that phase. What was said then or, if it be documentary, what was placed before the court, was not evidence given under oath; it was not subject to cross-examination; it was not admissible against anybody other than the accused from whom it has emanated. It is true that its evidential value, if any, would have to be evaluated at the end of the trial, but the evaluation would not depend upon the demeanour of the accused when making the statements which he did during the taking of his plea, nor, if a written explanation of plea was tendered, would the question of demeanour arise at all. The potential prejudice to an accused which is present in the case where viva voce evidence on oath has been given in his absence, or where a substitute magistrate takes over the hearing of a case at a stage where viva voce evidence has already been given, is absent where all that has happened in the way

of generation of evidential material, is what happened during the taking of the accused's plea. In S v Namba and Another 1990(2) SACR 101 (Tk) it was held that admissions made during the plea phase did not amount to "evidence. . .adduced" for the purposes of sec 119 of Act 13 of 1983(Tk). That provision is identical to sec 118 of the South African Act.

In the case of a request to refer the matter for trial in a regional court, the reason for the limitation is not the same because the hearing of evidence would have to commence de novo before the regional court. Yet what seems plain, is that the prosecutor's power to require the magistrate to refer the accused for trial in a regional court, arises only once the accused has pleaded not guilty. The process of pleading not guilty to the charge is not complete until it is clear to what extent, if any, either the accused or the court intends to

make use of the provisions of sec 115. There may be accompanying statements by the accused indicating the basis of the defence, or statements made by the accused in response to questioning by the magistrate. The statements may be recorded as admissions deemed to have been made under sec 220. It follows that the prosecutor's right to require the magistrate to refer the accused for trial to the regional court will not arise until this process is complete. If what has happened during that process is to be regarded as "evidence . . . tendered" within the meaning of sec 115A, it would largely nullify the power of the prosecutor to make such a request. His power is obviously not intended to be restricted by what may have happened during the plea phase of the case, for sec 115A specifically provides, by the use of the words "subject to the provisions of section 115", for the process to take place, and for the "record of the proceedings in the

magistrate's court" to "be received by the regional court and form part of the record of that court". In this instance therefore, it is apparent from the language alone that what may have resulted from the plea process (even an admission deemed to have been made under sec 220) is not "evidence. .tendered" within the meaning of sec 115A, even although it may have some, or even conclusive, evidential value in the trial. The underlying considerations of policy which prompted the legislature to terminate the prosecutor's power to make such a request once a start had been made with the tendering of evidence, are not as easy to discern as the policy considerations which underlie the limitation provisions in secs 118 and 157(1). It is unneccessary to attempt to discover what they might be, because the language alone makes it so clear that evidence tendered does not include what has emerged during the taking of the accused's plea. The same can be

said of sec 150. If the prosecutor wishes to make an opening address, he is not enjoined to do so before the plea is taken; he is enjoined to do so "before any evidence is adduced" and what it is envisaged he will do, is indicate "what evidence he intends adducing (my emphasis)". Again, the language is plain and excludes the notion that what might have been said by the accused during the taking of his plea (and over which the prosecutor has no control), can deprive the prosecutor of the right to make an opening address.

There are other provisions in Act 51 of 1977 which can be subjected to similar analysis and which show, likewise, that even if what happens during the taking of the plea in a criminal trial may be regarded as evidential material in the broad sense, it is not evidence led, or adduced, or tendered within the meaning of those expressions where they occur as limiting expressions in many of the provisions of

the Act. There is little point in piling Ossa on Pelion.

I conclude therefor that in casu no evidence had been led within the meaning of that expression in sec 81(1) and that the joinder of the charge of rape was procedurally permissible and not irregular. It is inherent in this conclusion that in so far as they are inconsistent with that conclusion, the cases of S v Witbooi 1980(2) SA 911 (NC) and S v Hulbert and Another 1982(2) PH H 150(C) were wrongly decided, and that the cases of S v Slabbert en Andere 1985(4) SA 248 (C) and S v Nsobeni 1981(1) SA 506 (B) were correctly decided. The case of S v Makgolelo and Others 1995(1) PH H 4(T) must also be regarded as having been wrongly decided if, as appears to have been the case, the admission made by the accused and which was considered by the court to amount to evidence led within the meaning of sec 81(1), was not in fact an admission made in terms of sec 220

(dehors the plea phase of the case, but an admission made during the plea phase which was deemed to be an admission made under sec 220. The court does not appear to have been alive to the distinction. I leave open the question of whether or not the unilateral placing on record by the accused of an admission at the inception of that phase of a case in which the court commences to receive evidence in the narrow sense, can be said to amount to the leading, or adducing, or tendering of evidence within the meaning of the various provisions discussed in this judgment. That did not occur in casu. Indeed, appellant cannot even be deemed to have made admissions under sec 220. The highest the case can be put for appellant is that the effect of sec 113(1) of the Act was that some of the things which he said during the plea phase of the case "stand as proof of those things. As I have said, I am unable to accept that that amounts to evidence led

with the meaning of sec 81(1).

The court in Makgolelo's case thought that the use of the word "getuienis", instead of the word "getuie", in the Afrikaans version of sec 81(1), and the use of the words "aangevoer" in sec 118(1), supported its interpretation of the provision. In my view, there is little to be learnt from that. The Act makes provision for the mere handing in by the prosecutor of all manner of documentary evidence without the need to place a witness in the witness stand. Plainly, once a prosecutor commences doing that, the trial is under way and he is leading or adducing evidence. If the word "getuie" or "witness" had been used, it would not have achieved the legislature's object of demarcating a clear dividing line between the plea phase and the evidence receiving phase of criminal proceedings. The court also regarded sec 81 as what it described as a safety valve designed to

protect an accused from having further charges joined as a consequence of knowledge gained from evidence (of whatever nature) placed before the court. Whatever else its object may be (and 1 have indicated earlier in this judgment what I conceive it to be), this cannot be one of them, for it is plainly open to the State to institute a separate prosecution upon such charges notwithstanding that it may only have been able to do so by reason of knowledge gained in the previous trial of the accused.

Having concluded that the joinder of Count 4 was not irregular, it is unnecessary to decide the further question debated before us, namely, whether an impermissible joinder of a charge renders the proceedings pro tanto fatally defective, or liable to be set aside only if prejudice to the accused may have been caused.

The alleged unfairness of the trial.

It is not clear to me that it is open to appellant to complain that even if the addition of count 4 was not irregular, he did not have a fair trial. No leave to raise that contention was granted by the Eastern Cape Division and I doubt that leave to do so was comprehended in the general grant of leave to appeal against the rape conviction which was granted on petition to the Chief Justice. However, I shall assume in his favour that it was. In my view, the contention cannot be upheld. It does not appear ex facie the record that appellant was, or might have been prejudiced. He has not sought to place any other evidence before the court to support an allegation of prejudice. Ultimately, he did have legal representation at his trial and, if any good purpose would have been served by the recall of witnesses who had already testified for further cross-examination, we

must assume that appellant's attorney would have sought their recall. He elected not to do so. There had been ample time between 26 February and 26 April for appellant and his attorney to confer fully and prepare for the resumption of the trial. In view of the attitude adopted by him shortly after his arrest, it was in his own interests that he be brought to trial promptly rather than be held indefinitely as an awaiting trial prisoner. There is no basis for the contention that appellant was, or may have been, unfairly prejudiced by the promptitude with which the case was initially brought to trial. The merits of the conviction.

I turn to the appeal on the merits of the conviction on the charge of rape (count 4). The fate of the appeal turns solely on the question of whether or not it was proved beyond reasonable doubt that appellant penetrated the vagina of complainant with his penis. No

question of consent arises, nor does any question as to whether or not it was appellant who assaulted complainant, both in the ordinary sense of that word, and in the sexual sense. Appellant's own evidence is to that effect. What counsel for appellant contended, was that the regional magistrate should have entertained a reasonable doubt as to whether complainant was being truthful and honest when she claimed that there had been penetration, alternatively, if she was honest, as to whether she was not mistaken. In my view, these contentions cannot prevail for these reasons.

There is no good reason why the honesty of complainant should be doubted. Her evidence is corroborated in numerous important and material respects by appellant himself. Moreover, there are also aspects of her evidence which demonstrate convincingly that she did not shrink from making a full disclosure of a highly unusual,

and personally extremely embarrassing, aspect of the matter, even although she could have withheld it, or denied it, with relative impunity. I say with relative impunity, because only appellant could have contradicted her, and because it was, in any event, so bizarre an aspect of the matter, that, if appellant chose to mention it, or if it was put to her in cross-examination, her denial that such a thing had happened, was very likely to be believed. Her candour in relation to this aspect of the matter is, I think, a telling illustration of her honesty as a witness. To appreciate why that is so, it is necessary to know what that aspect of her evidence was.

She testified that despite the fact that she had been compelled at knifepoint to submit to being blindfolded, gagged to a considerable extent, tied to a bed by her hands and feet with her legs spread apart, having her breasts exposed and sucked and her vagina

mouthed and fingered by appellant, and despite the fact that she had urinated twice in her anxiety and fear, she none the less experienced an orgasm as a consequence of appellant fingering her genitalia. The candour inherent in her account speaks volumes as to her testimonial honesty.

Nor does it end there. She said other things in her evidence in chief which were entirely inconsistent with a dishonest desire to convert an indecent assault into a rape, by fabricating an allegation of penetration. She said that appellant had assured her that he would not rape her, and that when his penis penetrated her vagina, the degree of penetration was not great, and his penis was not stiff. In cross-examination, she said his penis was not completely erect and that the depth of the penetration which occurred was approximately one inch. Those are hardly allegations which a dishonest woman

intent upon securing a conviction for rape against a person who had not raped her, but had indecently assaulted her, would make, if she knew that she would have to convince the court that penetration had occurred.

Yet another factor which makes the submission that complainant was deliberately fabricating the allegation that penetration had occurred grossly improbable, is her status as a married woman. If she knew she had not been penetrated, she would surely not have wished to bring her husband under the impression that she had been penetrated. It would only have served to aggravate an already difficult situation with which he would have to come to terms. It is no doubt theoretically conceivable that she might have told him that she intended to fabricate an allegation of penetration to aggravate the case against the appellant, but the other factors indicative of her honesty

and to which I referred earlier, are so inconsistent with there having been any such plot hatched between them, that the possibility may be safely discounted.

It was submitted that the failure to charge appellant ab initio with rape showed that complainant could not have made an allegation of rape when she first made a statement to the police, and that any subsequent allegation to that effect must of necessity be false. The submission fails because there was credible evidence from a policewoman who responded to a radio call to proceed to complainant's home, and who arrived there not long after the incident occurred, that complainant was in a traumatised state, and alleged that she had been raped. It was argued that her evidence was suspect, but the reasons advanced in support of the submission lacked substance. The regional magistrate's acceptance of her evidence cannot be faulted.

It negatives the suggestion that complainant failed to allege that she had been raped until very much later. The entire tenor of complainant's evidence is incompatible with a deliberately fabricated allegation of penetration.

What is more deserving of serious consideration, is the alternative contention that complainant was honestly mistaken in thinking that penetration had occurred. She was undergoing an extremely traumatic experience and was in a highly agitated and fearful state. She was blindfolded and could not see what was happening. Appellant claimed he was incapable of achieving an erection and her own evidence confirms that to be so. She conceded too that he had disavowed any intention of raping her. The result of tests carried out on vaginal smears taken from complainant by the district surgeon was negative. The degree of penetration alleged by

complainant is slight. All these circumstances made it necessary to consider very carefully whether complainant's insistence that she was indeed penetrated, was sufficiently reliable to be accepted as correct beyond reasonable doubt. The regional magistrate did so, and concluded that it was. I am not satisfied that he was wrong.

Complainant is a sexually experienced married woman with children. The fact that she was blindfolded would have had little, if any, effect upon her capacity to know whether or not penetration of her vagina was occurring. It is obviously a question of what is experienced physically, rather than what can be seen to be happening. It seems plain that despite his difficulty in achieving an erection, appellant was seeking sexual stimulation. While it may be that he planned initially to seek sexual gratification only by indecently assaulting complainant in the manner I have described, it is obvious

that a point was reached when he decided to attempt to rape complainant. On his own admission, he lay upon her. The reason he gave for doing so was quite ludicrous and manifestly not the real reason. He claimed that he was fully clothed and that his purpose was to prove to complainant that he could not achieve an erection. He was quite unable to say why he felt the need to prove this to her. Complainant testified that he had removed his trousers by the time he mounted her, that he succeeded in penetrating her to a limited extent notwithstanding the relative flaccidity of his penis, that he made the thrusting movements which ordinarily accompany sexual intercourse, experienced an orgasm, and ejaculated inside her vagina. She added that she could feel his semen exuding from her vagina. The possibility that she could have imagined all this, and that it did not actually happen, is so fanciful and unrealistic that it cannot be regarded as

reasonable. The very fact that appellant chose to lie about his state of dress when he mounted her, and his inability to give any plausible explanation for mounting her, shows that the true reason was one which he thought it would be damaging to him to disclose. That tends to confirm that complainant's version as to what happened, is true. The evidence of the district surgeon was that, although uncommon, it is physiologically possible for a woman to experience an orgasm even in such distressing circumstances, if the physical stimulation of her genitalia is sufficiently prolonged; that it is also possible for a male who cannot achieve an erection, to experience an orgasm if stimulated for sufficiently long a period; and that vaginal smears taken to detect semen often produce negative results even although semen has in fact been ejaculated into the vagina. When penetration has been slight, as it was here, the absence of residual spermatazoa is even less

significant. There is therefore nothing in these factors which necessarily militates against acceptance of complainant's evidence.

It was also suggested that the cautionary rule applicable in "sexual cases" had not been sufficiently respected. The suggestion cannot be entertained. The regional magistrate did not lose sight of it. The fact that relatively little was said in elaboration of his application of it is not surprising in the particular circumstances of the case. The need for its application in the circumstances which prevailed, was a very limited one. All other aspects of appellant's indecent assault upon complainant being virtually common cause, and identity not being in issue, it fell to be applied only to complainant's allegation that penetration had occurred. The reasons given by the regional magistrate for finding the allegation to be both honest and reliable are cogent and satisfy the cautionary rule. They have much in common

with what has been said in this judgment.

There were some other criticisms of complainant's evidence made by counsel for appellant, but the foundation for them was so slender, and the countervailing factors supportive of her credibility to which I have drawn attention earlier so compelling, that the criticisms do not merit more detailed treatment. No good grounds exist for disturbing the regional magistrate's conclusion that penetration had been proved beyond reasonable doubt.

The appeal against the conviction of rape is dismissed.

R M MARAIS JA

HEFER, JA)
concur
STEYN, JA)