THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE AS TO PARAS [1] TO [24], [68] – [72]
Case no: 175/07

In the matter between

W F BEZUIDENHOUT **APPELLANT**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

Coram: **FARLAM, CLOETE and HEHER JJA**

Heard: **8 NOVEMBER 2007**

Delivered: **29 NOVEMBER 2007**

Summary: Criminal procedure – appeal – special entry – application for – duty of judge; Criminal procedure – appeal – further evidence – application to admit – duty of judge; Criminal procedure – trial – application for postponement after conviction to consult expert in relation to sentence – refusal – approach of court.

Neutral citation: This judgment may be referred to as *Bezuidenhout v Director of Public Prosecutions* [2007] SCA 161 (RSA).

HEHER JA

HEHER JA:

[1] Hoërskool Standerton held a Valentine's Ball on the night of 18 February 2003. Within hours vicious unprovoked assaults were carried out on two victims whose only offence was that they were poor, alone and without protection. Sadly, the three events were not unconnected.

[2] On 25 February a local attorney contacted Detective Inspector Nortje. He represented the parents of several youths whose concern was to avoid prosecution. On the following day Nortje and his colleague Detective Inspector Jordaan apprehended the appellant, a 22 year old self-employed contractor, near his home in the town.

[3] The appellant stood trial before Smit J in the Secunda Circuit Court charged with the murder of Joey Grey at a house in Impala Crescent and assault with intent to commit grievous bodily harm on Adriaan Oosthuizen at the Standerton Caravan Park by hitting him with an iron bar. He pleaded not guilty but elected to reserve his defence.

[4] The State called one eyewitness to the first-mentioned incident and the pathologist who carried out a post-mortem examination on the body of Mr Grey on 26 February. A trial-within-a-trial was held to determine the admissibility of a statement made by the appellant to magistrate Fischer on 27 February. After a ruling in favour of the State it was duly taken into evidence. Inspector Nortje also gave evidence about the pointing out by the appellant of an iron pole lying in the garage at his residence.

[5] In respect of the lesser charge the State relied in the main on written statements made by an alleged eyewitness and the complainant. Both statements were admitted as evidence under the provisions of s 3 of the Law of Evidence Amendment Act 45 of 1988.

[6] The appellant did not testify. His case was closed without the leading of

evidence.

[7] Smit J convicted the appellant on both counts as charged.

[8] Counsel for the appellant (who was not his counsel in the appeal) asked for a postponement in order to allow him to consult an expert witness, then unavailable, for the purpose of preparing and presenting evidence in mitigation. The learned judge refused to postpone the case for a period which would have been sufficient for that purpose. Consequently no evidence was presented, the appellant relying upon an address by his counsel.

[9] Smit J decided that the murder had been committed by the appellant in the execution or furtherance of a common purpose. It therefore fell within Part 1 of Schedule 2 to the Criminal Law Amendment Act 105 of 1977. Accordingly the defence was required by s 51(1)(a) read with s 51(3)(a) of that Act to establish substantial and compelling circumstances which justified a lesser sentence than life imprisonment. The learned judge found that no such circumstances had been shown to exist and imposed the mandatory sentence. In relation to the second offence the learned judge held that imprisonment for one year was the appropriate sentence.

[10] The appellant applied for leave to appeal in respect of the convictions and sentences. He also applied under s 316(3) for the making of various special entries on the ground that the proceedings had been tainted by irregularity or were not in accordance with justice.

[11] The appellant also gave notice of his intention to apply for leave to present the evidence of a forensic medical consultant, Dr Leon Wagner, and a criminologist, Dr Irma Labuschagne, in terms of s 316(3) of the Act. Attached to the notice was a supporting affidavit of the appellant to which were annexed affidavits by the

proposed witnesses.

[12] The order made by Smit J in the application was ambiguous. The appellant's legal advisers understood it only as a grant of certain of the special entries. I think the learned judge probably also intended to accede to the application for leave to appeal as a whole. Be that as it may, this Court granted leave to appeal against both the conviction and sentence generally.

The special entries

[13] At the commencement of the appeal before us counsel abandoned reliance on the special entries *per se*. He informed us that they could as well be argued as part of his attack on the merits of the convictions. That was a proper approach[1]:

[14] Unfortunately, the procedures adopted by the trial judge to the application for the making of the special entries fell materially short of what law and established practice demanded of him. It is desirable that reference be made to his handling of the application so that other trial judges may be placed on their guard in relation to what is a relatively rare occurrence.

[15] The special entry procedure is designed to cater for irregularities which affect the fairness of a criminal trial. The formal requirements are set out in s 317 of the Criminal Procedure Act. An entry must be made unless the court to whom application is made is of the opinion that the application is not made *bona fide* or that it is frivolous or absurd or that the granting of the application would be an abuse of the

[1] *Sefatsa and Others v Attorney-General, Transvaal and Another* 1989 (1) SA 821 (A) at 843F-844B; *S v Heslop* 2007 (4) SA 38 (SCA) at 46G.

process of the court (s 317(1)). In the present case, Smit J, faced with ten applications for special entries said simply, 'Ek is nie van voorneme om al die aspekte te oorweeg nie. Ek meen daar is vier aspekte wat oorweging verdien.' The result was that six of the entries sought did not receive the specific consideration which the learned judge was bound to give to them and he did not purport to refuse those applications on any of the grounds recognised by the statute.

[16] The great majority of grounds depended upon irregularities not arising *ex facie* the record (eg alleged shortcomings in the conduct of the appellant's legal representatives). Many were dependent on the say-so of the appellant. These were irregularities which fell outside the cognizance of the trial judge. In such an event he was required to have the irregularity formulated and established by evidence[2]: that may be done on affidavit in appropriate cases[3]. It is also the duty of the trial court to determine whether or not a complaint of irregularity is well-founded[4]. Where, as here, it is impossible to make such a determination on affidavit, the taking of evidence can hardly be avoided. But Smit J did not hear evidence and indeed did not make a finding as to the substance of the complaints at all. (While it may ordinarily be advisable to remit the case to the trial judge to make factual findings in certain cases,[5] that may not be feasible in this instance as the learned judge has retired from active service[6].) Nor did the learned judge settle the terms of those special entries which he did grant, as he was obliged to do by s 317(4). If he had done so, he would probably have appreciated that none of individual reasons that he had, briefly, enunciated for granting each of the four successful applications fell within the scope of any of the special entries outlined

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[2] *R v Matsego and Others* 1956 (3) SA 411 (A) at 415A-D; *S v Naidoo* 1962 (2) SA 625 (A) at 629H; *Kroon v S* 1997 [2] All SA 330 (SCA) at 333b-e.
[3] *R v Knight* 1935 AD 342 at 345; *R v Velshi* 1953 (2) SA 553 (A) at 561D
[4] *S v Majola* 1982 (1) SA 125 (A) at 131H-132A, 133 *in fine*.
[5] See *R v Matshego* supra at 415D
[6] Section 3(2)(a) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001.

in the application.

[17] Finally, in this regard, s 320 of the Act provides:

'The judge or judges, as the case may be, of any court before whom a person is convicted shall, in the case of an appeal under section 316 or 316B or of an application for a special entry under section 317 or the reservation of a question of law under section 319 or an application to the court of appeal for leave to appeal or for a special entry under this Act, furnish to the registrar a report giving his, her or their opinion upon the case or upon any point arising in the case, and such report, which shall form part of the record, shall without delay be forwarded by the registrar to the registrar of the court

of appeal.'

The learned judge did not submit any report to the registrar and, accordingly, this court

was deprived of the benefit of his opinions both as to the entries granted and 'refused'.[7]

[18] In the present instance the appellant asked for special leave to appeal not only against the (supposed) refusal of his application in respect of convictions and sentence but also against certain of the unsuccessful applications for special entries[8]. Leave to appeal was not granted in relation to any of those entries.

[19] Having regard to the attitude of counsel to the successful entries to which I have earlier referred, further reference thereto is unnecessary.

The application to hear further evidence

[20] The appellant applied to Smit J after conviction and sentence to hear the

[7] See *R v Mogale* 1955 (2) SA 155 (A) at 161D-E. Although Kriegler and Kruger, Hiemstra, *Suid-Afrikaanse Strafproses* 6 ed 895 describe such a report as 'superfluous' – because judgments and rulings usually contain motivated reasons for decisions reached – an instance such as the present, in which the reasons delivered *ex tempore* fall well short of providing an adequate explanation for the decision, provides a continuing *raison d'etre* for compliance with the dictates of the section. It may, of course, depending on what has preceded the report, be necessary to do no more than affirm the court's already expressed reasons.

[8] Section 317 (5)

evidence of two further witnesses, Drs Wagner and Labuschagne. The first deposed to an affidavit which cast doubt upon the validity of certain findings and evidence of Dr Batev, the pathologist. The second provided a lengthy report, confirmed on oath, addressed to the appropriate sentencing of the appellant.

[21] Smit J made no reference whatsoever to the proposed evidence of Dr Wagner in

his judgment on the application and made no order that it should be heard or accepted. This Court did not grant special leave in that regard. As to Dr Labuschagne, Smit J said:

'Daarbenewens is daar dan tans ook 'n aansoek voor my om toestemming te verleen dat die hof van appèl verdere getuienis kan aanvaar van dr Irma Labuschagne en daardie getuienis kan oorweeg vir doeleindes van die oplegging van 'n gepaste vonnis. Ek meen, in terme van die bepalings van artikel 316(3), behoort ek gevolglik ook 'n bevel te verleen dat die hof van appèl sodanige getuienis sal aanvaar en oorweeg en dan oorweeg wat 'n gepaste vonnis in die omstandighede is. . .

Wat die aansoek om verlof om te appelleer teen die vonnis aanbetref word die bevel ingevolge artikel 316(3) van die Strafproseswet 51 van 1977 gemaak dat die getuienis van dr Irma Labuschagne aangehoor en oorweeg word.'

[22] But s 316(3) no longer relates to the admission of further evidence. Section 316 now provides:

'(5)(*a*) An application for leave to appeal under subsection (1) may be accompanied by an application to adduce further evidence (hereafter in this section referred to as an application for further evidence) relating to the prospective appeal.

(*b*) An application for further evidence must be supported by an affidavit stating that-

(i) further evidence which would presumably be accepted as true, is available;

(ii) if accepted the evidence could reasonably lead to a different verdict or sentence; and

(iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.

(*c*) The court granting an application for further evidence must-

(i) receive that evidence and further evidence rendered necessary thereby, including evidence

in rebuttal called by the prosecutor and evidence called by the court; and

(ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.

(6) Any evidence received under subsection (5) shall for the purpose of an appeal be deemed to be evidence taken or admitted at the trial in question.'

Clearly, what the statute contemplates is that when the trial court is satisfied that the requirements of s 316(5)(b) have been met and has granted the application, it shall itself take the steps laid out in s 315(5)(c) in order to place the appeal court in a position to deal adequately and fully with the additional evidence in the context of an appeal against conviction or sentence[9]. But here too the trial court failed in its duty. There may be circumstances where, with the concurrence of an opposing party, an affidavit may be received in satisfaction of s 316(c)(i) without the necessity for oral evidence, but this was not such a case and, in any event, the trial court was still bound to comply with the requirements of s 316(c)(ii), which it did not do.

[23] When apprised of the lack of a formal basis for reliance upon the proposed new evidence of Dr Wagner, counsel made an informal application for this Court to exercise its powers under s 22(a) of the Supreme Court Act 59 of 1959 to receive that evidence. We would be loth to deprive an accused person of a full opportunity to present his case on appeal because the trial court has been inattentive to its statutory duty. But acceptance of such evidence presupposes that the basic foundation, as determined in a long line of cases, has been laid:

'[T]heir tenor throughout has been to emphasise the Court's reluctance to re-open a trial. They may be summarised as follows:

(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a prima facie likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial.' [10]

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[9] Cf *S v Tsawane and Another* 1989 (1) SA 268 (A) at 273H-I.

[24] Counsel for the appellant was driven to concede that the application, even as supported by his client's affidavit to the trial court, did not satisfy the first requirement. Nor could he contend that the substance of Dr Wagner's proposed evidence amounted to more than speculation, not based on personal examination of the body of Mr Grey, as to a cause of death other than that confirmed in evidence by Dr Batev, *viz* a blow to the back of the head by a rigid object such as the iron bar recovered from the garage of the appellant. The proposed evidence would therefore not have a material bearing on the outcome of the trial and the third requirement was for that reason also not satisfied.

We are accordingly bound to refuse the application to adduce the further evidence of Dr Wagner.

The appeal against the convictions

[25] The substance of the case against the appellant on count 1 was

i) the direct evidence of an eyewitness which implicated him;

ii) the medical evidence;

iii) the content of a statement made by him before magistrate Fischer on the morning of 27 February 2003;

iv) the handing over of an iron bar by the appellant to the police;

That was by any standard a formidable combination and, in addition, he failed to give evidence.

[26] Counsel for the appellant relied on four basic submissions in attacking the judgment on the merits of the conviction. First, he contended that, *ex facie* the record, his client's counsel at the trial had committed a violation of his instructions by making formal and informal admissions in contradiction of the appellant's stated refusal to do so. Second, he submitted that certain admissions were made in conflict with clear indications that the appellant possessed no knowledge of the matters

[10] *S v De Jager* 1965 (2) SA 612 (A) at 613C-D; *S v Wilmot* 2002 (2) SACR 145 (SCA) at para 31.

admitted. Third, he criticised the eyewitness, Mr Johannes Maqo, as unreliable in the substance of his testimony. Finally, counsel attempted to persuade us that the trial court erred in admitting in evidence the statement to the magistrate.

[27] The first submission is without merit. The appellant pleaded not guilty to the charges. His counsel informed the court that his client chose to furnish no explanation of his plea at that stage and to answer no questions. He added, 'Daar sal egter in die loop van die verhoor erkennings gemaak word wat die verrigtinge aansienlik sal verkort'. Smit J then asked the appellant if he had heard his advocate and whether he was satisfied with what he had said. The appellant replied affirmatively to both questions. State counsel then took over. He began by saying:

'U edele, my geleerde vriend het verwys na sekere erkennings. Ek het voor die agbare hof 'n bundel geplaas wat dan ook sekere erkennings bevat. Dit is dan die formele erkennings. . . deur die beskuldigde in terme van artikel 220 van Wet 51 van 1977.'

He proceeded to read out the admissions as follows:

'1. Dat die oorledene gemeld in die akte van beskuldiging te wete Joey Philippus Cyril Grey op 19/2/2003 gesterf het as gevolg van beserings opgedoen op 19/2/2003 te Standerton in die distrik van Standerton.

2. Dat die liggaam van die oorledene nie verdere beserings opgedoen het nie sedert die beserings in paragraaf 1 vermeld opgedoen is, totdat die lykskouing op die oorledene uitgevoer was op 26/2/2003.

3. Dat Dr Nikola Batev die lykskouing op die liggaam van die oorledene uitgevoer het op 26/2/2003 en sy bevindings op die vorm GW 7/15 genotuleer het welke feite en bevindings korrek en volledig is, en dat die oorsaak van dood korrek aangeteken is synde "Head injury" (Hoofbesering).

Die lykskouingsverslag word by ooreenkoms ingehandig synde bewysstuk B.'

[28] The document containing the admissions was Exhibit A. It was headed in capitals 'Erkennings in terme van artikel 220 van Wet 51 van 1977'. It had been signed by the appellant and his advocate. Smit J asked defence counsel whether he was satisfied with the admissions as minuted to which he replied, 'Inderdaad so'.

Smit J did not ask the appellant the same questions but s 220 (as opposed to s 115) did not require him to do so.The appellant did not then or thereafter before sentence put in issue the correctness of his counsel's conduct or his own comprehension of what had transpired. His counsel's submission to us that there was an inherent contradiction between the appellant's refusal to explain his plea or answer questions and the making of the formal admissions immediately thereafter is unsustainable. The two steps were entirely unconnected. The formal admissions had obviously been prepared in advance and approved by the appellant. The prosecutor could have introduced them at any time during the trial. He chose to do so after the plea procedures for which s 115 of the Criminal Procedure Act 51 of 1977 ('the Act') makes provision had been concluded.

[29] The submission that the appellant's absence of personal knowledge precluded the making of the formal admissions (and by inference must have been at odds with counsel's instructions) is also devoid of merit. One of the advantages of being placed in possession of a summary of substantial facts[11] and copies of exhibits and witness statements in advance of the trial[12], is that an accused person is enabled to assess the merits of the case which the state proposes to prove against him and to decide which averments he does and does not wish to place in dispute. Despite lack of personal knowledge on his part, if the proposed medical evidence reveals a gunshot wound to the heart as the cause of death, the accused may reasonably conclude that the evidence is uncontestable. The considered admissions made in this case were likewise not at variance with an absence of personal knowledge of the matters admitted. That applies also to the possibility (according to counsel) that between the time of the assault on the deceased (of which the appellant did possess personal knowledge) and the next morning when he was found dead in his room, some unknown third party may have entered the room and inflicted on him the injuries which the doctor found

[11] Section 144(3)(a) of the Act.
[12] *Shabalala and Others v Attorney-General of Transvaal* 1996 (1) SA 725 (CC).

on the body

and of which he died.

[30] A further admission made by counsel at the trial was also criticised on appeal as being at variance with appellant's evidence in the trial within the trial and, therefore, by inference, in conflict with his instructions. After the court had ruled on the admissibility of the statement, counsel for the state told the court that the defence admitted in terms of s 220 of the Act that the contents of the statement made before the magistrate could be taken into evidence. This was obviously done to avoid the recall of the magistrate to whom defence counsel considered he could not usefully address further questions. That is a sensible, time-saving expedient which is commonly resorted to when an accused does not place in issue the correctness of the magistrate's recording of his statement. The appellant did not do so in this instance. Although he had testified that the police had told him about their knowledge of the incident in order to persuade him to speak (in itself not an improper mode of interrogation), it was not his case that he had been instructed to repeat any part of what he was told to the magistrate or that he did so. Nor was it put to the magistrate during cross-examination in the trial-within-a-trial that he had deviated from the actual words uttered to him by the appellant in any way at all. In these circumstances the submission of counsel on appeal bore no relation to reality and one deplores that it was made at all.

[31] Turning to the direct evidence, counsel submitted that the eyewitness had been unreliable in the substance of his testimony. The submission calls for consideration of his account of the events. Mr Maqo awoke at about 3am to the sound of kicking on a door. The area outside was lit by the lights from the store across the road. From the window he could see seven white males armed with what appeared to be 'kieries'. They entered the deceased's room and dragged him outside. They surrounded him and beat him all over his body. Six of the persons were boys, one man was older with long hair. (Later he said there were two who could be described as 'older'.) He was

the appellant, a person the witness had seen before. When the attackers became aware that they were being observed they ran off and climbed into a white 'bakkie', four on the rear and three in front. The appellant took the passenger's seat in front. One of the seven then returned to the deceased and called the others but they did not respond. He looked at the deceased, turned away laughing, and returned to the vehicle which then drove off. The witness and a friend attempted to help the deceased but when they touched him he complained of pain. Full of blood he crawled on his stomach into his room where they left him and tried without success to find his girlfriend. In the morning the deceased was dead.

[32] In cross-examination the witness was not materially shaken. The following version was put to him by counsel:

'Die beskuldigde het 'n meisietjie gaan aflaai in Kosmospark en hulle het van sy huis af vertrek ongeveer 12-uur middernag. Die rede was dat die meisie se ma het gesê dat hy 12-uur kan ry dan moet hy haar by die huis besorg. Nadat die meisie afgelaai is het hy weer huis toe gery vanuit Kosmospark op die pad wat Leandra/Standerton toe beweeg. Net voordat hy by Giants winkel aangekom het het persone wat agter op die bakkie was hard bo-op die bakkie se bak geklap. Hy het tot stilstand gekom. Die persone wat agter op die bakkie was het afgespring en die persoon wat voor in die bakkie saam met hom gery het, het uitgespring. Hy het na 'n murasie gehardloop wat basies aan die oorkant van Giants was en dit blyk te wees die murasie soos voorkom in foto's 1 en 2 van die fotobundel. Beskuldigde het hierop sy bakkie uit die pad, van die pad afgetrek en basies tot stilstand gekom voor hierdie geel item wat op foto's 1 en 2 sigbaar is voor die murasie. Hy het sy ligte afgesit en sy voertuig gesluit. Hy het by 'n deur ingegaan in die murasie wat volgens foto's 1 en 2 blyk te wees op die regterkant van die murasie.

Kan ek u net vra is daar 'n deur op die regterkant van daardie foto's 1 en 2? --- Ja, daar is 'n deur.

Goed. Hy sê toe hy binne-in die vertrek inkom het hy gemerk dat die persone wat saam met hom in die voertuig was en op die voertuig was is betrokke by 'n aanranding op 'n persoon. Een van hierdie persone het 'n pyp gehad soos wat blyk uit foto 16 in die fotobundel. Kan ek u net daarso onderbreek. Sal u sê dat daardie pyp wat u daarso sien sal dit inpas met u

beskrywing van 'n kierie?

--- Hulle het kieries gehad.

Nee goed, ek hoor wat u sê hulle het kieries gehad. Sal daardie een van die kieries kon wees waarvan u gepraat het? --- Almal het geslaan.

Nee meneer, daardie foto, daardie pyp op foto 16 lyk hy soos die kieries wat hulle gehad het? --- Ja, dit lyk soos 'n kierie want dié wat kieries gehad het was besig om te slaan.

Op die stadium wat hy ingekom het het hierdie persoon opgespring, hy was op die grond gewees en na die beskuldigde aangehardloop gekom. Beskuldigde het die persoon wat na hom toe aangehardloop gekom het plat geslaan. Het u so 'n voorval gesien?

--- Dit is nie so nie. Hulle het hom uit die vertrek uitgehaal, hulle het die deur geskop en hulle het hom gesleep.

Goed. Net hierna het daar 'n persoon met die naam van Gustav Lindeque wat in die beskuldigde se geselskap was wat in sy voertuig of op sy voertuig teenwoordig was gesê: "Go, go, go" waarna die groep na buite gehardloop het en in en op die bakkie geklim het. Kan ek u net onderbreek hierso. Is dit so dat die bakkie geparkeer was net voor hierdie oranje ding soos dit sigbaar is op foto's 1 en 2? --- Ja, dit was daar geparkeer.

So nou was die voertuig nie meer geparkeer 70 na 100 meter weg? --- Dit beteken toe ek so gesê het dit was op die stadium toe die voertuig weggery het.

Hierna het dieselfde Gustav weer om die murasie inbeweeg, 'n kort rukkie daar gebly, teruggekeer, op die bakkie geklim en het hulle weggery na sy huis. Het u gesien toe die bakkie vanaf, daar waar hy geparkeer was soos aangedui op foto's 1 en 2 wegbeweeg het? --- Ja, dit het weggetrek en dit het in die pad wat na Pretoria toe inlei af beweeg ondertoe.

My instruksies is dat die beskuldigde nie die oorledene wou gedood het nie. My instruksies is voorts dat die beskuldigde nie voorsien het dat die oorledene gedood kon word uit dit wat plaasgevind het nie. My instruksies is ook dat die beskuldigde inderdaad nie weet of die oorledene beswyk het as gevolg van dit wat plaasgevind het daar op daardie stadium. Wil u of kan u daarop reageer? --- Nee, daar was niks waarop ek kan antwoord nie. Die waarheid het ek reeds vertel.'

[33] It will be observed that the witness was thereby corroborated in identifying the appellant as an active participant in the assault at the scene although the nature of such participation was in dispute. What is also important in the version put to Maqo is that the appellant agreed that *one* person was in possession of a weapon resembling

the iron pipe recovered from his possession.

[34] The evidence relating to the finding of the iron pipe emanated from Nortje. Together with Detective Inspector Van Zyl of the Criminal Records Bureau he searched the appellant's vehicle without success for possible evidence. (This took place after the appellant made his statement to the magistrate.) The record of his evidence continues:

'By die beskuldigde se woning het ek hom gevra of het hy nog die pyp en hy het toe die pyp aan my uitgewys.

Wat was u presiese woorde aan die beskuldigde met betrekking tot die pyp? --- Net, Het jy nog die pyp?

Na watter pyp het u verwys? --- Na die pyp, ekskuus, die pyp waarmee die oorledene aangerand is.

Was die betrokke pyp toe nog beskikbaar? --- Dit is korrek u edele, hy het daar in die garage gelê.

Hoe het u geweet dat dit die betrokke pyp is? --- Die beskuldigde het hom vir my uitgewys.

Die betrokke pyp is daar enige foto daarvan geneem? --- Dit is korrek, u edele. Ek het inspekteur Van Zyl versoek om'n foto van die pyp te neem terwyl dit nog daar op die grond gelê het.

Dit is 'n ysterpyp, u edele.

En is dit moontlik om vir die hof te sê watse tipe pyp dit is, hoe swaar dit is. --- Ek het aangeneem dit is amper 'n tipe pyp amper soos 'n tentpaal of iets want hy het hakies aan die onderkant met drie gaatjies, wat ek nou maar aangeneem het jy seker iets aan vasmaak.'

The only questions concerning the pipe put in cross-examination by the appellant's counsel related to count 2. They have no bearing on count 1. Within the time frame of events it is clear that Nortje asked and received the answer concerning the pipe in the context of the reference to it in the statement made to magistrate Fischer.

[35] On the morning of 27 February 2003 the appellant made a statement which was taken down by magistrate Fischer in the latter's office at Standerton. According to the

evidence of Fischer the recordal was preceded by a series of questions put by him and answered by the appellant. It was made clear to the appellant that he was under no obligation to make a statement. When asked to tell how it had come about that he was in the magistrate's office to tell his story the appellant replied:

'Inspekteur Nortje het gesê ek kan 'n verklaring voor 'n landdros aflê as ek wil. As ek wil nie is dit ook goed. Ek wil egter 'n verklaring aflê. Ek verkies dit so.'

As to whether he still desired to make a statement despite the fact that it could be used as evidence against him in court, the appellant replied affirmatively. The questions and answers continue as follows:

'(d) Het die polisie of enige ander persoon u aangerand of gedreig om 'n verklaring voor my te kom aflê:
Antwoord: Nee, glad nie

(e) Is u deur enige persoon beïnvloed om 'n verklaring voor my te kom aflê:
Antwoord: Glad nie.

(f) Is u deur enige persoon aangemoedig om 'n verklaring voor my te kom aflê:
Antwoord: Glad nie

(g) Is enige beloftes aan u voorgehou om u te oorreed om 'n verklaring af te lê:
Antwoord: Nee, glad nie.

(h) Verwag u enige voordele as u 'n verklaring aflê:
Antwoord: Nee.'

Notwithstanding these answers the magistrate informed the appellant that he could expect no benefit of any kind whatsoever if he made a statement. After all this, the appellant was once again asked whether he was, despite the absence of any benefit, still willing to make a statement. He replied affirmatively.

The recordal continues:

'(n) U het nou wel aan my gesê dat u nie deur enigiemand aangerand, gedreig, aangemoedig of beïnvloed is nie en dat geen beloftes aan u voorgehou is ten einde u te oorreed om die verklaring af te lê nie. Ek wil u nogtans vra om my in u vertroue te neem en as daar na u oordeel enigiets onbehoorlik gebeur het wat u beïnvloed het om na my te kom om die verklaring af te lê dit nou aan my te openbaar. Ek onderneem om dit onverwyld te ondersoek en indien nodig, toe te sien dat u die nodige beskerming verleen word. Het daar enigiets gebeur wat u kan openbaar?:

Antwoord: Nee.

(o) Verstaan u wat ek so pas aan u verduidelik het?:

Antwoord: Ja.

(p) Wil u nog enigiets byvoeg tot wat u alreeds in die verband gesê het?:

Antwoord: Nee.

6. Hierna lê die verklaarder die onderstaande verkaring vrywillig af, welke verklaring in sy/haar teenwoordigheid in sy/haar eie woorde ten tye van die aflegging daarvan neergeskryf word, sonder dat enige vrae aan hom/haar gestel word behalwe vrae wat nodig is om onduidelike of onverstaanbare verklarings op te klaar'.

[36] Although the issue is the admissibility of the statement made before the magistrate on 27 February 2003 in an interview which commenced at 08h48, that question cannot be resolved without a full consideration of the influences acting on the mind of the appellant from the time that he was confronted by Inspector Nortje and Jordaan at shortly before 18h00 on the previous evening.

[37] When the trial-within-a-trial commenced the presiding judge asked the appellant's counsel on what grounds the admissibility of the statement was attacked. Counsel replied that the statement had not been made freely and voluntarily and without undue influence. He later confirmed that no allegation of physical violence or threats to that effect had been made by the police. Counsel made no mention of reliance on any infringement of the appellant's constitutional rights and indeed no failing of that nature was addressed during the subsequent judgment on admissibility although both in cross-examination of state witnesses and in the evidence in chief of the appellant in the trial-within-a-trial it was said that he had not been informed of his right to remain silent. In addition, Nortje testified about a telephone call made by the appellant to his employer while in custody during which the appellant requested him to arrange legal representation. Both of the last-mentioned two aspects assumed much more importance in the submissions on behalf of the appellant on appeal than they appear to have done at the trial. I shall however assume in the appellant's favour that

such significance has been present throughout.

[38] Certain facts were objectively established, were not disputed or were common cause during the trial-within-a-trial. The weight to be attached to or the slant put upon them by the evidence and perceptions of the participants differed and requires evaluation. Shortly before 18h00 on 26 February the two inspectors, acting on information, approached the appellant near his home in Standerton. All three are Afrikaans-speaking. Nortje told the appellant he was investigating a murder in which the appellant might be implicated. The appellant accompanied them to their office.

[39] Between 18h20 and 18h25 all three persons signed a document in English headed in bold letters 'NOTICE OF RIGHTS IN TERMS OF THE CONSTITUTION'. The appellant signed as a 'detainee' under a heading (in bold) 'CERTIFICATE BY DETAINEE' in which he purported to certify that he had been informed by Detective Inspector Nortje in Afrikaans of his rights in terms of the Constitution as set out in the Notice and that he understood the contents 'thereof'. Nortje signed as the 'person who informed the detainee'. Jordaan certified that the appellant had been so informed in his presence and signed as a witness accordingly.

[40] The terms of the Notice (Exhibit E) were as follows:

'(1) You are being detained for the following reason:

I received information that you were involved in a murder case

(2) As a person who is detained you have the following rights:

(a) you have the right to consult with a legal practitioner of your choice or, should you so prefer, to apply to the Legal Aid Board to be provided by the State with the services of a legal practitioner;

(b) you have the right to challenge the lawfulness of your detention in person before a court of law and to be released if such detention is unlawful;

(c) you have the right to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate accommodation, nutrition,

reading material and medical treatment at state expense; and

(d) you have the right to be given the opportunity to communicate with, and be visited by, your spouse or partner, next-of-kin, religious counsellor and a medical practitioner of your choice.

(3) As a person arrested for the alleged commission of an offence, you have the following rights:

(a) you have the right to remain silent and anything you say may be recorded and may be used as evidence against you;

(b) you are not compelled to make a confession or admission which could be used in evidence against you;

(c) you have the right to be brought before a court as soon as reasonably possible but not later than 48 hours after your arrest or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

(d) you have the right, at the first court appearance after your arrest, to be informed of the reason for your continued detention, or to be released; and

(e) you have the right to be released from detention if the interests of justice permit, subject to reasonable conditions.

(4) You can exercise all the abovementioned rights at any stage during your detention.'

Exhibit E was in the form of a page from a book. The original was removed from the book and given to the appellant. A copy was retained.

[41] The appellant asked Nortje for permission to make two telephone calls, one to his employer, the other to his parents. He made them in Nortje's presence. He asked his employer to arrange legal representation for him. It was not suggested in cross-examination that the appellant was dictated to by Nortje in this regard or that his freedom of action was in any degree affected or influenced by Nortje.

[42] The appellant was detained in a cell at the police station overnight. The following morning Nortje at about 07h30 took a warning statement in Afrikaans (Exhibit F), which he and the appellant signed on each page. The appellant also

initialled various deletions made by Nortje. Paragraphs 3,4 and 5 are material:

‘ 3

Ek het die verdagte as volg ingelig:

(a) Die doel van hierdie onderhoud is om u die geleentheid te gee om ‘n verklaring te maak rakende die beweringe teen u en om sekere vrae aan u te stel rakende die beweringe dat u betrokke was by die pleging van die misdryf(we).

(b) U het die reg om deurentyd tydens hierdie onderhoud te swyg en is nie verplig om enige verklaring te maak of enige vrae te beantwoord nie. Enige verklaring wat u maak en enigiets wat u sê, sal neergeskryf word en kan as getuienis in ‘n hof gebruik word. Indien u verkies om ‘n verklaring te maak of om die vrae te beantwoord, sal sodanige verklarings of antwoorde aan die Prokureur-generaal of die staatsaanklaer voorgelê word, wat die inhoud daarvan in ag sal neem ook wanneer besluit word of u vervolg moet word of nie.

(c) U het die reg om met ‘n regsverteenwoordiger van u keuse te konsulteer, of indien u dit verkies, aansoek te doen by die Regshulpraad om voorsien te word van die dienste van’n regsverteenwoordiger op staatskoste. Die regsverteenwoordiger van u keuse of die een voorsien deur die Regshulpraad, kan ook teenwoordig wees tydens die onderhoud.

Die verdagte erken dat hy hierdie regte, asook die doel van die onderhoud, begryp.

4

Ek het van die verdagte verneem of hy verkies om te konsulteer met ‘n regsverteenwoordiger voordat hy besluit om ‘n verklaring te maak. Die verdagte het aangedui dat hy-

. . . (c) verkies om nie konsulteer met ‘n regsverteenwoordiger nie,

voordat hy sal besluit om ‘n verklaring te maak.

. . .

Ek het die volgende stappe geneem om hom van die geleentheid daartoe te voorsien:

Meld dat hy wel ‘n regsverteenwoordiger sal kry vir ‘n borgaansoek.

. . .

Die volgende het geblyk as gevolg van die stappe wat ek geneem het:

Meld dat hy reeds met sy baas Theunis gepraat het, en dat hy ‘n verteenwoordiger sal reël.

5

Ek het die verdagte gevra of hy verkies om ‘n verklaring te maak rakende die bewering(e) teen hom. Die verdagte het aangedui dat hy -

. . .

(d) net bereid is om ‘n verklaring te maak aan ‘n landdros of vrederegter’.

[43] Thereafter Nortje made arrangements with the court for the taking of a statement from the appellant. Magistrate Fischer recorded in writing the subsequent interaction between himself and the appellant.

[44] The appellant testified in the trial within the trial that he made the statement to the magistrate for two reasons:

1. He thought from various things said by Nortje that the latter knew something of what had occurred on the night of 18-19 February. He felt that he, as the oldest member of the group, should stand up for his friends and take the blame on himself, knowing that his friends would come and tell the truth in due course.

2. As he put it,

‘Ek het begin gesels oor die ding toe sê hy vir my ja, dit is reg ek moet gesels daaroor, ek moet met hom oop kaarte speel en ek sal ligter op die ou einde van die dag daarvan afkom.’

[45] It is clear from his testimony that he had already decided to disclose his version to Nortje and had commenced doing so when Nortje allegedly held out the prospect of lighter treatment.

[46] There is a further aspect which requires some consideration in the context of the alleged exercise of undue influence by the police. According to the appellant he was threatened by Nortje at the time of his initial arrival at the police offices on the evening of 26 March in the following context:

‘. . . by die aankoms by die speurkantoor is ek gevra of ek iets weet omtrent hierdie saak en ek het gesê ek weet niks nie en sy woorde was gewees: Jy beter praat anders sluit ons jou toe.’

Both policemen denied that such a statement was made. Where do the probabilities lie and how strong are they? First, it was not the appellant’s case that he was influenced by the threat. He testified that his response was:

'. . . ek het vir hom gesê dit is reg dan sluit jy my toe en ons het vertrek daarvan af terug na die polisiekantore, toe het hulle my ingeboek . . . Die volgende oggend het inspekteur Mark Nortje my weer kom haal by polisieselle en ons het gery na sy kantoor toe, die speurtakkantoor . . . waar hy weer vir my gevra het of ek iets weet of ek hom iets kan vertel en ek het weer vir hom gesê ek weet niks nie'.

Second, both the making of the threat and any influence that the threat, if made at all, may have exercised on his mind are inconsistent with the terms of Exhibit E, para 3 of Exhibit F and the appellant's responses to the magistrate recorded in para 5 of the recordal. Third, the 'threat' did not merit mention by the appellant in his reasons for making the statement, as furnished in evidence. There can, in my view, be no doubt that whatever may have been said to the appellant by way of persuasion at the initial stage of his detention contributed not at all to his decision to disclose his version of the events to the magistrate.

[47] Did the appellant decide to speak out because Nortje promised or told him he would come off lighter if he did so? Nortje denied making such a remark. The evidence of the appellant read in context is revealing. What is significant is that the version was uninfluenced by interruptions or prompting by his counsel. One may accept that the appellant made a fair disclosure of those matters which he regarded as important:

'Die volgende oggend het inspekteur Mark Nortje my weer kom haal by die polisieselle en ons het gery na sy kantoor toe, die speurtakkantoor.

Ja, wat gebeur daar? --- Waar hy weer vir my gevra het of ek iets weet of ek hom iets kan vertel en ek het weer vir hom gesê ek weet niks nie. Toe sê Inspekteur Mark Nortje vir my laat ek jou vertel wat het daar gebeur. Nou op daardie stadium was 'n mens, jy is baie gespanne. Ek was baie gespanne gewees en op my senuwees. Ek weet nie waar is my vriende op daardie stadium nie of hulle alreeds in aanhouding is of wat die situasie is nie en inspekteur Mark Nortje het opgestaan, hy het 'n draai in sy kantoortjie geloop en hy het vir my gesê laat ek jou vertel wat het gebeur en hy het gesê ons het met die bakkie gery, ons het by daardie plek gestop, ons het uit die bakkie uitgeklim en van die bakkie af ingeklim, ons het binne-in die murasie inbeweeg, ons het die persoon uit die kamer uitgetrek en ons het hom aangerand en daarna weer op die bakkie geklim en ingeklip

en vertrek, weggejaag.

Toe hy dit nou vir u sê wat kom toe nou by u op? --- Dit kom toe by my op dat hy informasie gekry het, 'n deel informasie gekry het omtrent die saak.

Het u gedink by wie? --- By een van die persone wat teenwoordig was in die aanrandingsproses.

Ja, wat doen u toe of wat laat dit u dink en op sterkte van wat Nortje vir u sê? --- Ek begin toe vir inspekteur Nortje vertel omtrent hierdie saak want hy het vir my gesê ek moet met hom gesels en ek gaan toe voort met die (onhoorbaar).

Waarom praat u nou met hom? Hy sê nou vir u laat ek jou vertel wat gebeur het, hy vertel vir u en u begin toe nou met hom praat, waarom praat u toe nou met hom oor hierdie voorval? --- Ek het net gevoel omrede hy iets weet omtrent dit en my vriende dra nie kennis van die ding nie, van hulle, u weet ek moet met inspekteur Mark Nortje gesels daaroor.

Ek is jammer u sê nou u vriende weet nie … (tussenbei) --- Ek weet nie wie weet en wie weet nie daarvan nie.

Waarvan praat u nou? --- Van die aanranding u weet dat ek opgeneem is.

Dat die polisie u in hegtenis geneem het? --- Ja.

HOF: Ek verstaan nie mooi nie. As ek reg verstaan het sê u hy het vir u gesê u moet gesels en u gaan toe voort en u praat. Nou vra die advokaat vir u nou maar hoekom praat jy en nou sê jy vir my jy praat omdat hy iets weet en my vriende dra nie kennis nie daarom moet jy gesels. Is dit wat u vir my sê? --- Ja, van my vriende weet ek nie of hulle almal daarvan af kennis dra nie maar omrede die ding by inspekteur Mark Nortje uitgekom het dat hy vir my van die punte bewys het en uitgelig het, het ek aangeneem dat een van hulle het heel waarskynlik met inspekteur Mark Nortje gesels oor die saak.

Maar ek verstaan nie hoekom praat jy nou? Omdat die ander een gepraat het praat jy ook maar. Is dit wat jy sê? --- Nee, u edele. Ek het net gevoel ek moet opstaan vir my vriende. Ek het nie geweet waar hulle situasies is op daardie oomblik nie en ek vat die ergste blaam op my op daardie stadium.'

This passage leads one to conclude that what persuaded the appellant to speak was his belief that the police were on to him and his friends and that he felt a responsibility to take on himself the greater burden of blame. But, after the judge expressed his lack of understanding, appellant's counsel pressed the appellant for a clearer answer: The record continues:

'Wat sy edele wil weet is wat motiveer u nou om met Nortje te praat? Hoekom praat u met

hom? Wat beoog u om daarmee te bereik? – Hy het vir my, sy woorde aan my was gewees dat as ek met hom gesels oor die ding sal ek ligter daarvan afkom op die ou einde van die dag.

Goed. Terwyl u met hom praat …(tussenbei)

HOF: Maar nou wil ek net weet, nou verstaan ek dan ook nie wat wil u eintlik vir my sê? Sê vir my wat jy wil sê meneer. Sê jy eintlik nou vir my omdat hy nou vir jou gesê het jy gaan ligter afkom nou gaan jy maar praat, is dit wat jy sê? Dit help nie dat jy jou kop skud nie. Sê vir my op die band. --- Ja, u edele.

Omdat hy 'n belofte aan u gemaak het u gaan ligter afkom daarom praat u nou maar? --- Ja, u edele. Ja.

MNR MYBURGH: Mnr Bezuidenhout, op watter stadium het hy dit nou vir u gesê dat as u praat sal u ligter afkom? --- Net voordat ek met hom die verklaring, voordat ek vir hom die verklaring afgegee het. Ek het begin gesels oor die ding toe sê hy vir my ja, dit is reg ek moet gesels daaroor, ek moet met hom oop kaarte speel en ek sal ligter op die ou einde van die dag daarvan afkom.'

A short while later, while dealing with the admissibility of the making of the statement to the magistrate, the following exchange took place between his counsel and the appellant:

'Daar is sekere vrae aan u gevra onder andere of u voordele verwag omdat iemand u aangemoedig het om 'n verklaring te maak en u het nee gesê. Kan u aan sy edele verduidelik waarom u nie vertroue in die landdros gehad het en hom meegedeel het van wat plaasgevind het tussen u en inspekteur Nortje nie? --- Omrede inspekteur Nortje vir my gesê het as ek hierdie verklaring oorgee aan die landdros sal ek baie ligter daarvan afkom. So ek het dit net so gehou ek het nie verder uitgebrei oor dinge nie.'

[48] From the evidence one may fairly adduce that such prospects as Nortje may have held out to the appellant only arose after he had made the decision to speak out to the police (for other reasons not affecting admissibility). Neither does it seem that such 'promise' as was made amounted to more than a vague and unspecified hint of an eventual benefit. The appellant did not say what he understood Nortje to mean either as to the nature or the time of the advantage to him. Furthermore it can be noted how the benefit to be derived from talking to the police subtly shifts (without

explanation) at the end of the quoted passage to a benefit derived from communicating the same statement to the magistrate.

[49] At the end of appellant's evidence in chief, counsel, apparently feeling the need for further emphasis in this regard, asked:

'Mnr Bezuidenhout, kan u net aan sy edele verduidelik waarom het u daardie verklaring aan die landdros gemaak? – Ek het van my kant af gevoel omrede ek die oudste persoon is tussen ons groep ek moet van, ek moet die ergste slag op myself dra met die wete dat ons in die hof verskyn, u weet, dat my vriende sal terugkom en die waarheid sal praat oor wat gebeur het.

Is dit die rede? – Dit is korrek.'

Counsel for the State, having understood this reply as the definitive reason for the making of the statement, one which *per se* excluded further debate against its admissibility on the grounds of undue influence, elected not cross-examine the appellant at all in the trial within a trial. The learned judge saw matters the same way. While there is much to be said for their attitude, given the seemingly unequivocal and unconditional substance of that final answer, I think that they were wrong. A full conspectus of the evidence that I have quoted shows that the appellant furnished two separate although interrelated explanations for the making of the statement. The failure to cross-examine thus left the making and effect of the alleged promise in some degree of limbo. The question is whether that uncertainty was sufficient to exclude the making of the promise beyond a reasonable doubt or at least to exclude the reasonable possibility that the appellant was influenced by it.

[50] In my view the recorded responses of the appellant to the magistrate are conclusive of the issue. It was the appellant's evidence that he was told that he would come off more lightly if he made the statement. He did not tell the magistrate this. Why he did not do so is by no means clear from his answer to his counsel: 'Omrede inspekteur Nortje vir my gesê het as ek hierdie verklaring oorgee aan die landdros sal ek baie ligter daarvan afkom. So ek het dit net so gehou; ek het nie verder uitgebrei oor dinge nie.'

He did not testify that he was warned or instructed not to tell the magistrate of the

'promise' or that if he did, it would be nullified. No physical threat to his person was in prospect if he disclosed the 'promise.' Nor did he say that he had any reason to believe that would be the consequence. On the face of it, there was no reason why the appellant could not and would not have been candid with the magistrate if such an inducement had been held out to him by the police.

[51] With regard to the proceedings in the magistrate's office (as recorded by Mr Fischer) the following is clear-

i) the free choice as to whether to speak out or remain silent was entirely the appellant's;

ii) the consequences of making a full disclosure were explained to him;

iii) he was unequivocal in his denial of influence or encouragement to make the statement despite the very full opportunity afforded to him to make such an allegation;

iv) he was similarly unequivocal in his denial of the holding out of any promises or benefits.

[52] Nor can it be ignored that shortly before going to the magistrate, the appellant had signed Exhibit F in which paras 3, 4 and 5 were the subject of signatures or initialling by the appellant and which also witness to the free exercise of a choice to disclose his version of the events to a magistrate. Despite Nortje's evidence that he read its contents to the appellant and that appellant signed and initialled the document, the sum total of the appellant's testimony on this aspect was:

'Hierdie document is voltooi die oggend net voordat ek landdros, na die landdros toe geneem is . . . Ek het dit tegelykertyd wat ons hierdie document voltooi het, na dit het daardie twee A4 folio's voltooi met my verklaring op in my eie handskrif.'

He did not deny that Nortje read Exhibit F to him nor did he suggest that he did not know of or understand its contents. Its terms are inconsistent with the making of any inducement to him on which he could place reliance.

[53] Allowing that the alleged inducement, if made at all, was at best for the appellant subsidiary to the other factors which he identified as persuasive in his decision to make the statement, I am satisfied that the only reasonable inference to be drawn from the totality of the evidence is that the appellant did not regard the prospect of such lighter treatment as might flow from the making of the statement as a matter sufficiently worthy of mention to the magistrate even in response to direct unambiguous questions put by the magistrate. It would have been unreasonable in the circumstances for the trial court to regard his unexpressed hopes as sufficient ground for excluding the statement on the basis of undue influence or lack of the necessary freedom in choosing to make it. This inference prevails notwithstanding the absence of cross-examination.

[54] The appellant did not say in evidence that he had been deprived of access to legal advice at any time. Nor did he testify that, if he had been afforded the opportunity, he would have called for legal assistance during his interrogation or prior to being taken to the magistrate. His testimony, in so far as it was relevant to his rights under the constitution, was given in the context of signing Exhibit E. In cross-examination of Nortje his counsel had put to him that he did not warn the appellant of his right to silence, that he did not explain its contents to him and the appellant did not read or understand it. Nortje (supported by Jordaan) by contrast testified he did warn appellant of his right to silence both in the evening and the following morning, that he did explain it to him in Afrikaans, that the appellant read and signed Exhibit E and that he handed him a copy of the signed document (in English). But when the appellant gave evidence he said of Exhibit E:

‘Ek het die document daardie selfde dag onderteken [when the police first took him in] maar daar was nie in baie duidelikheid vir my verduidelik nie. Ek het ook nie hierdie document deurgelees wat my regte is nie.

Het u geweet dat u kon swyg? – Nee.’

[55] On this version, the document was explained – but not very clearly. The appellant did not explain why, in these circumstances, he signed the certificate. It will be remembered that it was at or about the same time, so he testified, that Jordaan threatened to lock him up if he did not talk, to which his reply was 'Well then, lock me up'. (That reaction, if true, showed quite clearly that the appellant knew that he had the power - if not the right - to remain silent and was prepared to exercise it.) Nor did he deny Nortje's evidence that he was given a copy of Exhibit E. The evidence of Nortje relating to legal representation was that he informed the appellant of his rights prior to the signing of Exhibit E; the appellant indicated that he understood. He asked the appellant for an explanation of the events, whereupon the appellant made certain admissions to him which Nortje regarded as tantamount to a confession. He stopped the appellant and asked him whether he would be willing to make a statement to a magistrate. The appellant was prepared to so. The appellant asked to make two telephone calls. One was to his employer, the other to his parents. Nortje was present during the calls. He testified that the appellant asked his employer if he would arrange legal representation. At that stage the purpose of legal representation was not clear to Nortje but the following morning when Nortje again explained his rights to him, the appellant told him that he wanted legal representation for the bail application. Indeed this is what Nortje then recorded in Exhibit F and the appellant initialled.

[56] The proceedings in the magistrate's office began as follows:

'V Is daar iets wat u uit u eie vrye wil aan my wil vertel?

A Ja

V Verstaan u dat u die reg het om regsverteenwoordiging te bekom en as u nie regsverteenwoordiger kan bekostig nie u kan aansoek doen vir regshulp?

V Verlang u 'n prokureur?

A Nee'.

[57] The appellant's evidence in the trial-within-a-trial did not touch on the making

of the telephone calls. He did not deny that he told Nortje that he had made arrangements for legal representation for purposes of a bail application.

[58] From the aforegoing the following conclusions seem to me to follow inexorably. First, that appellant was afforded an unconstrained opportunity to arrange his own legal representation; second, that he did so only for the purpose of a bail application; third, that it was not his case that he did not know of his right to immediate legal advice and assistance; finally, that even if he was ignorant of that right (despite the unambiguous evidence of the policemen that he was apprised of it at least twice before being taken to the magistrate) there is no suggestion that he would have taken advantage of it. It may be added that the opportunity offered the appellant to communicate with his parents and his employer (neither being in dispute) is inconsistent with an intention on the part of the police to exert improper pressure on him or to deprive him of access to outside assistance. When I weigh these conclusions together with the appellant's unreserved responses to the magistrate's very comprehensive preliminary questions I am persuaded that despite the absence of cross-examination of the appellant, the evidence of Nortje and Jordaan was rightly accepted by the trial court as embodying the truth of the events between the appellant's detention and the making of the statement to the magistrate. The evidence of the appellant in particular, in so far as it relied on ignorance of his right to remain silent, was dishonest and false beyond a reasonable doubt. The defence based on ignorance of the right and lack of access to legal representation had no foundation in the evidence and could not reasonably stand in the face of the testimony of the policemen supported as they were by the cumulative force of the appellant's responses in Exhibit F and to the magistrate.

[59] The totality of the evidence persuades me that Smit J did not err in admitting the appellant's statement, notwithstanding the absence of cross-examination of the appellant.

[60] Having addressed the disputes surrounding the State evidence on the merits of the appeal I am in a position to evaluate the case which the State presented against the appellant. The main elements were:

1. The evidence of Maqo who testified that he saw a number of persons drag the deceased from his room and beat him. He later identified the appellant as one of those persons. His evidence accords in material respects with content of the statement made by the appellant to the magistrate. While the circumstances under which the witness watched the assault were far from ideal his evidence was consistent and was accepted by the trial court as truthful.
2. The evidence of Dr Batev that the death of the deceased was caused by blunt force to the head administered with a very hard rigid object, not a fist, such as the iron pipe. He also sustained a broken femur and multiple blows to the head resulting in serious brain damage attributable to a similar cause. The evidence was persuasive and remained unrebutted.
3. The statement made by the appellant to the magistrate in the following terms:

'Verlede week Dinsdag aand, die datum onbekend aan my was daar 'n na partytjie by 93 Coligny straat vanaf die Valentines bal van Hoërskool Standerton. Ek het verskeie kere na 21h00 gery om kinders te gaan haal by die bal en daarna kinders te gaan aflaai by hulle huise. Later die aand het ek Gustav Mol, Kenneth en ongeveer 2 ander seuns Engen garage toe gery by Wimpy om koeldrank te koop vir drank en sigarette. Daarna het ons gery na 'n meisie naby die Hoërskool vir Gustav, vir een of ander rede. Daarna is ons terug na die Engen garage toe en ons het nog koeldrank gekoop en brood geëet oor die toonbank en toe teruggekeer na 93 Colignystraat toe. Ek en bogenoemde persone het gery om 'n meisie af te laai naby die Hoërskool. Daarna het ek in die karavaan park gaan ry, by die Vaalrivier. Ek het gestop by 'n klein kamertjie. In die kamer was 'n hond. Ek het die hond geslaan. 'n Persoon het te voorskyn gekom en ek het hom ook met die vuis geslaan. Ons is toe terug na 93 Colignystraat toe. Verder gekuier. Ek en dieselfde bogenoemde persone het gery om 'n meisie te gaan aflaai in die uitbreiding. Ons het teruggekeer na die Leandra-Standerton pad. Net voor die t- aansluiting was daar 'n kafee op linkerkant. Ek het om die kafee gery. Toe ek weer noordwaarts ry het ek 'n leë huis in my ligte gesien. Ek het daar gestop. Ek het uit my voertuig geklim en in die huis ingehardloop en daar het 'n persoon navore gekom. Ek het hom eers met my

vuis gslaan. Hy het weer opgestaan en die bogenoemde persone het hom ook met die vuis geslaan. Ek het 'n pyp in my linkerhand gehad. Toe begin ek hom oor sy bene en heupe slaan met die pyp. Daarna het ons teruggekeer na die voertuig toe. Gustav het toe weer teruggegaan na die leë huis toe om uit te vind of the persoon "oraait" is. En hy het weer teruggekeer na die bakkie toe en ons is weer terug na 93 Colignystraat toe. Dis al.'

Of course, the statement is not necessarily accurate or truthful in all its details. Taken at face value, it places the appellant at the scene of the events relating to count 1, in possession of the weapon which inflicted the fatal injuries and participating, without lawful excuse, in an attack on the deceased.

4. The undisputed evidence of Nortje that after the appellant had made the statement to the magistrate, he took the appellant to his place of residence. There he asked him 'of het hy nog die pyp', referring to the pipe mentioned in the statement made by the appellant which was in his possession. The appellant pointed out the iron pipe lying in his garage. He did not attribute possession of the pipe to any other person or otherwise distance himself from its use during the assault.

The appellant failed to give evidence. The cumulative effect is overwhelming. The forceful application of such a weapon to the head of the deceased leads, in the absence of countervailing evidence, to only one reasonable inference: the assailant foresaw the fatal consequences of his act as a reasonable possibility and proceeded in despite of that appreciation. That it was the appellant who wielded the pipe is likewise the only reasonable inference to be drawn from all the circumstances. Any other inference depends upon speculative assumptions. Counsel did not submit otherwise. The state case on the first count was therefore proved beyond a reasonable doubt.

[61] The second charge on which the appellant was convicted was one of assault with intent to commit grievous bodily harm allegedly inflicted on the complainant Oosthuizen at Standerton on or about 19 February 2003 by striking him with a pipe. The only witness for the prosecution was Paul Breedt, a detective inspector in the police who was deputed to look into a reported incident at the Standerton caravan park.

[62] On 20 February, the day following the alleged assault, he interviewed the complainant and took a signed written statement from him (Exhibit H1). According to Breedt, Oosthuizen lived in poor circumstances in a one-roomed 'storeroom' at the park together with his dog. Oosthuizen had damaged lips and black eyes when Breedt met him and appeared to have been seriously assaulted. The inspector also spoke to a Mr Kruger, apparently the caretaker or manager of the park who lived in a caravan near the vehicle gate and some 50-70 metres from the complainant's dwelling. He took a signed statement from Kruger which placed him on the scene as an eyewitness to the assault on the complainant. Breedt handed the statements to Nortje who was part of the investigation team. The latter, in the course of his evidence in the main trial, was asked by the State counsel, 'Wat is die posisie tans met betrekking tot mnr Oosthuizen en mnr Kruger, waar is hulle?' His evidence in this regard was relied on by the prosecution to justify the admission of the hearsay averments in the two statements. The record reflects the following evidence:

'U edele, hulle het toe in die karavaanpark gebly en ek het agterna navraag gaan doen en ek kon hulle nie weer opspoor nie. Ek het toe 'n berig in die koerant, ons plaaslike koerant, geplaas om inligting te bekom aangaande die twee persone. Ek is toe in kennis gestel dat beide persone reeds oorlede is.

Wat is die omstandighede waaronder hulle oorlede is?-

U edele, een persoon het verdrink by die karavaanpark self, by die rivier en die ander persoon is dood aan kanker.

Wie is die persoon wat verdrink het? – Kruger.

Mnr Kruger, en mnr Oosthuizen oorlede aan kanker? – Aan kanker, ja.

Kon u enige dokumentasie kry ter bevestiging van hierdie feite? – U edele, ek wou gistermiddag gekry het maar die Binnelandse Sake kantoor sluit al drie-uur. So ek kon nie daarby uitkom nie ons was te laat besig gewees hierso.'

[63] The State relied on s 3 of the Law of Evidence Amendment Act 45 of 1988 for the admission of the two statements. The defence opposed their admission. The

learned judge, having considered their terms, decided the interests of justice overwhelmingly favoured the admission of the hearsay evidence. He accepted the testimony of Nortje concerning the unavailability of the two witnesses as fact without comment. However that evidence was in itself hearsay upon hearsay and there was no acceptable explanation produced that could have enabled the court to have regard to 'the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends' as required by s 3(c)(v).

[64] Such a shortcoming need not *per se* be decisive of the matter in every case as the interests of justice may nevertheless favour admission of evidence even without the furnishing of such a reason. But that will certainly require exceptional circumstances since the factor mentioned in s 3(c)(v) is fundamental to the enquiry: if the party wishing to rely on the evidence is unable even to explain satisfactorily why he cannot call the witness upon whose credibility its value depends, the court will almost always rule that direct evidence best serves the interest of justice. That is certainly so when the fact or extent of participation of an accused person in a crime depends solely upon the credibility and reliability of the witness. The case may be different if, for example, the sole purpose of the evidence is to provide evidence *aliunde* in support of a confession (s 209 of the Act) and the commission of the crime *per se* is not disputed.

[65] It is, however, unnecessary to decide whether the trial judge correctly exercised his discretion to admit the two witness statements in the interests of justice. The offence was proved without reference to the contents of those statements. Inspector Breedt testified that on 20 February 2003 the complainant lived in a small room in the park. He was suffering from readily apparent facial injuries consistent with a severe assault. Whether one regards the appellant's statement to the magistrate as containing a confession to an assault or merely as an admission of the facts contained in it, the evidence of Breedt confirms in material respects the fact and seriousness of the

assault and its general time and location. The injuries which Breedt saw could obviously not have been caused by a single blow of a fist as the appellant's statement conveyed. But the appellant did not attribute the complainant's injuries to any other person and the only reasonable inference is that his was the entire responsibility for such injuries as the complainant suffered. The cumulative effect was sufficient to establish a prima facie case against the appellant which achieved proof beyond a reasonable doubt by his failure to testify in the main trial.

[66] Smit J convicted the appellant 'as charged', ie of assaulting the complainant with an iron bar. That was incorrect as there was no evidence to suggest any use of a weapon. The severity of the assault justifies the inference of an intent to commit grievous bodily harm. The terms of his order require an appropriate amendment to reflect the correct position. Save in that minor respect the appeal against the conviction on count 2 must fail.

[67] As to the sentence, as I have mentioned earlier, the learned judge concluded that the offence was one committed by a person or group of persons acting in the execution or furtherance of a common purpose. What is contemplated by the statute is not, of course, a common purpose to commit any crime other than the scheduled offence *viz* murder. A proven common purpose to assault which results in an intentional killing will not of itself activate Part 1 of the Schedule. The learned judge appears to have overlooked this requirement (or perhaps he understood the law differently). He said: 'As 'n groep van persone optree is daar 'n beginsel in ons reg dat hulle met 'n gemeenskaplike opset optree as hulle aan sekere vereistes voldoen. Vir doeleindes van hierdie uitspraak is dit nie vir my nodig om al die vereistes uiteen te sit nie behalwe om te sê ek meen die vereistes is aan voldoen en u wie ookal saam met u was het duidelik met 'n gemeenskaplike opset opgetree.'

During the earlier jaunt on the same evening, despite beating the victim severely, the unlawful conduct stopped well short of doing him to death. While it is true that at

least one of the party carried an iron bar throughout, a potentially fatal instrument if recklessly used, there is no evidence that anyone but the appellant contemplated its use in such manner and he only at the time of his attack on the deceased, by necessary inference, drawn *ex post facto,* from the manner and force with which he must have wielded it. Sight should also not be lost of the fact that he was the prime mover and an adult while his accomplices were apparently still at school. In the circumstances it seems to me that the evidence was insufficient to prove beyond reasonable doubt a common purpose to kill. The sentence must therefore be set aside.

[68] But there is a further matter to be considered. After judgment on the merits of the charges the following interchange took place between the judge and counsel for the accused:

'HOF: Mnr Myburgh, ek is in u hande. Ek sien daar is nog 20 minute oor. Ek is bereid om die saak af te handel vanmiddag of as u eers met beskuldigde wil praat en verder argumente aan my wil voorlê kan die saak afstaan na more oggend toe. Dit is vir u om te besluit.

MNR MYBURGH: Dankie, u edele. U edele, ek het nou instruksies ontvang dat ek voorvonnisverslae aan u sal voorlê en sal ek u versoek om op daardie basis dan 'n verdaging in hierdie aangeleentheid te bied. Die kriminoloog, dr Labuschagne, kan in hierdie verband opdragte gee ten einde 'n voorvonnisverslag saam te stel ten einde die beskuldigde …(tussenbei)

HOF: Het sy nog nie die beskuldigde gesien nie?

MNR MYBURGH: Sy het nog nie.

HOF: Ek is jammer, ek is nie bereid om uitstel daarvoor te verleen nie.

MNR MYBURGH: Soos dit u behaag.

HOF: Die beskuldigde het geweet die saak kom aan. As hy so 'n verslag wou gehad het kon hy dit voor die tyd gedoen het. Ek gaan nie die saak uitstel nie. Ek is net hierdie week beskikbaar behalwe as Dr Labuschagne vir my kan sê sy kan in hierdie week dit afhandel voor Donderdagmiddag is ek jammer gaan ek nie verdure uitstel verleen nie. Hy is in ieder geval nie meer 'n jeugdige nie. Hy is al goed in die 20's.

MNR MYBURGH: Dit is so, inderdaad. Nee u edele, dr Labuschagne sal nie beskikbaar wees nie. Ek weet dat sy op die huidige oomblik in die Kaap is besig om aangeleenthede daar te hanteer. Onder daardie omstandighede u edele, sal ek dan versoek dat die aangeleentheid sal afstaan tot more

toe dat ek dan behoorlike instruksies ontvang.'

The case was thereafter adjourned to the following day. The court then heard addresses from counsel and, finding no substantial and compelling circumstances present, sentenced the appellant to life imprisonment on count 1. The learned judge said:

'In die laaste instansie het mnr Myburgh gesê dat hy beoog om die getuienis van 'n kriminoloog aan my voor te lê. Die kriminoloog was nie beskikbaar om hierdie week getuienis af te lê nie. Ek is voorheen nooit daarvan in kennis gestel nie en ek het gemeen dit is in belang van reg en geregtigheid dat die saak afgehandel word. Ek meen ook dat die getuienis van die kriminoloog as sodanig die saak nie veel verder kan voer nie in soverre u verkies het om geen feite aan my voor te lê nie. Wat ookal die kriminoloog aan my kom sê moes hy van u verkry het. Ek sou graag van u wou verneem wat u gedwing het om daardie aand op te tree soos u opgetree het. Dit gaan 'n mens se verstand eintlik te bowe dat 'n man wat in 'n meer bevoorregte posisie is so teenoor medemense kan optree. Gevolglik meen ek ook dat die aspek van 'n kriminoloog nie enigsins kon bydra tot die bepaling of daar wesenlike en dwingende omstandighede teenwoordig was nie.'

[69] On behalf of the appellant his counsel contended on appeal that the refusal to afford a reasonable opportunity to consult with the expert witness with a view to preparing evidence in mitigation amounted to a serious irregularity. I agree. The appellant faced the heaviest sentence which the law allows. Someone in that position should be extended every reasonable opportunity to lay all relevant mitigating factors before the court. Against such a prospect the convenience to the court is secondary unless there is well-founded reason to believe that the accused is abusing his right or has been unreasonably dilatory in preparing himself to exercise it. While some accused are sufficiently prescient or pessimistic to anticipate the need for an investigation into sentence others will not, for any one of a number of reasons, take steps in advance to seek expert advice. (Innocence, lack of foresight, contrary advice, lack of means, and an incomplete insight into the ramifications of the case before the completion of the prosecution evidence are obvious, and acceptable, reasons; there are no doubt others which may not be as acceptable but will still fall short of

justifying the truncation of an accused's right to a fair trial.)

[70] In the present instance the reason for not consulting the expert witness before conviction was not explained and the court did not attempt to find it out. There was no sufficient basis for refusing a postponement even if that meant reconstituting the court at some later time. That Dr Labuschagne was bound to rely on information obtained from the appellant was hardly relevant. He need not have been the only source of material evidence. In any event, the possibility always existed of the appellant himself testifying in mitigation in confirmation of her report.

[71] The result is that the appellant did not receive a fair trial on the aspect of the sentence. This affects both counts. Having regard to my previously-expressed conclusion on the fate of the sentence imposed on count 1, the proper procedure would be to remit the case to the trial court (or such other judge as the Judge President may appoint for the purpose if the trial judge has been discharged from active service as contempkated in s 3(2)(b) of the Judges' Remuneration and Conditions of Employment Act, in which case he could not be called upon to perform service as contemplated in s 7(1) of the Act, or is otherwise unavailable as contemplated in s 275(2) of the Criminal Procedure Act.). The evidence of Dr Labuschagne can then be led (together with such other witnesses as the appellant and the State may be advised to call) so as to enable the sentences on counts 1 and 2 to be reconsidered and imposed afresh.

[72] The following order is made:

1. The appeal against the convictions on counts 1 and 2 is dismissed save that the conviction on count 2 is limited to striking the complainant with the fist.
2. The appeal against the sentences imposed on counts 1 and 2 succeeds. The sentences are set aside.
3. The matter is remitted to the trial court or such other judge as the Judge

President may appoint for the purposes of s 275(2) of the Criminal Procedure Act 51 of 1977, if applicable, to hear such additional evidence as the appellant and the State are advised to present on sentence and, thereafter, to impose sentence afresh on both counts.

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J A HEHER
JUDGE OF APPEAL

FARLAM JA)Concur
CLOETE JA)