IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. SS 32/2003

In the matter between:

THE STATE

and

MOGAMAT PHADIEL ORRIE Accused No 1
MOGAMAT SAMIR ORRIE Accused No 2

JUDGMENT : 14 OCTOBER 2004

BOZALEK J:

These are reasons for a ruling made on 2 August 2004 holding inadmissible a statement made by accused number 2 to Captain Clark of the Serious and Violent Crimes Unit at Bishop Lavis on 28 December 2000.

The defence contested the admissibility of the statement, initially on the grounds that the accused had not been made aware that he was a suspect and had not been warned of his right to silence and right to legal representation. At a later stage it was put by the defence that the accused's attitude was that if he had known that he was a suspect and 'had rights', he would have remained silent and waited for his lawyer.

Accordingly a trial within a trial was held to determine the admissibility of the

statement. During this trial, the evidence of Captain Clark ('*Clark*') and two other police witnesses, as well as that of the accused, was heard.

In determining whether the statement is admissible, the following questions arise:

i) Was the accused a suspect and, if so, was he informed of his status as a suspect?

ii) If the accused was a suspect, was he entitled to the rights of an arrested or detained person?

iii) Was the accused adequately informed of his constitutional rights?

iv) In light of the answers to the above questions, is the statement admissible against the accused?

Background

On 26 December 2000 the bodies of two witnesses in a witness protection programme were discovered at a so-called 'safe house' in Gouda, a small village some 100 kilometres from Cape Town. A person or persons unknown had made a forced entry into the house and shot the couple. A day or so earlier, around the time when the murders were committed, a police officer patrolling the area had come across an unattended pickup-truck ('*the vehicle*') and had noted the registration number. This information was conveyed to the investigating team and enquiries revealed that the registered owner of the vehicle was accused number two ('*the accused*'). The investigating detectives, including Clark, were aware that the accused's brother was

himself an accused in a pending urban terror case in which the murdered couple were to be State witnesses and as a result of which they had been placed in the witness protection programme. A search warrant was obtained for the accused's residence as well as for the vehicle.

On the morning of 28 December 2000, whilst driving his vehicle in Athlone, the accused was stopped by police. Clark was contacted and proceeded to the scene where he spoke to the accused and asked him to accompany him to his offices at Bishop Lavis. There the accused was questioned and a witness statement was taken from him which, on the face thereof, was exculpatory. The accused was at no stage arrested or detained. At Clark's request, he left his vehicle behind, ultimately, for several months. According to him, Clark wanted to show the vehicle to someone. The accused's witness statement was a sworn one but was not made on the standard form used when taking a statement from a suspect.

Such a form, a so-called SAPS 3M, is entitled '*Statement regarding interview with suspect*' and contains two pages of instructions directed principally at the police member taking the statement. In paragraph 2 it provides for a suspect to be informed that information exists which indicates that he/she may have been involved in the commission of an offence/s, advising the suspect of the nature of the alleged offence/s, and the relevant time period or date and the place of commission of the alleged offence/s. Provision is made for the suspect to be asked whether he/she understands the aforegoing allegations. Paragraph 3 contain the form of the warnings which must be conveyed by the member to the suspect and deals with the right to remain silent and the right to legal representation. Provision is made for the suspect to be told that he or she has the right to remain silent and is not compelled to make any statement or to answer any question and, of particular importance in this matter, that any

statement made or anything said, would be written down and could be used as evidence in a court of law. Provision is also made for the suspect to be told that he/she has the right to consult with a legal practitioner of choice or, if preferred, to apply to the Legal Aid Board to be provided with the services of a legal practitioner at State expense which legal practitioner may be present during the interview.

The evidence regarding the accused's suspect status and the warnings issued to him

Clark testified that, upon encountering the accused in Athlone, he informed him that his vehicle had been seen near the scene of a crime and that he was seeking an explanation from him. He suggested that the accused accompany him to his offices at Bishop Lavis. He also stated that he warned the accused, at the roadside, of his right to silence, his right not to incriminate himself and his right to legal representation.

According to Clark, the accused was again informed of his rights in the interrogation room in Bishop Lavis, on this occasion in greater detail. This took the form of him advising the accused that his vehicle had been seen 200 metres from the crime scene, that it was considered a suspect vehicle and that, as it was registered in his name, an explanation was sought from him. The accused was also told that he had the right to legal representation and, if needs be, to a lawyer through the legal aid system. He was also informed that he had the right to remain silent, that he was not obliged to make a

statement and that 'he should not incriminate himself'.

According to Clark, notwithstanding these warnings, the accused was co-operative and elected to give an explanation and to have that recorded in a written statement. Earlier, when informed of the sighting of his vehicle at a murder scene, the accused had asked whether it related to the killing of the couple under the witness protection programme. Clark's evidence of the warnings which he gave to the accused at Bishop Lavis was confirmed in broad outline by the evidence of his colleague, Captain Van Dyk, who was present in the interrogation room for a period. He testified that the accused was informed by Clark of his right to remain silent, his right to legal representation and that he need not incriminate himself. According to both witnesses the accused was completely at ease and willingly co-operated.

In his testimony, however, the accused stated that he had at no time been advised of his rights and that throughout he had never felt as if he was a suspect. He conceded that he was told why an explanation was sought from him regarding the whereabouts of his vehicle but insisted that he was merely told that a vehicle similar to his was seen at the scene of the crime. He stated that he did co-operate with the police and had made a statement voluntarily but said that if he had been warned of his rights he would have taken legal advice and would not have made a statement as he would then have appreciated the seriousness of the case. Against this background the questions set out above must be determined.

Was the accused a suspect and, if so, was he informed of his status as a suspect?

On the State's own case the accused was never told in explicit terms that he was a suspect. Captain Clark only made reference to the vehicle being a

suspect vehicle. However, in light of the fact that it was seen near the scene of the crimes shortly before the murders combined with the linkage between the accused's brother and the deceased (a linkage which provided a possible motive for the accused's involvement in the killings), it is quite clear that he was regarded as a suspect by the investigating officer.

Section 35 of the Constitution of South Africa, Act 108 of 1996, ('*the Constitution*') deals with the rights of arrested, detained and accused persons and it is here, in my view, that the rights of a suspect must be found. No provision is made for a suspect to be specifically informed of this status, but it stands to reason that a person must be informed that he/she is a suspect, or at least be aware thereof, in order that he or she can properly consider and exercise his or her rights before interacting with the police. Paragraph 2 of the suspect interview form referred to above is instructive. It provides, *inter alia,* for the suspect to be advised that information exists indicating that he/she may have been involved in the commission of an offence/s. In other words, the person at risk is not told in specific terms that he/she is a '*suspect*'. It appears to be assumed, correctly so in my view, that a person so apprised will appreciate that he/she is a '*suspect*'.

In the present matter the accused was told of the details of the crime as regards its time, place and nature and in fact indicated to the police that he was already aware thereof. He was told furthermore that his vehicle was seen near the scene of the crime at the relevant time. When the accused

gave evidence, there was no indication that he would not have understood the situation in which he found himself. Neither was it suggested by the defence that, for some reason, the accused would not have appreciated the necessary implications of being advised of these details. It is so that the accused insisted that he never felt like a suspect and that a very friendly atmosphere prevailed. However, in my view, the accused's claim that he did not realise that he was a suspect is disingenuous. Any person of normal intelligence in the accused's position would have realised that he was regarded as a suspect and that it was for that reason that the police were seeking an explanation from him. In the result, I consider that the information given to the accused by the police adequately conveyed to him that they regarded him as a suspect.

Was the accused entitled to the rights of an arrested or detained person?

The relevant sections of the Bill of Rights in the Constitution read as follows:

> '***Arrested, detained and accused persons***
>
> *35(1) Everyone who is arrested for allegedly committing an offence has the right –*
>
> *a) to remain silent;*
>
> *b) to be informed promptly*
>
> (i) *of* ***the right to remain silent****; and*
>
> (ii) *of* ***the consequences of not remaining silent****;*

(c) not to be compelled to make any confession or admission that could be used in evidence against that person;

(2) Everyone who is detained, including every sentenced prisoner, has the right:

(a) ...

(b) to ***choose, and to consult with a legal practitioner****,*

and to be informed of this right promptly;

c) *to have* ***a legal practitioner assigned to the detained person by the State and at State expense, if substantial injustice would otherwise result*** *and to be informed of this right promptly;*

... ' (own emphasis)

At the material time the accused was neither an arrested, detained nor an accused person, but merely a suspect. The State conceded, however, that the accused was entitled to be warned of "his rights", a concession which I consider to have been correctly made. In *S v Sebejan and Others*[1] the Court considered whether a suspect could lay claim to the rights enjoyed by arrested, detained and accused persons under section 25 of the Interim Constitution.[2] Satchwell J expressed the view that although the Constitution

1 1997 (8) BCLR 1086 (T)
2 Act 200 of 1993

was silent with regard to a suspect's rights, such a person is indeed entitled to '*fair pre-trial procedures*'. She held further that '[t]*hese include the rights which would accrue to an accused when arrested: the right to remain silent and the right to be informed of the right to remain silent; the right to be informed of the consequences of making any statement; the right to choose and to consult with a legal practitioner and to be informed of this right promptly.*'[3] The principle enunciated in *Sebejan* (*supra*) that a suspect is entitled to fair pre-trial procedures, most notably the warnings to which an accused is entitled, received qualified support in *S v Ndlovu*.[4] In *S v Langa and others*[5] the Court declined to follow *Sebejan* (*supra*) on the grounds that a suspect did not enjoy the rights of an arrested or detained person. Futhermore, it noted, the views expressed in *Sebejan* (*supra*) were *obiter* by reason of the fact that the accused was held not to be a suspect at the time of the taking of the statement. Most recently, in *S v Mthethwa*[6] the Court similarly declined to follow *Sebejan* (*supra*), again on the basis that section 35 of the Constitution does not afford rights to a suspect. However, the Court, per Pickering J (Sangoni J concurring), found that a suspect was entitled to be cautioned or warned before being questioned by the police. The Court reached this conclusion on the basis of Rule 2 of the 1931 Judges Rules and the finding in *S v Van Der Merwe*[7] that '[w]*anneer 'n persoon volgens Regtersreëls gewaarsku word, word daar inderdaad in my siening uiting*

3 At page 1096I-J
4 1997 (12) BCLR 1785 (N)
5 1998 (1) SACR 21 (T)
6 2004 (1) SACR 449 (E)
7 1998 (1) SACR 194 (O) at 200a-b

gegee aan die bepalings van die Grondwet want die aard en omvang van daardie Regtersreëls sal lei tot die behoorlike beskerming van die gearresteerde en/of beskuldigde se regte.' Notwithstanding a judicial reluctance to extend what can broadly be described as the right to fair pre-trial procedures already enjoyed by arrested, detained and accused persons to suspects, I find the reasoning in *Sebejan* (*supra*) persuasive. I respectfully concur with the conclusion reached by Satchwell, J that, no less than an accused, a suspect is entitled to fair pre-trial procedures.

An interpretation of the relevant provisions of section 35 which extends them to suspects is, to my mind, in keeping with a purposive approach which has regard to the interests which the rights were intended to protect.[8] Moreover it accords with the views expressed by the Constitutional Court in *S v Zuma and others*[9] that the 'right to a fair trial' embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. It was held further in *Zuma* (supra) that all courts hearing criminal matters must give content to the notion of 'basic fairness and justice.' This approach is endorsed by the authors of *South African Constitutional Law: The Bill of Rights.*[10] They observe that unless the Constitution's pre-trial rights are extended to suspects as well, investigating authorities could simply leave potentially accused persons in the category of '*suspect*', thus enabling themselves to collect evidential material from the '*unwary*, '*unsilent'*, *unrepresentative and unwarned suspect'.*[11]

Was the accused informed of his constitutional rights?

The next enquiry is whether the accused was indeed warned of his pre-trial rights and involves an evaluation of conflicting evidence placed before the Court. On the one hand the accused testified that he was at no stage warned

8 See *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at para 17
9 1995 (2) SA 642 (CC)
10 Cheadle, Davis & Haysom, *South African Constitutional Law: The Bill of Rights* Butterworths, Durban (2002)
11 At p 631

of any rights which he enjoyed and on the other hand there is the evidence of Clark and Van Dyk that the accused was warned of his right to silence, his right not to incriminate himself and his right to legal representation.

Taking into account that the events in question took place nearly three and a half years previously, Clark gave his evidence with clarity and left a favourable impression as a witness. His evidence was not materially shaken in cross-examination and was borne out in important respects by that of Van Dyk. The accused, however, did not create a favourable impression as a witness. His recollection of the events of the day seemed extremely poor. This was strange given that what happened to him was not an every day experience, whereas for the police officers involved the accused was simply another suspect to be interviewed, albeit one in an important case. The accused stated on numerous occasions that he was not sure of one or other aspect of his testimony or could not recall any detail thereof. The only fixed points in his evidence were his insistence that he never '*felt*' like a suspect and that he received no warning as to his rights. His certainty on these key issues, contrasted with the vagueness of the rest of his evidence, suggested that his denial that he was informed of his rights was a stock response rather than the truth of what took place. One example of the unsatisfactory nature of the accused's evidence will suffice. The accused testified that he did not drive his vehicle alone to the police offices but was accompanied by a police passenger. Clark's earlier evidence, however, had been that the accused

drove to his office unaccompanied and this was not challenged in cross-examination. When asked how he recalled that he was accompanied, the accused stated that it was because of a conversation he had with the policeman in question but, when asked, he could not recall the topic of the conversation. The accused had considerable difficulty in answering questions during cross-examination and many of his replies were preceded by lengthy silences.

The probabilities also do not favour the accused's version. He concedes that he was told of the circumstances which gave rise to the police wanting an explanation from him as to the whereabouts of his vehicle and himself. As I have already noted, this would render it apparent to any person of ordinary intelligence that he/she was a suspect. The statement which the accused gave was exculpatory and it would have availed him to give the police an explanation which might satisfy them, notwithstanding his being informed that he enjoyed the right to remain silent and to legal representation. Furthermore, the accused repeated claims that, had he been informed of his rights, he would not have made a statement as he would then have realised the seriousness of the matter, also ring somewhat hollow. Given the allegations conveyed to him by the investigating officer, it is most improbable that he did not realise the seriousness of the situation. Another weakness in the accused's evidence was his insistence that the police stipulated that a vehicle similar to his was seen near the scene of the crime. Not only was this

factually inaccurate, since if that was the case, the police would not have been able to trace the accused through the vehicle's registration number, but it was also not put to Clark when he testified that the accused was not told that his vehicle had been seen near the scene of the crime.

Most telling, however, was evidence which only came to light during cross-examination of Van Dyk when defence counsel called for the investigation diary and requested him to read out various entries. Unexpectedly, the following entry made on the same day that the statement was taken from the accused came to the fore: '*Op 28-12-2000 vergesel eienaar na (ondersoekbeampte) se kantoor… Hy is gewillig om (ondersoekbeampte) te vergesel. Hy het geen klagtes nie. Hy is mnr M S Orrie…. Hy word verwittig waarom hy by die kantoor* [sic]. *Hy het geen klagtes nie. Hy word meegedeel dat hy sy regsverteenwoordiger mag hê en sy grondwetlike regte is aan hom verduidelik. Hy word meegedeel dat hy vrywillig 'n verklaring kan aflê en een hoef te verstrek nie* [sic]. *Hy stem egter vrywillig in om 'n verklaring te verstrek sonder dat sy regsverteenwoordiger teenwoordig is. Hy is bewus gemaak dat hy homself nie moet inkrimineer nie. Hy verstaan dit. ...'* This diary entry was not even mentioned by Captain Clark in his evidence and in my view it is cogent corroboration that the accused was apprised of certain of his rights prior to his making a written statement. Taking all these circumstances into account, I have no hesitation in accepting the evidence of the police officers above that of the accused.

This is not the end of the matter, however, since it must now be determined whether the warning given to the accused adequately informed him of his rights under the Constitution. The evidence, not least the contemporaneous diary entry referred to above, clearly establishes that the accused was informed of his right to remain silent and of his right to choose and consult with a legal practitioner. What is less clear is whether the accused was informed of the consequences of his not remaining silent (section 35(1)(b)(ii)) and whether he was informed that, in appropriate circumstances, he was entitled to a legal practitioner assigned by the State (section 35(2)(c)).

Clark dealt with the subject matter of his warnings to the accused several times in his evidence in chief and was consistent in his description thereof. The elements of his warning were that the suspect had the right to remain silent, to be represented by a lawyer and that he should not incriminate himself. This last element of the warning however suggests Clark's lack of familiarity with the terms of a proper warning since it is illogical and self-defeating to warn a suspect, from whom a statement is sought, that he must not incriminate himself. Moreover, it was only under cross-examination, and then somewhat unconvincingly, that Clark mentioned telling the accused that whatever he said could be used against him. Again, only during cross-examination did Clark testify that he had informed the accused of his right to a legal aid practitioner. Clark stated on several occasions that in warning the accused he used the '*volle rympie'*, referring presumably to a standard warning which he gave to all suspects. But he was never asked, nor did he explain, what the recitation comprised. Captain Van Dyk confirmed that Clark had recited the '*volle rympie'* when he warned the accused, but also did not explain what it contained. He added, however, that he could not specifically

remember Clark mentioning the Legal Aid Board, nor warning the accused that whatever he said could be used against him. He stated moreover that, although his recollection was not clear, he doubted whether Clark had warned the accused that any statement he made could be used against him later because by the time Clark had decided to take the statement from the accused, he was approaching him as a witness and not as a suspect.

It is evident from the SAPS 3M form (Paragraph 3(b)) that the standard warning entails advising a suspect that any statement that he/she makes will be written down and '*may be used in evidence in a court of law*'. Similarly, paragraph 3(c) makes provision for a suspect to be advised of his right to the appointment of counsel at State expense. However, neither police witness claimed that the standard suspect interview form had been used as a basis for the warnings given to the accused and it is common cause that it was not used to record the accused's statement.

The accused was asked whether he had a lawyer at the time to which his answer was no. He stated that he would have tried to get hold of one and that he could have afforded one. This renders his formal reliance on the failure to advise him of his right to a legal aid lawyer, problematic and, incidentally, casts further doubt on one of the mainstays of his evidence, namely, that if he had been informed of his rights, he would have called his lawyer.

As I have indicated, there can be no doubt that the accused was informed of his right to remain silent and to choose and consult with a legal practitioner. The question of whether he was informed of the consequences of making any statement and that he was entitled to a legal aid lawyer must turn on Clark's version of events as the principal figure. The difficulty for the State in this regard is that these elements of the warning are neither confirmed by the contemporaneous written note, nor by any explicit reliance on a standard form. They emerged only under cross-examination and in response to direct questions from counsel as to whether Clark had mentioned to the accused the legal aid aspect or the consequences of making a statement. Even then Clark's answers were somewhat tentative, particularly on the latter aspect. In the circumstances I cannot find that the State has proved beyond any reasonable doubt that these components of a warning were communicated to the accused.

Is the statement admissible against the accused?

Against the above evaluation the question is whether the statement made by the accused is admissible against him. Mr **Van Der Berg** for the accused, relying on the judgment of the Supreme Court of Canada in *R v Brydges,*[12] concentrated his fire on the failure to apprise the accused of his potential right of access to State funded counsel. There the Court held that police have a positive duty to inform an accused, as part of a constitutionally enshrined caution, not only of the right to counsel, but of the existence of '*duty counsel*' and a legal aid plan in order that the accused is in a position to take full advantage of his/her constitutional rights. The Court held further that it was not necessary for there to be a causal link between the Charter violation and the evidence sought to be excluded. As long as a Charter violation occurred in the course of obtaining the evidence, a sufficient nexus between the breach and evidence will exist for the purposes of exclusion under section 24(2) of the Charter.

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12 Canadian Rights Reporter 46 CRR 236, judgment delivered on 1 February 1990

Counsel also relied on a judgment of the new Brunswick Court of Appeal in *R v Voisine*[13] going even further than *Brydges* (*supra*). There the appellant was informed of his right to retain a lawyer and his right to free and immediate advice from duty counsel if the lawyer of his choice was not available within a reasonable time or if he could not afford a lawyer. The Court held that the warning given to the arrested person, and notwithstanding that he had the means to afford a lawyer, improperly suggested that he could only utilize '*duty counsel*' in the limited circumstances described above, and thus did not adequately explain the absolute right to duty counsel (legal aid representation). A statement made by the accused unassisted after the improper warning was ruled inadmissible.

However, as appears from the provisions of section 35(5) of our Constitution, it favours a more practical, if not a more nuanced, approach to the exclusion of evidence obtained in violation of a constitutional right, one in which the keystone is the right to a fair trial. Section 35(5) provides that evidence obtained in a manner violating any right in the Bill of Rights '*must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'* In *Key v Attorney General, Cape Provincial Division, and Another,*[14] decided under the Interim Constitution, the Constitutional Court, per Kriegler J, speaking of the tensions inherent in any

13 Canadian Rights Reporter 20 CRR 258, judgment delivered on 24 February 1994. I have unfortunately only had access to an English version of the headnote of the judgment as the judgment was handed down and reported in French.
14 1996 (4) SA 187 (CC)

democratic criminal justice system stated as follows:

> '*What the Constitution demands is that the accused be given a fair trial. Ultimately, ..., fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.*'[15]

The theme of fairness was taken up in *S v Marx and Another*[16] where, in dealing with the question of how often an accused should be informed of his or her right to legal representation or assistance, Cameron J stated:

> '*It should be borne in mind always that the matter is one of fundamental fairness. As Kentridge AJ said in the* ***Zuma*** *case, the question is always whether the criminal trial is conducted in accordance with notions of basic fairness. Basic fairness does not require formalistic repetition. Basic fairness likewise does not require inappropriate or undue formalism. Mere formalism, ... , may indeed constitute a clog on the proper and efficient performance of police duties'.*

The discretion afforded to the Court under section 35(5) of the Constitution

15 At 196A-C
16 1996 (2) SACR 140 (W)

was considered recently by the Supreme Court of Appeal in *S v M*[17] and *Pillay and others v S.*[18] The judgment of the court *a quo* in *Pillay's* case is reported as *S v Naidoo and another.*[19] In *S v M* (*supra*) it was noted that real evidence procured by illegal or improper means is generally more readily admitted than evidence which depends on the say so of a witness since such evidence does not usually possess an objective reliability and tends to '*conscript the accused against himself.*'[20] In *Pillay's* case (*supra*) the evidence sought to be excluded by reason of a breach of the accused's constitutional rights was "real" evidence, namely, money found in the ceiling of the accused's house. The Court held that the admission of the evidence would not render the accused's trial unfair because it would, in any event, have been found by the police through other means. In proceeding to deal with the concept of '*bringing the administration of justice into disrepute'* the Court found it useful to consider the line of Canadian cases on the question. It held that a determination of whether the admission of evidence would have such an effect required a value judgement involving a consideration of the interests and views of the public which themselves may change from time to time. In performing such an exercise, all relevant circumstances should be considered, including the kind of evidence obtained, the nature of the constitutional right infringed, the seriousness of the breach and whether the evidence would have been obtained by other means.

17 2002 (2) SACR 411 (SCA)
18 2004 (2) BCLR 158 (SCA)
19 1998 (1) SACR 479 (N)
20 At 432b-d

The initial enquiry in this matter must, however, be whether the admission of the evidence obtained in violation of an accused's constitutional rights, would render the trial unfair. This requirement was more fully dealt with by the Court in *S v Naidoo* (*supra*) which found guidance in recent Canadian cases, keeping in mind the similarities between section 35(5) of the Constitution and its Canadian counterpart. The Court quoted with approval from *R v Jacoy*[21] and *R v Collins*[22] to the effect that where the admission of such evidence would effect the fairness of the trial, it would tend to bring the administration of justice into disrepute and as such would generally be excluded.[23]

Thus the first issue in the present matter must be whether the shortcomings in the warning or communication to the accused rendered his trial unfair. In this regard the question of the nature and extent of the prejudice suffered by the accused becomes relevant. As far as the question of state aided legal representation is concerned, no basis at all was laid in the evidence to suggest that the accused would ever have relied on State provided counsel, either then or at any later stage. Throughout the trial the accused has made use of privately funded counsel. In my view, the omission from the warning given to him of this aspect of the accused's rights did not lead to his suffering any prejudice at all. In the circumstances, to attach any weight to this omission would be to elevate form above substance. I am mindful that in *Brydges (supra*) the Canadian Supreme Court laid down that no causal link

21 (1988) 38 CRR 290 at 298
22 (1987) 28 CRR 122 at 137 and 140
23 *Naidoo* (*supra*) at 526a-h

was required between the shortcoming in the warning to the accused and the evidence sought to be excluded. Whilst there may be good reasons for adopting such an approach, not least the benefits of standardizing this and other aspects of the warning to persons during pre-trial procedures, neither section 35(5) of the Constitution nor the right to a fair trial inevitably requires the blanket exclusion of evidence obtained in breach of a suspect's right to be apprised of his/her right to legal aid counsel, notwithstanding the lack of materiality of such breach. For the reasons which follow it is unnecessary for me to consider whether the admission of such evidence would nevertheless be detrimental to the administration of justice and, as such, fall to be excluded for this reason.

It now remains to consider whether the failure to advise the accused that his statement could be used against him rendered his trial unfair. Here, it appears to me, notwithstanding the exculpatory nature of the statement, the considerations are much clearer. The right not to be compelled to incriminate oneself in criminal matters is a hallowed one and a fundamental tenet of a fair trial.[24] Furthermore, although a statement may on the face thereof appear exculpatory, it may nevertheless have prejudicial consequences for the statement maker, for example, where the statement maker has furnished a false exculpatory explanation. In these circumstances I can see no reason why statements of such a nature should not, for the purposes of deciding on

24 As discussed in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) at paras 91-100

their admissibility following a breach of the statement maker's constitutional rights, be determined on the same basis as confessional statements. In both cases the suspect or the accused is conscripted to give evidence against him or herself. The keen tussle around the admissibility of the statement in the present matter in itself an indication of the weight which it may carry. Thus in the present instance, although the disputed statement is apparently not confessional in nature, I must assume that it compromises the accused in some way.

In my opinion, the admission of such a statement obtained without a warning that it may be used against the maker will inevitably taint the fairness of any subsequent trial. The statement in question was obtained from the accused in violation of the constitutional duty to inform him that any statement he made could be used against him in later proceedings. As such I hold it to be inadmissible against the accused. Again, the conclusion which I have reached renders it unnecessary to consider the question of the effect of the admission of the statement on the administration of justice.

For these reasons I ruled that the written statement made by the accused on 28 December 2000 could not be admitted in evidence against him.

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BOZALEK, J