CASE NUMBER: CA 2/2005

SUMMARY

NILTON KASANGA v THE STATE

HEATHCOTE A J

Constitutional law – Criminal procedure – Does an unrepresented accused have a right to be informed that he can remain silent, even in circumstances where he wants to plead guilty to a charge? This question can also be rephrased as follows: An unrepresented accused undoubtedly has the right to be informed that he can remain silent in circumstances where he pleads not guilty. Does the unrepresented accused forfeit that constitutional right when he mistakenly indicates the he wants to plead guilty, but after having been questioned in terms of section 112(1)(b) of the Act, a plea of not guilty is recorded. In such circumstances an accused obviously does not understand the elements of the crime with which he is charged. In fact if an accused is properly informed, he will not mistakenly plead guilty. Should the rights of an accused who is properly informed, be different from the one who is ill informed?

In *S v Shikongo and Another 1999 NR 375 (SC)* the Namibian Supreme Court held that there is no duty on a presiding judicial officer to explain to an accused that he has the right to remain silent unless and until he pleads not guilty

In terms of Article 81 of the Constitution the court is obliged to follow what was decided in the *Shikongo* matter even where the court does not agree with the ratio of the *Shikongo* case

Nevertheless, pointed out that the Supreme Court was not referred to a number of relevant authorities. Had that been done, the Supreme Court might have come to a different conclusion

The starting point in determining the fairness of a trial as envisaged in Article 12, should always be whether or not the accused is informed. Without an accused being properly informed, one cannot even begin to speculate whether or not rights have been exercised or indeed waived. *In casu*, the appellant wanted to plead guilty. He was obviously ill informed, and did not know the elements of the crime of murder. Had he been properly informed, a plea of not guilty would have been recorded (i.e. exactly the same plea the magistrate was compelled to record in terms of section 113 of the Act). Then, according to the *Shikongo* judgement, he would have been entitled to be informed that he had the right to remain silent. Thus, the admission made by him that he indeed stabbed the deceased with a knife, would not have been on record if he was fully informed. Had he further been informed that he was entitled to expect the State to prove its case beyond a reasonable doubt while he remains silent, he may have done so. If he was legally represented, he would most probably have conducted his case on that basis. Why should an uninformed accused be in a worse position than an informed one? It cannot be accepted that such is the spirit of Article 12 of the Namibian Constitution

Appeal nevertheless succeeding because the appellant not properly informed about his right to legal representation as What would the appellant have understood under the phrase *"constitutional right to be defended by a lawyer of his choice and means"*? The case was a serious one. It concerned a charge of murder. Inevitably, the magistrate must have known that if the accused was found guilty, he will face a sentence of long-term imprisonment. The explanation to the accused about his rights to obtain legal representation was totally insufficient. It was also misleading. No indication whatsoever was recorded in the District Court that the appellant was entitled to apply for legal representation with the Legal Aid Board. He was not informed how to go about in exercising his rights. Such irregularity vitiated the proceedings

CASE NUMBER: CA 2/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NILTON KASANGA **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: Heathcote A J

HEARD ON: 27 July 2005

DELIVERED ON: 2 December 2005

JUDGEMENT

HEATHCOTE A J: The appellant was charged with murder in the Regional Court. It was alleged that he unlawfully and intentionally killed one Jacob Anton by stabbing him with a knife on 4 December 1999.

At his first appearance in the Regional Court, it was recorded that the appellant confirmed that his rights to legal representation and Legal Aid were explained to him in the District Court and that he wanted to conduct his own case. However, the record of proceedings in the District Court reflects the following:

> *"Accused informed that they have a constitutional right to be defended by a lawyer of his own choice and means."*

No reference to Legal Aid was made. The magistrate before whom the appellant appeared the first time in the District Court was not the same magistrate who presided in the Regional Court. Thus, at best for the State, the appellant was only informed in the District Court that he has a constitutional right to be defended by a lawyer of his own choice and means.

After the aforementioned explanation to the appellant the appellant pleaded guilty to the charges in the District Court. The following is then recorded:

> *"Q: Did you understand the charge against you?*
>
> *A: Yes I did.*
>
> *Q: Were you influenced to plead guilty to the charge?*
>
> *A: I wasn't influenced by someone, I did that out of my own free will.*
>
> *Q: Were you at Kafuro village on the 4th December 99 in the district of Rundu?*
>
> *A: Yes I was there.*

Q: You pleaded guilty what did you do wrong?

A: I killed the deceased person by stabbing him with a knife.

Q: What is the name of the person you killed?

A: His name is Jacob Anton.

Q: Can you describe how you killed him or the deceased?

A: On the day in question I was sent by our commander in Angola to cross into Namibia to come buy food. When I came in Namibia I found accd 2 and his friend, the deceased. Accd 2 started to tell me that this friend of mine is a criminal and is also a Unita member, he was referring to the deceased. I then told the deceased to accompany us to our commander in Angola. I then forced him to go and he entirely refused, I then stabbed him with a knife in the chest with a bayonet. I stabbed him on the left side of the chest. After stabbing him the deceased runaway eastward. I didn't see where deceased fell down. Me and my friend accd 2 went back to Angola.

Q: Did you know that by stabbing him with a knife on the chest you would cause his death and that you were committing an offence for which you could be punished if caught?

A: I don't know that.

Q: Why did you kill him?

A: I killed him because he refused to go with me in Angola."

The proceedings were then stopped and on 24 April 2001 transferred to the Regional Court. When the matter was called in the Regional Court, the appellant again pleaded guilty. It is necessary to quote the whole of the proceedings as to what was said in the Regional Court when the appellant pleaded guilty.

"COURT: How do you plead, guilty or not guilty?
ACCUSED: Yes I'm guilty, because I killed somebody.
PLEADS GUILTY
COURT: Now the Court will put questions to you in terms of Section 112(2) of the, 112 (1)(b) of the Criminal Procedure Act. You must carefully listen to these questions because the Court must find out whether you admit all the allegations mentioned in the charge, as well as the elements of the offence of murder. Understood? Mr (intervention)

MR HIPONDOKA: *Kambina, try to interpret please, not write, interpret, not write.*

INTERPRETER: *No, yes, I'm interpreting.*

COURT: *Okay, does he understand? Yes, what do you say? Mr (intervention)*

ACCUSED: *Yes, I do understand, Your Honour.*

COURT: *Thank you, thank you. Mr Kasanga were you in any way influenced or forced to plead guilty to this charge of murder?*

ACCUSED: *No, Your Honour, myself.*

COURT: *On the 4th of December of 1999 were you at Kakuro Village?*

INTERPRETER: *I beg your pardon My Honour, is it Kakuro or Kakoro.*

COURT: *It reads Kakuro, K-A-K-U-R-O.*

INTERPRETER: *Kakuro?*

COURT: *Kakuro.*

ACCUSED: *I don't know this place, Your Honour.*

COURT: *Okay. Now where you, or let me rather ask you this, did you on that particular day meet with Jacob Anton, the deceased?*

ACCUSED: *We were not together, Your Honour, but we just met.*

COURT: *Where did you meet?*

ACCUSED: *I won't recall the place but it's after Koringrusa, the other side, it's where we met, Your Worship.*

COURT: *So was it near Kakuro Village?*

ACCUSED: *I don't know the name of the place, but because I'm new in this area, but I think that's the place where we met with him*

COURT: *You think what?*

INTERPRETER: *He's actually new in Namibia.*

COURT: *Ja?*

INTERPRETER: *Ja, he doesn't know the names of the places.*

COURT: *Hmm?*

ACCUSED: *So I think that the place (intervention)*

COURT: *Is Kukuro Village?*

ACCUSED: *Yes Your Honour.*

COURT: *Now, what happened between you and the deceased, Jacob Anton, that gave rise to you standing before Court today? Did you do anything to him or did he do anything to you or what happened?*

PLEA-EXPLANATION BY ACCUSED: *Because I stabbed him with a knife, Your Honour.*

COURT: *Where did you get the knife from which you used to stab him?*

ACCUSED: *It was mine, Your Honour.*

COURT: *What type of knife was it?*

ACCUSED: *It was a bayonet, Your Honour.*

COURT: *How many times did you stab him?*

ACCUSED: *Just one time, Your Honour.*

COURT: *On which part of his body?*

ACCUSED: *At the left hand at the upper (intervention)*

COURT: *Where?*

ACCUSED: *Side.*

COURT: *Just show, can you just indicate to the Court? On the left, just, he's pointing on the shoulder blade, just below the left shoulder blade. Was he injured?*

ACCUSED: *When I stabbed him, he ran away*

COURT: *Do you know when he passed away, when he died?*

ACCUSED: *I was not aware Your Honour, but I was informed when I was in jail.*

COURT: *That he had died or what?*

ACCUSED: *Yes, Your Honour, that he died.*

COURT: *now why did you stab him with a bayonet?*

ACCUSED: *It was actually not my intention to stab him with a bayonet. So I was informed by a friend that he was a member of UNITA and then I tried to convince him so that I can take him to our commando, but since he was refusing and planning to run away from us and then I decided to stab him with the bayonet.*

COURT: *So if I understand you correctly, you though that he was a member of UNITA and you requested him to accompany you to your commander and when he refused to do that and tried to run away, you stabbed him?*

ACCUSED: *Actually he was informed that he is a member of UNITA.*

COURT: *Who was informed?*

ACCUSED: *The Accused.*

COURT: *Yes, you were informed that the deceased was a member of UNITA?*

ACCUSED: *Yes, Your Honour.*

COURT: *And you wanted to take him to your commander?*

ACCUSED: *Yes, Your Honour.*

COURT: *And he then tried to run away and you stabbed him?*

ACCUSED: *That's right, Your Honour.*

COURT: *Are you a member of the forces?*

ACCUSED: *Yes, Your Honour, I'm a member of the FAR.*

COURT: *Of what?*

ACCUSED: *The FAR, it's an Angolan Army.*

COURT: *Angolan Army?*

ACCUSED: *Yes, Your Honour.*

COURT: *But why was it necessary to stab him?*

ACCUSED: *No, if he could not refuse, I couldn't stab him with the knife, but since he refused, I stabbed him with the knife, Your Honour.*

COURT: *Could you not have done anything else to get him to your commander, if that was your aim?*

ACCUSED: *I was not having any forms of taking him to the, to our commanders, so (intervention)*

COURT: *Sorry?*

ACCUSED: *I was not having any plans or forms to take him to our commander.*

COURT: *Hmm?*

ACCUSED: *So I have to stab him with the knife, that was the only means.*

COURT: *Were you alone or was there anyone else to help you?*

ACCUSED: *Yes, Your Honour, I was alone, my friends went by that time.*

COURT: *But why did you stab him in his, on that place on his body, just below the shoulder blade, next to his neck? Why didn't … why did you stab him there?*

ACCUSED: *As you know, Your Honour, when you are holding a knife with your right hand, when you stab someone, it will end up on his left side.*

COURT: *Did you realize that he, or let me rather ask you this, did you intend killing him?*

ACCUSED:	*No, it was not my intention of killing him, Your Honour, but I was just thinking of injuring him.*
COURT:	*Then why didn't you stab him on the leg?*
ACCUSED:	*I was just fearing him so that he can abide to my laws.*
COURT:	*Did you realize that he could be seriously injured or even killed if you stab him on the part of his body?*
ACCUSED:	*Yes, I was thinking of injuring him, but no killing him, Your Honour.*
COURT:	*You didn't think that he could die because of this injury?*
ACCUSED:	*No, Your Honour, I was not thinking that.*
COURT:	*Do you know what caused his death?*
ACCUSED:	*Yes, I know, Your Honour.*
COURT:	*What, what was it? Mr Interpreter, ask him what was it?*
ACCUSED:	*Because I stabbed him with a knife, Your Honour.*
COURT:	*How do you know that?*
ACCUSED:	*I was informed in jail by the police.*
COURT:	*So you were told that, you didn't, you don't know that from your own knowledge?*
ACCUSED:	*Yes, Your Honour.*
COURT:	*Thank you. In terms of Section 113 of the Criminal Procedure Act, a plea of not guilty is entered. Mr Kasangas you must remember that all allegations which were made up to this stage which are not in dispute, will stand as proof of such allegations during the trial. Yes."*

It is important to note at this stage that:

1. the learned magistrate in the Regional Court states in his additional reasons, which were filed after the appeal was noted, that he did not know, and could not have known at the time he questioned the appellant in terms of section 112(1)(b) of the Criminal Procedure Act, Act 51 of 1977 ("the Act"), that the appellant already pleaded guilty in the District Court, or in which manner the appellant was informed about his rights to legal representation in the District Court;

2. neither the Regional Court magistrate, nor the District Court magistrate informed the appellant that he had the right to remain silent before he pleaded guilty, or at least before he was questioned in terms of section 112(1)(b) after he pleaded guilty. There is furthermore no indication whatsoever that the Regional Court magistrate or the District Court magistrate informed the appellant how to go about in order to apply for Legal Aid;

3. it was only after the Regional Court magistrate recorded a plea of not guilty in terms of section 113 of the Act, that the appellant was informed that the admission made by him during the section 112(1)(b) questioning process will stand as proof during the trial.

The first State witness, Hausiku, testified that he knew the deceased, but when he was asked whether he could see the person holding the deceased (apparently immediately prior to the deceased was stabbed) he stated that he could not identify the person holding the deceased as *"it was a bit far"*. According to this witness three people approached the deceased (and I assume while another person held the deceased at that stage). The three persons, all of them MPL(A) soldiers then surrounded the deceased as well as the person holding the deceased. According to the witness all four men

(surrounding the deceased) had knives with them. The witness then stated:

> *"Yes, and then? --- Your Honour, as I say that they were armed, from a distance I could see that they are using the knives like as pointing at him with knifes, but later on when they left, because they left him and then they went to a nearby cuca shop. After they left, he was standing there, looking at them and then the same time turned, and the time when he turned, I could see blood coming out."*

By the time Hausiku finished his evidence in chief, he did not implicate the appellant at all. He did not even mention that the appellant was part of the group of four men who held and surrounded the deceased, let alone that the appellant stabbed the deceased.

Before the appellant was allowed to cross-examine Hausiku, the magistrate informed him as follows:

> *"COURT: … You now have the opportunity to cross-examine this Witness and all other Witnesses to be called by the State by putting questions to them. You may put questions to them on those aspects of their evidence that you do not agree with and put to them what your version is so that they can answer thereto. If during the course of their evidence, they omitted to mention any facts which you feel are important, then you should also put questions to them about that so that they can answer thereto. You may also put questions to the Witnesses generally in order to show that they should not be believed or that they are mistaken or unreliable as to the events they testify about. Should you fail to put questions on certain issues then the Court may infer that you are in agreement with what was said, so it is important to dispute everything with which you disagree. Do you understand these rights?*
>
> *ACCUSED: Yes, I do, Your Honour."*

The second question asked by the accused was this:

> *"And these other three (3) friends which he said, they were just passing, so they were not present when I stabbed the deceased. --- What I saw, they were present, they were standing there."*

The second State witness, Neramba, did not take the State's case any further. He started off by saying that he did not recognize the accused, although, according to him, he did witness the incident. He also described an incident similar to what the first State witness described, i.e. that someone stabbed the deceased and that the deceased fell down after moving away from the place where he was stabbed. However, he could not and did not identify the stabber.

After the second State witness stepped down the Prosecutor said:

> *"Your Worship, after consideration of this matter, I ought to have called another State Witness, a Police Officer, but in the meantime, Your Worship, with the permission of the Court, I intend to submit two documents, the post mortem which was already discussed with the Accused or its context and the ending thereof as well as the proceeding in the Magistrate Court, Your Worship. As it please the Court."*

The State called no further witnesses but the Prosecutor did hand in the record of the section 119 proceedings (which recorded what happened in the District Court when the appellant endeavoured to plead guilty to the charge), as well as the medical report. It is important to quote from the record to understand in which context the appellant's consent was obtained for these documents to be handed in.

"MR HIPONDOKA:	*To remind the Accused, Your Worship.*
COURT:	*Thank you. Mr Kasanga, as you have heard, the Prosecutor now intends handing in a post mortem report without calling the doctor, and according to him, you have studied this document. Is that correct?*
ACCUSED:	*Yes, Your Honour, I do understand.*
COURT:	*He intends handing it in without calling the doctor. Do you have any objection to that or do you insist on the doctor being called because you're under no obligation to agree to the document being handed in, but if you so wish, then it can be done by agreement?*
ACCUSED:	*Yes, Your Honour.*
COURT:	*Yes what?*
INTERPRETER:	*He do understand, I mean the contents of the post mortem.*
COURT:	*Okay.*
ACCUSED:	*Yes, but no obligation about that.*
COURT:	*No, and do you have no objection to it being handed in without the doctor being called?*
ACCUSED:	*Yes, Your Honour."*

The Prosecutor then handed up the medical report and quoted from it. Amongst others, it was stated that the deceased died as a result of a knife wound.

As a result of the so-called agreement reached with the appellant, he could not question the doctor about the report.

As far as the record of the section 119 proceedings is concerned the following needs to be quoted:

"MR HIPONDOKA:	*As it please the Court, Your Worship.*
COURT:	*And that was also, was that also made available to the Accused or not, because if (intervention)*
MR HIPONDOKA:	*Not, Your Worship.*
COURT:	*If not then you must just interpret it, just read that then. It can be interpreted to him please.*
MR HIPONDOKA:	*As it please the Court. Your Worship, this is the proceeding in the District Court held at Rundu on the 25th of January 2000, where Accused tendered a plea of guilty to a charge or murder which was put to him on the said date. Can you speak loud please, Mr*

Interpreter? Now the Accused was informed of his constitutional right to defend, to be defended by a lawyer of his choice or the means and he then preferred to conduct his own defence during the criminal investigation. The charge was put to the Accused in terms of Section 119 of the Criminal Procedure Act, Act 51 of 1977 and the Accused pleads as follows; (intervention)

INTERPRETER: *I beg your pardon, 119 Article?*

MR HIPONDOKA: *And when Accused pleaded guilty and when questions was put to him in terms of Section 112(1) (b) of the Criminal Court, the Accused replied to the question as follows; he was asked "Did you understand the charge against you, him" and he said, "Yes", he did. He was asked by the Presiding Officer whether he was influenced to plead guilty to the charge and his answer was, "I wasn't influenced by someone, I did that out of my own free will". On the question whether you, he were at Kavolo Village on the 4 December 99 in the district of Rundu, the Accused answered, "Yes, I was there". The Accused was then asked why did he plea not guilty, what did he wrong, and his answer "I killed the deceased persons by stabbing him with a knife"."*

Only after the section 119 proceedings were read into the record the magistrate stated:

> *"Mr Kasanga you have heard the part of the record which was read out by the Prosecutor as being part of the Section 119 Proceedings held on the 25th day of January here of the year 2000. Do you have any objection to this being handed in, in other words, are you in agreement that what was written down and in the certified copy of the case record, that it was recorded correctly?"*

and further:

> *"Now I may just point out to you that the Criminal Procedure Act provides that where a certified copy of the Section 119 Proceedings is handed in as part of the evidence in the Court, which tries the Accused, then it is prima facie proof of what was said, in other words, if you dispute the document, you must prove on a balance of probabilities, that what is recorded in this document, is not what you said. So the onus is on you to prove that you didn't mention the name and that you did not say that you returned to Angola as was recorded in the Section 119 proceedings. Do you understand this? So you must just kept that in mind. Yes, Mr Hipondoka?"*

After the section 119 proceedings were received in evidence the State closed its case. The appellant decided not to testify.

The accused was then convicted of murder and eventually sentenced to 18 years imprisonment. That occurred on 26 April 2001.

On 27 May 2004, the appellant filed an affidavit in support of an application for condonation for the late filing of his appeal as well as a document titled application for leave to appeal. This document is intended to be a notice of appeal and I shall regard it as such.

In his application for condonation the appellant states that:

1. he did file two notices of appeal against his conviction and sentence within the required 14 days period;

2. he then waited for three years for the appeal to be set down;

3. when he heard nothing from the Clerk of the Magistrate's Court, he sent the new notice of appeal to the Registrar;

4. it is difficult, while in prison, to ensure that the notice of appeal is indeed filed;

5. it is also difficult, while is prison, to make enquiries. The only assistance is the prison authorities, who may not always be that helpful;

6. he is a layman.

In his notice of appeal against conviction the appellant states:

> *"The learned magistrate erred in not explaining the applicant his legal rights to legal representation.*
>
> *The learned magistrate erred in not assisting the unrepresented accused to obtain legal representation through the Directorate of Legal Aid, since the applicant was facing a serious count of murder.*
>
> *The learned magistrate erred in admitting the medical report as evidence …*
>
> *The learned magistrate failed to apply section 186-187 of the Criminal Procedure Act, 51 of 1977. Seeing in the light the applicant was unrepresented, this failure of the court had prejudiced the applicant not to have a fair trial.*
>
> *The learned magistrate erred in not finding that the State witnesses couldn't tell the court who stabbed the deceased.*
>
> *The learned magistrate gave further reasons after he received the notice of appeal."*

With regard to the ground of appeal that the appellant was not properly informed about his right to legal representation the magistrate stated that:

> *"With the first appearance in the Regional Court in Rundu on 17/10/2000 the appellant (& co-accused) confirmed that their rights to legal representation and Legal Aid were explained to them in the District Court and that they elected to conduct their own defence.*
>
> *The court therefore, had no reason to again explain the accused's rights to legal representation and Legal Aid to him.*

> *At that stage the Court did not have before it the certified copy of the Court proceedings held in the District Court on 25/01/2000 as this was only handed in at a later stage of the trial.*
>
> *As regards the explaining of the Appellant's rights, the following appears on p.1 of the record:*
>
> > *"Accused informed that they have a constitutional right to be defended by a lawyer of his own choice and means. Accused prefers to conduct their own defence." (sic)*
>
> *Although the Appellant now states that he was not informed of his right to Legal Aid, he did confirm to this Court on 17/10/01 that it was explained to him."*

With regard to the appellant's ground of appeal that the State witnesses did not and could not tell the court who stabbed the deceased, the magistrate stated:

> *"During the Sec 112(1)(b) questioning by Magistrate Mukasa as well as myself, the Appellant admitted having stabbed the deceased person."*

Having summarized the facts of the matter it appears to me that, in essence, three issues have to be determined. They are:

1. should condonation for the late filing of the applicant's appeal be granted;

2. if condonation is granted, should the appeal succeed on any one or more of the following grounds:

    2.1 whether or not the trial magistrate had to inform the appellant that he had the right to remain silent before he pleaded guilty;

2.2 whether the applicant was properly and adequately informed of his right to legal representation;

2.3 did the magistrate correctly allow the medical report and the record of the section 119 proceedings as admissible evidence?

3. if any one or more of the issues mentioned in paragraph 2 above are determined in favour of the appellant, did such irregularity vitiate the proceedings to such an extent that the appellant did not have a fair trial as envisaged in Article 12 of the Namibian Constitution?

I shall first deal with the issue of condonation.

The State did not file any opposing affidavit. The allegations made by the appellant must accordingly be accepted. Nevertheless, Ms Herunga who appeared for the State, submitted that the appellant failed to provide a satisfactory explanation for the inadequate delay, and therefore it can be concluded that the application is not *bona fide*. She also submitted that the appellant's prospects of success are so weak that condonation should be refused. While I agree that the reasons given by the appellant to explain the delay can be criticized, there is nothing before me to gainsay what the appellant

alleges to have happened. According to him he did file his notice of appeal timeously and he was awaiting the allocation for a trial date. If that is accepted there would not even be a need for an application for condonation. While the appellant's apparent patience in waiting to be informed about a trial date can also be criticized, I am nevertheless of the view that he has reasonable prospects of success on the merits of his appeal. I am prepared to exercise my discretion in his favour. Condonation for the late filing of the appellant's appeal is granted.

Does an unrepresented accused have a right to be informed that he can remain silent, even in circumstances where he wants to plead guilty to a charge? This question can also be rephrased as follows: An unrepresented accused undoubtedly has the right to be informed that he can remain silent in circumstances where he pleads not guilty. Does the unrepresented accused forfeit that constitutional right when he mistakenly indicates the he wants to plead guilty, but after having been questioned in terms of section 112(1)(b) of the Act, a plea of not guilty is recorded. In such circumstances an accused obviously does not understand the elements of the crime with which he is charged. In fact if an accused is properly informed, he will not mistakenly plead guilty. Should the rights of an accused who is properly informed, be different from the one who is ill informed?

Ms Herunga referred me to *S v Shikongo and Others 1999 NR 375 (SC)* where Strydom C J stated the following at *385B-386A*:

> *"Returning to the present appeal it seems to me that the duty of the Court to inform an accused of his right to remain silent only arises once an accused has pleaded not guilty. Only after an accused has pleaded would the Court know what explanations and warnings should be given. In S v Mabaso and Another 1990 (3) SA 185 (A) the following was stated by Hoexter JA for the majority of the Court at 201C - E:*
>
> > *'The purpose of the pre-trial procedure, the rights of an accused thereunder, and the status and evidential cogency of admissions made by an accused in the course thereof have been considered in a number of decisions by this Court. See S v Seleke en 'n Ander 1980 (3) SA 745 (A); S v Sesetse en 'n Ander 1981 (3) SA 353 (A); S v Daniëls en 'n Ander 1983 (3) SA 275 (A); S v Nkosi en 'n Ander 1984 (3) SA 345 (A). In the last-mentioned judgment this Court stressed the significant difference between the respective situations of (1) an accused who, having pleaded not guilty in s 119 proceedings, is questioned as to the basis of his defence under s 115 and (2) an accused who, having pleaded guilty under s 119, is questioned in terms of para (b) of s 112(1). It was held that in the latter situation it is unnecessary for a magistrate to advise the accused of his right to remain silent. The reason is that by his plea of guilty the accused has admitted the whole of the State's case. Any warning to the accused at that stage, so it was held, would be contrary to the spirit of s 119 read with ss 121(1) and 112(1)(b); and it would be calculated to thwart its object.'*
>
> *Where, as in this case, the respondents together with their pleas of not guilty spontaneously admitted a fact which was put in issue by the plea of not guilty, namely the fact whether they have had sexual intercourse with the complainant, I can also think of no reason why such admissions should be ignored. I know of no rule of evidence which would make such evidence inadmissible, except if it were made under compulsion but that was never even suggested. As was stated in the Mabaso case supra at 206F, the general rule is that all relevant evidence is admissible unless it is prohibited by a specific rule of the law of evidence.*
>
> *For the reasons set out above I respectfully agree with what was stated in the Sesetse case supra, and the other cases referred to above and from this it follows that the Court a quo was wrong to summarily disregard the informal admissions made by the respondents when they pleaded at the s 119 proceedings. The magistrate was only obliged to give the necessary explanation and warning after it became clear what the respondents were going to plead. They pre-empted this by making the admissions together with their pleas.*
>
> *The third point referred to by me above, and which must be considered, was answered during the discussion of the second point above, ie that admissions which are unfavourable to an accused and not confirmed in terms of s 115(2)(b) are regarded as informal admissions and form part of the evidential material which must be considered together with all the other evidence. See further in this regard S v Mjoli and Another 1981 (3) SA 1233 (A) at 1238D - E; S v Daniëls en 'n Ander 1983 (3) SA 275 (A) at*

> *300E - F; S v Mabaso and Another (supra at 209I); S v Shivute 1991 (1) SACR 656 (Nm) A at 659e and S v Cloete 1994 (1) SACR 420 (A) at 424d - g."*

It is clear that the *ratio decedendi* of *S v Shikongo* lies in the finding of the Supreme Court that there is no duty on any court to inform an accused of his right to remain silent unless and until such time the accused pleads not guilty to the charges. Thus, where an accused pleads guilty, and even in circumstances where it appears at a later stage that he had mistakenly pleaded guilty, the admissions made by him remain to be treated as proof against him by virtue of the provisions of section 113 of the Act, which provides that:

> *"If the court at any stage of the proceedings under section 112 and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty or is satisfied that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation."*

Article 81 of the Namibian Constitution provides that:

> *"A decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted."*

Article 81 of the Namibian Constitution compels me to follow the *Shikongo ratio*. I have no discretion whether or not to apply the rule as laid down by Strydom C J. I shall indeed apply it. However, with due respect to the learned judges of the Supreme Court, I wish to

point out that counsel for the State and the defense, appear not to have referred the learned judges to a number of relevant decisions during argument. Had that been done, the decision may have been different. As there is always a possibility that the *ratio decedendi* of the Supreme Court *"may be reversed by the Supreme Court itself"*, I wish to say the following:

1. the Namibian Supreme Court followed the case of *S v Mabaso and Another 1990 (3) SA 185 (A)*. The reasoning by Hoexter J A in the *Mabaso* matter had it that any warning to an accused (i.e. that he can remain silent) at a stage where the accused wants to plead guilty, would be contrary to the spirit of section 119 read with section 121(1) and 112(1)(b) of the Act, and it would be calculated to thwart its object;

2. I have a great difficulty to determine the spirit of the provisions of section 119 read with section 121 and 112(1)(b) of the Act. If the spirit of those provisions allow an uninformed accused to be deprived of his right to remain silent merely because he is uninformed, I have great doubts whether such spirit will pass Constitutional scrutiny;

3. in my view, the starting point in determining the fairness of a trial as envisaged in Article 12, should always be whether or not the accused is informed. Without an accused being

properly informed, one cannot even begin to speculate whether or not rights have been exercised or indeed waived. *In casu*, the appellant wanted to plead guilty. He was obviously ill informed, and did not know the elements of the crime of murder. Had he been properly informed, a plea of not guilty would have been recorded (i.e. exactly the same plea the magistrate was compelled to record in terms of section 113 of the Act). Then, according to the *Shikongo* judgement, he would have been entitled to be informed that he had the right to remain silent. Thus, the admission made by him that he indeed stabbed the deceased with a knife, would not have been on record. Had he further been informed that he was entitled to expect the State to prove its case beyond a reasonable doubt while he remains silent, he may have done so. If he was legally represented, he would most probably have conducted his case on that basis. Why should an uninformed accused be in a worse position than an informed one? I do not accept that such is the spirit of Article 12 of the Namibian Constitution;

4. when Strydom C J decided the *Shikongo* matter, he was not referred to *S v Damons and Another 1997 (2) SACR 218 (W)*. In *S v Damons*, the accuseds' legal representatives objected when the State sought to introduce evidence by endeavouring to hand in the record of the proceedings which took place

before a magistrate in terms of section 119 of the Act. The objection was twofold:

4.1 that the accused were not properly informed of their rights to legal representation at the time they pleaded guilty; and

4.2 that the accused were not informed that they were entitled to remain silent before they pleaded guilty;

5. Nugent J rejected the first objection on a factual basis, holding that the accused persons were indeed properly informed about their right to legal representation. He accordingly held that it was not necessary to decide the legal issue as to whether a failure to inform an accused of his right to legal representation, can have the effect that the section 119 proceedings will not be admitted at a subsequent criminal trial;

6. Nugent J also rejected the second ground of objection, *inter alia*, on the following grounds:

6.1 although section 109 of the Act states that a plea of not guilty should be entered if an accused refuses to plead, it does not create a right not to plead;

6.2 section 25(3)(c) of the South African Interim Constitution (guaranteeing a fair trial) did not have the effect that the magistrate can decide whether or not to compel an accused to plead, as a magistrate must assume that the Act conforms with the interim constitution, and act accordingly (see: *Podlas v Cohen and Bryden NNO and Others 1994 (4) SA 662 (T)* at *672G-J*);

6.3 he relied on the *dictum* of Hoexter J A in *S v Mabaso* supra at *208E-I* where the following was stated:

> *"Under cross-examination an accused is obliged to answer questions. From the provisions of s 197 it is self-evident that an accused cannot during his cross-examination claim the privilege in respect of the very offence with which he is charged. See Hoffmann & Zeffertt (op cit at 36 footnote 48).*
>
> *Under s 119 an accused is obliged to plead forthwith. But here too his response relates exclusively to the very offence with which he is charged; and, logically, there is no room whatever for the privilege against self-incrimination. Any attempt to import it at this stage of the proceedings would represent a complete stultification of the requirement to plead. There is a further and compelling consideration which must not be overlooked. At the very heart of the privilege against self-incrimination lies the notion of testimonial compulsion. In R v Camane and Others 1925 AD 570 Innes CJ remarked at 575:*
>
> > *'Now it is an established principle of our law that no one can be compelled to give incriminating evidence*

against himself. He cannot be forced to do that either before the trial, or during the trial.'

In the case of an accused called upon to plead under s 119, however, the essential attribute of testimonial compulsion is entirely lacking. At that stage of the proceedings the accused has simply to exercise a choice between two alternatives. He may, through a plea of guilty, choose the course of inculpation; but he may just as well elect, by pleading not guilty, to exculpate himself. His choice is entirely uncoerced and unfettered. The fact that the accused is obliged to plead does not mean that he is compelled or forced to plead guilty. His choice between a plea of guilty and a plea of not guilty is an untrammelled one.

The scenario conjured up by counsel for the appellants in argument (the possibility that, if the appellants had had legal advice, this might have induced the appellants to plead not guilty at the s 119 proceedings) raises the question, not so much of the right of an accused to legal representation in criminal proceedings (which is dealt with in s 73(2) of the Criminal Code), as his right to consult his lawyer (which J is dealt with in s 73(1)).”

6.4 referring to what Hoexter J A stated (as quoted above) Nugent J held that the decision between pleading guilty and not guilty was an entirely uncoerced one, as the choice between pleading guilty and not guilty is an untrammelled one;

6.5 Nugent J also referred to *S v Maseku 1996 (2) SACR 91 (W)* in which case Borchers A J ruled section 119 proceedings to be inadmissible on the basis that the

accused was not informed of his right to remain silent, and in circumstances where he mistakenly pleaded guilty but eventually a plea of not guilty was recorded. Borchers A J stated that:

> *"...even before the enactment of the Constitution, it was settled law that an accused who is questioned in terms of s 112(1)(b) of the Criminal Procedure Act has the right to remain silent"*

For coming to this conclusion, Borchers A J relied on the *dictum* of Milne J A in *S v Mabaso* supra at *211C-D* where the following is stated:

> *"The appellants had the right to remain silent when questioned by the magistrate in terms of s 115. S v Daniels en 'n Ander 1983 (3) SA 275 (A) at 299F - H. They also had the right to remain silent when questioned by the magistrate in terms of s 112(1)(b). S v Nkosi en 'n Ander 1984 (3) SA 345 (A). In that case this Court held that a magistrate who questions such an accused is not obliged to warn him of his right to remain silent, but it is clearly implied that he has such a right and I do not understand this to be questioned. It must also be assumed that the appellants were not aware of this right"*

6.6 Nugent first quoted what Borchers A J said at *223I-224D*, being:

> *"'The appellants had the right to remain silent when questioned by the magistrate in terms of s 115. S v Daniels en 'n Ander 1983 (3) SA 275 (A) at 299F - H. They also had*

> *the right to remain silent when questioned by the magistrate in terms of s 112(1)(b). S v Nkosi en 'n Ander 1984 (3) SA 345 (A). In that case this Court held that a magistrate who questions such an accused is not obliged to warn him of his right to remain silent, but is clearly implied that he has such a right and I do not understand this to be questioned.'"*

and then dealt with Borchers A J's reasoning as follows:

> *"The issue which had arisen for decision in S v Mabaso was whether the accused was entitled to be informed that he had a right to legal representation before being called upon to plead in terms of s 119. Whether he was entitled to remain silent was only incidental to that issue, and the remarks by Milne JA in that regard were obiter. Furthermore, his opinion represented that of the minority of the Court. An obiter dictum in a minority judgment cannot be regarded as having settled the law on a subject.*
>
> *Furthermore, in my respectful view, the decision in S v Nkosi does not 'clearly imply' that an accused has a right to refrain from answering questions put to him in terms of s 112(1)(b). In my view the most that can be said is that the Court assumed that the accused had such a right, without pertinently considering the question. I think it is clear from the reasoning in that case that the Court was of the opinion that for an accused person to refrain from replying to questions would be contrary to the very purpose of s 119, read with s 121(1) and s 112(1)(b) (see 353B - I). If that is so, I see no reason to assume that he has such a right at all. I would be most reluctant to accept that the Appellate Division was of the opinion that an accused has a right to remain silent, but should not be encouraged to exercise it."*

6.7 Nugent J then held that Borchers A J's findings were clearly wrong, as an accused has no right from refraining from answering questions posed to him in terms of section 112(1)(b) once he has indicated that he wants to plead guilty to the charges;

6.8 Nugent J further held that the right to remain silent is inherently incompatible with the plea of guilty, and then said at *225B-C*:

> *"By tendering the plea, if it was correctly tendered, the accused has chosen to incriminate himself on each and every element of the charge, and has abandoned his right to silence in its entirety. If the plea was incorrectly tendered his right to silence will survive only in those respects in which he has not chosen to incriminate himself. This is recognised by the Act, which requires the magistrate to warn him before asking whether he wishes to disclose the basis of his defence on those issues."*

Nevertheless, Nugent J went on to agree with Milner J A's *dictum* as stated in the minority judgement in *S v Mabaso* supra at *216* where Milner J A said the following:

> *"In my judgment, public policy requires that before a man condemn himself out of his own mouth in preliminary court proceedings he should be fully advised of his right to remain silent and as to whether it is in his interests to do so. The proper person to advise him of this is a legal adviser and public policy requires that he should be advised of his rights in this regard as well."*

7. while I have no difficulty with the reasoning of Nugent J, it can only be right in as far as an accused has been fully informed about his rights and the essential elements of the crime he wants to admit. The difficulty I have with this reasoning of Nugent J, in as far as an uninformed accused is concerned, is that Nugent J says that the right to remain silent only survives in respect of those issues which the accused has not chosen to incriminate himself. The answer to this, in my view, is that an

uninformed accused does not choose in the proper sense of the word. Rather, his fate is determined by the luck of the draw. He might incriminate himself or not;

8. I much prefer the reasoning of Borchers A J in *S v Maseku* supra. As already pointed out the accused in that case also pleaded guilty in the High Court. Once again, the accused was ill informed and did not succeed in having a plea of guilty recorded. Borchers A J held that, the right to remain silent during plea proceedings is also included in Article 25(3) of the South African Interim Constitution. In my view, that right is also included in Article 12(1) of the Namibian Constitution. Borchers A J further went on to hold that that right was in any event in place, prior to the advent of the South African Interim Constitution. She relied on what Milne J stated in *S v Nkosi en 'n Ander 1984 (3) SA 345 (A)*. On that basis, Borchers A J did not permit the section 119 proceedings to be handed up as part of the record;

9. the *Damons* decision was also referred to in *Director of Public Prosecutors, Natal v Magidela and Another 2000 (1) SACR 458 (A)*. Mr Kangueehi, who appeared for the appellant, correctly pointed out that, albeit that it did not do so, the South African Appellate Division had opportunity to deal with the following pertinent legal questions:

9.1 whether the respondents (accused) had the right to remain silent after they had pleaded guilty during the proceedings conducted in terms of section 119 of Act 51 of 1977;

9.2 whether there was a duty to inform the respondents of such right after they had pleaded guilty;

9.3 whether the Magistrate's failure to do so necessarily rendered the record with its contents of the said proceedings inadmissible at the subsequent trial of the respondents;

10. the *Magidela* case (i.e. the court *a quo*) referred to the decision of *S v Nkosi en 'n Ander* supra in which case it was held that *"it was not necessary to advise the accused of this right as, by their pleas of guilty, they had already admitted the State's case: that the purpose of questioning the accused was not primarily directed to self-incrimination but to protecting them against the consequences of an unjustified plea of guilty; and that any warning to the accused at that stage would conflict with the spirit of ss 119, 121(1) and 112(1)(b) and the scheme of the Act"*. Magid J (in the court *a quo*) held that the reasoning in the *Nkosi* case was wrong,

bearing in mind the impact of section 25(3)(c) of the then interim constitution of South Africa. Magid J, in the court *a quo*, decided that statements made in terms of s 112(1)(b) of the Act by an unrepresented accused who had pleaded guilty in terms of s 119, were not admissible unless the accused was informed of his rights not to incriminate himself and ... of the consequences which may flow from doing so, and then stated:

> *"I am in respectful agreement with the judgment of Borchers AJ in his conclusion that the phrase 'plea proceedings' in section 25(3)(c) of the interim Constitution cannot be interpreted only to mean the proceedings which follow upon a plea of not guilty and not to include the proceedings following upon a plea of guilty. I am therefore of the opinion that the judgment of Borchers AJ in Maseko's case was correct and that my judgment in the case of Langa, to the extent that it appears to refer to the failure to advise an accused of his right to remain silent, is wrong. As it is common cause in this case that the accused were not advised of their right to remain silent during the plea proceedings, it seems to me that I must uphold the point taken by counsel for the defence and rule that any admissions which may have been made in the course of the section 119 proceedings, are inadmissible."*

11. on appeal, in the *Migidela* case, Melunsky A J A made no order as to the legal issues but did emphasize the following general principles:

11.1 fairness would, in general, require that an accused person should be so informed of this right (to remain silent);

11.2 the decision in *S v Nkosi* and the majority judgement in *S v Mabaso* may have to be revisited in the light of the

constitutional advances which require criminal trials to be conducted according to the notions of basic fairness and justice;

11.3 the interim constitution required a judicial officer, in general, to inform an unrepresented accused of the right to silence during plea proceedings;

11.4 to inform an accused of the right to silence after he has pleaded may serve little purpose but there is no need to decide at what stage in the plea proceedings the accused should be so informed.

While I record my agreement with the reasoning of Borchers A J and Melunsky A J A, I must uphold the Namibian Constitution. The *Shikongo* decision is binding upon me and for that reason I hold that the appellant's appeal cannot succeed on this ground.

I shall now deal with the question whether or not the appellant was properly informed of his rights to legal representation. As I have already indicated, what was stated to the appellant in the District Court was the following:

> *"Accused informed that they have a constitutional right to be defended by a lawyer of his own choice and means."*

I am not so sure what it means if someone is informed that he has a constitutional right to be defended by a lawyer *"of his own choice and means"*. What I do know is that it is highly unlikely that the appellant would have known what was conveyed to him.

Does this comply with the provisions of Article 12 of the Namibian Constitution. In my view, it does not.

In *James Gadu v The State 2004 (1) NCLP 48* Manyarara A J, with whom Gibson J agreed, stated the following:

> *"This court is indebted to the Chief, Lower Courts, for making available to it a copy of the magistrate's handbook prepared by JFF Verwey, Director of the Justice Training Centre, and published in July 1994. The Court would recommend the handbook for study by magistrates who may be uncomfortable with their knowledge of criminal procedure. For the benefit of those who may not have access to the handbook, it deals with, inter alia, the issue under consideration at page 7 as follows:*
>
> *"Article 12(1)(e) of the Constitution specifically provides that accused persons shall be afforded time to prepare for trial and shall be entitled to be defended by a legal practitioner of their choice. In S v T Kau and Others Nam. SC. SA 1/93 (now reported in 1995 NR 1) Dumbutshena, AlA stated as follows on P. 7C*
>
> > *'In Namibia the right to be defended by a lawyer or one's choice is a constitutional right. When the trial Magistrate failed to inform the appellants of this right he deprived them of their constitutional right. Because the right is given to the people by the Constitution, it is the duty of judicial officers to inform those that appear before them of their right to representation. There, of course, will be exceptional cases. A lawyer who appears before a judicial officer is expected to know his right to legal representation. There are many such other people, educated and knowledgeable who need not be informed If they do not know, they must be informed.*"
>
> *In the present case, it was vital for the magistrate to spell out the appellant's right to legal representation for the reasons which will emerge in the course of this judgment.*
>
> *Article 12 of the Constitution sets out the requirements of a fair trial and*

sub-article (1)(e) provides as follows:

> *"All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice*"

It will be observed, firstly, that the right to a fair trial covers the period both before and during the course of the trial and, secondly, that nowhere does the sub-article mention payment for the services of a lawyer. That is dealt with by the Legal Aid Act 29 of 1990.

Miss Schimming-Chase who prepared and filed written heads of argument and argued the appeal set out the correct position in the heads she filed as follows:

"*The Act (Legal Aid Act 29 of 1990) gives the Director of Legal Aid the discretion to grant legal aid upon application and to determine the contribution (to the cost thereof), if any, that an applicant would have to make, depending on what is just and reasonable, having regard to that person's means.* "

That is to say, there is a means test to determine whether an applicant can pay and, if so, how much he should be called upon to pay. What the author of the pro forma used by the magistrate in this case has attempted to do is to summarise the relevant provisions of the Act, with disastrous consequences. The magistrate said to the appellant

"*In this case (of legal aid) you may pay half or one third of this costs (sic) and the other two thirds will be subsidized by the Government...*"

That is a gross misrepresentation of the provisions of the Legal Aid Act. It had the effect of discouraging the appellant and other would-be applicants from seeking legal aid, for the wrong reasons. This appellant was functionally illiterate. He told the magistrate that he was a refugee residing at the Osire refugee camp, that he was almost totally dependent on the humanitarian aid he received from the United Nations High Commission for Refugees and that he was unfamiliar with Namibian law. These factors should have prompted the magistrate to refer the appellant to the legal aid office without hesitation and to adjourn the trial pending the outcome thereof.

There is merit in the submission made by Miss Schimming-Chase as follows:

> *"It is submitted that had the appellant been informed of the fact that it may not be necessary (for him) to pay the costs of legal aid (as) the decision lay with the director of legal aid... that the accused may have elected to apply for legal aid.*
>
> *However, this did not happen. The result of this was that the appellant, who was a foreigner and could not properly understand English, had to represent himself, and was put in a position where he could not competently conduct his own defence by the same court that was held to be responsible for also protecting his rights.*"

It follows that the appellant suffered a sufficiently material failure of justice to warrant the setting aside of the proceedings.

In conclusion, I refer to the recommendation made by Dumbutshena AJA in S v Kau, supra, at 7C as follows:

> *"A magistrate must therefore record on the record of the proceedings at least as follows:*
>
> *'The accused is informed of his/her right to legal representation.'*
>
> *Then record the response of the accused, eg 'Accused states s/he is going to conduct his/her own defence and does not wish to have legal representation' or record whatever she has to say."*

I would respectfully go further than the learned Acting Judge of Appeal went and suggest that in cases like the present case there should be a verbatim record of what the magistrate said to the accused person before him to enable the reviewing or appellate tribunal to ascertain whether the accused was correctly informed of his rights.

A possible method of ensuring that this result is achieved would be to adopt a simple format by which the information is conveyed to the accused in the following sequence:

(a) *that he has the right to be defended by a lawyer (deliberately omitting at this initial stage the rather confusing phrase "of one's choice");*

(b) *that he has the right either to hire and pay a lawyer "of his choice" or, alternatively, to apply to the legal aid office for a lawyer to be provided by the state;*

(c) *that, if he chooses to apply for a legal aid lawyer, the clerk of court will assist him in completing the necessary forms; and*

(d) *that the legal aid office will consider his financial circumstances and, based on its finding, it will decide and inform him whether he will be required to make any contribution towards the cost of the legal aid lawyer to be provided to represent him."*

I am in full agreement with the sentiments expressed and guidelines laid down by the learned judges in the *Gadu* matter. It is evident from the record in this case, that the appellant was illiterate. This is confirmed by the learned magistrate's own statement which appears on page 37 of the record:

> *"Yes Sir, you probably do not understand when a case goes on trial. But take my word for it, there was no need for these Witnesses to have been here before. Do you have any other questions for the last time?*

What would the appellant have understood under the phrase *"constitutional right to be defended by a lawyer of his choice and means"*? The case was a serious one. It concerned a charge of murder. Inevitably, the magistrate must have known that if the accused was found guilty, he will face a sentence of long-term imprisonment. The explanation to him about his rights to obtain legal representation was totally insufficient. It was also misleading. No indication whatsoever was recorded in the District Court that the appellant was entitled to apply for legal representation with the Legal Aid Board. He was not informed how to go about in exercising his rights. In my view the irregularity vitiated the proceedings.

Recently I stated in *S v Kautewa 2005 (6) NCLP 52 (HC)*, with which statement Damaseb J P agreed:

> *"The question whether or not any irregularity vitiated the proceedings, is in most cases a factual question, but it is a very difficult question to be answered where that very irregularity caused the accused to be without legal representation. The reason is obvious. If a lawyer was present, there would have been (almost inevitably in all cases) other facts to be taken into consideration as well. It is for this reason that it was decided in S v Seheri en Andere 1964 (1) SA 29 (A) at 36 that, in determining whether or not an irregularity occurred as a result of a refusal of a postponement in order to allow an accused time to obtain legal representation, the court of appeal is required to ignore the evidence led in the trial court against the appellant, for that evidence is not necessarily the evidence on which the State could have relied had there been legal representation.*
>
> *In S v Shabangu 1976 (3) SA 555 (A) at 558F-G Jansen J A stated:*
>
> > *"The case against the appellant on the merits certainly appears to be formidable and to have fully justified the conviction. But, on the other hand, it is impossible to say what effect a properly conducted defence could have had on the ultimate result. In view of the misdirection which materially influenced the court in exercising its discretion, the principles applied in S. v Seheri en Andere, 1964 (1) SA 29 (AD).) at p. 36, are fully operative. It was there held that an accused unrepresented at a trial through his attorney's fault, does*

> *not as a result forfeit his right to legal representation, and that a refusal to grant a postponement to the accused to enable him to be represented later amounted to a failure of justice ...""*

I also agree with what was stated in *S v Khanyile and Another 1988 (3) SA 795 (N)* where the following was stated:

> *"The duty of a presiding officer, faced by an unrepresented accused, does not end when he has advised the accused of his rights, including the right to legal representation. Where an accused has been charged in a matter which is neither so serious that pro deo representation will be automatically appointed to assist him, nor so trivial that, were the accused able to afford legal representation, he would dispense with it but lies somewhere between the two extremes, and the accused is unrepresented, not because he has freely and deliberately chosen to be unrepresented, but because he is too poor to pay for representation, the presiding officer has a duty, prior to the commencement of proceedings, to assess whether the lack of legal representation will place the accused at so great a disadvantage that the ensuing trial would be palpably and grossly unfair were it to proceed without a lawyer for the defence. There are three aspects to the enquiry which the presiding officer should conduct: (a) the inherent simplicity or complexity of the case as far as both the law and the facts go; (b) the personal resources of the accused, such as how mature, sophisticated, intelligent and articulate he looks and sounds, or what impression he gives of his general ability to fend for himself in a case with those dimensions; and (c) the gravity of the case and the possible consequences of a conviction. Imprisonment, a crippling fine, the loss of employment or the means of earning a livelihood are merely some of the matters which should be considered.*
>
> *The presiding officer should elicit all the information which has a bearing on all three aspects of the enquiry and should then weigh the circumstances thus established or otherwise apparent to him, together with any more of which he learns that are particular and pertinent to the case in hand. Should he conclude that their cumulative effect would be such that a trial without representation for the accused would be grossly unfair, he should refer the case at once to those administering the legal aid scheme or to one of the associations of lawyers who are willing to offer assistance pro bono and, what is more, he should refuse to proceed with the trial until representation is procured through some agency."*

It is not difficult to realize the prejudice the appellant suffered in this case. Had he been properly informed that he could obtain legal representation, and had he done so, a lawyer understanding all the elements of the crime of murder would have explained to the appellant that he was entitled to plead not guilty. He could have

remained silent. He could have and probably would have put the State to the proof that he committed the crime, and to prove so beyond reasonable doubt. Not a single State witness implicated the accused. He implicated himself in circumstances where he was ill informed. Although I have held that I am bound to follow the decision of *S v Shikongo* supra, I must emphasize that the learned Chief Justice, in coming to the conclusion that the right to remain silent only arises after an accused indicates that he wants to plead not guilty, the *Shikongo* ratio was laid down in circumstances where the accused fully understood their rights to legal representation, and indicated that they were prepared to defend themselves. Moreover, the charge of rape was explained to them and they indicated that they understood it before they pleaded guilty. Those safeguards are not even remotely applicable *in casu*.

In all the aforementioned circumstances I am of the view that the accused did not have a fair trial, and that his conviction and sentence should be set aside.

In all the aforementioned circumstances I make the following order:

1. The late filing of the appellant’s notice of appeal is condoned.

2. The appellant’s appeal against conviction succeeds.

3. The appellant’s conviction and sentence are set aside.

.....

HEATHCOTE, A J

COUNSEL ON BEHALF OF THE APPELLANT: Mr Kangueehi

INSTRUCTED BY:

COUNSEL ON BEHALF OF THE RESPONDENT: Ms Herunga

INSTRUCTED BY: