REPORTABLE

CASE NO.: CC 32/2001

SUMMARY

IN THE HIGH COURT OF NAMIBIA

HELD AT WINDHOEK

In the matter between:

THE STATE

and

CALVIN LISELI MALUMO & 111 OTHERS

HOFF, J

03 February 2012

The production of bail proceedings in a subsequent trial – in terms of the provisions of section 235(1) of Act 51 of 1977.
Section 235(1) merely creates a mechanism for the proof of judicial proceedings and does not provide finality regarding what testimony is admissible or not – does not constitute proof of any fact contained in the record of the bail proceedings.
Purpose of section 235(1) to avoid calling officers of court (magistrate, prosecutor, interpreter or legal representative) to testify in subsequent trial in order to prove that judicial proceedings had been correctly recorded.
General rule is that any relevant testimony during criminal proceedings is admissible against accused unless such testimony is excluded by a specific evidentiary rule.
The admissibility of the content of the record of bail proceedings *in casu not* to be done by way of a trial-within-a-trial but to consider the issue on the face of the record of the bail proceedings.

Section 203 re-states common law privilege of a witness against self-incrimination.
Article 12(1)(f) of Namibian Constitution provides that no person shall be compelled to give testimony against themselves.

Duty on judicial officer to warn a witness in criminal proceedings he or she is not obliged to answer incriminating questions – duty arises whenever it appears that witness might well be about to give such evidence.
Complementary duty on prosecutor where he or she proposes to put questions likely to reveal incriminating conduct on the part of witness to inform Court of such intentions.

Non-observance of duty to inform witness not to answer incriminating evidence is an irregularity which will render incriminating evidence inadmissible in subsequent trial against witness.

Although the guilt of an accused person may be relevant in a bail application evidence thereon should be confined to the central issue namely, whether it would be in the public interest or the interests of the administration of justice to release accused on bail.

Questioning by prosecutor of undefended accused during bail application solely for the purpose of laying a foundation for cross-examination in subsequent trial and where confessions had been elicited during such questioning by prosecutor – an abuse by prosecutor of the right to cross-examination – such abuse may render subsequent trial unfair.

Failure by magistrate *in casu* to inform the accused person of privilege against self-incrimination together with conduct of prosecutor during bail proceedings would result, should the record of the bail proceeding be admitted as evidence against the accused, in an unfair trial, since it would expose accused to cross-examination by the State on the content of the record of the bail proceedings in circumstances where a fundamental right of the accused persons had been violated.

CASE NO.: CC 32/2001

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

HELD AT WINDHOEK

In the matter between:

THE STATE

and

CALVIN LISELI MALUMO & 111 OTHERS

CORAM: **HOFF, J**

Heard on: 23 November 2011; 23 January 2012

Delivered on: 02 February 2012

JUDGMENT

HOFF, J: [1] This is an objection by defence counsel against the admissibility of the contents of the record of bail proceedings in the magistrate's court.

Background

[2] On 23 November 2011 the State was leading the evidence of one of the investigating officers on the merits of this case. Mr July on behalf of the State indicated at that stage that he would deal with the record of a bail application. Defence counsel indicated their opposition to such a course and briefly addressed the Court regarding their grounds of objection which in a nutshell was the following: when a transcript of the bail proceedings was handed in by the State in this Court (on 23 August 2004) in terms of the provisions of section 235 of the Criminal Procedure Act, Act 51 of 1977, counsel at that stage did not object and still do not object to the correctness of the record in that bail proceeding. What was objected against was the admissibility of the content of such a record on the basis *inter alia* that certain Constitutional requirements had not been complied with.

Counsel then applied for a postponement in order to address the Court fully on the grounds of their objection.

This Court granted the application for a postponement and directed that Counsel should address this Court on 17 January 2012 at the beginning of the legal year.

On 17 January 2012, for reasons not now relevant, this Court postponed argument on the objection to 23 January 2012.

On 23 January 2012 this Court was informed that only three counsel whose clients are affected by the bail proceedings would address the Court namely, Messers Kruger, Neves and Kachaka.

The objections raised by Counsel

[3] Mr Kruger submitted that when the record of the bail proceedings in the magistrate's court was submitted in this Court in terms of the provisions of section 235(1) of Act 51 of 1977 it was admitted only on the basis that it presents a proper record of the earlier court proceedings i.e. what appears on the transcribed record has been correctly recorded. The admissibility of the contents and any fact the record may contain, it was submitted, was never admitted and cannot be considered as being *per se* admissible as evidence against the accused persons in this trial and that the State must prove the admissibility requirement of the contents of such record prior to the admission thereof as evidence against the accused.
It was submitted that the admissibility requirements were not complied with in the court *a quo*. Furthermore the record of the bail proceedings contain incriminating evidence against the accused persons and that there is a duty on the State to convince this Court that it was obtained in "a lawful manner and through a lawful process". In order to determine this there should be an enquiry to determine whether the protection of rights enshrined in Article 12 of the Namibian Constitution had not been violated.

[4] M Kruger submitted that before the record of bail proceedings may be used against the accused persons the State must convince this Court that:

(a) the accused persons were properly informed of their Article 12 rights;

(b) that the accused understood and appreciated those rights, and;

(c) that the accused have conducted an informed waiver of those rights;

In addition the accused persons must have been informed that what they say during the bail proceedings may be used against them later during the trial.

Mr Kruger further submitted that the questioning by the prosecutor during the bail proceedings went beyond the purpose of what is required of the State to prove during a bail proceeding and that a basis was laid at that stage for evidence in the main trial.

This Court was referred to relevant authorities in support of his submissions.

[5] Mr Kruger submitted with reference to *S v Botha and Others* (2) 1995 (2) (SACR) 605 (W) that the State must prove the admissibility of the content of the record of bail proceedings by way of an inquiry in the form of a trial-within-a-trial where the record of the bail proceedings should be kept distinct from the evidence in the main trial.

[6] Mr Neves who also opposed the production of the bail proceedings as evidence against the accused persons associated himself with the submissions by Mr Kruger and added that the magistrate during the bail proceedings failed in his duties to protect the accused persons when the prosecutor went beyond the purpose of a bail application when he cross-examined the accused persons.

[7] Mr Kachaka who appears on behalf of the accused no. 30, based his objection against the admission of the record of the bail proceedings on a different foundation, namely that during the arrest of the accused person and thereafter, the accused had been assaulted at various stages; that the accused was under compulsion when he said certain things in Court which according to Mr Kachaka amounted to a confession; and that the admissibility requirement of section 217 of the Criminal Procedure Act, Act 51 of 1977 had not been complied with in the sense that the confession made to the magistrate in court was not done freely and voluntarily by the accused person. In addition it was submitted that the accused

had not been informed of his Constitutional rights, i.e. his right to legal representation, his right in terms of Article 12(f) of the Namibian Constitution not to incriminate himself, and his entitlement to legal aid.

[8] I must at this stage pause to add that it is very clear from the record that the magistrate had on more than one occasion prior to the testimonies by the accused persons (there were 12 applicants) in detail informed the accused persons of their right to legal representation in respect of their bail application, their entitlement to legal aid and also informed the accused persons, should they elect to apply for legal aid, where they could get the application forms and explained to them the concept of legal aid.

[9] I have therefor at this stage no hesitation in rejecting the objection on these two grounds, namely, that the accused persons had not been informed of their right to legal representation and their entitlement to legal aid.

[10] Mr July who appeared on behalf of the State disagreed with Mr Kruger that a trial-within-a-trial should be held.

Secondly, it was submitted that it is a factual issue and not a legal issue what the prosecutor allegedly did and what the magistrate allegedly failed to do since that is apparent from the record.

Thirdly, on authority of the Namibian case *S v Shikongo* and Others 1999 NR 375 (SC) which relates to pre-trial proceedings, in particular section 119 proceedings, that there was no duty on a magistrate to inform an accused person of his right to remain silent where an accused person has not yet pleaded to a charge. It was only where an accused person had pleaded not guilty, it was submitted, that the duty arises to inform an accused person of his right to remain silent. It was submitted that since bail proceedings are pre-trial proceedings, and

since the accused persons had not pleaded at that stage, the magistrate did not know what they would be pleading and thus there existed no duty on the magistrate to inform the accused persons during the bail application of their right to remain silent.

It was further submitted that the replies by the accused persons during cross-examination by the prosecutor were spontaneous replies in clarifying matters raised by the prosecutor.

Legal issues

[11] The record of the bail proceedings was handed in in terms of the provisions of section 235(1) of Act 51 of 1977 which reads as follows:

> "It shall, at criminal proceedings, be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other officer or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such criminal proceedings, and such copy shall be *prima facie* proof of any matter purporting to be recorded thereon was correctly recorded."

[12] Mr July agreed with Mr Kruger that section 235(1) provides the manner in which judicial proceedings, including bail proceedings, may be proved but that the record does not constitute proof of any fact contained in it.

The purpose of section 235(1), is that it is not necessary to call *officers of the court* to testify in order to prove that judicial proceedings had been correctly recorded.

[13] In *S v Nomzaza* 1996 (2) SACR 14 (A) the Court held that section 235 of the Criminal Procedure Act 51 of 1977 merely creates a mechanism for the proof of judicial proceedings and does not provide finality regarding what testimony is admissible or not.

The Court further held that the general rule is that any relevant testimony during criminal proceedings is admissible against an accused person unless such testimony is excluded by a specific evidentiary rule.

[14] Mr Kruger initially conceded, when questioned by the court, whom the State should call as witnesses in the trial-within-a-trial, that since the correctness of record of the bail proceedings was not in dispute, that it would serve no purpose to call either the magistrate or the prosecutor since what were said by them appears from the record, which record is accepted as a true reflection of what was said by the court officials during the bail application.

I must at this stage remark regarding the submission by Mr Kruger namely that what *witnesses* had said in earlier judicial proceedings amount to hearsay evidence, is not applicable to the objections raised by counsel in these bail proceedings since what were said by *court officials* cannot be classified as hearsay evidence since these officials were not *witnesses* in the bail proceedings.

Should the Court order a trial-within-a-trial ?

[15] It was submitted by Mr Kruger on the authority of *S v Botha* (*supra*) that the State has the onus to prove that the content of the bail record complies with Constitutional imperatives by way of trial-within-a-trial.

Myburgh J in *Botha* at p 611 held the view that if the evidence given by an accused at a bail application is admissible later at the trial, the accused faces a dilemma, namely, if he fails to give evidence or refuses to answer incriminating questions, he may be refused bail, yet, if he

does give evidence and answers incriminating questions in order to get bail, he foregoes his right to remain silent and the privilege against self-incrimination and that in the interest of a fair trial, the accused should not have to choose.

Myburgh J was of the view that the way to avoid burdening the accused with that choice is to follow the procedure adopted with the evidence of an accused given at a trial-within-a-trial. Thus when an accused places in issue the voluntariness of the confession made by him, the issue of voluntariness is kept distinct from the issue of guilt. Myburgh J, further reasoned that an accused must be at liberty to challenge the admissibility of an incriminating document at a trial without fear of inhibiting his election of not testifying on the issue of his alleged guilt.

[16] In *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 at pp. 96 – 97 the Constitutional Court in South Africa rejected the view held in *S v Botha* that in the interest of a fair trial the accused should not have to choose between the right to bail and the privilege against self-incrimination.

Kriegler J held, that although there is a certain tension between the right of an arrested accused to make out an effective case for bail by adducing all the requisite supporting evidence and the constitutional rights of accused persons, that tension is by no means unique to applicants for bail.

He argued that choices often have to be faced by people living in open and democratic societies and that defending a criminal charge in particular can present a minefield of hard choices. Kriegler J at 96 f – h stated the following:

> "The important point is that the choice cannot be forced upon him or her. It goes without saying that an election cannot be a choice unless it is made with proper appreciation of what it entails. It is particularly important in this country to remember that an uninformed choice is indeed no choice. The responsibility resting upon judicial officers to ensure the requisite knowledge on the part of the unrepresented accused need hardly be repeated."

[17] Kriegler J with reference to the reasoning in *Botha* (*supra)* (where the procedure of a trial-within-a-trial was proposed) stated the following on 97 a:

> "In effect the reasoning in *Botha* wishes to give the accused the best of both alternatives or, as it was put bluntly in *Dlamini*, the right to lie: one can advance any version of the facts without any risk of a come-back at the trial; and there one can choose another version with impunity. However, the protection of an arrestee provided under the right to remain silent in the Constitution – or the right not to be compelled to confess or make admissions – offers no blanket protection against having to make a choice. It is true, the principal objective of the Bill of Rights is to protect the individual against abuse of State power; and it does so, among others, by shielding the individual faced with a criminal charge against having to help prove that charge. That shield against compulsion does not mean, however, that an applicant for bail can choose to speak but not to be quoted. As a matter of policy the prosecution must prove its case without the accused being compelled to furnish supporting evidence. But if the accused, acting freely and in the exercise of an informed choice, elects to testify in support of a bail application, the right to silence is in no way impaired. Nor is it impaired, retrospectively as it were, if the testimony voluntarily given is subsequently held against the accused.
>
> Of course the real problem with *Botha* is that the court incorrectly diagnosed the ill that had befallen the accused and accordingly went unnecessarily far in propounding a broad and radical remedy for an ill that could and should have been treated conservatively and selectively. In principle there was no reason to look beyond the decision of Supreme Court of Appeal in *S v Nomzaza*. That judgment was expressly based on the law as it stood before the advent of the constitutional era and was directly in point in *Botha* with regard to the common law. As explained in *Nomzaza*, there is no general rule at common law excluding, from the evidentiary material at trial, incriminatory or otherwise prejudicial evidence given by an accused at a prior bail hearing, but if the admission of such evidence would render the trial unfair, the trial court ought to exclude it. Botha did not know of his right to refuse to answer incriminatory questions when he testified in support of his application for bail. In the result, when he was cross-examined skillfully on the merits of the charges, he effectively convicted himself out of his own mouth and, on the authority of *Nomzaza*, the incriminatory evidence thus elicited should have been excluded at the trial"

[18] I endorse the views by Kriegler J and of the view that there is no need to order a trial-within-a-trial. The objections raised by counsel may be considered on face of the record of the bail proceedings.

Would the accused persons have a fair trial should the record of the bail proceedings be admitted as evidence against them ?

[19] It is common cause that all twelve accused persons in the bail application were not legally represented at that stage.

[20] Article 12(f) of the Namibian Constitution *inter alia* reads as follows:

> "No person shall be compelled to give testimony against themselves or their spouses, … and no Court shall admit in evidence against such person's testimony which has been obtained from such persons in violation of Article 8(2)(b)."

[21] Article 8(2)(b) prohibits the torture, or cruel, inhumane or degrading treatment or punishment.

[22] Section 203 of Act 51 of 1977 provides as follows:

> "No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he would not on the thirtieth day of May 1961, have been compelled to answer by reason that the answer may expose him to a criminal charge."

[23] Article 12(1)(a) of the Namibian Constitution provides that all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court in the determination of their civil rights and obligations or any criminal charge against them.

[24] Section 203 re-states the English common law privilege of a witness against self-incrimination. This common law principle against self-incrimination is reinforced by Article 12(f) of the Namibian Constitution.

[25] In *S v Lwane* 1966 (2) SA 433 (AD) at 439 Ogilvie Thompson JA stated that in order to exercise this privilege a witness must be aware of the existence of such an privilege and remarked that even wholly uneducated persons recognize the duty to testify if subpoenaed, but that it is highly improbable that any, save a very small percentage of such persons, are aware that they are entitled to decline to answer incriminating questions.
Holmes JA in *Lwane* at 444 states that there is a general rule of practice in terms of which a judicial officer has a duty to warn a witness in criminal proceedings that he is not obliged to give evidence which might have a tendency to expose him to a criminal charge and that the duty arises whenever it appears that the witness might well be about to give such evidence, whether or not a specific question has been directed thereto.

[26] The consequences it was held in *Lwane* of the non-observance of this duty is an irregularity which ordinarily will render the incriminating evidence inadmissible in a prosecution against the witness.

[27] It was further held in *Lwane* that in addition to the duty which rests on a court to inform a witness whenever the occasion so demands, to decline to answer an incriminating question, there rests upon a prosecutor a complementary duty in certain circumstances for example, where he proposes to put questions likely to reveal conduct on the part of the witness which, to the prosecutor's knowledge, will be incriminating, to make some prior

intimation to the Bench of his intentions. This was not done by the prosecutor in the present bail application under consideration.

[28] In *S v Nyengane* and Others 1996 (2) SACR 520 (EC) one of the grounds why the record of the bail proceedings in the court *a quo* was found to be inadmissible was because the magistrate did not warn the accused persons not to answer questions that might have been self-incriminating. Myburgh J in *S v Botha (supra) r*efused to allow the State to use the record of the bail application as evidence against the accused in circumstances where incriminating answers had been given to questions asked during the bail application. The magistrate had not informed the accused that he had a right to refuse to answer those questions and Myburgh J accordingly held that the accused could not have had a fair trial if the evidence had been recieived.

[29] If one has regard to the record of the bail proceedings objected against by counsel the following is apparent: Firstly, the magistrate explained to the accused persons the relevant issues at a bail application namely, the risk of absconding before the trial; the risk of committing another offence before the trial; the risk of interfering with witnesses or with the investigation of the case should an accused be released on bail; the risk of endangering the maintenance of law and order or public safety or national security; or the question whether it would be in the interest of the public or the administration of justice to release the accused on bail.

Secondly, that the prosecutor scarcely cross-examined the accused persons on the issues raised by the magistrate, but directly questioned the accused persons regarding the charges they face in particular the charge of high treason to such an extent that virtually all these accused persons gave incriminating answers which amounted to confessions.

Thirdly, it does not appear from the record of the these bail proceedings that the accused persons had been warned of their right against self-incrimination either prior to testifying in support of their respective bail applications or during the cross-examination by the magistrate.

Fourthly, in the normal course where bail is opposed by the State, the prosecutor would call the investigating officer to testify *inter alia* on the likelihood that the applicant may abscond and the strength of the State's case against the accused person. The prosecutor in this bail application, not unsurprisingly, did not deem it necessary to do so, since all the accused persons had already confessed their participation in the crime of high treason.

[30] Although the guilt of an accused person may be relevant in a bail application, evidence thereon should be confined to the central issue, namely, whether it would be in the public interest or the interests of the administration of justice to release the accused person on bail.

[31] In *S v Basson* 2007 (1) SACR 566 (CC) the Constitution Court in the Republic of South Africa confirmed the trial court's decision to exclude the bail record since to allow it would have resulted in an unfair trial. One of the reasons why the record of the bail proceedings was disallowed was the finding by the trial court that the prosecutor acted unfairly by *inter alia* questioning the accused persons in the bail hearing *solely* for the purpose of laying a foundation for cross-examination in the subsequent trial.

I am of the view, and the record clearly reflects this, namely that the prosecutor in the bail application (the record of which had been objected against in this case) made himself guilty of the very same unfair conduct in respect of unrepresented accused persons who had not been warned of the privilege against self-incrimination.

[32] I associate myself with the words of Kriegler J *in Dlamini (supra)* where he (at p. 99) stated that in the cases under consideration in that case, the respective prosecutors were allowed to abuse the right of cross-examination of an accused person who had elected to enter the witness box in support of a bail application. In this present bail application under consideration the prosecutor similarly abused the right of cross-examination. Abuse by a prosecutor of the right of cross-examination especially in relation of an undefended accused person may result in the evidence being excluded at the subsequent trial.

[33] Regarding the issue of guilt in bail proceedings it was held in *Dlamani (supra)* that it may be a factor which has to be probed during a bail application "but not necessarily nor, where it is, with no holds barred".

[34] This conduct by the prosecutor and the failure to inform the accused persons of the privilege against self-incrimination (in terms of the provisions of section 203) or their right not to be compelled to give evidence against themselves (in terms of Article 12(1)(f) of the Namibian Constitution) will in my view render this trial unfair since to allow it would expose the accused persons to cross-examination by the State on the contents of the record of the bail proceedings in circumstances where a fundamental right of the accused persons had been violated.

[35] The submission namely that there is no duty on a magistrate to inform the accused of his right to remain silent before such an accused has pleaded to the charge by Mr July on authority of *S v Shikongo (supra)* is distinguishable from the present objection.
In this application I am of the view that the duty of the magistrate to inform an accused person of his or her right to remain silent did not arise since all the accused persons were eager to testify in support of their bail applications. The accused persons had to come and

testify in support of their bail applications. If the accused persons had been informed of their right to remain silent and had exercised that right there would have been no evidence before the magistrate on which he could have considered the bail applications, and therefor exercising such a right would have defeated the very purpose of the bail application.

[36] One of the issues considered in *S v Shikongo* was whether, during section 119 proceedings in the magistrate's court, spontaneous admissions by an accused person uttered immediately after the charges were put to him but prior to the magistrate informing him of his relevant rights including the right to remain silent, was admissible in his subsequent trial in the high court. Strydom CJ for the reasons mentioned in *Shikongo* held that there was no legal rule which prevented the high court from receiving these admissions as evidence against the accused person as part of the evidential material.
I agree with the observation by Strydom CJ that only after an accused had plead not guilty would a Court be in a position to inform an accused person of his relevant rights during section 119 proceedings.

[37] Bail proceedings, as well as section 119 proceedings, are pre-trial proceedings, but in my view the rationale in *Shikongo* cannot with the same legal force be transplanted to bail proceedings since bail proceedings differ from section 119 proceedings both in nature and in purpose.

[38] The fact that the accused persons at the stage when they had applied for bail had not yet pleaded to the charges in my view did not absolve the magistrate from informing them prior to their respective testimonies and during cross-examination by the prosecutor, when it should have been apparent that the accused persons would be giving self-incriminating answers, of the privilege against self-incrimination.

[39] It is trite law by now and I have had the opportunity during the course of this trial to give a number of judgments, which do not at this stage be repeated, in which this Court emphasised the fundamental rights of an accused person to a fair trial as guaranteed by the provisions of Article 12(1)(a) of the Namibian Constitution, and explained that the right to a fair trial is not limited to the proceedings during the trial but includes the pre-trial proceedings. A bail application is one such pre-trial proceeding and the same principles and considerations must apply.

In my view therefore the privilege against self-incrimination which an accused person enjoys is not only applicable during trial proceedings but also during a pre-trial proceeding such as a bail application.

[40] This principle has been emphasized in the post-constitutional era. In *Dlamini (supra)* in this regard the following was said by the Constitutional Court as per Kriegler J at pp. 98 – 99:

> "But it is not only trial courts that are under a statutory and constitutional duty to ensure that fairness prevails in judicial proceedings. The command that the presiding judicial officer ensure that justice is done applies with equal force to bail hearings. There the presiding officer is duty bound to ensure that an accused who elects to testify, does so knowingly and understanding that any evidence he or she gives may be admissible at trial."

[41] I am fully aware of the fact that the provisions dealing with bail applications in the Republic of South Africa differ to some extent from those applicable in Namibia. Nevertheless the requirements referred to in this judgment, namely, to ensure fair trials, remains the same in both jurisdictions.

[42] It is necessary at this stage to refer to the accused persons who had applied for bail in the magistrate's court namely Messrs Rodwell Mwanabwe Sihela (the client of Mr Kachaka), Calvin Liseli Malumo (the client of Mr Kruger), Chika Adour Mutalife (the client of Mr Neves)., Bran Mushandikwe, Joseph Kamwi, Ndara Derrie Ndala, Herbert Mutahane Mboozi, Rafael Lifumbela, Josua Biven Tubwikale, Muja Moshiva Kingsley, Chris Ntaba and Sylvester Ngalaule Lisiku.

[43] The objection raised by Mr Kachaka rests on two legs. In the first instance, that what was said by his client during the bail application was said under compulsion and that the onus was on the State to prove the admissibility requirements of what he submitted was a confession made by his client to the magistrate in court.
If this had been his only objection to the admissibility of the record of the bail proceedings this Court would have considered to order a trial-within-a-trial.

[44] However there was also a second ground of objection namely that his client had not been informed of his constitutional rights including the right contained in Article 12(1)(f) of the Namibian Constitution.
I have indicated *(supra)* that virtually all the incriminating answers by the accused persons during cross-examination amounted to confessions. I however have my doubts whether the replies by Rodwell Sihela amounted to a confession. I agree with Mr July that those answers were in part incriminating and in part exculpatory.
In any event whether the incriminating answers can be classified as a confession or mere admissions is immaterial, since these incriminating answers were given in the absence of the accused person being informed of his right not to incriminate himself. I am accordingly of the view, for the same reasons mentioned *(supra)* that to allow the record of the bail proceedings as evidence against this accused person would result in an unfair trial.

[45] In the result the following order is made:

> The objection against the admissibility of the content of the record of the bail proceedings in the court *a quo,* and in respect of the accused persons mentioned in this judgment, is upheld.

_____
HOFF, J

ON BEHALF OF THE STATE: **MR JULY**

(Objection by defence counsel – against admissibility of content of record of bail proceedings in the magistrate's court)

Instructed by: **OFFICE OF THE PROSECUTOR-GENERAL**

ON BEHALF OF THE DEFENDANTS: **MR KRUGER**

MR NEVES

MR KACHAKA

Instructed by: **DIRECTORATE OF LEGAL AID**