CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 30/03

THE STATE Applicant

versus

WOUTER BASSON Respondent

Heard on : 4 and 5 November 2003

Decided on : 10 March 2004

JUDGMENT

ACKERMANN J, MADALA J, MOKGORO J, MOSENEKE J, NGCOBO J, and O'REGAN J:

[1] The state has applied to this Court for special leave to appeal against a judgment of the Supreme Court of Appeal (the SCA) in terms of rule 20 and, simultaneously, for leave to appeal directly to this Court against a judgment of the High Court in Pretoria (the High Court) in terms of rule 18. The respondent, Dr Wouter Basson, opposes both applications.

Background

[2] During 1999, the respondent, an employee of the South African National Defence Force, was charged in the High Court on 67 counts including murder, fraud, conspiracy to commit various crimes and drug offences. All the offences were allegedly committed before 1994 when the respondent worked in a division of the Defence Force called the Civil Co-operation Bureau.

[3] During 1997 the accused was arrested, first on charges of contravening the Medicines and Related Substances Control Act, 101 of 1965, and later in the same year on charges of fraud. In relation to both sets of charges, bail hearings were held and the accused was granted bail. In relation to the fraud charges, the bail hearing was held during October and November 1997. The trial on all 67 charges (which now included charges of murder and conspiracy to commit various offences) commenced on 4 October 1999 before Hartzenberg J.

[4] Before the accused was called upon to plead, the trial was postponed to enable the respondent's legal representatives to apply for the quashing of certain charges in the indictment in terms of section 85(1)(c) of the Criminal Procedure Act, 51 of 1977 (the Criminal Procedure Act)[1] and to challenge the admissibility of the October and November bail record (the bail record). The question of the admissibility of the bail

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[1] Section 85(1)(c) provides:

> "An accused may, before pleading to the charge under section 106, object to the charge on the ground—
> . . .
> (*c*) that the charge does not disclose an offence . . . ."

record was argued on 6 October 1999 and, on 15 November 1999, the judge ruled that the bail record was inadmissible in evidence in the criminal trial.

[5] The respondent objected to nine counts in the indictment on various grounds. On 12 October 1999, the judge upheld the objections in respect of six of the counts ─ charges 31, 46, 54, 55, 58 and 61. All these charges were based on section 18(2) of the Riotous Assemblies Act, 17 of 1956 (Riotous Assemblies Act).[2] The judge held that, properly interpreted, this provision did not criminalise conspiracies entered into in South Africa to commit crimes beyond the borders of South Africa.[3] To the extent therefore that the charges related to conspiracies in South Africa but in relation to crimes to be committed beyond our borders, the charges did not, so the judge reasoned, disclose an offence.

[6] On 25 October 1999, the accused was asked to plead and the trial commenced. On 14 February 2000, the state applied for the recusal of Hartzenberg J on the grounds that he was biased and had prejudged the case. On 16 February 2000, Hartzenberg J dismissed this application, holding that a reasonable person would not have believed that he was biased against the state.[4]

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[2] The full text of the provision is cited at para 28 below.

[3] *S v Basson* [2000] 1 All SA 430 (T) at 441 d-e.

[4] *S v Basson* [2000] 3 All SA 59 (T). at 75 b-d.

[7] The trial then proceeded and lasted for more than a year. More than 140 state witnesses were called and evidence was taken on commission outside South Africa. On 1 March 2001, the state closed its case. The accused then applied for a discharge in terms of section 174 of the Criminal Procedure Act. This application succeeded in respect of some of the charges. The accused was the only witness for the defence. He gave evidence for about two months and the defence closed its case on 26 September 2001. On 11 April 2002, the accused was acquitted on all the remaining charges.[5]

[8] The state immediately launched an application in terms of section 319(1) of the Criminal Procedure Act to have certain questions of law reserved for consideration by the SCA.[6] It also sought, in terms of the Constitution, leave to appeal to the SCA against the trial court judge's refusal to recuse himself.

[9] On 3 May 2002, the High Court handed down judgment on this application. It reserved a single question of law in terms of section 319(1) for consideration by the SCA. That question was whether the state was barred from seeking reservation of the question of law as to whether the trial court judge ought to have recused himself in February 2000 because it had failed to indicate in February 2000 that it intended to seek such reservation. In the event that this question was answered in favour of the

[5] The judgment is long, and is unreported.

[6] Section 319(1) and (2) provide that:

> (1) "If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.
> (2) The grounds upon which any objection to an indictment is taken shall, for the purposes of this section, be deemed to be questions of law."

state, Hartzenberg J conditionally reserved three further questions of law. They were the following:

- whether Hartzenberg J had erred in law in refusing to recuse himself on the grounds of bias;
- whether Hartzenberg J had erred in law when he heard argument regarding the admissibility of the bail record, before the accused had been called upon to plead; and
- whether Hartzenberg J had erred in law when he ruled that the bail record was inadmissible in the trial.

The judge refused to reserve the other questions of law sought by the state, including the question relating to the quashing of some of the charges.

[10] In June 2002, the state appealed to the SCA on the question of law reserved by the High Court. Simultaneously it petitioned the SCA in terms of section 319(3), read with section 317(5) of the Criminal Procedure Act, for the reservation of the questions of law that Hartzenberg J had declined to reserve, including the question of the quashing of the charges. In the alternative, the state applied to the SCA for leave to appeal to it in terms of the Constitution against the trial court judge's refusal to recuse himself.

[11] In November 2002, the Registrar of the SCA wrote to the state's lawyers indicating that its petition for the reservation of further questions of law and its accompanying application for leave to appeal were not in order. The following

month, the state filed a further affidavit seeking to rectify the situation and sought condonation of its non-compliance with the rules.

[12] The matter was argued before the SCA in May 2003. In its judgment, the SCA held that the question whether the trial judge should have recused himself was one of fact, not law, and could therefore not be reserved under the provisions of section 319 of the Criminal Procedure Act. It accordingly held that the question reserved by the High Court raised purely academic issues and struck the question from the roll, as well as the first conditionally reserved question. The question conditionally reserved concerning the admissibility of the bail record was also struck from the roll because, according to the SCA, it raised questions of fact and not of law. In the circumstances, the second conditional question was considered to be academic and was struck from the roll on that basis. The SCA also dismissed the application for condonation with regard to the reservation of additional legal questions, including the question of the quashing of the charges. The application for leave to appeal in terms of the Constitution was held not to be properly before the SCA and therefore also dismissed.[7]

[13] The state now seeks special leave to appeal to this Court against the judgment of the SCA on the following grounds:

- the SCA ought to have set aside the acquittal on the basis that the judge was biased or could reasonably be perceived to have been biased;

[7] *S v Basson* [2003] 3 All SA 51 (SCA).

- the SCA ought to have set aside the acquittal on the basis that the judge erred in finding that the bail record was inadmissible in the trial; and
- the SCA ought to have reversed the decision of the High Court quashing the charges based on the Riotous Assemblies Act.

The application is out of time, in that it was filed more than 15 court days after the SCA handed down its judgment[8] and the state has accordingly applied for condonation of the late filing of the application. The reasons given for the delay are the complexity of the matter and the voluminousness of the record.

[14] After filing its application for special leave to appeal, the state also lodged an application in terms of rule 18 for leave to appeal directly to this Court against the High Court's judgment acquitting the respondent on the ground that the proceedings were vitiated by the actual or perceived bias of the judge against the state during the criminal proceedings. As indicated above, the respondent opposes both applications.

[15] On 20 August 2003, the Chief Justice gave directions requesting the parties to lodge argument on the following preliminary issues raised by the applications:

> "2.1 Was the accused in jeopardy of being convicted at his trial? If so, and if the appeal were to succeed, would a further prosecution be competent if regard is had to the provisions of section 35(3)(m) of the Constitution.
>
> 2.2 If a further prosecution would not be competent is it in the interests of justice for leave to appeal to be granted?
>
> 2.3 If a further prosecution would be competent, then bearing in mind the nature of the charges against the accused, the fact that the trial commenced in October 1999

[8] Rule 20(2) of the Rules of Court.

and the provisions of section 35(3)(d) of the Constitution, that every accused person has a right to have their trial begin and conclude without unreasonable delay, is it in the interests of justice to hear an appeal directed to setting aside the acquittal of the accused, which if successful, might expose him to the possibility of being required to stand trial again several years after the first trial commenced?

2.4 Is a decision by the Supreme Court of Appeal as to what constitutes a question of law for the purposes of section 319 of the Criminal Procedure Act a constitutional matter?

2.5 Is a refusal by the Supreme Court of Appeal to exercise its discretion to reserve a question of law, a constitutional matter?

2.6 Is a refusal by the Supreme Court of Appeal to condone a failure to comply with its rules, a constitutional matter?

3. With regard to the first ground of appeal

Is the finding by the Supreme Court of Appeal in the present case, that the trial judge's refusal to recuse himself raises questions of fact and not of law, subject to appeal to the Constitutional Court?

4. With regard to the second ground of appeal: the bail record

4.1 Is section 35(3) of the Constitution applicable to the State? If not, is the decision of the Supreme Court of Appeal on this issue a constitutional matter? In particular, is the finding by the Supreme Court of Appeal that the trial judge's ruling on the bail record, raises questions of fact and not of law, subject to appeal to the Constitutional Court?

5. Third ground of appeal: Conspiracy to commit murder abroad.

5.1 Does section 168(3) of the Constitution, read with section 21(1) of the Supreme Court Act, confer a competence on the Supreme Court of Appeal to hear an appeal against the upholding of the exception to charges 31, 46, 54, 55, 58 and 61, if such an appeal is not otherwise subject to appeal to the Supreme Court of Appeal under section 319 of the Criminal Procedure Act, or any other law?

5.2 Bearing in mind that the conspiracies said to fall within the scope of section 18(2) of the Riotous Assemblies Act, are all alleged to have been entered into during the period 1981–1989, prior to the coming into force of the Constitution, 1996 or the interim Constitution, 1993, are the issues raised concerning the interpretation and application of section 18(2) of the Riotous Assemblies Act within the jurisdiction of the Constitutional Court?

> 5.3 Is the question whether the state may appeal to the Supreme Court of Appeal against a decision in a criminal trial to uphold an exception to the indictment, a constitutional matter? If so, is it competent to raise that question in the Constitutional Court by way of an appeal against a decision of the Supreme Court of Appeal, when the state would have been unable to raise that question in the Supreme Court of Appeal, by reason of its failure to comply with the rules of that Court?"

[16] On 25 August 2003, the Chief Justice directed that a further question be considered by the parties, namely, whether South Africa's international obligations are relevant to any of the questions in the directions given on 20 August 2003. After the application for leave to appeal directly against the decision of the High Court had been lodged, the Chief Justice directed that three further questions be considered:

> "(a) whether the State is entitled to appeal to the Supreme Court of Appeal against an acquittal in a criminal case on the basis that a constitutional matter is raised by a refusal of an application for recusal, where such appeal would not raise a question of law and would deal only with findings of fact;
> (b) if the state is entitled to appeal the decision referred to in (a) above, is it in the interests of justice for this Court to grant leave to appeal directly to it in circumstances where the applicant could have raised the issue before the Supreme Court of Appeal but failed to do so timeously and in a proper manner; and
> (c) whether it is in the interests of justice for leave to appeal to be granted in the present case, having regard to the matters referred to in (a) and (b) above, to the delay in applying for the rule 18 certificate and the lodging of the application for leave to appeal, and to the issues raised in the previous directions issued on 20 August 2003 and 25 August 2003 by the Chief Justice."

These preliminary questions were set down for argument and heard on 4 and 5 November 2003.

[17] This Court may decide only constitutional matters and issues connected with decisions on constitutional matters.[9] If an application is concerned with a constitutional matter, then the criterion for determining whether to grant leave or not is whether the Court is satisfied that it is in the interests of justice to do so.[10] In considering an application for leave to appeal against a decision of the SCA in terms of rule 20, the first question that has to be answered therefore is whether the application concerns a constitutional matter.[11] Many of the questions put to the parties by the Chief Justice go to this issue (see in particular questions 2.4, 2.5, 2.6, 3, 4.1, 5.2, 5.3 of 20 August 2003). For reasons that will become plain, it is necessary to consider each ground of appeal separately in answering this question.

1. Does the application for special leave to appeal raise a constitutional matter?

1(a) The application for special leave to appeal against the SCA's decisions on the refusal by the trial court judge to recuse himself

[18] As we have seen, the trial judge reserved one question of law for consideration by the SCA, namely, whether the state was barred from appealing against the recusal decision on the ground that it had failed to appeal immediately against that decision.

[9] Section 167(3)(b) of the Constitution.

[10] Section 167(6)(b) of the Constitution provides that:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court –
>
> . . .
>
> (b) to appeal directly to the Constitutional Court from any other court ."

[11] *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at paras 10-11.

[19] The SCA found that the decision of the trial judge refusing to recuse himself involved a finding of fact and not one of law and could therefore not be reserved under section 319 of the Criminal Procedure Act. It further held that the first question conditionally reserved should accordingly also not have been reserved as it did not involve a question of law. The SCA therefore struck these questions from the roll.

[20] The question that has to be considered is whether the decision by the SCA that the trial judge's refusal to recuse himself was not appealable under section 319, because it raises a question of fact and not of law, itself raises a constitutional matter. In our view it does.

[21] The question whether a judicial officer should recuse himself or herself is a constitutional matter. In *SACCAWU v Irvin & Johnson,*[12] this Court held that "the question of judicial recusal is a constitutional matter"[13] and that an appeal on judicial bias is "competently directed to this Court."[14] Recusal is a constitutional matter because the impartial adjudication of disputes in both criminal and civil cases is a "cornerstone of any fair and just legal system".[15] A judge who sits in a case who ought not to do so by reason of actual or perceived bias "acts in a manner that is

[12] *South African Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC).

[13] Id at para 2.

[14] Id at para 2; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) at para 30 where this Court held that the application for recusal raised a constitutional matter.

[15] Id at para 35.

inconsistent with s 34 of the Constitution,[16] and in breach of the requirements of s 165(2)[17] and the prescribed oath of office."[18] While this statement was made in relation to civil proceedings, it applies equally to a criminal trial.

[22] It follows that the question whether the trial judge should have recused himself is a constitutional matter which is properly directed to this Court. As the question whether the trial judge should have recused himself is a constitutional matter, legal and factual issues that need to be decided in order to determine that matter will themselves be issues connected with a decision on a constitutional matter. The question whether the refusal by the trial judge to recuse himself involves a finding of fact and not of law is an issue that needed to be determined by the SCA in order to determine the recusal question.[19] It is accordingly an issue connected with a decision on recusal, which is a constitutional matter.[20]

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[16] Section 34 provides that:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[17] Section 165 (2) provides that:

> "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

[18] *SARFU* above n 14 at para 30.

[19] The question of whether the refusal by the trial judge to recuse himself is a finding of fact and not of law is dealt with in detail later in this judgment, see paras 41-49 below.

[20] Section 167(3)(b) provides that:

> "The Constitutional Court –
> . . .
> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters . . . ."

[23] One further issue requiring consideration is the question whether the state is entitled to complain of bias on the part of a judge. The state prosecutes crime on behalf of all citizens, and it would be incompatible with our Constitution to hold that the state acting in such capacity is not entitled to an impartial court. In our view, the state has a right to an impartial judge and a fair trial. The Constitution obliges the courts to apply the Constitution and the law "impartially and without fear, favour or prejudice",[21] as does a judge's oath of office. Nothing precludes the state from alleging actual or perceived bias in a criminal trial.

[24] In this, we agree with the views expressed by Cory J (Iacobucci J concurring) in the Supreme Court of Canada, who put the matter thus:

> "Usually, in a criminal trial, actual or perceived judicial bias is alleged by the accused. However, nothing precludes the Crown from making a similar allegation. Indeed it has a duty to make such a submission in appropriate circumstances. Even in the absence of explicit constitutional protection, it is an important principle of our legal system that a trial must be fair to all parties — to the Crown as well as to the accused."[22]

[25] We accordingly conclude that the application for special leave to appeal on the question of recusal raises a constitutional matter. The question whether the SCA was correct in holding that such issue was not appealable to it under section 319 of the

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[21] Section 165(2) provides that:

> "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

[22] *R v S (RD)* [1997] 3 SCR 193 (SCC) at para 96.

Criminal Procedure Act, because it involved a question of fact and not law, is therefore "an issue connected with a decision on a constitutional matter" within the contemplation of section 167(3) of the Constitution. It will be dealt with in paragraphs 42 to 53 below.

1(b) The application for special leave to appeal against the SCA's decision on whether the admission of the bail record by the High Court was appealable to it

[26] The question whether a bail record should be admitted involves the exercise of a discretion by the High Court judge. In the exercise of its discretion, the trial court must have regard to what is fair in the circumstances.[23] Section 35(3) of the Constitution guarantees to every accused person "a right to a fair trial." Fairness during a trial is a requirement of the Constitution. Therefore, the question whether the admission of the bail record would be fair to the accused is a constitutional matter and falls within the jurisdiction of this Court. In the light of this conclusion, we consider it unnecessary to deal with whether section 35(3) applies to the state.

[27] To the extent that the question of the admissibility of the bail record gives rise to a constitutional question, the question whether the SCA should have entertained an appeal in that regard is an "issue connected with a decision on a constitutional matter" within the wording of section 167(3). We conclude then that the application for special leave to appeal on this ground does raise matters which fall within the jurisdiction of this Court.

[23] *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at paras 97-8.

1(c) The application for special leave to appeal against the decision of the SCA refusing to overturn the High Court's decision upholding the objection to the charges under the Riotous Assemblies Act

[28] The judge upheld an objection to six charges raised by the respondent prior to plea. All of these charges concerned offences in terms of section 18(2) of the Riotous Assemblies Act. This provision states that:

> "(2) Any person who –
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> (a) conspires with any other person to aid or procure the commission of or to commit; or
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> (b) incites, instigates, commands, or procures any other person to commit,
>
> any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

At the end of the trial, the state sought to reserve the correctness of this decision as a question of law in terms of section 319 of the Criminal Procedure Act. The High Court refused to do so. The state then petitioned the SCA to reserve this question of law for consideration by the SCA. The petition filed by the state was procedurally flawed, and the state applied for condonation. After considering the application, the SCA concluded that it should not be granted.[24]

[29] In addition, however, the SCA held that the issue sought to be reserved – that is the decision upholding the objection to various charges – was not a question of law

[24] Above n 7 at para 42.

within the meaning of section 319 of the Criminal Procedure Act. In reaching this conclusion, the SCA relied on a line of earlier decisions that concluded that section 319, properly construed, did not permit the prosecution to reserve a question of law for decision by the SCA in circumstances where an objection to a charge is upheld by a trial court.[25]

[30] The SCA, moreover, held that it would not exercise its discretion to reserve this as a question of law, even if it were to be construed as a question of law within the terms of section 319, for the following reasons. It held that the state had failed to pursue the matter within a reasonable time, because it had delayed until the end of the criminal trial to seek reservation of the question of law. The SCA held that such delay had been unnecessary because once the objection had been upheld, the case in relation to those charges had been concluded.[26] Furthermore, it held that at the time that the objections had been upheld, the state had not indicated that it intended to appeal, but merely mentioned that it might pursue its remedy under section 333 of the Criminal Procedure Act.[27] Another factor relevant to its decision was the fact that the state had not, in its application to the SCA, advanced any argument against the correctness of

[25] *R v Adams and Others* 1959 (3) SA 753 (A) at 764G; *S v Mene* 1978 (1) SA 832 (A) at 838 B-C; *S v Seekoei* 1982 (3) SA 97 (A) at 101D-E; *S v Khoza en Andere* 1991 (1) SA 793 (A) at 795J-796C.

[26] Above n 7 at para 70(a).

[27] Section 333 of the Criminal Procedure Act provides:

> "Whenever the Minister has any doubt as to the correctness of any decision given by any superior court in any criminal case on a question of law, or whenever a decision in any criminal case on a question of law is given by any division of the Supreme Court which is in conflict with a decision in any criminal case on a question of law given by any other division of the Supreme Court, the Minister may submit such decision or, as the case may be, such conflicting decisions to the Appellate Division of the Supreme Court and cause the matter to be argued before that Court in order that it may determine such question of law for the future guidance of all courts."

the High Court's interpretation of section 18(2) of the Riotous Assemblies Act. Finally, the SCA took into account the fact that some of the evidence the state wished to lead to establish the section 18(2) charges had been rejected by the High Court in relation to other charges.

[31] The question that arises is whether the quashing of the charges gives rise to a constitutional matter. In our constitutional state the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the right to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The state must protect these rights through, amongst other things, the policing and prosecution of crime.[28]

[32] The constitutional obligation upon the state to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework. The effect of the High Court's judgment in this case, given the interpretation of section 319 by the SCA and its previous jurisprudence, is that the state will be prevented from prosecuting the accused on the charges which were quashed, without the state being given an opportunity to appeal the correctness of that decision.[29] This case is different from those in which a charge is quashed, but where

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[28] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938(CC); 2001 (10) BCLR 995 (CC) at paras 61-2.

[29] Above n 25; *R v Manasewitz* 1933 AD 165 at 169; *R v Pope and Le Roux* 1952 (3) SA 409 (C) at 413; *S v Vermeulen* 1976 (1) SA 623 (C) at 630-4; *S v Delport alias Boucher* 1984 (1) SA 511 (O) at 514-5.

the state is able to supplement the charge sheet in a manner that enables the prosecution to take place. This course is not open to the state here.

[33] The importance of the state's duty to prosecute crime is implicit in section 179(2) of the Constitution which provides that:

> "The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings."

By providing for an independent prosecuting authority[30] with the power to institute criminal proceedings, the Constitution makes it plain that the effective prosecution of crime is an important constitutional objective. Where, therefore, a court quashes charges on the ground that they do not disclose an offence with the result that the state cannot prosecute that accused for that offence, the constitutional obligation of the prosecuting authority and the state, in turn, is obstructed. The constitutional import of such a consequence is particularly severe where the state is in effect prevented from prosecuting an offence aimed at protecting the right to life and security of the person. In these circumstances the quashing of a charge in an indictment will raise a constitutional matter.

[34] In this case, the High Court quashed the charges against the respondent on the ground that section 18(2) of the Riotous Assemblies Act does not criminalise conspiracies to commit crimes beyond the borders of South Africa. The court reached

[30] See section 179(4) of the Constitution.

this conclusion by holding that the interpretation of the Act should be adopted which imposes least burdens on citizens.[31] This finding raises a constitutional matter because it is an impediment to the performance by the state and the prosecuting authority of their duties to protect fundamental rights under the Constitution, analysed above. In determining the elements of any charge, not only the interests of the accused come into play, but also the state's obligations to protect the Constitution and its fundamental values.

[35] In our view, therefore, the proper interpretation of section 18(2) of the Riotous Assemblies Act raised in the special application for leave to appeal gives rise to a constitutional matter within the terms of rule 20 and section 167(3) of the Constitution. It must be emphasised, however, that not all cases concerned with the quashing of charges will necessarily raise constitutional matters. In particular, the charge may be quashed for technical reasons, such as the fact that it lacks sufficient particularity for the purposes of section 85(1)(d) of the Criminal Procedure Act.[32] In such cases where the court is considering the factual adequacy of the pleading of the charge, no constitutional issue will arise.

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[31] Above n 3 at 441e.

[32] Section 85(1) of the Criminal Procedure Act provides:

> "An accused may, before pleading to the charge under section 106, object to the charge on the ground –
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> . . .
>
> (d) that the charge does not contain sufficient particulars of any matter alleged in the charge: Provided that such an objection may not be raised to a charge when he is required in terms of section 119 or 122A to plead thereto in the magistrate's court".

[36] One further question needs to be considered. That is whether, because the alleged offences took place before the Constitution came into force, the quashing of the charge does not raise a constitutional issue. The Constitution cannot render unlawful something that was formerly lawful.[33] The corollary must also follow. The Constitution cannot retrospectively make lawful something that was formerly unlawful. In this case, however, we are not concerned with an argument that a statutory offence means something different now, in the constitutional era, to what it meant before 1994. No party suggests that the meaning of section 18(2) of the Riotous Assemblies Act has changed as a result of the coming into force of the Constitution. The only question that arises is what section 18(2) of the Riotous Assemblies Act, properly construed, means. In our view, that question needs to be considered in the light of the ordinary and existing principles of statutory interpretation.

[37] Moreover, the state's obligation to prosecute offences is not limited to offences which were committed after the Constitution came into force but also applies to all offences committed before it came into force. It is relevant to this enquiry that international law obliges the state to punish crimes against humanity and war crimes.[34] It is also clear that the practice of apartheid constituted crimes against humanity and

[33] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 20.

[34] See Dugard "Is the Truth and Reconciliation Process Compatible with International Law? An unanswered question" 13 (1997) *SA Journal on Human Rights* 258 at 263. See also *Prosecutor v Dusko Tadic* (ICTY) (1996) 35 ILM 32 at 72.

some of the practices of the apartheid government constituted war crimes.[35] We do not have all the details before us but it does appear that the crimes for which the accused was charged may well fall within the terms of this international law obligation. In the circumstances, it may constitute an added obligation upon the state. We conclude therefore that the question of the quashing of the charges in this case also raises a constitutional matter.

[38] We also agree with the reasoning and conclusion of Chaskalson CJ that the interpretation of section 319 of the Criminal Procedure Act also raises a constitutional matter and falls within this Court's jurisdiction in terms of section 167(3) of the Constitution.

2. Is it in the interests of justice to grant the application for special leave to appeal?

[39] We have concluded that all three of the substantive grounds upon which the state wishes to appeal raise constitutional matters. Therefore the question whether they could or should have been entertained by the SCA raises issues connected with a decision on constitutional matters, within the jurisdiction of this Court. The next question that arises is whether it is in the interests of justice to grant both the application for condonation for the late filing of the application for special leave to appeal and the application itself. In determining what is in the interests of justice,

[35] Id at 263. See also Convention on Suppression and Punishment of the Crime of Apartheid, 1973, article 1; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968.

each case has to be considered in the light of its own facts[36] and all the relevant circumstances of a particular case.[37] It is necessary to take into account, amongst other considerations, the following: the importance of the constitutional issue raised, the nature of the crimes concerned, the rights of accused persons as entrenched in section 35 of the Constitution and the interests of the victims of the crimes, the prospects of success and the public interest in a determination of the constitutional issues raised.[38] In *Islamic Unity Convention v Independent Broadcasting Authority and Others*[39] this Court held that:

> "A resolution . . . would have distinct implications for the interests of justice, going beyond the immediate needs of the applicant and the respondents. It would further contribute to certainty, on the part of both the general public . . . ."

In relation to the application for condonation, of course, other factors will also be relevant. The most important of these is the reason given for the late filing of the application.

[40] Several of the questions raised by the Chief Justice in his directions to the parties were concerned with issues related to the interests of justice (see, in particular, questions 2.1, 2.2 and 2.3 of the directions of 20 August 2003, and the question posed on 25 August 2003, as well as questions (b) and (c) posed in the directions of the 21

[36] *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32.

[37] *Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe and Another* 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) at para 30.

[38] *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 14.

[39] 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at para 18.

October 2003).[40] The Court is however not, at this stage of the proceedings, in a position to consider all the factors relevant to the interests of justice, as it does not have the record before it, nor has it had the benefit of full argument on all relevant issues. In particular, we are unable to consider the prospects of success on the merits of the grounds of appeal.

[41] However, the issues that we can deal with are the following:

(a) whether the SCA was correct that the questions which the state wished to reserve for determination by the SCA concerning the refusal of the trial judge to recuse himself and to permit the bail record to be admitted as evidence in the trial were not questions of law as contemplated by section 319(5) of the Criminal Procedure Act;

(b) the relevance of section 35(3)(m) of the Constitution to the interests of justice in the application for leave to appeal. Section 35(3)(m) provides that accused persons have the right "not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted" – (see questions 2.1 and 2.2 of the directions of 20 August 2003); and

(c) the relevance of section 35(3)(d) of the Constitution to the interests of justice in the application for leave to appeal. Section 35(3)(d) provides that accused persons have the right "to have their trial begin and conclude without

[40] See para 15 above.

unreasonable delay" ─ (see question 2.3 of the directions of the 20 August 2003).

Each of these issues will be dealt with separately.

2(a) Do the recusal and admissibility challenges raise questions of law?

[42] A consideration of the interests of justice of an application for leave to appeal ordinarily commences with a consideration of the prospects of success. In this case, the ultimate relief sought by the state is the overturning of the respondent's acquittal by the High Court on the grounds that the proceedings before the High Court were vitiated by bias and that the High Court erred in not admitting the bail record. It will be recalled that the bail record was ruled to be inadmissible before the respondent pleaded and that the state applied early in the trial for the judge to recuse himself, but that that application was refused. Upon the acquittal of the accused at the end of the trial, the state sought the reservation of both these issues. The High Court reserved one question in terms of section 319 of the Criminal Procedure Act, which was whether the state could still seek to reserve the question of the High Court's failure to recuse itself in the light of the fact that the state did not immediately prosecute an appeal. It then conditionally reserved three other questions of law, including the question whether the judge had erred in refusing to recuse himself and the question whether the bail record was wrongly not admitted at the trial.

[43] The SCA held that neither the recusal challenge nor the admissibility challenge raised a question of law within the contemplation of section 319 of the Criminal

Procedure Act, but that each raised questions of fact alone. As the state's application for leave to appeal to this Court in this respect is based on section 319, the correctness of these conclusions would constitute an insuperable bar to the state's application for special leave to appeal to this Court on the recusal issue or the admissibility issue.

[44] The directions issued by the Chief Justice before the hearing did not encompass the issue whether the recusal challenge and the admissibility challenge raised a question of law or a question of fact; so the directions did not envisage a decision on this issue as a preliminary issue in this application. The state, however, dealt with the issue in considerable detail in its written submissions. Although the respondent did not deal with the matter in any depth in his written submissions, the issue was dealt with in some detail by counsel in argument before this Court. The respondent's counsel was given an opportunity to address the issue in further written submissions. Both parties have now filed these and the matter can now be dealt with.

2(a)(i) The recusal challenge

[45] The respondent contended that the drawing of inferences from facts raises only factual issues. He relied on the cases of *Magmoed v Janse van Rensburg and Others*[41] and *S v Coetzee*[42] and contended that once the legal standard for the way in which a relevant determination has been settled, the application of that standard to particular

[41] 1993 (1) SA 777 (A); 1993 (1) SACR 67 (A).

[42] 1977 (4) SA 539 (A).

facts does not raise a question of law. He thus submitted that the recusal decision was one of fact despite involving the application of a legal standard. He contended that there is no difference in substance between the nature of the assessment that has to be made in a recusal decision and that that has to be made in the process of coming to a conclusion that the state has proved its case beyond a reasonable doubt. Both kinds of decisions, said the respondent's counsel, entail the application of a legal standard to a set of facts. They are all therefore decisions on fact. Counsel for the state, on the other hand, drew a distinction between those decisions that require the application of a legal standard and those that do not. He contended that the recusal decision falls in the first category and raises a question of law.

[46] For the purpose of section 319 of the Criminal Procedure Act, the state is limited to what may, for practical purposes, be termed an appeal against an acquittal on a question of law. We are therefore concerned with the distinction between a question of law and a question of fact in that context.

[47] The approach of our courts to this classification may for present purposes be summarised as follows:

(a) A finding by a court that facts that must be proved in a given case have been proved beyond a reasonable doubt is a finding of fact. It is true, as contended by the respondent, that the process of arriving at the finding of fact involves the application of a standard determined by law: the facts must be proved beyond a reasonable doubt. The legal rule applicable defines the degree of probability or

certainty that must exist in the mind of the trier of fact before the fact in question can be said to be proved. The fact that a legal rule defines how certain a court must be about a fact before that fact can be said to be proved does not render the finding one of law. The reason for this is that the legal rule is intrinsic to the process by which a fact is proved, embodies no further definition and is not in dispute. It has nothing to do with the evaluation of facts already proved for the purpose of deciding whether some legal standard has been observed.

(b) Trial courts often draw inferences from existing facts according to given rules. Not all inferences of this kind are questions of law. As Botha J said in *S v Petro Louise Enterprises (Pty) Ltd and Others*:[43]

> "I am unable to accept counsel's widely-based and generalised proposition that in all cases the question whether a particular inference is the only reasonably possible inference to be drawn from a given set of facts is a question of law. To accede to the proposition in such general terms would, I consider, open the door to the possibility of large numbers of appeals being brought under sec. 104 of Act 32 of 1944, contrary to the limited scope of that section which I conceive the Legislature contemplated."

It is relevant in this connection that section 319 of the Criminal Procedure Act is also aimed at limiting appeals by the state.

[48] Corbett CJ in *Magmoed*[44] made a helpful distinction between, on the one hand, an enquiry into whether the facts found to be proved established the offence charged,

[43] 1978 (1) SA 271 (T) at 280B.

[44] Above n 41.

and, on the other, one that seeks to decide if the proved facts establish a factual ingredient of the offence. He said:[45]

> "It is a genuine question of law *(a)* whether the evidence against an accused was such that there was a case to go to the jury or that there were grounds upon which the jury could legally convict the accused of the crime charged; or *(b)* whether the proven facts bring the conduct of the accused within the ambit of the crime charged. . . category *(b)* involves an enquiry as to the essence and scope of the crime charged by asking whether the proven facts in the particular case constitute the commission of the crime. This is clearly a question of law. But, in my opinion, a question of law is not raised by asking whether the evidence establishes one or more of the factual ingredients of a particular crime, *where there is no doubt or dispute as to what those ingredients are*." (emphasis supplied)

[49] This distinction highlights the importance of the purpose of the enquiry in the sense of whether the enquiry is aimed at a conclusion of law or the determination of what is really a fact.

(a) If the inferential process is directed at determining a fact (often referred to as a secondary fact) no question of law arises.[46] Thus, inferences drawn as to whether the accused had paid money as an inducement or reward in a statutory corruption charge,[47] that the accused may have acted in self-defence based on a factual misdirection,[48] and that the accused was party to a common purpose[49]

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[45] Id at 807I-808B.

[46] A helpful analysis of the difference between questions of law and fact is to be found in *Magmoed* above n 41 at 806 and following.

[47] *Petro Louise* above n 43.

[48] *Coetzee* above n 42

[49] *Magmoed* above n 41 at 811A.

with others have all been held to be inferences of fact. In none of these cases can it be said that the proof of any of these matters involves the decision as to whether the proved primary facts measure up to an objective legal norm or standard. Thus, Corbett CJ in *Magmoed*[50] agreeing with Botha J in *Petro Louise*[51] said:

> "I cannot imagine for one moment that the Attorney-General will have a right of appeal upon the footing that an intent to do grievous bodily harm was the only reasonable inference to be drawn from the facts."

(b) On the other hand, challenges to findings which are in reality conclusions of law have been held to raise issues of law for purposes of section 319. It was held in *R v Patel* that an issue as to the correctness of the interpretation of the definition of "official functions" and the application of that definition to the facts of the case was a question of law.[52] As pointed out in *Magmoed,*[53] the judgment in *Patel* indicates that an issue of law "involves an enquiry as to the essence and scope of the crime charged by asking whether the proven facts in a particular case constitute the commission of the crime".

(c) The determination of certain issues requires both factual findings (whether on a balance of probabilities or beyond a reasonable doubt) as well as legal

[50] Above n 41 at 809A.

[51] Above n 43 at 280D.

[52] 1944 AD 511.

[53] Above n 41 at 808A.

conclusions on the basis of factual findings. These are mixed conclusions of fact and law. In cases of that kind, appeals that challenge the basis of factual conclusions alone raise issues of fact while those that raise a question whether the primary and secondary facts found are sufficient to justify the legal conclusion raise questions of law.

[50] These principles are now considered in the context of the reservation of the question of law relating to the refusal by the trial judge to recuse himself. The SCA held, as previously pointed out, that the High Court had made a factual finding that the conduct of the judge would not create a suspicion of bias in the mind of the reasonable litigant. The SCA gave no reasons for this finding. We may add that no authority has been referred to us nor have we been able to find any that seeks to answer this question directly. A finding that the conduct of a judge in fact created a suspicion *in the mind of a particular person* that the judge concerned was or was not biased may well be one of fact. Whether that finding is arrived at by inference makes no difference, because the issue relates to what, in fact, the state of mind of a particular person is. However, a conclusion in relation to the suspicion created in the mind of a hypothetical reasonable litigant goes beyond a mere inference of fact.

[51] It entails, in the first instance, a determination of what the facts are. In the second place, it requires an assessment of what a reasonable litigant would think in the circumstances. Judicial officers must apply an objective standard and measure the

facts against that standard. In *S v Shackell* the SCA articulated the test for reasonable apprehension of bias as follows: [54]

> "The ultimate test is whether, having regard to (all the relevant facts and considerations) the reasonable man would reasonably have apprehended that the trial Judge would not be impartial in his adjudication of the case. The norm of the reasonable man is, of course, a legal standard".

The test for recusal on the grounds that a reasonable person would reasonably have apprehended that the trial judge would not be impartial in his adjudication of the case is not a factual determination. The application of this test is different from the process by which a court decides whether a case has been proved beyond a reasonable doubt. In that case, the relevant facts are found only if they are proved beyond a reasonable doubt. The standard of proof, which is undisputed, is applicable to the fact-finding process. In recusal cases, the facts are first established by the application of the standard of proof. Only after that has been done are the facts measured against the objective legal standard of the reasonable person.

[52] Support for this approach is to be found in the judgment of *S v Bochiris*.[55] In dealing with a conviction of culpable homicide, the Appellate Division considered the requirement of *culpa* which involves a failure of the accused to observe the degree of care which a reasonable person would have observed. In dealing with the assessment

[54] 2001 (2) SACR 185 (SCA) at para 25.

[55] 1988 (1) SA 861 (A).

of what the reasonable person would do in particular circumstances, the following was stated:

> "The reasonable man in the embodiment of the social judgment of the Court, which applies 'common morality and common sense to the activities of the common man'."[56]

[53] It must follow that a recusal challenge also involves a virtually identical enquiry, namely "the social judgment of the Court" applying "common morality and common sense" in deciding whether the reasonable person, in possession of all the relevant facts, would reasonably have apprehended that the trial judge would not be impartial in his adjudication of the case. A similar approach was adopted by Olivier JA in *Betha v BTR Sarmcol, a Division of BTR Dunlop*[57] where he reasoned as follows:

> "The question of the reasonableness or not of Sampson's attitude is not a question of fact by which this Court is bound, but a juristic evaluation, ie a matter of law."[58]

Where the reasonable apprehension of the reasonable person in a recusal issue is in dispute,[59] as it invariably must be, and is in the present case, this clearly involves a normative evaluation on the part of the court. The correctness of such evaluation

[56] Id at 865G, per Nicholas AJA.

[57] 1998 (3) SA 349 (SCA).

[58] Id at 358A-B.

[59] See the emphasised phrase in the quotation from *Magmoed,* para 44, above.

must, for all the above reasons, raise a question of law. It must be concluded, therefore, that in this regard the SCA erred.

2(a)(ii) The admissibility of the bail record challenge

[54] The state seeks to challenge the decision of the High Court that the bail record was inadmissible as evidence in the criminal trial. In essence, the High Court found that the admission of the evidence against the respondent would, in all the circumstances, be unfair. The SCA correctly held that an accused was entitled to a fair trial, that it was necessary for the High Court to determine what would be fair under the circumstances and that section 35(3) of the Constitution justifies the exclusion of evidence the admission of which would be unfair to an accused. However, the SCA, relying on certain reasoning in *Attorney-General, Transvaal v Kader*,[60] held that the determination of the High Court as to what was fair raised an issue of fact and not an issue of law. It is now necessary to consider whether this decision was correct.

[55] The issue discussed in that part of the judgment in *Kader* relied upon by the SCA was whether the finding by a provincial division that it would have been "humanly intolerable" for a witness to testify in a regional court case was a finding of fact and not one of law. In the process of concluding that the issue raised only a

[60] 1991 (4) SA 727 (A) at 740F-J.

finding of fact, E M Grosskopf JA, in the passage cited by the SCA, relied on the following passage from *Morrison v Commissioner for Inland Revenue*:[61]

> "A question that depends for its answer on matters of degree, on what weight is to be given to this and that variable factor… seems to me to be ordinarily answerable only for the particular case and to be therefore a question of fact."

The court typified the nature of the assessment that had been required in that case as being one aimed at determining how serious the consequences of giving evidence would have been for the respondent. A decision whether it would have been intolerable for the respondent to give evidence is a decision on a factual issue and does not entail the application of any legal norm or standard to the facts found.

[56] The quotation from Morrison above must be understood in the context of the decision in that case. In the process of defining the issue involved there as a question of fact, Schreiner JA said that the finding with which that court was concerned was:

> "…a finding that the appellant's betting activities 'constituted an essential feature of his racing as a business'. It followed upon a finding that the appellant's purpose in betting was to increase the profits from his racing and it rested upon an estimate of the closeness of the association of his betting and his racing. It was essentially a question of a degree, and was incapable of being cast into the form of a general rule. It seems to me to have been a finding of fact which there was evidence to support and with which…the Supreme Court has no jurisdiction to interfere."[62]

[61] 1950 (2) SA 449 (A) at 455.

[62] Id at 457.

[57] As the court said in that case, the finding involved an assessment of degree and was incapable of being cast into a general rule. Both Kader and Morrison were concerned with factual findings, findings which did not require the measurement of proved facts against a legal standard. The admissibility challenge raises a different issue. The ruling of the High Court was in effect that the evidence of the bail record was not admissible. The part of the judgment in Magmoed,[63] which dealt with admissibility challenges, is instructive. In determining whether the High Court's refusal to admit evidence given in inquest proceedings by the accused raised a question of law, the court held:

> "The admissibility of evidence may well turn solely on an issue of fact. An obvious example of this is the case where the admissibility of an extra-curial statement by the accused is in issue and this depends on whether it was made freely and voluntarily and without undue influence or whether it was induced by some form of physical coercion. This is a question of fact; and the only way in which it could be raised by an accused person as a point of law reserved would be to pose the question as to whether there was any legal evidence upon which the Judge could properly have found that the prosecution had discharged the onus on this issue (see *R v Nchabeleng* 1941 AD 502 at 504; *R v Ndhlangisa & Another* 1946 AD 1101 at 1103-4). Admissibility may, on the other hand, turn purely on a question of law, for example whether a certain statement constitutes a confession (see *R v Becker* 1929 AD 167 at 170; *R v Viljoen* 1941 AD 366 at 367). Furthermore, in a particular case admissibility may depend upon both law and fact.
>
> It seems to me that the decision of Williamson J on the admissibility of the inquest evidence falls into the last-mentioned category. In effect he found (i) that the failure, after a certain stage in the proceedings, on the part of the respondents (and their counsel) to object to answering incriminating questions was the result not of a free election to do so, but of their having been discouraged or inhibited from so objecting by the general ruling of the magistrate and his approach to this issue; and (ii) that this

[63] *Magmoed* above n 41.

> rendered the evidence of the respondents inadmissible. Finding (i) is clearly one of fact or of factual inference; whereas finding (ii) is a matter of law."[64]

[58] It is apparent from this passage that there is a two-step process in the adjudication of issues concerning the admissibility of evidence. The first is to determine the facts. These may be primary facts provable by direct evidence or secondary facts established by inference. The determination of the facts is essentially separate from the second enquiry. The second stage is concerned with whether, on the basis of the facts determined in the first stage, it is fair for the evidence to be admitted.

[59] This is demonstrated in the second admissibility challenge at issue in Magmoed. That challenge related to a High Court ruling that evidence given by the accused as a state witness in a criminal trial was not admissible at the subsequent criminal trial. The witness in the previous trial was the accused in the subsequent trial. Referring to the reasons of the trial court for its ruling that the evidence was not admissible the court said, "The reasons seem to me, with respect, to misinterpret and misapply Lwane's case and, therefore, to contain errors of law."[65] The test formulated in *S v Lwane*[66] to determine whether evidence given by an accused in an earlier case without a warning concerning the right against self incrimination was admissible in a subsequent criminal trial was stated as follows:

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[64] Id at 823B-G.

[65] Id at 825F-G.

[66] 1966 (2) SA 433 (A).

> "The effect of non-observance of that rule upon the admissibility in subsequent proceedings of an incriminating statement made by an uncautioned witness falls, in my judgment, to be determined upon the particular facts of the case. In any such enquiry, the nature of the incriminating statement and the ascertained, or presumed, knowledge of his rights by the deponent will always be important factors."[67]

The Appellate Division in *Magmoed* held that the challenge to the admissibility decision in that case raised a question of law. It thereafter measured the facts applicable against the test that it set out in *Lwane* and concluded that the trial court ought to have admitted the evidence.

[60] The reasoning in *Magmoed* in relation to admissibility is sound both in principle and in law. It is moreover directly applicable to the admissibility challenge in this case. The High Court in considering the admissibility challenge did two things. In the first place, it determined the facts. In the second place, it measured the facts against the test of fairness in order to determine whether the evidence was admissible. The second enquiry raised a question of law. We conclude therefore that in this regard, as well, the SCA erred.

2(b) Double jeopardy

[61] Section 35(3)(m) of the Constitution guarantees that ─

> "[e]very accused person has a right to a fair trial, which includes the right –
>
> . . .
>
> (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted".

[67] Id at 440H-441A.

The plea of double jeopardy, whether in the form of a previous conviction or acquittal, is –

> "based in English law on the maxim nemo debet bis vexari si constat curiae quod sit pro una et eadem causa and,thi maxim is derived from the Roman law exceptio rei judicatae and … a pleas of autrefois acquit 'is in fact equivalent to a plea of the exception rei judicatae in our law'."[68]

The plea of double jeopardy also forms part of the English common law and was recorded by Blackstone as a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence".[69] The constitutional protection against double jeopardy is part of the right to a fair trial. Both the individual and the state have interests in the prevention of double jeopardy. The individual must be protected against abuse by the state and be given the benefit of a final decision in any criminal prosecution. The process of prosecution is disruptive and there must be the prospect of and timely receipt of finality in a prosecution. Moreover, an accused has a right to rely on an acquittal, when he or she has been at risk of conviction, and the accompanying right not to face further prosecutions.

[62] Sections 106(1)(c) and (d) of the Criminal Procedure Act provide for the pleas of *autrefois convict* or *autrefois acquit*. These pleas provide the legal remedy which enables an accused to rely on his or her section 35(3)(m) right and they must

[68] *S v Moodie* 1962 (1) SA 587 (A) at 596C.

[69] Blackstone *Commentaries on the Laws of England* 15 ed (Professional Books Limited, England 1982) at 335-336.

accordingly be interpreted in the light of that right. The pleas are based on the common law principles referred to above.

[63] Once an accused has pleaded to a charge, he or she is entitled to demand to be acquitted or convicted.[70] Where, however, a conviction and sentence are overturned by a review or appellate court on grounds that the court lacked competence to convict the accused; or that the indictment on which the accused was convicted was invalid or defective; or that there was some other fatal technical defect in the procedure, section 324 of the Criminal Procedure Act provides that an accused may be recharged on the same offence.[71]

[64] For the plea to be sustained, the accused must show that he or she was in jeopardy of conviction in the first prosecution.[72] An accused will have been in jeopardy if the previous court had jurisdiction to try him or her; the trial was based on

[70] There are exceptions to this rule. For example, when the accused pleads that a court has no jurisdiction, or where a court enters a plea of not guilty on behalf of an accused. See *Moodie* above n 68.

[71] Section 324 provides that:

> "Whenever a conviction and sentence are set aside by the court of appeal on the ground –
> (a) that the court which convicted the accused was not competent to do so; or
> (b) that the indictment on which the accused was convicted was invalid or defective in any respect; or
> (c) that there has been any other technical irregularity or defect in the procedure,
> proceedings in respect of the same offence to which the conviction and sentence referred may again be instituted either on the original charge, suitably amended where necessary, or upon any other charge as if the accused had not previously been arraigned, tried and convicted: Provided that no judge or assessor before whom the original trial took place shall take part in such proceedings."

[72] Above n 29 at 173-174.

a charge on which a conviction could have been obtained; and the acquittal was on the merits.[73]

[65] The question whether the accused was in jeopardy on the first charge is approached objectively and irrespective of what the verdict was, whether at first instance or on appeal. This implies that the charge will be inspected to see whether it could support a valid conviction. If the charge did not disclose an offence it does not mean that the accused was not in jeopardy, because a conviction might validly have been obtained by invoking sections 86(4) and 88 of the Criminal Procedure Act.[74]

[66] In *McIntyre en Andere v Pietersen en 'n Ander* [75] it was held that the purpose of the right contained in section 35(3)(m) was to protect citizens against the possibility of repeated prosecutions for the same conduct. The court held that such protection was necessary in the interests of fairness and also because of the public interest in the finality of judgments. It follows that in the circumstances where a retrial does not give rise to double jeopardy the retrial will not amount to an unfair trial in violation of section 35(3)(m) of the Constitution.

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[73] See *Moodie* above n 68 at 595F-G.

[74] Section 86(4) provides that:

> "The fact that a charge is not amended as provided in this section, shall not, unless the court refuses to allow the amendment, affect the validity of the proceedings thereunder."

Section 88 says that:

> "Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgement, be cured by evidence at the trial proving the matter which should have been averred."

[75] 1998 (1) BCLR 18 (T).

[67] The question we must now consider is the relevance of the constitutional proscription on double jeopardy to the interests of justice in the application for special leave to appeal. It is clear that it is only of any relevance to the first two grounds in the special application for leave to appeal: that against the trial judge's decision not to recuse himself; and that against the trial judge's refusal to admit the record of the bail proceedings as evidence in the trial. The accused did not plead to the charges that were subsequently quashed and was therefore never in jeopardy of conviction upon them.

[68] If the state were to succeed in its appeal on the bias ground, it may well be that the accused will be held not to have been in jeopardy of conviction on the indictment. But we do not need to decide that question now. In relation to the admission of the bail record, the situation may well be different. That too need not be decided now.

[69] In the circumstances, we conclude that this factor is not sufficient on its own at this stage to conclude that it is not in the interests of justice for the application for leave to appeal to be granted. It is a relevant factor, but not a determinative one.

2(c) The relevance of section 35(3)(d) to the interests of justice

[70] A further question relevant to the interests of justice is that raised by section 35(3)(d) of the Constitution which provides that accused persons are entitled to have their trial begin and conclude without unreasonable delay. At this stage of the

proceedings it is not clear whether the state's appeal will succeed, and even if it did, whether the state would decide to re-prosecute the respondent. If it did, the question whether that prosecution would be in breach of section 35(3)(d) would have to be determined at that stage by the trial court.

[71] The question of whether such a prosecution would infringe the respondent's right to a trial without unreasonable delay has not been canvassed on the papers before us. It raises complex constitutional issues in its own right.[76] What is clear, however, is that although it may be a factor relevant to the determination of the interests of justice, on its own it is not determinative of the interests of justice. It will have to be considered when all the other relevant factors have been identified and analysed.

[72] These are the only issues relevant to the interests of justice that we can explore at this stage. In particular, the question of the prospects of success on all three applications needs to be considered fully in due course.

3. Application for leave to appeal against the judgment of Hartzenberg J in terms of rule 18

[73] We must now consider the rule 18 application for leave to appeal directly to this Court against the High Court judgment on the grounds that it was vitiated by bias. This application was lodged in this Court after the rule 20 application for special leave

[76] See the discussion in *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC); *Wild and Another v Hoffert NO and Others* 1998 (3) SA 695 (CC); 1998 (6) BCLR 656 (CC).

to appeal against the decision of the SCA. The state did apply to the High Court for a certificate in terms of rule 18, and Hartzenberg J issued a negative certificate.

[74] The state says it has lodged the application in order to ensure that the consideration of the merits of the recusal application, if they are to be considered, should be on the basis that the record of the trial read as a whole discloses bias on the part of the presiding judge, or a reasonable apprehension of bias. It will be recalled that the state originally applied for the trial judge to recuse himself shortly after the beginning of the trial, and that application was refused. The trial then continued and at the end of the trial, the state applied for the question as to whether the trial judge should have recused himself to be reserved in terms of section 319 of the Criminal Procedure Act.

[75] That application too was refused by the High Court, but one question of law was reserved. That question was whether the state was barred from seeking reservation of this question of law because of the delay in seeking its reservation. The High Court conditionally reserved three further questions of law for consideration by the SCA, if this preliminary question was answered in the state's favour. One of those conditionally reserved questions was whether the trial judge had erred in failing to recuse himself because of bias.

[76] This issue cannot be determined in this judgment, but the question arises whether − if it has to be resolved – it is to be decided on the whole record or only on

the record up to February 2000 when the initial application for recusal was made. The state argued that one should look at the whole record in order to determine "bias at the end of the day". The question of bias, so the state submitted, had to be determined on this basis. The state described its rule 18 application as part of a "belt-and-braces" strategy to ensure that the recusal issue, if it is to be determined, be determined on the basis of bias at the end of the day. The state submitted that its only purpose was to prevent a contention that the recusal issue should be determined as at February 2000 and not on the full record.

[77] In our view, the state must stand or fall by its rule 20 application for special leave to appeal. It is quite undesirable for a litigant to be given two bites at the appeal process. In this case, the state opted to pursue its relief to the SCA under section 319 of the Criminal Procedure Act and under the Constitution. The SCA refused it relief. The state then sought to approach this Court in terms of rule 20, as it was entitled to do.

[78] It would be wrong to permit a litigant who perceives that there are shortcomings in its appeal to the SCA to rectify those shortcomings by allowing a direct appeal under rule 18, read with section 167(6)(a) of the Constitution.[77] Either the application for rule 20 does raise bias at the end of the day, or it does not, which is a matter we cannot determine today. If it does not, that is not something that can be

[77] Section 167(6)(a) provides that:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court —
> (a) to bring a matter directly to the Constitutional Court . . . ."

cured by permitting a litigant to change horses midstream and commence an application for leave to appeal directly to this Court as if it had not already pursued relief before the SCA. It is not in the interests of justice, therefore, to grant the rule 18 application and it must therefore be dismissed. As this is a criminal matter, an order as to costs is inappropriate.

Conclusion

[79] At this stage of the proceedings, we conclude that the grounds of appeal upon which the rule 20 application is based all raise constitutional issues. We cannot however decide in this judgment whether it is in the interests of justice for that application to be granted. Further directions will thus have to be given by the Chief Justice for the further disposal of the matter.

[80] The issues that still have to be considered include –

(a) the question initially reserved by the trial judge, namely, whether in delaying its application to reserve the question of law relating to the recusal issue, the state became barred from seeking the reservation of that question;

(b) the question whether, if the recusal issue is to be considered, it should be considered on the basis of the full record, or only on the record up until February 2000;

(c) the question whether the state has made out a case for the condonation of the late filing of its application; and

(d) the merits of the application for leave to appeal.

[81] In considering the merits of the application, it will be important for the parties to bear in mind that this is an application for special leave to appeal against a decision of the SCA. In refusing the application to reserve the questions of law that the High Court had refused to reserve, the SCA exercised its discretion. The application for special leave, therefore, requires a consideration of the circumstances in which this Court will uphold an appeal in respect of the exercise of such a discretion.

The order

[82] The following order is made:

1. The application, for leave to appeal directly to this Court against the judgment of the High Court in terms of rule 18 is dismissed.

2. It is declared that the grounds of appeal upon which the rule 20 application is based all raise constitutional matters or issues connected with decisions on constitutional matters, for purposes of section 167(3)(b) of the Constitution.

CHASKALSON CJ:

[83] I agree with the order proposed by the other members of the Court, and with their judgment save for paragraphs 28 to 38 which deal with the objection to indictment.

[84] The objection to the charges under the Riotous Assemblies Act raises an issue of considerable importance. Can a South African court put one of its citizens on trial for conspiring to commit murders and other offences during the period 1981 to 1989 in a territory, then under South African administration but beyond the territorial borders of the country? The answer given by the High Court was, no. The reason, so the court held, was that such matters are not crimes according to South African law. This, despite the fact that the conspiracy is alleged to have been entered into in South Africa, and the crimes, which if proved may amount to war crimes, are alleged to have been committed in the course of a conflict involving the South African armed forces and those fighting against it.

[85] If that answer was wrong, there is a second question raised by the High Court judgment. The High Court held that the respondent was in any event entitled to the benefit of an amnesty granted by the former Administrator General of Namibia. The question whether that amnesty protects the respondent against prosecution in a South African court against the grave charges laid against him is also a matter of great importance, involving not only the terms of the amnesty, but its implications for a South African court, bearing in mind the values of our Constitution and South Africa's obligations under customary international law.

[86] The state wanted to appeal against the decision of the High Court. It sought to do so by asking for a question of law to be reserved in terms of section 319 of the Criminal Procedure Act. This was refused because, according to a line of decisions in

the Appellate Division,[1] which were followed by the Supreme Court of Appeal (the SCA) in the present case, it is not competent to invoke section 319 of the Criminal Procedure Act to appeal against the upholding of an objection to an indictment in a criminal case. The procedures followed by the state in attempting to pursue the appeal were flawed but that does not arise at this stage of the proceedings.[2]

[87] Whether such an appeal could have been brought under the provisions of section 21(1) of the Supreme Court Act, 59 of 1959,[3] which confers additional jurisdiction on the SCA to hear appeals from other courts, does not arise directly in the present case, for the state did not pursue or attempt to pursue an appeal under that section.

[88] The question that has to be decided now does not concern the correctness of the decision of the High Court on the quashing of the charge, or the correctness of the decision of the High Court and the SCA on the meaning of section 319 of the Criminal Procedure Act, or the consequences of the delays and other irregularities in the steps taken by the state to pursue its appeal. What is in issue is whether an appeal on the issues raised by the quashing of the charge is within the jurisdiction of this

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[1] See n 33 below.

[2] This is dealt with in para 28 of the majority judgment.

[3] Section 21(1) provides:

> "In addition to any jurisdiction conferred upon it by this Act or any other law, the appellate division shall, subject to the provisions of this section and any other law, have jurisdiction to hear and determine an appeal from any decision of the court of a provincial or local division".

Court. That issue arises not because of the place at which the alleged crimes were to be committed, but because section 167(3)(b) of the Constitution provides that:

> "The Constitutional Court . . . may decide only constitutional matters, and issues connected with decisions on constitutional matters . . . ."

[89] Thus the question: Would an appeal against the decision by the SCA in the circumstances of the present case be a constitutional matter, or involve a decision on an issue connected with a decision on a constitutional matter? If not, this Court has no jurisdiction to hear the appeal.

[90] There can be no doubt that this Court has an extensive jurisdiction. The Constitution is the supreme law of the Republic and law or conduct inconsistent with it is invalid.[4] All legislation must be made, and all public power must be exercised, in accordance with its provisions.[5] It is the source of the power of the courts, and the power of the prosecuting authority.[6] Chapter 2 of the Constitution which contains the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.[7] It binds also "a natural or a juristic person if, and to the extent

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[4] Section 2 of the Constitution.

[5] *Executive Council of the Western Cape and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC); *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC); *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

[6] Chapter 8 of the Constitution.

[7] Section 8(1) of the Constitution.

that, it is applicable".[8] It is relevant to the interpretation of all legislation and to the development of customary law and the common law.[9] It is also relevant to disputes which are subject to legislation such as the Labour Relations Act, 66 of 1995,[10] the Promotion of Access to Information Act, 2 of 2000,[11] the Restitution of Land Rights Act, 22 of 1994,[12] the Maintenance Act, 99 of 1998[13] and other laws connected with constitutional rights. Issues connected with such matters will almost always be "constitutional matters" for the purpose of 167(3)(b).

[91] This jurisdiction, though extensive,[14] is not all embracing. Where no constitutional right is engaged, a challenge to a decision of the SCA or any other court, on the basis only that it is wrong on the facts, is not a constitutional matter.[15] And a dispute that does not impact upon or give effect to an entrenched right or other constitutional provision, will not ordinarily be a constitutional matter. Where does the present case fit within this broad framework?

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[8] Section 8(2) of the Constitution.

[9] Section 39(2) of the Constitution which provides: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[10] *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC).

[11] *Ingledew v Financial Services Board: In Re Financial Services Board v van der Merwe and Another* 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC).

[12] *Alexkor Ltd and Another v The Richtersveld Community and Others* CCT 19/03, 14 October 2003, as yet unreported.

[13] *Bannatyne v Bannatyne (Commission of Gender Equality as Amicus Curiae)* 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC).

[14] *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 14.

[15] Id at para 15(a); *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC) at para 9.

[92] The mere fact that this is a criminal case in which the accused's liberty is threatened, does not make it a constitutional matter. That is clear from the decision of this Court in *Boesak*'s case,[16] where it was held that if all criminal cases are said to be constitutional matters, "the distinction drawn in the Constitution between the jurisdiction of this Court and that of the SCA would be illusory."[17]

[93] The prosecution of crime is a matter of importance to the state. The state can justifiably feel aggrieved if a judge mistakenly acquits an accused person when on the facts of the case that person should have been convicted. But that does not mean that it can necessarily appeal to this Court against such a decision. If, as this Court held in *Boesak*'s case, the conviction and imprisonment of an accused person who has a constitutional right to a fair trial, is not in itself a constitutional matter for the purpose of section 167(3) of the Constitution, it could hardly be suggested that the acquittal of an accused because of an error alleged to have been made by the High Court or the SCA in their assessment of the facts is a constitutional matter.

[94] The same holds good for findings of law. If a finding of law is inconsistent with the Constitution, or is made on a constitutional issue which arises in a criminal case, as for instance was the case in *S v Thebus and Another*,[18] then this Court has

[16] Above n 14.

[17] Id at para 15.

[18] 2003 (6) SA 505 (CC): 2003 (10) BCLR 1100 (CC). The case dealt with two constitutional matters: first, whether the doctrine of common purpose was inconsistent with the Constitution and secondly, whether the inferences drawn by the lower courts infringed the accused's right to silence.

jurisdiction to hear an appeal against such finding. But if this is not so, the fact that the decision may be wrong does not in itself give rise to a constitutional issue that would bring the matter within the jurisdiction of this Court.[19]

[95] The charges against the accused concern events that are alleged to have taken place some years before the Constitution came into force. This Court held in *Du Plessis and Others v De Klerk and Another*[20] that the Constitution does not have a retroactive impact.

> "It does not enact that, as at a date prior to its coming into force, 'the law shall be taken to have been that which it was not'."[21]

As pointed out, however, by Kentridge AJ in *Du Plessis*' case this is not necessarily an invariable consequence of the coming into force of the Constitution. Special considerations may apply to criminal cases where the interests of the accused may be relevant. There may also be cases

> "where the enforcement of previously acquired rights would, in the light of our present constitutional values, be so grossly unjust and abhorrent that it could not be countenanced, whether as being contrary to public policy or on some other basis."[22]

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[19] *Lane and Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) at para 4; *Van Der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 (CC) at para 14; cf *S v Boesak* above n 14 at para 23.

[20] 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC).

[21] Id at para 20.

[22] Id

[96] The prosecution under the Riotous Assemblies Act in the present case failed because of the view that the High Court took on the interpretation of the relevant provisions of that Act. If there is another basis on which the alleged conspiracy can be prosecuted, then the quashing of the charge will not in itself preclude such a prosecution. I will assume for the purposes of this judgment that there is no other basis on which such a prosecution can be brought.

[97] If the conduct with which the accused was charged did not constitute an offence under South African law at the time it was committed, then in the light of *Du Plessis'* case,[23] the state cannot contend that it has become an offence because of the provisions of the Constitution. Thus section 39(2)[24] of the Constitution which might have been material to the interpretation of the relevant provisions of the Act if the Constitution had been applicable, and if invoked would have made the case a constitutional matter, cannot be invoked for that purpose in the present case.

[98] The decision of the High Court deals with the essential elements of the offence created by section 18(2) of the Riotous Assemblies Act. It holds that the conspiracy charged in the indictment does not fall within the purview of the section. That is a finding of law on an issue to which the Constitution has no application. In the circumstances, the contention that the finding is wrong is not in itself a constitutional matter.

[23] Above n 20.

[24] Above n 9.

[99] The majority hold that if the interpretation is wrong it has, in effect, obstructed the constitutional obligation of the prosecuting authority, and that is a constitutional matter. I do not agree. In *Lane and Fey NNO v Dabelstein and Others,*[25] this Court said: "The Constitution does not and could hardly ensure that litigants are protected against wrong decisions."[26] I can see no difference between a wrong decision that leads to the failure of a prosecution and a wrong decision that leads to the conviction and imprisonment of an accused person. Although there is a connection between the error and the Constitution, in the light of the decision of this Court in *Boesak's* case, that connection is in my view too remote to warrant the decision being classified as a constitutional matter.

[100] That, however, is not the end of the matter. Counsel for the state submitted that, according to our common law, statutes should where possible be interpreted in conformity with international law. That principle has now been incorporated into our Constitution. Section 233 of the Constitution provides that:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".

The High Court judgment does not deal with international law. The state contends that if consideration had been given to international law, the judge would have

[25] Above n 19 at para 4.

[26] See also *Metcash* above n 19 at para 14.

reached a different conclusion.[27] The failure to do so was thus not only an error, but an error that is inconsistent with a requirement of the Constitution.

[101] If the submission that the High Court should have had regard to international law for the purposes of interpreting section 18(2) of the Riotous Assemblies Act is correct, it may well be that the failure to have done so implicates the Constitution in a way sufficient to make this a constitutional matter. The argument on the relevance of international law to the interpretation of section 18(2), raises complex and difficult issues. I prefer to leave that question open at this stage of the proceedings, and to say no more on the topic than is necessary for the purposes of this judgment. I do so because of the view that I take on the interpretation of section 319 of the Criminal Procedure Act, which makes it unnecessary for me to express a firm opinion on that question.

[102] I have come to the conclusion for reasons that follow, that the interpretation of section 319 of the Criminal Procedure Act is a constitutional matter. If this is so, then a decision on the interpretation of section 18(2) of the Riotous Assemblies Act would be connected with a decision on a constitutional matter. This Court would then have jurisdiction to deal with the application for leave to appeal.

[103] The powers of the various courts in South Africa are derived from the Constitution. Chapter 8 of the Constitution deals with the courts and the

[27] In support of this contention the state relied on the case of *Nduli v Minister of Justice and Others* 1978 (1) SA 893 (A) at 906B.

administration of justice. The SCA, which has taken the place of the Appellate Division and, subject to the Constitution, has all the powers that the Appellate Division used to have. Its place in the hierarchy of courts and its authority is dealt with in section 168 of the Constitution which provides in subsection (3) that:

> "The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only-
> (a) appeals;
> (b) issues connected with appeals; and
> (c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.

[104] Chapter 8 must be read with item 2 of Schedule 6 of the Constitution, which provides that:

> "All law that was in force when the new Constitution took effect, continues in force, subject to -
> (a) any amendment or repeal; and
> (b) consistency with the new Constitution".

This in turn must be read with item 16 of Schedule 6 which deals with courts, and the interim Constitution which dealt with the law in force when the new Constitution took effect.

[105] Item 16 of Schedule 6 of the Constitution provides that:

> "(1) Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial

> officer continues to hold office in terms of the legislation applicable to that office, subject to -
>
> (a) any amendment or repeal of that legislation; and
>
> (b) consistency with the new Constitution".

[106] Section 241(1) of the interim Constitution made provision for existing courts to continue to function in accordance with the laws applicable to them until changed by a competent authority,[28] and section 241(10) dealt with the jurisdiction of courts and the powers of judicial officers. It provided that:

> "The laws and other measures which immediately before the commencement of this Constitution regulated the jurisdiction of courts of law, court procedures, the power and authority of judicial officers and all other matters pertaining to the establishment and functioning of courts of law, shall continue in force subject to any amendment or repeal thereof by a competent authority".

This provides the legal framework within which the powers of the SCA must be determined. Basically, subject to the provisions of the Constitution, it adopts and continues the legal framework that existed before the interim Constitution was adopted.

[107] Two well-established principles are relevant to the powers of the state to note an appeal to the SCA, and the powers of the SCA to hear appeals.

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[28] Section 241(1) of the interim Constitution provided as follows:

> "Every court of law existing immediately before the commencement of this Constitution in an area which forms part of the national territory, shall be deemed to have been duly constituted in terms of this Constitution or the laws in force after such commencement, and shall continue to function as such in accordance with the laws applicable to it until changed by a competent authority".

[108] The first principle is that in the absence of a special statutory provision enabling it to do so, the state has no right of appeal against an acquittal of an accused in a criminal case.[29] The relevant history of the provisions regulating appeals by the state is discussed by Corbett CJ in *Magmoed v Janse Van Rensburg and Others*.[30] The state may not appeal against an acquittal based on findings of fact. Prior to 1948 it could also not appeal against a finding of law made in a trial before a judge which resulted in the acquittal of an accused person.[31] In 1948 the Criminal Procedure Act then in force was amended to make provision for the reservation of questions of law at the instance of the state in terms substantially similar to section 319 of the present Act.[32] These provisions have been interpreted by the Appellate Division to exclude from their ambit appeals against the upholding of an exception to an indictment by a judge.[33] The SCA considered itself bound by these decisions in the present case.

[109] The second principle is that the SCA has no jurisdiction to hear an appeal against a decision of another court unless such a right is conferred on it by the Constitution or by statute.[34] The Constitution makes provision, as part of the fair trial

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[29] *Magmoed v Janse Van Rensburg and Others* 1993 (1) SA 777 (A) at 816 D-H.

[30] Id at 812B-817A.

[31] *R v Herbst* 1942 AD 434.

[32] This was done by sections 10 and 12 of the Criminal Procedure Amendment Act 37 of 1948.

[33] *R v Adams and Others* 1959 (3) SA 753 (A) at 764F-G; *S v Mene* 1978 (1) SA 832 (A) at 837H-838C; *S v Seekoei* 1982 (3) SA 97 (A) at 101 D-E; *S v Khoza en Andere* 1991 (1) SA 793 (A) at 795J-796C.

[34] *Sefatsa and Others v Attorney-General, Transvaal and Another* 1989 (1) SA 821 (A) at 834 E-F; *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7 D-I; *S v Pennington and Another* 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at para 20.

right of accused persons, for a right of appeal to or review by a higher court.[35] No corresponding right is made in favour of the state and it was not suggested in argument that the Constitution requires that there should be such a right.

It was, however, contended on behalf of the state that section 168(3) of the Constitution is relevant because it provides that the "Supreme Court of Appeal may decide appeals in any matter". The state does not challenge the constitutionality of section 319 of the Criminal Procedure Act. It contends, however, that section 168(3) of the Constitution is relevant to the proper construction of section 319. That raises a constitutional issue within the jurisdiction of this Court.

[111] The Constitution is also implicated in another way. Section 319 deals with the powers of the SCA to hear appeals in criminal cases. The power of the courts is derived from the Constitution. In *Bannatyne v Bannatyne*[36] this Court held that "any issue as to the nature and ambit" of the powers of the High Court "necessarily raises a constitutional question".[1] This applies equally to issues concerning the nature and ambit of the powers of the SCA. An interpretation of section 319 of the Criminal Procedure Act, which precludes an appeal to the Supreme Court of Appeal against a decision of the High Court quashing a charge in an indictment, has a material bearing

[35] Section 35(3)(o).

[36] Above n 13.

[1] Id at para 17.

on the powers of the SCA. The interpretation of that section is accordingly a constitutional matter.

[112] It follows that although my reasons are different as far as the objection to the indictment is concerned, I concur in the order that is made.

Langa DCJ and Yacoob J concur in the judgment of Chaskalson CJ.

SACHS J:

[110] I concur in the majority judgment, but wish to add supplementary reasons on one aspect. It concerns the quashing by the trial court of certain charges against the respondent, Dr Basson, and deals with the question of the constitutional significance of conduct amounting to a war crime.

[111] The questions before us have to be determined in the complex historical and jurisprudential situation in which the South African state has moved from perpetrating grave breaches of international humanitarian law to providing constitutional protections against them.[1] Issues which in another context might appear to be purely

technical concerning the interpretation of a statute or the powers of a court on appeal, in my view, take on profoundly constitutional dimensions in the context of war crimes.

[112] Nothing shows greater disrespect for the principles of equality, human dignity and freedom than the clandestine use of state power to murder and dispose of opponents. It follows that any exercise of judicial power which has the effect of directly inhibiting the capacity of the state subsequently to secure accountability for such conduct goes to the heart of South Africa's new constitutional order. When the depredations complained of are of such a dimension as to transgress the frontier between ordinary state-inspired criminal violence and war crimes, the engagement with the core of the Constitution becomes even more intense.

[113] It is in this context that the interim Constitution provided for the establishment of the Truth and Reconciliation Commission (the TRC). Its objective was to build a bridge between the past and the present and enable an appropriate balance to be achieved between all the public and private interests involved. The respondent has not chosen to have recourse to the TRC process. We are accordingly left to deal with this matter on the basis of applying the ordinary principles of law and statutory interpretation as viewed and developed in the light of the Constitution.

[114] The very enormity and intricacy of the legal issues requires that the analysis be undertaken with the utmost rigour and dispassion. The need for objectivity is

eloquently highlighted by Cassese in the Preface to his seminal work on international criminal law:[2]

> "[O]ne should never forget that this body of law, more than any other, results from a myriad of small or great tragedies. Each crime is a tragedy, for the victims and their relatives, the witnesses, the community to which they belong, and even the perpetrator, who, when brought to trial, will endure the ordeal of criminal proceedings and, if found guilty, may suffer greatly, in the form of deprivation of life, at worst, or of personal liberty, at best. Law, it is well known, filters and rarefies the halo of horror and suffering surrounding crimes. As a consequence, when one reads a law book or a judgment, one is led almost to forget the violent and cruel origin of criminal law prescriptions. One ought not to become oblivious to it. To recall it may serve as a reminder of the true historical source of criminal law. This branch of law, more than any other, is about human folly, human wickedness, and human aggressiveness. It deals with the darkest side of our nature. It also deals with how society confronts violence and viciousness and seeks to stem them as far as possible so as 'to make gentle the life on this world'. Of course the lawyer can do very little, for he is enjoined by his professional ethics neither to loathe nor to pity human conduct. He is required to remain impassive and simply extract from the chaos of conflicting standards of behaviour those that seem to him to be imposed by law."

[115] In the present case our country's relatively rapid transformation from predator state to protector state has intensified "the chaos of conflicting standards" to which Cassese refers. The resolution of the conceptual tensions involved can only be found in the Constitution[3] and its values and in the duty imposed on the state to protect those values.[4] In a fraught area like this it is particularly important to avoid forms of consequential reasoning which lack a principled foundation. The crucial question is not whether consequences influence reasoning but the nature of the consequences which may be involved. In my view, if the desire to avoid potentially painful consequences results in the filling in of gaps in legal reasoning, or places unacceptable

strain on principled legal logic, the integrity of the law is imperilled. But if the consequences at issue relate to the constitutional legal order itself or to rights protected by that order, they become integral to rather than destructive of rigorous legal analysis. In the present case I believe the consequences of the decision of the trial court to quash the charges, and the subsequent refusal of the Supreme Court of Appeal (the SCA) to entertain an appeal against that decision, do impact directly on the legal order as envisaged by the Constitution, particularly insofar as war crimes may be involved.[5] They touch on central features of our constitutional democracy. As such they are determinative of the issue before us at this stage, namely whether the questions raised in the application for leave to appeal, are constitutional matters.

[116] I believe that three substantial, sequential and interrelated constitutional questions arise in connection with the quashing of the charges and the refusal of the SCA to entertain an appeal from the trial judge's decision. The first is whether the conduct charged could be characterised as a war crime as understood by international humanitarian law. If the answer is affirmative, the second question is whether and to what extent this could impose a special constitutional responsibility on the state to prosecute the respondent. The third is whether the quashing of the charges by the trial court followed by the refusal of the SCA to entertain an appeal against this decision, without reference to the fact that the prosecution of war crimes was involved, manifested a failure to give effect to South Africa's international obligations as set out in the Constitution.

[117] I deal first with the question of whether the conduct alleged in the charges that were quashed should be seen as constituting war crimes. Cassese[6] defines a war crime as follows:

> "War crimes are *serious violations* of customary or, whenever applicable, treaty rules belonging to the corpus of the international humanitarian law of armed conflict. As the Appeals chamber of the ICTY [International Criminal Tribunal for the former Yugoslavia] stated in *Tadić (Interlocutory Appeal)*, (i) war crimes must consist of 'a serious infringement' of an international rule, that is to say 'must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim'; (ii) the rule violated must either belong to the corpus of customary law or be part of an applicable treaty; (iii) 'the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule' (§ 94); in other words, the conduct constituting a serious breach of international law must be criminalized.
>
> . . .
>
> War crimes may be perpetrated in the course of either *international* or *internal* armed conflicts, that is, civil wars or large-scale and protracted armed clashes breaking out within a sovereign State."[7]

[118] The charge sheet against the respondent alleged in count 31 that he had been involved in a conspiracy in Pretoria to murder members of South West African People's Organisation (SWAPO) in Namibia (then referred to as South West Africa), in contravention of section 18(2)(a) of the Riotous Assemblies Act, 17 of 1956. The material facts which accompany the charge sheet provide the substance of the allegations against him. Count 31 reads:[8]

> "1. In 1979/1980 it was found that as a result of pseudo-operations which the SADF carried out in the then South West Africa (Namibia), there was an overpopulation of captive SWAPO members in the detention facilities. A decision was taken in defence headquarters in Pretoria that SWAPO members who had become too many to be

handled and represented a security risk, should be killed and their bodies gotten rid of. It was decided that an aeroplane (PIPER SENECA) should be bought clandestinely and that it would be employed to cast the remains of the SWAPO captives who were killed into sea.

2. As a result of problems encountered with the first SWAPO members whose deaths were engineered, Dr. Basson was instructed to help kill the persons.

3. The accused began to supply JJ Theron with TUBERINE and SCOLINE (both muscle-relaxants). The accused explained that if a person is injected with these agents such person in this situation basically asphyxiates. His lungs do not function because the lung muscles are inactive because of the agents. Later KETALAAR (a narcotic agent) was also provided. In most cases the Accused provided these agents to JJ THERON, but in his absence other doctors who worked under him and on his instructions provided the agents to other persons involved in the operation. The SWAPO members and persons from their own forces, who had to be killed, were overdosed with the above agents which brought about their death.

4. Theron went ahead to kill a large number of SWAPO members who had been identified (about 200 persons) in the above manner and to get rid of their remains in the sea.

5. The accused also provided THERON with cool-drink with sedatives to surreptitiously cause people to fall asleep. THERON, on his part, gave the cool-drinks with the sedatives to co-workers such as DJ PHAAL, T FLOYD and ICJ KRIEL.

6. The accused informed THERON that they had experimented with various cool-drinks. THERON personally bought the cool-drinks and delivered them to the accused. The accused showed THERON where a small hole was drilled into the cool-drink. The sedative was injected with a thin syringe into the cool-drink. With the use of skilful soldering process the little hole was covered so that it would be invisible. The accused on ten occasions delivered contaminated cool-drink to THERON. From time to time there was to be feedback to the accused about the effectiveness of the cool-drink.

7. Contaminated beer was also delivered to THERON in a similar manner. The beer also contained a sedative and THERON received such beer on about twelve occasions.

8. The accused also delivered to THERON pills that were indented with a deep V. Usually 10-15 of the pills were handed over and the accused delivered them five or six times. These pills also caused potential victims to fall asleep if they took them.

9. In furtherance of the above conspiracy a series of incidents took place. The state will inter alia rely on the occasion where the accused and THERON killed 5 black male persons (hereafter called the deceased) who were in detention at Fort Doppies, SWA.

10. The accused gave the above-mentioned detainees the pills to drink. The five refused to take the pills and hid them away in the legs of the chairs in the place where they were being held.

11. The accused and Theron looked through a one-way window in a neighbouring observation room, and saw the deceased hide the pills.

12. The accused went into the cell again and persuaded the five persons to take the pills, which they did.

13. As a result of the medicine the five persons fell asleep. The accused and THERON injected them with tuberine and scoline which the accused supplied.

14. The accused used the opportunity to see if THERON administered the injections correctly.

15. When the five were dead the accused, THERON, and other persons unknown to the State, helped load the bodies onto an aeroplane.

16. While the accused sat in front of the aeroplane, they flew out to sea, and went on to throw the five bodies into the sea."

[119] The charge sheet further alleged in count 61 that in 1989 the respondent furnished cholera bacteria to poison the water supply of a SWAPO refugee camp in order to manipulate the outcome of pending elections in Namibia. The material facts appended to count 61 read:

> "1. Before the election in Namibia/South West Africa, the CCB decided that all forces must be brought together to influence the outcome of the election. All the different regions of the CCB members were told to direct their activities to South West Africa/Namibia.
>
> 2. RNL had the capacity to cultivate the Vibrio Cholera-Bacterium. This pathogenic organism was packed in bottles. On 4 August 1989 A IMMELMAN handed to the operator "Koos", 16 bottles containing the Cholera bacterium. On 16 August another 6 bottles of Cholera germs were handed over to the medical coordinator of the CCB (Koos). This bacterium was supplied through the instruction and agency of the accused to the medical coordinator of the CCB. Immelman also reported to the accused.
>
> 3. BOTES, a CCB member who by rights worked in Region 2, had a clandestine member who had access to a camp in Windhoek that accommodated mainly SWAPO members. On the instruction of PJ VERSTER a project was launched, which included the contamination of the water supply of the refugee camp where mainly SWAPO members were staying near Windhoek.
>
> 4. BOTES received from VERSTER four bottles containing Cholera germs. BOTES handed it over to his operator, J DANIELS for it to be thrown into the water supply of the camp at Windhoek.
>
> 5. After the operator carried out his instruction, Botes destroyed the bottles.
>
> 6. The state alleges that the Cholera germs were handed over to the CCB on the instructions and through the agency of the accused."

[120] If the allegations contained in counts 31 and 61 could be proved, it would be difficult to argue that, accepting Cassese's definition, they did not constitute war crimes.

[121] The next question relates to the constitutional significance of a finding that the charges if proved could establish the commission of war crimes. Would such a finding signify a constitutionally-commanded need to take account of international law in determining the issues?[9] In particular as far as the present case is concerned, would it require that in relation to the interpretation of the Constitution and our law of criminal procedure, special consideration be given to South Africa's international law obligations? This is a relatively new area in our jurisprudence, and requires appropriate circumspection. At this stage, however, we are not called upon to make definitive determinations. Rather, we must decide the limited question of whether or not the possible impact on the case of South Africa's international law obligations raises a constitutional question. In this respect I am of the opinion that the materials before us are sufficiently substantive to propel this question from the realm of the purely speculative into the universe of the real.

[122] Section 232 of the Constitution states:

> "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

The rules of humanitarian law constitute an important ingredient of customary international law. As the International Court of Justice [the ICJ] has stated, they are

fundamental to the respect of the human person and "elementary considerations of humanity".[10] The rules of humanitarian law in armed conflicts are to be observed by all states whether or not they have ratified the Conventions that contain them because they constitute intransgressible principles of international customary law.[11] The ICJ has also stressed that the obligation on all governments to respect the Geneva Conventions in all circumstances does not derive from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.[12]

[123] The duty of states to provide effective penal sanctions today for persons involved in grave breaches of humanitarian law, whenever committed, is captured and expressed in Article 146 of the Fourth Geneva Convention of 1949 (articles 146-147 appear with different numbering in all four conventions). It states:

> "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article."

Article 147 of the Geneva Convention goes on to indicate what sort of conduct would constitute grave breaches of international humanitarian law. These include:

> "(A)ny of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health".

[124] This brings me to the third question. It concerns the failure of the SCA, when dealing with the proposed appeal against the decision to quash the charges, to take account of South Africa's international law obligations as outlined above. It should be repeated that at this stage we are not called upon to make any definitive determinations as to whether the trial court was correct or not in quashing the charges. Nor is it necessary to decide whether the SCA should or should not have entertained the appeal against the decision. The only issue in these preliminary proceedings is whether the fact that at no stage was any attention paid to South Africa's international obligations as mandated by the Constitution raises a constitutional issue. In *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)*[13] this Court held that a dispute as to whether a decision by the SCA gave paramountcy to the best interests of the child, and enquiries into gender equality, both raised constitutional issues, properly before this Court. Similarly, enquiries into whether the SCA failed to give sufficient or any weight to the state's obligations under international law, raise constitutional questions, properly before this Court.

[125] This Court is accordingly entitled to hear the application for leave to appeal against the SCA's decision refusing to entertain the appeal against the trial court's quashing of the charges.

[126] In conclusion, it should be emphasised that none of the above should be taken as suggesting that because war crimes might be involved, the rights to a fair trial of the respondent as constitutionally protected are in any way attenuated. When

allegations of such serious nature are at issue, and where the exemplary value of constitutionalism as against lawlessness is the very issue at stake, it is particularly important that the judicial and prosecutorial functions be undertaken with rigorous and principled respect for basic constitutional rights. The effective prosecution of war crimes and the rights of the accused to a fair trial are not antagonistic concepts. On the contrary, both stem from the same constitutional and humanitarian foundation, namely the need to uphold the rule of law and the basic principles of human dignity, equality and freedom.

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