

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO
	NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case Nr: 185/2005

Case Heard: 09/03/2006
Date delivered: 10/03/2006
 In the matter:

DIRK TILO

APPELLANT

versus

THE STATE

RESPONDENT

Coram: Kgomo JP et Tlaletsi J

JUDGMENT ON APPEAL

KGOMO JP:

1. This is one of those perennial so-called prison appeals. The appellant initially appeared in the district court. The case was transferred to the regional court for an unspecified reason because the regional court record is silent and the district court proceedings have not been incorporated therein. It is, however, safe to infer that the transfer by the State was motivated by the catalogue of previous convictions that appellant has accumulated over the years, in that the Regional **Magistrate, Mr S O du Plessis**, at the conclusion of the trial, declared him a habitual criminal.
2. **Regional Magistrate du Plessis** is named because the irregularities that he has committed were so patent that I can only ascribe them to complacency and a total disregard for the appellant's constitutional right to a fair trial as enshrined in section 35 of the Constitution. I make these remarks because I cannot accept that a Regional Magistrate of several years' standing, even on the 11th August 2003 when the case was disposed

of, fluffed his Criminal Procedure and the Law of Evidence through sheer inadvertence or blissful ignorance. What happened follows.

3. The prosecutor informed the court that he is ready to commence with the trial and has four of his six witnesses available. The other two, he said, are fingerprint experts who have been subpoenaed for the following day because they were in the process of preparing their court-charts (for presentation in Court as evidence or exhibits). I now translate what the Court imparted to the appellant:

“Court: Very well. Mr Tilo, I notice that you informed the District Magistrate on the occasion of the transfer of your case to the Regional Court that you will conduct your own defence in this Court and that you do not require any legal aid.

I have taken up this issue earlier with the Magistrate concerned after the prosecutor explained the position to me. The magistrate has confirmed to me that he has explained your right to legal aid several times to you and that you were adamant that you will undertake your own defence. Now, the witnesses are available today. The Court-hours can therefore be utilized today. I therefore direct (‘gelas’) that the case be proceeded with.

State: Count 1: Housebreaking with the intent to steal and theft ...”

4. What the foregoing proceedings illustrate vividly is that:
 - 4.1. The appellant was not afforded the opportunity to address the Court and give his version of what transpired in the District Court in respect of what the Regional Magistrate said;
 - 4.2. The Regional Magistrate had absolutely no right to discuss the case with the prosecutor and the District Magistrate in the absence of the accused. The proceedings commenced a mere twelve lines before the prosecutor addressed Court as stated in the first two sentences in para 3 (above). There is nothing reflected on record in those twelve lines that the Regional Magistrate’s discussion aforesaid took place *in curiae facie*. What the Regional Magistrate has done was grossly irregular. See: **R v Maharaj 1960 (4) SA 256 (N)** at 258A-C whereat **Broome JP** said:

“It is a principle of justice as administered in this country that trials must take place in open

court and that judicial officers must decide them solely upon evidence heard in open court in the presence of the accused. If that principle is violated, then, quite apart from the question as to whether the accused is manifestly guilty, the proceedings are bad because it might be supposed that justice was being administered in a secret manner instead of in open court. It is elementary that a judicial officer should have no communication whatever with either party in a case before him except in the presence of the other, and no communication with any witness except in the presence of both parties. For that reason the conviction must be set aside.” See also **S v Mmatli** 1988 (2) SA 533 (T) at 536F-537E; **S v Rousseau** 1979 (3) SA 895 (T) at 898A-899E and **S v Sejake** 1981 (1) SA 1215 (O).

4.3.If the prosecutor or the Magistrate deemed it vital to have the information, of what the District Magistrate imparted to the Regional Magistrate, on record they should have called for the record, duly proved. See section 235 of the Criminal Procedure Act, 51 of 1977. If the record lacked the required information either one of them could have called the Magistrate to testify on how precisely he explained the appellant’s rights to him. This would have enabled the appellant to cross-examine the Magistrate on disputed aspects and give rebutting evidence and/or call a witness, if so advised: See: **S v Ndlovu** 1987 (3) SA 827 (D) at 828E-I where **Page J** remarked:

“Counsel for the defence further contended that, once it was not clear from the record that the accused’s rights had been adequately explained to him, this shortcoming could not be rectified by viva voce evidence and that the statements recorded were inadmissible. It was likewise contended, on the strength of the authorities quoted, that the accused’s alleged admissions in terms of s 115(2)(b) of the Act were obtained by irregular means and were accordingly inadmissible. Further reliance was placed upon the fact that it did not appear ex facie the record that the accused was warned before making the admissions that he was under no obligation to do so.

It was not disputed by the State that the warnings and explanations recorded by the magistrate were insufficient to enable the Court to determine from the record alone whether the accused had been properly warned or apprised of his rights. It was further conceded that, in the light of this shortcoming, it would not be permissible for the Court to receive the record in evidence on the mere production thereof in terms of s 235. It was pointed out, however, that this was not what the State was asking the Court to do. What the State

was proposing to do was to prove the statement and admissions made to the magistrate by way of viva voce testimony of the magistrate, after laying the basis for their admissibility in that testimony.

*In my judgment, there is nothing in the decisions quoted nor in the Act itself which renders this procedure impermissible.” See also **Thole Olehile: Case No 833/2000** (Northern Cape) Delivered 15/09/2000, Unreported.*

4.4. In my view the whole cumbersome procedure could have been very easily resolved. All that the Regional Magistrate had to do was to explain the appellant's right to him afresh because it is his responsibility to ensure that the appellant was accorded a fair trial and not that of the District Magistrate. Logic and common sense dictates that even if the appellant elected to conduct his own defence in the District Court he may have undergone a change of mind. It must also have dawned upon the Regional Magistrate that if the charges merited the attention of the Regional Court then they ought to be serious. Unfortunately the Regional Magistrate could not have received the assistance of the prosecutor in terms of section 150 of the Criminal Procedure Act relating to the seriousness of the charges because it was inopportune and impermissible to have disclosed the appellant's encounters with the law previously. In fact the Regional Magistrate could even have taken the safe route to encourage the appellant to appoint a legal representative on private brief but if he was indigent then through legal aid funding. See: **S v Manale** 2000 (2) SACR 666 (NC) at 668h-672f; **S v Mbambo** 1999 (2) SACR 421 (W) at 426b-d; **S v Mabaso & Another** 1990 (3) SA 185 (A) at 203B-G and **S v Nkondo** 2000 (1) SACR 358 (W) at 360b-e.

5. In my view the Magistrate displayed an intemperate disposition because in his own words *“die hof tyd kan benut word vandag”*. He was not going to postpone the case, hence his failure to explain appellant's rights to him.
6. On another aspect the Magistrate misguided the appellant and may even have inhibited his cross-examination. When the appellant cross-examined Ms Sizeka Mgadana who said she saw the appellant as she was going home, not far from her parental home, bleeding from an arm and clutching it with the unaffected hand the Magistrate interrupted his very first question. The Magistrate also lost sight of the fact that the appellant was not only putting

his version to the witness but he also did what was to be done when pleading an alibi. These were the exchanges:

“Hof: Het u enige vra vir haar?”

Beskuldigde: Ja Meneer

Hof: Vra maar

Beskuldigde: Ek hoor Mevrouw sê, Mevrouw ken vir my. Hoe lank ken Mevrouw my?

Hof: Nee, sy’t gesê sy ken jou nie. Sy’t jou maar daar gesien toe jy verbyloop.

Beskuldigde: Nou, ek sê ek dra geen kennis van huisbraak, waar ek ingebreek het by die mense se huis nie.

Hof: Nee, maar, luister, sy’t nie gesê u het ingebreek nie. Kan u onthou? U’t mos nou geluister wat sy getuig het?”

7. The appellant’s question was incorrectly disallowed because the witness said in her evidence-in-chief that she knew the appellant.

“Staat: Ken u vir beskuldigde wat hier staan?”

Me Mgadana: Ja

Staat: Hoe ken u vir hom?

Me Mgadana: Nadat my broertjie geskree, vir my geskree het, het hy by (onhoorbaar) verby gegaan. Hy het vir my gekyk en ek het hom gekyk. Hy het sy hande so vasgehou, aan sy arm vasgehou, want hy’t gebloei.”

It was in fact the Magistrate who was inattentive.

8. On the 31st July 2000 my unreported judgment (**Majiedt J** concurring) viz **S v Siphso Makheta**, Case No 1070/99 (Northern Cape) was circulated amongst Magistrates in the Northern Cape. This was a wide ranging judgment dealing with how and why the rights of the accused must be properly explained to them and the proceedings properly recorded. The judgment also bears testimony to the efforts taken to guide Magistrates but more importantly to safeguard the rights of accused persons, more particularly the unrepresented ones. It is a long quotation that follows but it is excusable and meant to re-orientate some newly appointed Magistrates who also fall into lapses from time to time.

9. In the aforesaid judgment I remarked:

“A. Verduideliking van Beskuldigde se regte

- 1. Ek het onder andere die volgende navraag aan die betrokke landdros gestuur:*

“Wat was die presiese terme van beskuldigde se ‘regte met betrekking tot regsverteenvoordinging asook regshulp’ wat glo aan beskuldigde verduidelik is? Waarom kom hierdie terme nie in die oorkonde voor nie, soos die gesag bepaal?”

2. *Die landdros antwoord hierop as volg:*

“In die praktyd waar notules per hand afgeneem word, word die inhoud wat aan beskuldigde verduidelik word nie genotuleer nie. Die terme waarvan beskuldigde deeglik in kennis gestel was, was die volgende. ‘Dat u geregtig is om gebruik te maak van die dienste van ‘n regsverteenwoordiger van u eie keuse wat u kan bystaan met die verhoor. U kan ook gebruik maak van regshulp indien u nie oor genoegsame fondse beskik nie, m.a.w. u kan by die regshulpbeampte aansoek doen waarna ‘n regsverteenwoordiger vir u gratis aangestel sal word.’ Beskuldigde word ook meegedeel dat indien hy dit nie so verkies mag hy sy eie verdediging waarneem. Hierna word beskuldigde gevra of hy verstaan wat aan hom verduidelik is. Sy antwoord en sy keuse word hierna genotuleer soos wat die hof dit in die onderhawige saak wel gedoen het.”

3. *Die Staatsadvokaat aan wie die Direkteur van Openbare Vervolgings (DOV) die saak toevertrou het het hieromtrent die volgende mening op die reaksie van die landdros gelug:*

“4. Daar is ‘n magdom van beslissings wat bepaal dat ‘n beskuldigde se regte met betrekking tot regsverteenwoordiging en regshulp behoorlik aan hom verduidelik moet word. Dat dit wel gedoen is moet ook met voldoende besonderhede op die rekord aangeteken word.

S v Evans 1981 (4) SA 52 (KPA) op 58H; **S v Daniëls en ‘n ander** 1983 (3) SA 275 (A) op 299G-H; **S v Moos** 1998 (1) SASV 372 (K) op 379j.

5. *In **S v Evans**, wat eintlik handel oor artikel 115 van die Strafproseswet, sê Vivier R op 58H:*

‘Wat betref die formulering van die waarskuwing wat aan ‘n beskuldigde gegee moet word moet, na my mening, gewaak word teen ‘n te formalistiese benadering tav art 115. So lank daar by die verduideliking aan die aangeklaagde in gedagte gehou word die opmerking van **Hiemstra HR in S v M en Andere** (supra) ten opsigte van die karakter van die pleitverduideliking waarna ek heirbo verwys het, en mits aangeklaagde duidelikheid het aangaande sy regte, is die presiese wyse waarop dit aan hom duidelik gemaak word, nie van belang nie. Dat sy regte wel aan hom verduidelik is, moet natuurlik uit die oorkonde blyk; op so ‘n wyse en met voldoende besonderhede, dat beoordeel kan word of dit wel voldoende was.’

6. *In die onderhawige geval blyk dit uit die oorkonde dat die beskuldigde se regte met betrekking tot regsverteenwoordiging en regshulp wel verduidelik is, maar dat die ipsissima verba van die landdros nie op rekord geplaas is nie. Die landdros het bloot genotuleer dat die beskuldigde ‘in kennis gestel is*

van regte met betrekking tot regsverteenwoordiging asook regshulp'. Die notule bevat klaarblyklik nie voldoende besonderhede om ex facie die document self te bepaal of die verduideliking korrek en voldoende was nie." (My onderstropping)

4. *Daar bestaan geen sodanige praktyk in hierdie afdeling soos wat die landdros in paragraaf 3 (hierbo) voorhou nie. Die landdros het dit goed gevind om geen gesag vir sy standpunt aan te haal nie nieteenstaande my versoek dat hy dit moet doen nie. So ver my kennis strek is daar slegs vier of vyf ander landdroste wat hierdie ongewenste metode soos in die onderhawige geval gebruik. In **S v Moses Sebeela**: Saakno: CA&R 542/2000 (Kimberley), gelewer op 30/06/2000 (ongerapporteer) spreek ek myself as volg op 'n soortgelyke versuim uit:*

'The magistrate merely recorded that the rights of the accused concerning legal aid and legal representation were explained to him. The exact terms of what was explained are not reflected on record. The magistrate, to my query, justifies this procedural defect by stating that it is a longstanding procedure that has been followed. It is a wrong procedure which is strongly deprecated. It must be stopped forthwith. If the terms cannot be fully recorded manually due to time (constraints) a properly worded pro forma may be used and incorporated as part of the record.'

5. *In **S v Moses Sebeela** (supra) reageer hierdie selfde landdros soos volg op 'n navraag met dieselfde strekking:*

'Die beskuldigde is van al sy regte voor die aanvang van die verrigtinge verwittig. In my hof word konsekwent die volgende aan die beskuldigde verduidelik wanneer daar aangeteken word dat beskuldigde in kennis gestel word van sy reg op R/V en R/H: dat beskuldigde geregtig is om gebruik te maak van 'n prokureur van sy keuse. Indien hy nie fondse het mag hy gebruik maak van die dienste van 'n prokureur wat die Staat gratis aan hom sal verskaf. Dit word benadruk dat dit sy reg is. Hy word nie verplig nie en mag ook sy eie verdediging waarnaam as hy so verkies.'

6. *As die verduideliking van beskuldigdes se regte deur dieselfde landdros in die twee sake vergelyk word sal dit opgemerk word dat die wese van die verduideliking dieselfde is. Daar is niks verkeerd daarmee nie. Wat egter opvallend is is dat die bewoording nie dieselfde is nie. Die gevolgtrekking wat dus daaruit gemaak kan word is dat die landdros nie die regte uit 'n voorbereide dokument lees nie. Indien dit die geval is is dit vir my onverstaanbaar hoe die landdros in*

die onderhawige saak die verduideliking in aanhalingstekens plaas asof hy die einste woorde gebruik het en uit sy geheue onthou. Dit skep die verkeerde indruk.

7. Die versuim om die verduideliking van die beskuldigde se regte behoorlik te boekstaaf is ongewens en veroorsaak die volgende probleme:

7.1 Die navrae en die reaksies daarop neem onnodiglik waardevolle tyd van die landdros en die hersieningsregter(s) in beslag;

7.2 Die proses in par 7.1 hierbo neem gewoonlik 'n redelike lang tyd om af te handel. Hierdie vertraging kan tot nadeel van 'n beskuldigde strek veral waar die skuldigbevinding tersyde gestel word of die vonnis aansienlik verminder word.

7.3 In sommige gevalle was beskuldigdes se regte nie deur die verhoorlanddros self verduidelik nie. Die verhoorlanddros sal dus sy kollega wat die verduideliking gemaak het moet nader ten einde op die navraag of van die navrae te beantwoord. Dit kan vertraging of onoplosbare probleme veroorsaak soos, onder andere, hieronder in par 7.4 uiteengesit, waar 'n beskuldigde se insette noodsaaklik geag word.

*7.4 Die vraag ontstaan soms of sommige verduidelikings deur 'n landdros die rekord aanvul, alternatiewelik of die aanvulling op 'n eensydige rekonstruksie neerkom. My opmerking in **S v Patrick Mbuzwane**: Hiersieningsaakno 1050/99 (Kimberley): gelewer 30/06/2000 (ongerapporteur) op bls 5-6 is hier matuatis mutandis van toepassing:*

*'Landdroste moet versigtig wees om nie na willekeur 'n rekord aan te vul nie. Dit kom hier neer om rekonstruksie van die rekord wat ongeoorloof is. Dit benadeel ook die beskuldigde aangesien die rekonstruksie eensydiglik gedoen is. Dit is 'n growwe onreëlmatigheid. Daar bestaan goedgevestigde voorskrifte wat berus op **R v Wolmarans TPD 279** oor wat gedoen moet word om oorkonde wat onvolledig is in orde te kry. Sien ook **S v Joubert 1991 (1) SA 119 (A)**. Ek wil dan ook net onderskryf wat*

Pickard HR gesê het in In re Appeal: S v Stofile and Others 1989 (2) SA 629 (CK) op 630l:

'I find in practice that, by the time a judgment is submitted for revision, (one's) recollection of the case generally is often no longer clear enough ... to render a reliable contribution.'

Op 631F-H van die saak rig **Pickard HR** die volgende waarskuwing:

*'I do believe that, not only Judges but also magistrates, are, at times, required to revise judgments and have access to records of proceedings after their transcription but prior to the final certification and submission. Only fairly recently, in the case of **S v Visser**, heard in the Eastern Cape Division of the Supreme Court of South Africa at Grahamstown (unreported), a magistrate was convicted as a result of his having materially altered the records of the proceedings over which he presided prior to the matter being heard on appeal and having inserted facts and allegations that never occurred in his court. This conviction was confirmed on appeal by the Appellate Division in Bloemfontein. It seems to me that the temptation to which this magistrate succumbed could have been avoided if the recording contractors accepted the sole responsibility for which they are employed and presumably paid and if this magistrate was not given an opportunity to tamper with the record.'*

Ek wil nie hiermee voorgee dat die landdros iets onwettigs gedoen het nie. Maar ek kan ook nie verstaan hoe die landdros iets wat so belangrik is nie sal boekstaaf nie. Daar berus 'n plig op die landdros om 'n volledige record van sy hof aan te hou. Waar dit 'n handgeskrewe oorkonde is soos hier (en nie 'n meganiese opname nie) is daar geen sprake van die landdros se notas wat hy kan naslaan nie."

Sien verder **S v Kester** 1996 (1) SAVS 46 (B) op 473g - 474a waar **Friedman RP** himself so uitlaat:

(3) It is a salutary practice that the explanation of the rights of the accused by the presiding officer should appear on the record with adequate and satisfactory particularity to enable a judgment to be made on the adequacy thereof. See **S v Daniels en 'n Ander** 1983 (3) SA 275 (A); **S v Modiba** 1991 (2) SACR 286 (T) per **Goldstein J** at 286i-j.

(4) The aforesaid duty resting upon a magistrate cannot and should not be delegated to an interpreter. It is the duty of the magistrate. See the remarks of **Eloff AJP** (as he then was) in **S v Mahooa** 1991 (1) SACR 261 (T) at 264a-f.

(5) If roneod forms are used, care should be taken to ensure that the said forms contain all the necessary explanations, together with the import thereof. In some cases, an accused has to be informed of special defences and presumptions. The court must also be alerted to, and cognizant of the fact, that the circumstances of a case may require that more be explained to an accused by the magistrate than what is contained in the said roneod form. In addition to the foregoing, a magistrate should ensure that the accused understands what he has been informed of by a question or statement confirming the same. See the remarks of **Eloff AJP** in **S v Mahooa** (supra at 264f-h).

In breë trekke is die voorafgaande die gesonde praktyk en nie die praktyk waarvan die landdros melding gemaak het nie.

7.5 Die versuim om behoorlik 'n beskuldigde se regte te

*notuleer kan in sekere gevalle ongelukkig tot die tersydestelling van 'n skuldigbevinding en vonnis lei waar twyfel bestaan en moontlike skuldiges laat loop moet word. Sien: **S v Moos** 1998 (1) SASV 372 (K) op 380h-j.*

8. *Gedagtig aan alles wat hierbo bespreek is sal ek nietemin die landdros se verduideliking met groot teensinnigheid aanvaar. Die landdros en die ander paar van sy kollegas wat sy werkswyse volg moet dit onverwyld staak en die korrekte praktyk, soos in die aangehaalde gesag, volg."*

10. Hard as I may have tried, I could not fathom why some magistrates seem to prefer that accused prosecute their own defences. I find it to be extremely burdensome because not only must the accused's rights be explained to him at all appropriate stages, which could number over thirteen to the conclusion of the trial, but the Court also has a duty to assist the unrepresented accused who is out of his depth. Failure to do that may lead to the result that will follow. At the inception of the trial the prosecutor informed the Court that two fingerprint experts will be called. See para 3 of this judgment. The alarm bells should immediately have alerted the Magistrate that the appellant was unlikely to wrap his mind around the very intricate impending evidence of these experts and should have warned and encouraged him that a legal representative will serve his interests better. This is a further failure on the part of the Regional Magistrate. See **Shabalala & Others v Attorney-General of TVL & Another** 1996 (1) SA 725 (CC) at 740H-741G and cases quote in para 4.4 of the judgment at hand.

11. On a different matter: I do not know on what basis the Magistrate discriminated against Mrs Fourie and the appellant in addressing them. For example at p16 line 10 of the record he enquired from Mrs Fourie: "*Het u versekering gehad?*" Thereon the same page a mere seven lines later he address the appellant contemptuously and disrespectfully as follows: "*Goed. Beskuldigde, het jy enige vrae vir die dame?*" (Sight should not be lost of the fact that Regional Court Magistrate S O du Plessis is Afrikaans speaking):

11.1. In 1988, long before the democratic South African Constitutions were ushered in **S v Gwebu** 1988 (4) SA 155 (W) at 158F-G **Goldstone J**

warned:

“It is perhaps as well also to say something about the habit which a number of magistrates, and some prosecutors in the magistrate's courts, have developed in recent years, of addressing accused persons by the appellation 'accused' or 'beskuldigde'. And, one sees, too, in many records that some magistrates (not in this case) refer to witnesses as 'witness' or 'getuie'.

This depersonalising of people is disrespectful and degrading. It is no cause for difficulty for people to be called by their proper names. I can find no reason for the appellant, in this case, when addressed directly by the magistrate, not being called 'Mr Gwebu'. Members of the public who appear in our courts, whether as accused or as witnesses, are entitled to be treated courteously and in a manner in keeping with the dignity of the court.”

11.2. In **S v Malatji & Another** 1998 (2) SACR 622 (W) at 624b-d **Cameron J** (as he then was) cautioned:

“Both appellants were unrepresented. After the prosecutor put the charges to them, the magistrate asked them what they pleaded. In doing so, and throughout the record, he referred to them with the familiar form of the Afrikaans personal pronoun, 'jy' and 'jou'. In a formal context this is not merely inappropriately familiar, but discourteous to the accused. Such language is in any event inconsistent with the dignity and propriety which is required of a judicial officer. If judicial officers expect the dignity of their office to be recognized and respected by those appearing before them, they must conduct themselves with the reciprocal courtesy appropriate to that expectation.”

See further **S v Abrahms & Another** 1989 (2) SA 668 (E) and **S v Kok: Case CA&R 162/99**, (Northern Cape) Delivered 08/09/2000, Unreported.

12. Neither Adv A T Medupe of the Justice Centre, Kimberley, instructed by the Legal Aid Board nor Adv M Mpofu, State Counsel, dealt with these irregularities in their Heads. However, both agreed that the irregularities are of such a material nature that it cannot be argued with any measure of justification that the irregularities did not vitiate the fairness of the trial.
13. As far as the merits are concerned the appellant is “dead in the water”. He was linked to the crime scene through his finger and palm prints. Both offences were committed in the same vicinity on the 4th and 11th of April 2002. The *modus operandi* appears to have been the same and although there was no DNA testing done, the appellant clearly injured himself whilst gaining entry into the house of Ms Mgadana. It is a great pity that he must now walk free through the Magistrate’s aforesaid ineptitude. The appellant is a serial thief and a habitual criminal, having regard to his

criminal records. It is probable that he will strike again in due course whereas the community should have been rid of him for some 7 - 15 years. This court can unfortunately not come to the society's rescue under these circumstances: See **Carmichelle v Minister of Safety and Security** 2001 (4) SA 938 (CC) and **Minister of Safety and Security v Carmichelle** 2004 (3) SA 305 (SCA).

Order:

In the result the appeal succeeds on a technicality. The conviction and sentence are set aside.

**F D KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION**

I concur:

**P L TLALETSI
JUDGE
NORTHERN CAPE DIVISION**

**For the Appellant: Adv A T Medupe
On behalf of: Legal Aid Centre, KIMBERLEY**

**For the Respondent: Adv M Mpofu
On behalf of: Director of Public Prosecutions, KIMBERLEY**