

UNIVERSITY OF ZULULAND

**AN UNFAIR TRIAL WITH SPECIAL
REFERENCE TO IMPROPER
SPLITTING OF CHARGES**

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TO IMPROPER SPLITTING OF CHARGES**

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**THE DISSERTATION IS SUBMITTED TO THE FACULTY OF LAW
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(i)

PREFACE

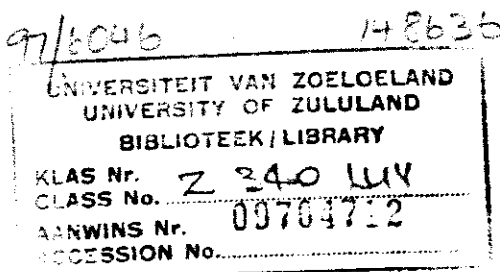
I would like to thank and express my sincere appreciation to Professor A E B Dhlodhlo, my supervisor, for his encouragement and assistance in binding and compiling this work.

Thanks to my relatives and friends whose words of encouragement and help made this research effort possible. I would like to thank Mrs S J Clarke of the University of Zululand who managed to read my handwriting.

I gratefully thank my children Mondli, Nqobile and Sanele for their patience when the dissertation took their place in my life.

Fikile Gladys LUVUNO

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DEDICATION

This dissertation is dedicated to my mother, my late father and my children, Mondli, Nqobile and Sanele.

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SUMMARY

In this work the candidate discusses improper splitting of charges which is a problem in our criminal courts.

The candidate starts by defining improper splitting of charges and then discusses its origin and guidelines which are followed by our courts in determining whether or not a charge has been split.

Reference is made to the provisions of Chapter Three of the interim Constitution of the Republic of South Africa which provides, among others, that an accused person is entitled to a fair trial. The right to a fair trial includes the right to have recourse by way of appeal or review and to legal representation. The candidate discusses these rights.

Numerous reported and a few unreported cases have been discussed. In these cases courts tested the facts of the cases against the tests and guiding principles. In most of them it was found that splitting of charges was improper. In many cases judges stress that improper splitting of charges results in the duplication of punishments.

In chapter four of this work the meaning and interpretation of a fair trial is discussed.

In the concluding chapter some recommendations are made.

ABBREVIATIONS

A	—	Appellate Division
B	—	Bophuthatswana Division
C	—	Cape Division
CC	—	Constitutional Court
CGD	—	Ciskei General Division
CPD	—	Ciskei Provincial Division
E	—	Eastern Cape
EDC	—	Eastern Cape Division
EDL	—	Eastern Local Division
J	—	Judge
JP	—	Judge President
JA	—	Judge of Appeal Court
N	—	Natal
NC	—	Northern Cape
O	—	Orange Free State Division
PH H	—	Prentice Hall Decisions
RA	—	Rhodesian Division
R	—	Rex
S	—	State
SA	—	South African Law Report
SALJ	—	South African Law Journal
SACR	—	South African Criminal Report
SR	—	South Rhodesian Division
SW	—	South Western Division
T	—	Transvaal
TK	—	Transkeian Division
TPD	—	Transvaal Provincial Division
V	—	Versus
ZRA	—	Zimbabwe-Rhodesia Appellate Division

CHAPTER 1

1. INTRODUCTION

1.1 WHAT IS IMPROPER SPLITTING OF CHARGES?

The case of *Ex parte Minister of Justice: In Re Rex v Moseme*¹ is the leading case on this topic. According to this case the inception of this rule of practice is to be found in the case of *Regina v Marinus* which was decided in 1887.²

It was in this case that the phrase "splitting of charges" was first used.

In his judgment Buchanan J said that it was an "objectionable practice" to split charges, and so enable the magistrate to impose punishment, in the whole, far in excess of the limit of the jurisdiction conferred upon him by the Legislature.³

In *Moseme case*⁴ De Villiers JA said that it was apparent that both in the magistrates' court and in the court a quo, namely the Transvaal Provincial Division there had been a confusion of two

1. 1936 AD 52.

2. At 58.

3. Ibid.

4. Supra note 1.

entirely distinct subject matters, namely, splitting of charges and the plea of *autrefois acquit*. The learned judge of appeal said that there is a wide and essential distinction between the two matters. He said that splitting of charges can only arise in a case where an accused is charged in one and the same trial with several offences arising out of the same act, or connected series of acts or transactions.⁵ It is immaterial whether an accused is charged with such several offences in two or more courts of one indictment, or in two or more separate indictments. In such a case the accused person can raise the question of splitting of charges but can obviously not plead *autrefois acquit*.⁶

The rule does not owe its origin to an application of the maxim *nemo debet bis vexari pro una et eadem causa*.⁷

The facts of this case are as follows:

An African woman by the name of Meriam Moseme, hereinafter referred to as the accused, was tried with seven other African women before a magistrate's court on a charge of having contravened s 35 of Ordinance 26 of 1904 (Transvaal), in that she and the other women had wilfully obstructed certain police

5. Ibid.

6. Ibid.

7. Ibid.

officers in the execution of their duties by attempting to rescue one Johannes Moseme who had been arrested and was being transported to a police station by the said police officers. The evidence disclosed further that, in addition to attempting to prevent the arrest and to rescue Johannes Moseme after he had been arrested, the said accused at or about the same time and place, struck one of the police officers on the head with a shovel, thereby inflicting a serious bodily injury on the said police officer.

The magistrate acquitted the accused and her co-accused on the ground that the police officers had no lawful authority to arrest Johannes Moseme. After she had been acquitted the accused was again brought to trial in the same magistrate's court on a charge of assault with intent to commit grievous bodily harm in that she had struck the police officer, one Gustav Molife, on the head with a shovel with intent to do him grievous bodily harm.

To this charge the accused pleaded *autrefois acquit*, relying upon her acquittal on the previous charge of obstructing the police.

It appears that the accused's attorney, after arguing on the plea of *autrefois acquit*, also argued that, in the alternative, there was an unlawful splitting of charges.

The magistrate overruled the plea of *autrefois acquit* on the

ground that there had been no splitting of charges after which the trial proceeded and the accused was found guilty of assault with intent to do grievous bodily harm. She was sentenced to a fine with imprisonment as an alternative. On review the reviewing judge directed that the case be argued before the full Bench of the Transvaal Provincial Division which came to the conclusion that there had been an improper splitting of charges and that on that ground, "the conviction was bad."⁸ The conviction was set aside.

Having doubt as to the correctness of the judgment, the Minister of Justice submitted the case to the Appellate Division under the then s 388 of the Criminal Procedure and Evidence Act.⁹

After referring to several sources affecting aspects of splitting of charges and *autrefois acquit*, De Villiers JA concluded as follows:

"In answer to the question of law submitted by the Minister ... whether the conviction of the accused of assault with intent to do grievous bodily harm was correctly set aside by the court *a quo* on the ground that there was an improper splitting of charges, the opinion of this court is that it was not correctly set aside on that ground, inasmuch as there was no splitting of charges and therefore no improper splitting of charges."¹⁰

8. At 56.

9. 31 of 1917.

10. At 60 and 61.

In this case ¹¹ it was argued that the principle underlying the doctrine is not that the accused shall not be punished twice, but that he shall not be harassed twice. ¹²

The defence of *autrefois acquit* applies only if the indictment was correct and the acquittal was on the merits of the case. ¹³

If acts constituting one offence in substance were allowed to be split up into several offences and such offences charged against the accused in one trial, the effect would naturally be to multiply by several times the magistrate's jurisdiction in regard to imposing punishments. In practice the courts have met with a difficulty in deciding the accused's conduct whether in a particular case the accused's conduct constitutes only one offence in substance. ¹⁴

There is no general test when a formula has been set to enable the courts to say when an offence is in substance the same and when not. ¹⁵

Where the evidence necessary to support the one charge could

11. *Moseme supra.*

12. At 54.

13. At 60.

14. *Moseme case supra.*

15. *Rex v Gordon* 1909 EDC 254.

likewise support the other, then the offences charged into two counts differed in their elements. They are separate and distinct offences even if they relate to one transaction.¹⁶

For another prospection of this matter, attention must be given to s 83 of the Criminal Procedure Act¹⁷ which provides that ... if by reason of any uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any of such offences, and any number of such charges may be tried at once or the accused may be charged in the alternative with the commission of any number of such offences.

Save where otherwise indicated, section shall refer to that of the Criminal Procedure Act.

In general it is essential that presiding officers and other officials, especially where the accused is not represented, carefully examine the charge before the accused is called upon to plead.

In regard to the predecessor of s 83 the court remarked as follows

16. *Rex v Johannes* 1925 TFD 782.

17. 51 of 1977.

in *S v Grobler*.¹⁸

"The result of this section ... is that the State is at liberty to draw up as many charges as the available facts justify."

When a prosecutor draws up a charge sheet or indictment he or she relies on the information in the docket.

The effect of s 83 is therefore, *inter alia*, that at the commencement of the trial no objection can be made to the charge, but the question of splitting of charges can only arise if the several offences are charged in one and the same trial. In such a case the accused can raise the question of splitting of charges but he cannot plead *autrefois acquit or convict*.¹⁹

In *S v Grobler*²⁰ Wessels JA remarked that the section has, no doubt, drawn a veil across taking of exceptions of a technical nature directed to the formulation of charges.²¹

The *obiter dictum* in *S v Nomga*²² cannot be supported, where the court, referring to the charge sheet as it was at the commencement of the trial, remarked as follows:

18. 1966 (1) SA 507 (A) 513F.

19. At 513G.

20. *Supra*.

21. At 522E.

22. 1984 (3) SA 79 (N).

"Clearly the charge sheet as framed was objectionable inasmuch as there was an improper splitting of charges having these two stand as main counts respectively." ²³

The two counts were:

- (1) a contravention of the then s 138 (1) of Ordinance 21 of 1966 - reckless and/or negligent driving, and
- (2) a contravention of the then s 140 (1) (a) of Ordinance 21 of 1966 - driving under the influence of liquor.

There is no obligation on the State to indicate at the close of the State case which of the charges the state wishes to proceed with. ²⁴

When the accused is charged with a main count together with alternative counts, the State only requires a conviction on an alternative count, if the main count is not proved. ²⁵

Where more than one charge is proved, the court will convict on the charge which the facts best suit. ²⁶

In *R v Zechlin* ²⁷ the court remarked as follows:

23. At 80G.

24. *S v van Zyl* 1949 (2) SA 948 (c) 950.

25. *S v Grantham* 1953 (4) SA 663 (N) 666.

26. Kriegler J: Hiemstra - Suid-Afrikaanse Strafproses 5 uitg (1993).

27. 1955 (1) SA 651 (N).

"In the result I come to the conclusion that when a magistrate has before him evidence which established both of two alternative counts, it is open to him to convict on either subject to prosecutors right to withdraw on any count." ²⁸

In *S v Langa* ²⁹ the accused was charged in the magistrate's court with contravening s 2 (a) of the then Abuse of Dependence-Producing Substances and Rehabilitation Centres Act ³⁰ dealing in four kilograms of dagga or, alternatively, with contravening s 2 (b) of the same Act - possession of the same quantity of dagga.

The accused pleaded not guilty to the main count but guilty to the alternative count. The magistrate then questioned him on the alternative count in terms of s 112 (1) (b) of the Criminal Procedure Act ³¹ and the accused admitted possession of dagga for his own use. After the questioning the prosecutor informed the court that he did not intend leading evidence on the main count and submitted that the accused was guilty of contravening s 2 (a) as he had not rebutted the onus of presumptions in s 10 (1) (a) (1) of the Act.

In the present case the counts were not presented in such a way as to indicate that the prosecutor would only seek a conviction on

28. At 653F.

29. 1985 (3) SA 833 (N).

30. 41 of 1971.

31. *Supra*.

the alternative counts and the court might convict the accused thereon.³²

When a trial court has found an accused not guilty on a main charge, but guilty on an alternative charge, the court of appeal can reverse the finding and convict the accused on the main charge.³³

If an accused is convicted on the main count, a judgment on the alternative count is unnecessary.³⁴ If, however, a trial court wishes to convict on a third alternative, a verdict should first be given on the main first and second alternative counts, before the accused is convicted on the third alternative count.³⁵

It is unnecessary, in fact it is superfluous where a competent verdict exists in respect of a particular offence, to charge the competent verdict as an alternative on the charge sheet.³⁶

Any number of charges in the same proceedings against an accused can be joined at anytime before any evidence is led in respect of any particular charge and to number each charge

32. At 837J.

33. S 309 (3) of the Criminal Procedure Act, *S v Motha* 1987 (1) SA 374 (T), *S v du Tait* 1966 (4) SA 627 (A) and *S v Ngcobo* 1980 (1) SA 579 (B).

34. *S v du Tait* and *S v Ngcobo* *supra*.

35. *Ibid*.

36. *R v Sebeko* 1956 (4) SA 618 (O) and *R v M* 1959 (3) SA 332 (A).

consecutively.³⁷

The question arises whether this applies to alternative charges since s 81 does not specifically refer to such charges and the fact that charges joined in terms of s 81 (1) of the Criminal Procedure Act must be numbered consecutively, may create the impression that alternative charges may not be joined.³⁸

Alternative charges may be joined in terms of s 83 of the Criminal Procedure Act if it is doubtful which of several offences is constituted by the facts.

If this doubt exists at the time s 81 (1) is utilized, there appears to be no good reason why alternative charges cannot be joined. It is submitted that alternative charges can also be joined in terms of s 81 (1).³⁹

Another question that arises is whether the joinder provided for in terms of s 81 (1) can take place after questioning in terms of s 112 (1) (b) or when s 115 has been concluded. The answer to this question depends on the meaning attached to the word "evidence" in s 81 (1). If the answers to the questions in terms

37. S 81 (1) of the Criminal Procedure Act.

38. *R v M* supra.

39. *S v Ngcobo* supra.

of s 112 (1 (b) or 115 are regarded as "evidence" no further charges may be added.⁴⁰

Section 336 of the Criminal Procedure Act provides that ... where an act or an omission constitutes an offence under two or more statutory provisions or is an offence against a statutory and the common law, the person guilty of such act or omission shall, unless the contrary intention appears, be liable to be prosecuted and punished under either statutory provision or, as the case may be, under the statutory provision or the common law but shall not be liable to more than one punishment for the act or omission constituting the offence.

It is clear that the legislator is referring to the position where two offences are constituted by the same fact or omission. The fundamental principle is that the accused is not to be liable to more than one punishment for an act or omission constitution more than one statutory offence or a statutory as well as a common law offence.⁴¹

In the *Diab*⁴² case the accused was convicted of begging, working or holding a claim without a licence on or about the 23rd of July.

40. *S v Whitby* 1980 (2) SA 911 (N) and *E du Toit et al* op cit 14-1.

41. *Hiemstra* op cit 884.

42. 1924 TPD 337.

Thereafter the same accused was charged, with and convicted of being in unlawful possession on or about the 23rd July of two rough and uncut diamonds. There was no evidence that the illegal working of the claim for which the accused had already been convicted, had resulted in the production of these two diamonds.

It was held that where an act constitutes an offence under two statutes, the offender shall only be liable to be punished once. The court further held that there had been no unlawful splitting of charges.⁴³

We are aware that every person has a right to a fair trial and to be informed with sufficient particularity of the charge.⁴⁴

“The right to be informed with sufficient particularity of the charge being a constitutional right requires strict compliance.”⁴⁵

From the moment an accused person is put in the dock up to the stage when he is sentenced, every procedure must be adhered to strictly.

The splitting of charges and the duplication of convictions must

43. At 338.

44. S 25 (3) (b) of the Interim Constitution Act of the Republic of South Africa 200 of 1993. The final constitution is not yet in operation but it contains this provision.

45. Cachalia A *et al* *Fundamental Rights in the New Constitution* 1 ed (1994) 85.

be avoided at all cost.

1.2 TESTS TO BE APPLIED TO DETERMINE WHETHER OR NOT THERE HAS BEEN IMPROPER SPLITTING OF CHARGES

Since there is no general rule regarding the splitting of charges, in my work reference will be made to the work of J C Ferreira. In the *Moseme*⁴⁶ case it was said:

“... that where the accused has committed only one offence in substance, it split up and charged against him in one and the same trial as several offences.”⁴⁷

The question of tests has also been introduced to determine whether or not a charge has improperly been split.

There are two tests that have been adopted as major ones and that they can be used conjunctively or separately. When a charge sheet comprises of two separate charges that exhibit improper duplication, the prosecution must choose which one he prefers and which one he abandons.⁴⁸

The leading case as far as the test issue is concerned is *S v Grobler*⁴⁹ where a number of authorities are found in support of

46. Supra.

47. At 59.

48. J C Ferreira *Strafprosedreg in die Laer Howe Uitg* (1979) 276.

49. Supra.

each test.

The first test is the single intent or continuous transaction test.

This test is based on the enquiry into the nature of the criminal acts.

The second test is the general test which sets out the material facts which must be proved in order to establish each count and considers whether the same evidence will establish the material facts on more than one of the counts.

In *R v Seromele*⁵⁰ de Wall JP followed *R v Johannes*⁵¹ decision to the effect that two tests can be used to determine whether there has been an improper splitting of charges.

In this case⁵² the accused was firstly charged with an offence of pretending to be a policeman and secondly with theft from the person to whom he had so pretended. The accused was convicted and sentenced separately on both charges.

The court held that there had been no improper splitting of charges. It was further held that if the accused had been charged with robbery instead of theft, there would have been an improper

50. 1928 TPD 364.

51. 1925 TPD 782.

52. Ibid.

splitting of charges.

In *R v van der Merwe*⁵³ the court held that the question as to which test is to be applied depends on the circumstances of each particular case.

In *R v Johannes*⁵⁴ the court held that these tests are not rules of law but useful practical aids which can be employed to determine whether or not there is substantially an offence.

The tests discussed in *R v Gordon*⁵⁵ were:

- (a) whether the offences were committed with a single intent and were part of one continuous transaction or
- (b) whether the offences differed from one another in their elements and whether the same evidence was necessary to prove both or all offences.

In *R v Tau*⁵⁶ the court held that both tests, or one or the other might be applied, depending on the circumstances of each particular case.

53. 1921 TPD 1.

54. Supra.

55. 1909 EDL 254.

56. 1924 TPD 150.

In *R v Kuzwayo*⁵⁷ it was held that these tests are not rules of law but are just practical guides and can be applied in a common sense view of the matter and what could be regarded as fair to an accused person in a particular case.

In *R v Verwey*⁵⁸ the court held that the multiple convictions constituted a misdirection and that the appellant should be convicted on the main charge and not also on the alternatives.

It was further said that the court appears to have a discretion to apply such tests as it deems fit including either of the above two tests in deciding whether or not there has been a splitting of charges and it should pay heed primarily to the question of prejudice to the accused if there were to be a possible duplication of convictions. This would infringe the accused's rights to a fair trial.

In *R v Strauss*⁵⁹ the question of the general test was discussed that even if the introductory words of the charge mentioned on the offence not known to the law, the charge can stand if the body of it clearly sets forth the essential elements of the offence the charge is intended to lay and clearly informs the accused what

57. 1960 (1) SA 340 (A).

58. 1968 (4) SA 683 (A).

59. 1952 (1) SA 157 (SW).

charge he has to meet.

1.3 INTERESTS TO BE PROTECTED IN THE SPLITTING OF CHARGES

The disadvantages suffered by an accused as a result of a duplication of convictions are obvious. In the first place a duplication of convictions upon charges to which compulsory sentences apply would particularly prejudice an accused.⁶⁰

Further, a magistrate's punitive jurisdiction may be artificially increased by splitting up a continuous transaction which actually consists of only one crime and charging him or her of each of the fragments.

Such a splitting of charges and of convictions would lead to a magistrate imposing sentences which collectively would exceed the maximum penalty which could have imposed if the accused had been convicted of one offence.⁶¹

Notwithstanding the fact that an accused received a heavier sentence than would be the case if there were not a duplication of convictions, the duplication of charges is misused when a magistrate is allowed in a roundabout way to impose a sentence

60. E du Toit *et al* op cit 14-6.

61. *S v Mutawarira* 1973 (3) SA 901 (RA) 905.

which the legislature had not authorised him to impose.⁶²

An accused may be further prejudiced by a duplication of convictions in that the form of the sentence in a subsequent case against him is made dependant upon the number of previous convictions which the State proves against him.⁶³

In such a case it would be of no use to him that the court in a previous case had taken together for the purposes of sentence the two or more contraventions of which he had been found guilty or because of the overlap between the two offences had punished more lightly than would otherwise have been the case.⁶⁴

1.4 WHY I HAVE CHOSEN THIS TOPIC

I am a public prosecutor by profession. My duties includes, *inter alia*, prosecuting in criminal courts. I feel obliged to make a contribution to this controversial topic which relates to a fair trial. It must not matter whether an accused in a criminal trial is legally represented or not.

He or she must be subjected to a fair trial. Not all accused persons are versed with the law and procedures to be followed in

62. *S v Grobler* supra 517.

63. At 523D.

64. *E du Toit et al* op cit 14-5.

courts but there are still those who see no need to engage the services of legal representatives.

By stressing a fair trial I mean that every accused person must be dealt with in accordance with justice in a criminal court. It is the duty of the public prosecutor to see to it that a proper charge is put to an accused person before such person can be expected to plead.

In most cases the person who is entrusted with the drafting of charge sheets or indictments will not, prior to the trial, be certain which facts will be accepted by the court as proven.

In *S v Grobler*⁶⁵ it was held that it is the task of the court to see to it that an accused is not convicted of more than one offence if the crimes with which he is charged in the relevant charges rest on the same culpable fact. In short, it is the court's duty to guard against a duplication of convictions and not the prosecutor's duty to refrain from the duplication of charges.⁶⁶

It has been said that the term "splitting of charges" appears, in the context to be a misnomer, as the purpose of a principle involved in a splitting of charges is not to avoid multiple

65. *Supra.*

66. At 513E-H.

convictions in respect of the same offence but duplication of convictions.⁶⁷

If the charges have been duplicated the convictions might be duplicated or multiplicated and that will amount to injustice.

Numerous cases that I shall refer to will show that some presiding judicial officers are unable to detect that a charge has been improperly split. Were it not for the fact that some proceedings of lower courts are automatically reviewable by the Supreme court, some convicted and sentenced accused persons would have been wrongfully convicted and sentenced as a result of improper splitting of charges.

The unfortunate position is that of a case which falls in the category which is not automatically reviewable. In such instances a splitting of charges is not discovered and the accused persons suffer as a result.

It is these considerations that have prompted me to investigate this topic.

The main source of this topic is case law. For this reason I shall rely heavily on the judgments of our courts.

67. *S v Tantsi* 1992 (2) SACR 333 (TK) 344F.

CHAPTER 2

2. GUIDING PRINCIPLES IN THE DETERMINATION OF DUPLICATION OF CHARGES AND CONVICTIONS

2.1 GENERAL DISCUSSION

In the absence of any founded principle about the duplication of convictions it is very difficult to determine whether or not a duplication has occurred.¹ There are a number of offences which differs in their facts and, as a result, it is not too easy to develop a single guiding principle which would apply to all circumstances. In the preceding chapter a brief reference was made to these guiding principles.

There is no fixed test that is laid down by our courts whether an accused's criminal conduct gives rise to one or more offences. In *S v Kuzwayo*² the accused was found in possession of a pistol which he had stolen earlier. He was convicted of both theft and the unlawful possession of the pistol. The court described the "intent" and "evidence" tests as mere aids, and without applying either of the tests, found that there was no splitting.

1. E du Toit *et al Commentary on the Criminal Act* 1 ed (1993) 14-6.

2. 1960 (1) SA 350 (A).

It was said:

“even if this offence (the theft) in law continent after the *contrectatio* as long as the accused remained in possession of the pistol the actual offence he committed after he had stolen the pistol, until it was found in his possession on the 10th, was the unlawful possession of the pistol without a licence. Two separate offences were committed and no reason exists not to deal with it as two.”³

From the decision of *S v Kuzwayo*⁴ it was summed up as follows:

“that concerning this question of duplication, each case must be decided on the basis of sound reasoning and the court’s perception of fairness.”

In *S v Mavuso*⁵ the accused was convicted in a magistrate’s court on two counts of culpable homicide involving two people who died whilst they were passengers in a motor vehicle which the accused was pushing to the right hand side of the road when it was hit by an oncoming vehicle. The court held that the accused should have been convicted of only one count of culpable homicide and that convictions as recorded by the court *a quo* were to be set aside and a single conviction be substituted.

The other important factor on the examination of the duplication

3. At 334D.

4. *Supra*.

5. 1989 (4) SA 800 (T).

of convictions is the definitions of those crimes in which duplication had taken place.

In *S v Rankolane*⁶ the accused stole at the same time and place, two oxen belonging to K and a cow belonging to P. He was convicted of two counts of theft. By applying the "intent tests", it was held that there was splitting since there was a single intent to steal.

In *S v Koekemoer*⁷ the accused stole items belonging to five different owners at the same time from a changing room. He was convicted of five counts of theft. On review the court followed the *Rankolane*⁸ decision and found improper splitting to have taken place.

Another logical point of departure for an examination of the duplication of convictions can be made from an analysis of the elements of a crime.⁹

In *S v Mampa*¹⁰ the accused was convicted on two counts of culpable homicide arising from a motor accident in which two

6. 1931 EDL 159. See also *S v Majola* 1973 (4) SA 58 (O).

7. 1956 (2) SA 140(E).

8. *Supra*.

9. E du Toit *et al* op cit 14-6.

10. 1985 (4) SA 633 (C).

people were killed. The "intent test" could not be applied and the court held that:

"... the single evidence test cannot be regarded as decisive." ¹¹

The court found that there had been splitting on the following ground:

"In relation to the death of both passengers the accused's conduct was the same as his negligence and constituted in our opinion one offence in substance." ¹²

According to the reported decisions involving culpable homicide cases it has been held that where two deaths result from one motor collision caused by the negligence of the accused it is an improper splitting of charges if the accused is charged with as many counts as the number of the deceased persons. ¹³

Where a person intentionally causes the death of more than one person, it is trite law that he is guilty of as many charges of murder as there are persons killed. ¹⁴

11. At 640D.

12. At 640E.

13. *S v Mavuso* supra. See also *R v Chamboko* 1964 (1) PH H69 (SR), *S v Nomen* 1978 (2) PH H209 (E) and *S v Erasmus* 1983 (1) PH H57 (O).

14. *R v van der Merwe* 1921 TPD 1 at 5.

In *S v Mampa*¹⁵ a detailed exposition of the situation regarding murder is given where the accused was charged with two charges of culpable homicide, both arising from a motor accident. The accused was also charged with the third count of driving such motor vehicle without a driver's licence. The accused pleaded guilty to all three counts.

The accused admitted that it was through his negligence that the vehicle went out of the road and collided with a tree. In that collision two passengers were killed. For the purposes of sentence the trial court took two counts of culpable homicide together and imposed a single sentence. The fact that two counts were treated as one for the purpose of sentence did not cure the prejudice of an improper duplication of convictions.

The question that was argued on review was whether the accused was properly convicted on two counts of culpable homicide and it was ordered that the charge sheet be amended by the deletion of two counts of culpable homicide and one of culpable to be framed to include both deceased.

The same exposition is also found in *S v Grobler*¹⁶

15. *Supra*.

16. 1966 (1) SA 507 (A) 513.

In *S v Polelo*¹⁷ the accused stole goods from two complainants who lived in the same room. It was one act and one intent and therefore only once theft, even if the accused was aware that the property belonged to two different persons. In my view in such a case the accused should be convicted on two counts because he was aware that the items stolen belonged to two people.

In *S v Kahn*¹⁸ the accused was convicted of

- (1) hunting game without a licence,
- (2) hunting of game by means of an artificial light, and
- (3) trespassing on land on which game is found.

On appeal Counsel for the defence contended that there was splitting of charges based on the "intent" test. The court however, applied the "evidence" test and held that there was no improper splitting.¹⁹

Broome J stated:

"In applying the evidence test I do not think that it is necessary to go beyond the bare material facts which

17. 1981 (2) SA 271 (NC).

18. 1949 (4) SA 868 (N).

19. At 870.

must be proved in order to establish each count.”²⁰

In *S v Pieterse*²¹ the accused abducted a nine-year-old girl, raped her and in the process throttled and injured her to such an extent that she died. He was convicted of rape and murder and sentenced to death on each count. The intention to rape and the intention to murder were found to be completely different.²²

The same difference in intent is found in armed robbery cases where the victim is fatally wounded.²³

In *S v Mbonambi*²⁴ the court held that the acts charged under the two acts were done with a single intent and the evidence on one was so inter-related with the evidence on the other that an improper duplication of convictions had occurred.²⁵

The same view was held in *S v Diedericks*.²⁶ In this case²⁷ the appellant was charged with dealing in dagga, alternatively possession thereof, and with dealing in Mandrax, with a similar alternative. The appellant pleaded guilty and was convicted of two

20. Ibid.

21. 1982 (3) SA 679 (A). See also *S v N* 1979 (3) SA 308 (A).

22. At 688D.

23. *S v Grobler* supra.

24. 1986 (3) 839 (N).

25. At 848F.

26. 1984 (3) SA 814 (C).

27. Ibid.

counts and convictions were not taken as one for the purposes of sentence. On appeal what was argued was whether there had not been a duplication of convictions.

Counsel for the Appellant held that both cannabis and methaqualone are prohibited dependence-producing drugs and therefore dealing in both these substances is occasioned as one transaction with a single intent.²⁸

Although it provides no solution to the problem, mention must be made of *S v Makazela*²⁹ wherein the following was said:

"In some cases even if there has been a technical splitting of charges, the mischief of this can be met by the expedient of treating all the counts as one for the purposes of sentence, and prejudice to the accused may be thereby avoided."³⁰

But in the very next sentence the court warns that this is, however, frequently not the case where the number of previous convictions has a relevant bearing upon the future punishment to which an accused may become exposed.

When a court finds that a conviction on more than one count will amount to a splitting the court should, before judgment, authorise

28. At 818B.

29. 1965 (3) SA 675 (N).

30. At 673G-H.

the amendment of the charge sheet in terms of s 86 so the particulars regarding the "goods in regard to" and the "person against whom" are correctly reflected in a single charge on which it is intended to convict.

An acquittal on the remaining charges then follows. Such an amendment is not procedurally correct, but is also important when it comes to sentence.³¹

2.2 POSSESSION OF OR DEALING IN VARIOUS FORMS OF PROHIBITED DEPENDENCE-PRODUCING SUBSTANCES (THE DRUGS AND DRUG TRAFFICKING ACT)

In terms of s 1 (ii) (bb)³² dealing includes performing any act in connection with the transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug.³³

On the other hand possession in relation to a drug, includes keeping or storing the drug or having it in custody or under control or supervision of the same.³⁴

31. *S v Mampa* supra.

32. Drugs and Drug Trafficking Act 140 of 1992.

33. *Ibid.*

34. S 1 (1) (ii) (f) of Drugs and Drug Trafficking Act.

In *S v Maansdorp*³⁵ the accused was convicted of two counts of possession of dagga and that of mandrax tablets. It was held that both substances were listed in the same schedule in part 1 thereof, as prohibited dependence-producing drugs.

The court held that the mere fact that different sentences were prescribed and different presumptions applied to specific forms of an offence does not necessarily mean that one has to do with different offences.³⁶

The court held that it was splitting on the mere ground of interpretation.

In *S v Swartz*³⁷ the accused was convicted of being found in simultaneous possession of dagga and mandrax powder in a pill form. On review it was held that the two substances constituted only one offence and that the accused had been incorrectly charged.

The convictions were set aside and were substituted by a conviction of one consolidated offence of possession of prohibited dependence-producing substances which included both the

35. 1985 (4) SA 235 (c).

36. At 239I.

37. 1986 (3) SA 287 (T).

mandrax and the dagga.

In *S v Mkhize, S v Osborne, S v Naidoo*³⁸ it was held that where a person is found in possession of dagga and methaqualone at one and the same time in circumstances not amounting to dealing, he is guilty of possession of dependence-producing substances.

Where a person sells dagga and methaqualone in one transaction, that person can be convicted of dealing or possession of dependence-producing substances.

In *S v Phillips*³⁹ the accused was found in possession of dagga and mandrax tablets. The court held that there were two separate crimes and there had not been an improper splitting of charges.

The decision in *S v Phillips*⁴⁰ was overruled by the decision of *S v Maansdorp*.⁴¹

In *S v Festers*⁴² the accused was convicted of possession of dagga and possession of mandrax pills. The court held that a splitting of charges had taken place and that the accused had been charged with one count of possession. The court further held that only

38. 1987 (4) SA 430 (N).

39. 1984 (4) SA 536 (C).

40. *Supra*.

41. *Supra*.

42. 1985 (4) SA 242 (C).

one sentence should have been imposed.

In *S v Diedericks*⁴³ the accused intended to sell either one item or the other or both if the opportunity arose. The court held that there had been an improper duplication of convictions since both cannabis and methaqualone are listed in the same schedule of the Act. The mere fact that it was expressly put on the indictment was only to alert the accused as to what sort of substance he was allegedly found dealing in.

2.3 ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM AND POSSESSION OF A DANGEROUS WEAPON IN CONTRAVENTION OF SECTION 2 (1) OF THE DANGEROUS WEAPONS ACT 71 OF 1968

In *S v Manamela*⁴⁴ the accused stabbed three victims during one incident. He was charged with three counts of assault. The magistrate ruled that there had been a splitting of charges and convicted him on one count only. On review the "intent test" as well as the "evidence test" were applied and with the assistance of both tests the court came to the conclusion that there was no splitting. The decision of the trial court was altered and he was convicted on all three counts of assault. The decision of the

43. Supra.

44. 1985 (4) SA 542 (B).

reviewing court seem to be in accordance with justice.

In *S v Mbulawa; S v Thandawupi*⁴⁵ the accused in the first case had been charged with assault with intent to do grievous bodily harm and with possession of a dangerous weapon. The evidence revealed that the accused picked up a knife with the sole purpose of stabbing the complainant. On review the court held that there had been a duplication of convictions. The decision of the reviewing court is in accordance with the intent test.

In the second case it did not relate to possession of a dangerous weapon but to the carrying of a dangerous weapon beyond the premises of his homestead by the accused. Therefore convictions on the second case were confirmed.⁴⁶

But if the accused is by coincidence in possession of a knife and then subsequently meets a certain person and stabs him with that knife, it cannot be said that the original possession and the subsequent assault were carried out with the same intention.⁴⁷

In *S v Zenzile*⁴⁸ the accused was charged with four counts of assault with intent to do grievous bodily harm and one of

45. 1969 (1) SA 532 (E).

46. At 533E.

47. E du Toit *et al* op cit 14-10.

48. 1976 (1) SA 210 (E).

possession of a dangerous weapon. The accused was convicted of all four counts. On the question whether such constituted a duplication of convictions, the court held that in the absence of evidence that both offences were committed with a single intent, no duplication of convictions occurred if the accused was convicted on both charges.

2.4 CULPABLE HOMICIDE AND RAPE

The single intent test cannot apply in an offence involving negligence as well as intention at the same time. Where an accused person is convicted of both a crime of which negligence is an element and a crime involving intention, duplication of convictions can rarely occur.⁴⁹

In *S v N*⁵⁰ the appellant had been charged with murder and rape of an eight-year-old girl and was convicted by the trial court of culpable homicide and rape. The charges were joined for the purposes of sentence and he was sentenced to death. In an appeal the major contention was that the appellant should not have been convicted of rape and culpable homicide as he had only one intention namely to rape and that death resulted as a consequence of rape.

49. E du Toit *et al* op cit 14-10.

50. *Supra*.

The court held that the appellant was correctly convicted of both counts and that the court erred in joining the counts for the purposes of sentence, that the rape alone justified the imposition of the death sentence. The judgment of the Appellate Division is, in my view, very sound.

2.5 MURDER AND RAPE

In *S v Pieterse*⁵¹ the accused abducted a nine-year-old girl, raped her and in the process throttled and injured her to such an extent that she died. He was convicted of rape and murder and sentenced to death on each count. The intention to rape and the intention to murder were found to be completely different.⁵² The same difference in intent is found in armed robbery cases where the victim is fatally wounded.⁵³

2.6 MURDER AND ROBBERY

There is a remarkable difference between the elements of murder and robbery, therefore an accused can be charged and convicted of a murder committed in the course of that robbery.⁵⁴

51. Supra.

52. At 688D.

53. *S v Grobler* supra.

54. *E du Toit et al* 14-11.

In *S v Grobler*⁵⁵ the first appellant entered the cafe carrying a pistol and threatened a person with such a pistol and in that process grappled with that person and shot him first on the thigh. The struggle continued and the appellant shot him fatally for the second time. He ran out of a cafe after he had taken out the money in a cash box and entered a vehicle which was driven by the second appellant. Both appellants were convicted on these two counts.

The court held that the appellants had not been convicted or sentenced twice since there had been no improper splitting of charges. Both the offences had been committed.

An element of violence is present in murder to bring about the death of the victim whereas in the crime of robbery violence is applied to facilitate the removal of the goods.⁵⁶

In *R v Constance*⁵⁷ after committing robbery, the appellants escaped using a vehicle and on their way they were pursued by a delivery van. In the exchange of fire the owner of a delivery van shot a passer - by who had just arrived on the scene. The appellants were convicted and sentenced for robbery and

55. Supra.

56. E du Toit *et al* op cit 14-11.

57. 1960 (4) SA 69 (A).

subsequently for murder.

On deciding whether a special plea of *autrefois convict* was correctly rejected and whether the presiding judge had acted correctly in not taking into account the murder incident, the court held that the presiding judge had erred in not having taken into account the murder incident and that a plea of *autrefois convict* was correctly rejected.

In *S v Prins*⁵⁸ the court held that the act of violence by the appellants on the deceased led to two separate results and further that the violence on the deceased had not been perpetrated with one intent but with the intent to rob the deceased as well as to cause his death. Therefore the appellants had not been convicted twice on the same crime and thus there had not been an improper splitting of charges.

In *S v Mooi*⁵⁹ the appellant was convicted in the Orange Free State Provincial Division on murder without the then extenuating circumstances and robbery with aggravating circumstances as defined in s 1 of the Criminal Procedure Act.⁶⁰

58. 1977 (3) SA 807 (A).

59. 1985 (1) SA 625 (A).

60. *Supra*.

In respect of each of the convictions the appellant was sentenced to death. The appellant had fatally shot the deceased in the course of robbery.

The appellant was granted leave to appeal in respect of the death sentence imposed for the robbery with aggravating circumstances. This case does not involve improper splitting of charges but duplication of sentences as the two convictions were based on the same set of facts.

Jansen J A held that it was clear that the trial court had correctly "thought away" the death of the victim when imposing the sentence for the charge of robbery.⁶¹

Joubert JA, dissenting, was of the view that if all relevant circumstances of the case were considered and, if the death of the victim were "thought away" it would be clear that the trial judge had not exercised his statutory discretion properly.

The learned Judge of Appeal was of the view that the appeal had to succeed, the death sentence set aside and substituted therefor by one of imprisonment for eight years.

61. At 630F. See also Kriegler op cit 221 and *S v S* 1987 (2) SA 307 (A).

2.7 CULPABLE HOMICIDE AND DRIVING UNDER THE INFLUENCE OF ALCOHOL

A person who drives a vehicle on a public road while under the influence of alcohol is guilty of the offence.⁶² If the same person, whilst driving the vehicle commits culpable homicide through his or her negligence, he is guilty of two crimes because, for the purposes of culpable homicide, the State must prove that the accused drove negligently and that the death of the deceased was as a result of such negligence.

In *S v Viljoen*⁶³ the accused was charged with

- (1) culpable homicide;
- (2) driving under the influence of alcohol in contravention of s 122 (1) (b) of the Road Traffic Act,⁶⁴ alternatively driving whilst the concentration of alcohol in his blood was more than 0,08 grams per 100 ml in contravention of s 122 (2) (b) of the Act.

The accused pleaded guilty to counts 1 and 3 and to the main count of count 2. The accused was convicted in terms of s 112

62. S 122 (1) (a) of Road Traffic Act 29 of 1989.

63. 1989 (3) SA 965 (T).

64. *Supra*.

(1) (a) of the Criminal Procedure Act ⁶⁵ on the third count. In respect of the other counts he was questioned by the magistrate in terms of s 112 (1) (b) of the Criminal Procedure Act. ⁶⁶

The Magistrate convicted the accused on count 1 but entered a plea of not guilty on count 2 in terms of s 113 of the Criminal Procedure Act. The magistrate questioned him on this count and convicted him.

On review the court held that the magistrate was incorrect in finding that he was not bound by the decisions of other Provincial Divisions. It was further held that it would not have been incorrect to convict the accused of culpable homicide as well as a contravention of s 122 (1) (b).

The conviction on the second count was substituted with a more serious offence of contravening s 122 (1) (b). The same view was held in *S v Koekemoer* ⁶⁷ where the appellant was convicted of culpable homicide and driving a motor vehicle under the influence of intoxicating liquor in contravention of s 122 (1) (a) of the Road Traffic Act. In an appeal the appellant contended that there was splitting of charges yet the court held that such

65. Supra.

66. Ibid.

67. Supra.

contention could not be sustained. The court held further that the two counts should be taken as one for the purpose of sentence. I am of the view that this case was correctly decided.

In *S v Grobler*⁶⁸ the accused was charged with a number of counts which included culpable homicide through negligent driving and driving under the influence of intoxicating liquor.

It was argued and held that there was no splitting of charges.

2.8 NEGLIGENCE DRIVING AND DRIVING A MOTOR VEHICLE WHILE THE PERCENTAGE OF ALCOHOL IN THE DRIVERS BLOOD EXCEEDS THE PRESCRIBED LIMIT

A person charge with both the offences of negligent driving of a motor vehicle while the concentration of alcohol exceeds the limit can be convicted on both offences.⁶⁹

In *S v Nomga*⁷⁰ the accused was convicted of reckless driving in contravention of s 120 (1) of Road Traffic Act⁷¹ (driving a vehicle with excessive alcohol in the blood). On review the court applied the "intent test" and held that the intent required for one offence

68. 1972 (4) SA 559 (O).

69. E du Toit *et al* op cit 14-11.

70. 1984 (3) SA 79 (N).

71. *Supra*.

is not the same as the intent required for the other. The court also held that the elements of the respective offences also differed to such an extent that the accused's state of blameworthiness could not be brought within the ambit of one charge. It depends entirely on the circumstances of each particular case.

In *S v Milo*⁷² the accused drove a motor vehicle while under the influence of liquor and caused a collision. He was convicted of contravening s 122 (1) (b) of the Road Traffic Act (driving under the influence) and also of contravening s 120 (1) of the same Act (driving recklessly and/or negligently).

On review the court emphasized that the "intent" test could be applied and applied the "evidence test" since, in the particular instance, the collision could be attributed to the accused's intake of liquor.⁷³

The following remarks by the court of review are important:

"... if the elements of a contravention of section 120 (1) and 122 (1) (b) are considered in my opinion a conviction or both counts could in specific cases follow."⁷⁴

72. 1986 (1) SA 74 (T).

73. At 75C.

74. At 75F.

In *S v Netshilindi*⁷⁵ the court held that to charge the accused on both contravention of s 120 (1) and 122 (1) (b), negligent driving and driving with an excessive concentration of alcohol in the blood does not amount to an unfair splitting of charges.

In *S v Jakubec*⁷⁶ the Attorney-General appealed on a point of law on the ground that the magistrate erred in concluding that it would be improper to convict the accused on both counts of driving with an excess of alcohol in the blood and driving negligently.

The court held that there was no splitting of charges in charging the accused with and convicting him of both offences.

It was further held that a person who has considerable resistance to intoxicating liquor may be perfectly capable of having proper control of his motor car and can drive in a perfect manner irrespective of the alcohol content in his blood.

2.9 NEGLIGENCE DRIVING IN TERMS OF SECTION 120 OF THE ROAD TRAFFIC ACT

To drive a motor vehicle while under the influence of alcohol does

75. 1980 (2) SA 106 (V).

76. 1980 (2) SA 884 (ZRA).

not necessarily require negligent driving but an accused person can be convicted of both those crimes without violating the rule against duplication.⁷⁷

In *S v Nthlahla*⁷⁸ it was held that a person cannot be convicted of reckless or negligent driving and driving under the influence if both offences flowed from the same event.

In the present case it was held that there was no splitting of charges but a multiplicity of convictions.

On review the convictions or contraventions s 120 namely driving recklessly or negligently was set aside.

In *S v Mtsweni*⁷⁹ the court held that the accused cannot be convicted of reckless or negligent driving and driving under the influence of liquor since both offences flowed from the same event.

2.10 ATTEMPTED MURDER AND ROBBERY

Attempted murder can occur without an act of assault constituting an element thereof. If it happens that assault

⁷⁷. *S v Mlilo* supra.

⁷⁸. 1977 (3) SA 109 (Tk).

⁷⁹. 1963 (3) SA 398 (T).

constitutes an element of attempted murder then the charge will be that of assault with intent to murder.⁸⁰

In *S v Benjamin*⁸¹ the two appellants were charged with attempted murder and robbery with aggravating circumstances. They were convicted and separate sentences on each count were imposed.

The court held that the attempted murder and robbery had resulted in the appellants being twice convicted of the same act of assault. It was further held that the convictions of attempted murder had to be set aside and that the sentences on each count should be altered.

The decision in *S v Cain*⁸² was overruled since it could not be reconciled with other decision. In this case⁸³ the appellant was charged with (i) robbery; (ii) assault with intent to commit murder; (iii) assault with intent to commit murder; (iv) theft of a motor car. The appellant was acquitted on the second and fourth counts and was convicted as charged on the first and third counts.

80. E du Toit *et al* op cit 14-12.

81. 1980 (1) SA 950 (A).

82. 1959 (3) SA 376 (A).

83. Ibid.

In relation to the robbery charge, aggravating circumstances were found to be present. Many factors were considered by the court before arriving at the then decision. The court held that the appellant impliedly authorised the shooting of the deceased and further that the trial court erred in holding that aggravating circumstances were present.

It was held that in robbery the mere possession of a dangerous weapon by the accused's accomplice does not *per se* constitute an aggravating circumstance. If it is proved that his fellow robber had prior knowledge of the accomplices possession of the weapon, that can be inferred as a common purpose.⁸⁴

In *S v Moloto*⁸⁵ the court held that it was not a duplication of convictions where the evidence disclosed offences of attempted murder and of robbery with aggravating circumstances. When a man has committed two offences he should be found guilty of two offences and what can serve as a solution is to cause such offences to run concurrently.

Where attempted murder is committed in connection with a robbery, the state is entitled to charge the accused with robbery and with attempted murder and the court is entitled to find him

84. At 381E.

85. 1980 (3) SA 1081 (B).

guilty of the two separate offences.⁸⁶

2.11 MULTIPLE THEFTS

In *S v Verwey*⁸⁷ the accused was charged with theft on the main count and with nine counts on the alternative. The state closed its case after seven complainants had given evidence and the accused made certain admissions. The accused was convicted separately on seven counts.

The court held that multiple convictions constituted a misdirection. The appellant should be convicted on the main charge in respect of the general shortfall.

An accused who, on one time and by one intention, steals property belonging to a number of persons will be guilty of one theft.⁸⁸

The accused who had stolen various articles belonging to four inmates of a certain room⁸⁹ had been convicted on four counts of theft.

86. *S v Maloto* 1982 (1) SA 844 (A).

87. 1968 (4) SA 682 (A).

88. *E du Toit et al* op cit 14-12.

89. *S v Ndlovu* 1962 (1) SA 108 (N).

In the *Ndlovu*⁹⁰ case on review the court held that there had been a splitting of charges. It was further held that one of the counts of theft should be amended so as to incorporate the other three and that the accused should be acquitted on those three.

In *S v Koekemoer*⁹¹ the accused was convicted of five charges of theft committed at the same time and place of items belonging to five different people.

The court held that it constituted one act and two acts of theft and that the mere fact that these were different owners had nothing to do with the number of charges. It was further held that there was an improper splitting of charges.

In *S v Polelo*⁹² it was held that the accused must have known that he was stealing from two different persons, that it was one act with one intent and accordingly constitutes one theft.

In *S v Ntswakele*⁹³ it was held that there is no universal test or criterion which can be applied to every case to determine whether or not the actions of the accused amount in substance to one offence.

90. Ibid.

91. Supra.

92. Supra.

93. 1982 (1) SA 325 (T).

The approach can only be aided by the application of the two tests:

- (1) whether the acts alleged in the charges were committed with a single intent or
- (2) whether the evidence necessary to establish one of the acts involves proof of the other.⁹⁴

In considering whether there was a single intent and one continuous transaction, the period of time between the separate acts or omissions which constitute the transaction and the duration of the commission of the transaction, are indicative factors, but they, similarly, are not conclusive, that is the test is whether a new intention was formed at some stage.⁹⁵

In theft cases the consideration must depend on the circumstances of the accused's conduct which will include:

- (1) the period over which the acts were carried out;
- (2) the place where they were carried out;
- (3) the nature of the accused's actions, the enquiry being whether there was one *actus reus* covering the whole

94. Harcourt AB *Swift's Law of Criminal Procedure* 2 ed (1969) 740.

95. Harcourt 741.

operation or several *acta rea*,

- (4) the intention of the accused in carrying out the course of conduct.⁹⁶

In *S v Majola*⁹⁷ the accused was convicted by a magistrate on five counts of theft and was sentenced as follows:

Count 1 — theft of a bicycle - five months' imprisonment.

Counts 2 to 5 — theft of clothing belonging to four different complainants.

The four counts were treated as one for purposes of sentence and was sentenced to a fine of R50 or, in default of payment, 60 days' imprisonment. The court ordered that the two sentences run concurrently.

It appeared from the evidence that the accused stole the items at the same time from a room which was occupied by four complainants.

Reviewing the judgment, De Villiers JP, after referring to several authorities, was of the view that the accused should have been

96. *S v Ntswakele supra*.

97. 1973 (4) SA 58 (O).

charged with one count. The learned Judge President then ordered that counts 2 to 5 be set aside. The case was referred back to the magistrate to impose a fresh sentence in the light of the judgment.

Klopper J concurred.

My submission is that if evidence proves that the accused was aware at the time of stealing that he was stealing goods which belonged to different owners he should be convicted with as many counts as there are items stolen and their owners.

2.12 THEFT AND FRAUD

An accused who steals a cheque with an intention of later committing fraud with such a cheque can be convicted of both the theft of the cheque and a fraud he committed by using the cheque.⁹⁸

98. *S v Murbane* 1992 (1) SACR 298 (NC).

CHAPTER 3

MISCELLANEOUS

In this chapter I will discuss cases which do not fall within the categories referred to in the preceding chapter.

The first decision I want to discuss is that of *R v Hannah*.¹

In this case² the accused was charged upon two indictments with a contravention of s 39 of the Transvaal Ordinance.³

In the first indictment the accused was charged with 24 counts of not having been duly registered in the Transvaal as a medical practitioner or chemist under the said Ordinance, to practise as a medical practitioner. On the second indictment the accused was charged with nine counts of performing acts belonging to the calling of a dentist. The accused was convicted on each count of both indictments and was sentenced on each count to a fine of £15, or the alternative of one month imprisonment.

On appeal the accused raised that the indictment did not state any offence since the same Ordinance on which he was charged did not prohibit or penalise unregistered practice and that the accused could only be sentenced

1. 1913 AD 484.

2. *Supra*.

3. 29 of 1904.

to a maximum fine of \$100, or, in the alternative to six months' imprisonment for one act of illegally practising.

On appeal the court held that when once the fact has been established that a person is practising as a medical man, each act of treating a patient, separated in respect of time and place may be regarded as a separate contravention of the section. This decision is correct as in accordance with the tests.

In *R v Shelembe*⁴ the accused was charged with two counts, the first being housebreaking with intent to commit a crime to the prosecutor unknown, the second one being malicious injury to property. He pleaded not guilty on count 1 and guilty on count 2. He was found guilty and sentenced on both counts.

The reviewing judge queried the correctness of the conviction on the second count, the one of malicious injury to property, being doubtful whether the accused did anything except a desperate effort to avoid capture. There remains the enquiry whether there was a splitting of charges.

It was argued whether the breaking out of the accused after the match was struck in the room where a number of girls were sleeping constituted a crime of malicious injury to property or an effort to escape after the occupants had been aroused by his presence.

On review the court held that the accused's conduct amounted to malicious

4. 1955 (4) SA 410 (N).

injury to property. It was further held that there had not been a splitting of charges as the accused's breaking out was separate from the breaking in and that the motives were separate and distinct incidents.

The question of splitting of charges was further discussed in *S v Cebekhulu*.⁵ In this case the accused was charged with two counts of theft in that he stole a horse which was saddled and bridled. The magistrate convicted him on one count of stock theft of the horse, and on one count of theft which related to the theft of the saddle and the bridle. Both counts were taken as one for the purpose of sentence and sentenced to nine month's imprisonment.

The said magistrate was queried by the reviewing judge whether there had not been an improper splitting of charges. The reply was to the effect that the magistrate was obliged to convict on two counts because the theft of the horse was a statutory crime in terms of the Stock Theft Act⁶ and it was distinct theft of a saddle fell under the common law.

The court held that the Stock Theft Act does not create a new species of crime and all it does is provide a new procedure, additional penalties and extended jurisdiction in every case of theft. Then in the instant case the conviction was altered to a single conviction of theft covering both the horse and the saddle. The court, further, ordered that the convictions on both counts be set aside and a conviction on a charge of the theft of a horse, saddle and bridle be

5. 1967 (2) SA 16 (N).

6. 57 of 1959.

substituted. The sentence of nine months' imprisonment was left unaltered.

It is virtually impossible in our law to lay down a general inflexible test as to when there is a splitting of charges or a duplication of convictions. The circumstances of each particular case must be examined.⁷

In *S v Christie*,⁸ the appellant was a student and a doctor in philosophy and had been convicted on five counts under Terrorism Act.⁹ Various sentences were imposed on the separate counts constituting effective imprisonment of 10 years. An application for leave to appeal against all the convictions was granted by the trial judge. The most cogent evidence for the State was a confession made by the appellant and the gist of the argument was whether a statement made to a senior police officer was freely and voluntarily made and whether it had been properly admitted in evidence in the court *a quo*.

The Court found further that the conspiracy was not proved beyond a reasonable doubt.

The appellant was found guilty as charged on both the second and third counts. On the fifth and sixth counts the appellant was also found guilty.

Counsel for the appellant contended that there had been a duplication of convictions in as much as appellant should have been convicted both of the

7. *S v Christie* 1982 (1) SA 464 (A) at 465C.

8. *Supra*.

9. 83 of 1967.

conspiracy and of performing all the acts referred to in pursuance of that conspiracy.

On the question whether there had been a splitting of charges or not, the court held that there had been no splitting of charges in respect of the other four counts on which he had been rightly convicted.

In *R v Lak Zany*¹⁰ it was held that a separation into two counts of a charge of keeping an eating house in a disorderly way on four days was held to be an unlawful splitting.

Thus in accordance with the prohibition against the splitting of charges, criminal conduct spread over a period of time, in general, form the subject of one charge.

In *S v Ntswakele*¹¹ the accused in a magistrate court on charges of eight counts of theft pleaded not guilty on all counts of which he was convicted on the first three counts. The case was then referred to the regional magistrate's court in terms of s 116 (1) (b) of the Criminal Procedure Act.¹² The case was then submitted for review in terms of s 116 (3) of the Act since the regional court magistrate suspected that there had been an improper splitting of charges and that the accused should have been found guilty on one count of

10. 1919 TPD JS 345.

11. *Supra*.

12. 51 of 1977.

theft and not on three counts.

The first complainant in the first count, when proceeding to work early on that day, left his belongings in a box which was locked and later discovered that the box was broken into and certain items had been removed. The second complainant in the same room discovered that his pair of shoes that was placed under his bed was missing. The third complainant lost a watch and R100-00 in cash.

In this case thefts were committed in a room in a hostel with separate beds, but, because of a lack of particularity in the evidence, it became very difficult to determine whether there was only one theft in substance or three separate thefts. It was also not clear whether the thefts were carried out separately or were part one operation carried out at the same time. In such circumstances the uncertainty operated in favour of the accused and three convictions were set aside and substituted by one conviction. To me this appears to be a very sound judgment.

In *S v Nkwenja*¹³ the two appellants had been convicted in a Local Division of charges of culpable homicide, robbery with aggravating circumstances and rape.

The two appellants had planned to rob the occupants of a motor car and the appellants had wrenched the doors open simultaneously. In that process one

13. 1985 (2) SA 560 (A).

of the occupants died as a result of violence used against him.

In an appeal against the appellants' conduct it appeared that there had been planning as they divided their roles in robbing the occupants of the motor car and the use of violence in robbing them.

It was reasonably foreseeable that the use of violence for that purpose of robbing the victims could possibly result in death.

It was held that the appellants were rightly convicted of culpable homicide and that there was no improper splitting of charges nor duplication of convictions.

The court held that there was no reason why the appellants could not be convicted of culpable homicide and robbery since the two offences were totally different crimes.

It was further held that in culpable homicide one had to do with negligent killing of a person and robbery is concerned with the use or threat of violence in order to commit theft.

In *Maansdorp*¹⁴ the accused with two contraventions of s 2 (b)¹⁵ of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act, in that they had both been found in simultaneous possession of dagga and mandrax pills and they were both convicted of these offences.

14. Supra.

15. 41 of 1971.

On appeal, the court held that the appellants should have been convicted on only one joint charge of possession of prohibited dependence-producing substances which should have included both the mandrax and the dagga. It was held that the splitting of charges had occurred.

The court *a quo* was asked to consider the sentence *de novo* and that the convictions be replaced by one contravention of s 2 (b) of the Act.

The same exposition was found in *Fester's*¹⁶ case where the accused had been charged with and convicted of the contravention of s 2 (b) of the Act and contravention of s 22A (10) (a)¹⁷ of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act.

The first argument was about the 1965 and the 1971 Acts and since the 1971 Act was the recent Act, it was held that its provisions had to be complied with.

The court, in regard to the splitting of charges, held that only one sentence was constituted by simultaneous possession of mandrax and dagga as the two substances were merely two species of the same genus. There was no reason whatsoever of the possessor to be punished twice if charged under both Acts.

In *R v Chamboko*¹⁸ the appellant was charged before a magistrate on two counts of culpable homicide arising from a collision between the car he was

16. 1985 (4) SA 242(C).

17. 101 of 1965.

18. 1964 (1) PH H 69 (SR).

driving and a railway engine which resulted in the death of two passengers in the car. He pleaded to both and was found guilty and sentenced to three months' imprisonment. The sentences were ordered to run concurrently.

Counsel for the Crown on the appeal contended that there had been an improper splitting of charges and did not oppose the immediate release of the appellant.

Since the magistrate had not found that appellant was guilty of a high degree of negligence or of recklessness or that there were any aggravating circumstances, that alone clearly showed that the case was of simple negligence.

The court held that there was an improper splitting of charges.

It was further held that in the absence of recklessness or some high degree of negligence, a unsuspended sentence of imprisonment without the option of a fine should not be enforced on a first offender for culpable homicide.

In the *Nomen*¹⁹ case the accused was driving a heavy truck and the accident occurred when he was negotiating a bend with a full load of sand. In that process the truck collided with two boys who were on the side of the road and, as a result, both died.

19. 1978 (2) PH H 209(E).

On the evidence the magistrate found that the accused was guilty on two counts of culpable homicide. He submitted that it could be argued that the first victim was struck by an act of driving of the accused and that the truck went to strike the second victim immediately after striking the first one.

The magistrate's view was held to be incorrect.

The court held that the act of negligence which caused the accident was a single act and that the results were results of that single act. It was held that only one act was committed and that the splitting of charges had occurred. This view is also held in *Erasmus*²⁰ case where the appellant was charged with two counts of culpable homicide resulting from one motor vehicle accident.

The court held that the accused ought only to have been convicted of one count of culpable homicide since two convictions constituted a duplication of convictions.

In *R v Khan*²¹ the accused were charged with three counts,

- (1) killing game otherwise than specially authorised by the Ordinance;
- (2) using an artificial light as an aid in killing game and
- (3) entering upon lands in pursuit of game without owner's permission.

20. 1983 (1) PH H 57(O).

21. Supra.

The accused were convicted on all counts and they all appeal. Counsel for the defence contended that charging them on three separate counts constituted an improper splitting of charges.

He pointed out that all the acts alleged in the charges were done with a single intent and in the course of a single criminal transaction and that they should be regarded as involving only one offence.

No case was cited which laid down that one of the tests was to be preferred to the other.²²

The difficulty in this present case was that the tests would appear to give opposite results and that the fate of this appeal would depend upon which test was adopted. The other question to be considered was whether the material facts necessary to establish the three counts could be proved by the same evidence or not. In this case it is clear that each of the counts could have been established by evidence which did not establish the others.

The court held that, therefore, there was no improper splitting of charges.

In *R v Mayet*²³ the appellants had been convicted of the contravention s 12 (1) of Group Areas Act²⁴ as amended, in that they had occupied land or premises in a specified area which was not occupied or deemed to have been

22. At 869.

23. 1958 (1) SA 1 (T).

24. 41 of 1950.

occupied by a number of the same group on the specified date.

These premises were situated in a specified area and were also situated in a mining district within the meaning of s 7 (2) of the Gold Law Act ²⁵ as amended.

The appellants were each convicted on these charges.

It was proved that the appellants had occupied these premises which were situated in a specified area within the mining area which, in law, was prohibited.

It was also proved by the Crown that there were no permits that had been issued authorising the occupation of the premises by the appellants.

At that time and place, the premises in question were occupied by Coloured persons and that such occupation was prohibited by law.

The appellants were charged under two statutory provisions and the great contention was that the appellants should have been charged under one statutory provision.

The submissions that were made, were made under s 282 of the then Criminal Procedure Act ²⁶ which provided that when an act constituted an offence under

25. 35 of 1908 (T).

26. 56 of 1955.

two or more statutory provisions, a charge could be brought under either of them but an accused was not liable to more than one punishment.

In this case nothing was found to be contrary to the guidelines and therefore the appeal was dismissed.

In *R v Malako*²⁷ the accused was charged on two counts firstly of theft by false pretences in that he had pretended that he was a member of the police force authorized to investigate a charge of theft and to take charge of a certain sum of money alleged to have been stolen, which money was handed over to the accused. On the second count the accused was alleged to have contravened s 25 of the Police Act²⁸ in that, not being a member of the police force, he had pretended by words, conduct or demeanor that he was such a member.

The pretence was so material that the accused induced the complainant to part with such money.

The accused was convicted on both counts after he had pleaded guilty on both of them.

The accused was sentenced to six months' imprisonment with compulsory labour coupled with spare diet and solitary confinement on two days per week for the first four weeks. The two count were taken together for the purpose

27. 1959 (1) SA 569 (O).

28. 7 of 1958.

of sentence.

On review Potgieter J, after considering authorities, was of the view that two criminal acts charged were committed with a single intent and constituted one single criminal transaction. He further held that if the other test was applied it would be seen that the State could not prove the offence of pretending to be a policeman without proving the theft, and if the theft could not be proved without proving the statutory offence.²⁹

From this case it was evident that the magistrate had improperly convicted the accused on both counts. It was decided that one of the counts was to be set aside and a more serious count was to stand. In such circumstances theft was more serious than the statutory offence.

The court held that there had been an improper splitting of charges and therefore both convictions were set aside and the case was remitted to the magistrate to impose a fresh sentence on the first count.

De Villiers J concurred.

In *R v Tebbie*³⁰ the accused were convicted on a number of counts. On the fourth count the accused were charged with the crime of robbery and the fifth count was attempted robbery. On the sixth count they were charged with the

29. At 571H.

30. 1965 (3) SA 776 (R).

theft of a raincoat. There was one complainant on counts four and six.

The magistrate reached the conclusion that the conviction on the sixth count amounted to a splitting of charges.

According to the evidence led by the State the two accused entered the quarters occupied by the complainants. The two complainants were Sixpence Mondina and Tiwa Dakamera. The accused grabbed hold of Sixpence Mondinah and demanded money. They took the money form Sixpence Mondinah and they were on their way when they met Tiwa Dakamera who had come to assist his room-mate. They then got hold of Tiwa Dakamera and demanded money from him and that gave Sixpence Mondinah an opportunity to escape. Tiwa Dakamera eventually got an opportunity to slip off.

Later on the same evening the accused were arrested and they were found in possession of Sixpence Mondinah's raincoat which had been hanging in the quarters at the time of the invasion by the accused.

On review Young J held that the circumstances suggested that there was no improper splitting of charges.³¹ Concerning the theft of a raincoat, an inference was drawn to the fact that the raincoat was taken after the escape of two complainants.

The court held that the accused were not robbed of the raincoat in question

31. At 776G.

but only robbed of the money and that the stealing of a raincoat was an after thought after both complainants had escaped.

Judge Young's reasoning seems to be in accordance with the tests and guidelines discussed earlier.

I now proceed to discuss the case of *S v W*.³² In this case the appellant was convicted in a Local Division of three counts of rape and robbery and was sentenced to death on each count and to five year's imprisonment on a robbery charge. It appeared that the complainant had been riding her horse across the fields near her home when she was accosted by the appellant who pulled her from her horse and dragged her into a bush where he raped her three times.

The complainant shouted when this incident took place and tried to defend herself but in vain and was soon overpowered by the appellant.

Any attempt at resistance was met by him banging her head against the ground and threatening to kill her.

Having raped her for the first time he again dragged her off to another place where he again raped her. He then got up and ordered her to get up too. While the appellant was still adjusting his clothing she attempted to run away.

32. 1993 (2) SACR 74 (A).

The appellant ran after her and eventually caught up with her. It is alleged that he picked up a brick and threatened to kill her and dragged her back into the bushes and again raped her for the third time.

Before he could rape her for the third time he first ripped her of her jewellery which consisted of a necklace, earrings and a watch. The appellant then released the complainant and she turned to the direction of her home. On the other hand the complainant's husband had been alerted by the horse which had returned home without the complainant.

The assailant's track was pursued and he was apprehended on the same evening. The complainant identified him on the same day.

The appellant's defence in the Court *a quo* was that he and the complainant arranged to meet in the bushes and that, because the horse broke loose from the branches the complainant had decided to falsely lay a charge of rape to placate her husband. The appellant's story was rejected by the Court *a quo* and the complainant's version was accepted.

Counsel for the appellant was only concerned with the so-called "moratorium" which the executive powers had in the execution of the death sentence.

The three offences were probably committed within a period of 30 to 40 minutes. The complainant suffered no serious physical injuries and on the other hand the appellant admitted a long list of previous convictions. In all,

he had 14 previous convictions and had been released from prison after serving 11 years' imprisonment only 17 months before the present offences were committed.

Having duly considered the case the Appeal Court held that, although the three sentences of rape properly formed three separate charges, they could for the purpose of sentence, be regarded as one continuous transaction.

The court further held that the death sentence was not only the proper sentence in this case but that life imprisonment was to be regarded as the proper and appropriate sentence in this regard.

The crucial and integral part of splitting of charges was at no stage raised in this case. This is very surprising because the appellant's acts of raping the complainant clearly constituted a continuous transaction. The act of the appellant does not differ from that of a man who detains a woman for a night and has sexual intercourse with her against her will more than once during that period of detention. That man commits one count of rape. Why was W convicted of three counts of rape?

The short intervals between the acts of sexual intercourse did not create separate transactions.

I feel that on appeal the three convictions of rape should have set aside and one conviction of rape should have been allowed to stand.

In *R v Peter*³³ the accused was charged with eight counts of theft. He was convicted of six counts with the exclusion of the sixth and the eighth counts and was sentenced to imprisonment for one month with hard labour on each count on which he was convicted.

According to the evidence led by the State the accused was an employee in a Mission School and stole property belonging to scholars who resided at the mission. The theft took place at the same time from the same dormitory. The accused was charged separately on eight counts.

There was a contention that an improper splitting of charges had occurred since the stolen items belonged to six complainants who occupied one dormitory. It was submitted that only one criminal transaction had been constituted.

The matter was referred to the Attorney-General who also agreed that there had been an improper splitting of charges. Since the evidence led at the trial revealed that there had been a theft of the property from several persons at the same place and time, one *contrectacio*, the magistrate should have brought in a single verdict of theft.³⁴

On review the court held that there had been an improper splitting of charges. It was further held that the first count should be amended to include the

33. 1965 (3) SA 19(R). See *S v Majola supra*.

34. At 20 B-C.

allegations of theft from the other five complainants. Since the court had the power to substitute a sentence not more severe than that imposed, the conviction on count one was confirmed and the rest set aside and the sentence of six months imprisonment was imposed.

In *S v Ebrahim*³⁵ the accused was charged before a magistrate with

- (1) contravening s 2 (a) of the then Abuse of Dependence-Producing Substances and Rehabilitation Centres Act in that he had dealt in a specified quantity of dagga and
- (2) contravening s 2 (b) of the same Act in that he had in his possession a specified quantity of dagga.

In fact three cases came before the reviewing judge for argument but they were all dealt with under this one of *Ebrahim*.³⁶

The accused was convicted on both counts and both counts were treated as one for the purpose of sentence and a minimum sentence of five years was imposed as laid down by the Act but the magistrate suspended a substantial portion thereof.

The question that was to be argued was whether the accused who sold and delivered a portion of the total quantity of dagga which he possessed at the

35. 1974 (2) SA 78 (N).

36. *Supra*.

relevant time retaining the balance in his possession could properly be said to have contravened both subsect (a) and (b) of the Act or whether, in substance and in truth, he had committed only one offence, namely, that of selling dagga in contravention subsect (a).

The accused in this case was found selling two cigarettes of dagga and, on being searched after arrest, he was found having ten more cigarettes on his person. He actually admitted that he intended selling the cigarettes.

The court held that there was no room for a conviction under s 2 (b). It was further held that the accused should have been convicted of one offence only of dealing in dagga in contravention of s 2 (a) of the Act.

Therefore the conviction in respect of count 2 was set aside, but the conviction in respect of count 1 was confirmed as the sentence imposed by the magistrate.

The facts of the *Ebrahim*³⁷ case are similar to those of *S v Ntoapane*³⁸ where it was held that an accused person who walked carrying a quantity of dagga, sold part of the dagga and remained with a quantity which exceeded 115 grams and could, in terms of the then s 10 (1) (a) of the Dependence-Producing Substances and Rehabilitation Centre Act,³⁹ be presumed to have

37. Supra.

38. unreported case discussed by Kriegler *op cit* 222.

39. Supra.

possessed the balance of the dagga for purposes of selling it could be convicted of only selling the first quantity and not for possessing the balance of the dagga. If he were convicted of both counts, improper splitting of charges could occur.

In *R v Vlok*⁴⁰ the accused was charged and convicted in the magistrate's court of assault and of contravening s 46 of the Police Act⁴¹ by endeavouring to effect the release of a person under arrest. It appeared that the assault was committed on the persons who had effected the arrest and was part of the accused's conduct in attempting to effect the release from arrest.

On appeal, the court held that as the accused's intent was only to effect the release of a prisoner, he should not have been charged with two offences and that the conviction and sentence on the count relating to the assault should be quashed.

It was held that the accused was wrongly charged with both assault and the contravention of the section. The result was that the conviction on the first count was set aside but the conviction and sentence on the second count was confirmed.

In *S v Nambela*⁴² the accused was convicted on three counts, firstly of having

40. 1931 CPD 181.

41. 31 of 1917.

42. 1996 (1) SACR 356 (O).

contravened s 4 (b) of Drugs and Drug Trafficking Act ⁴³ by being in possession of 10 grams of dagga secondly of having contravened s 27 (2) (a) of the Police Act ⁴⁴ by hindering a policeman in the exercise of his duties and, thirdly of having contravened s 27 (2) of the latter Act by having assaulted a policeman.

On the count of possession of dagga the accused was sentenced to a fine of R600-00 or 120 days' imprisonment conditionally suspended for five years while on the last two counts he was sentenced to six months' imprisonment wholly suspended for five years on certain conditions.

According to the evidence led by the State it was established that dagga was found on the accused's person. The accused further pointed out to the police some dagga plants in the garden next to the accused's house. While the two policemen were still busy pulling up the dagga plants, the accused ran away and one policeman chased after him. The accused managed to creep through the thick bushes and turned to lash out the policeman who crawled after him.

On review Leach J queried whether concerning counts two and three there had not been an improper duplication or "splitting" of charges. The magistrate's reply was to the effect that the accused's action in kicking a policeman was an action separate from him having run away from the police and thus there was no improper splitting of charges.

43. 140 of 1992.

44. 7 of 1958.

The magistrate referred the reviewing judge to the case of *S v Salvier*⁴⁵ where it was held that it was not necessary for a contravention under the section for the accused to physically act against the policeman. It is sufficient if the accused makes it more difficult for the police officer to carry out his duties. In that matter the accused, when approached by two policemen with an intention to arrest him for public drunkenness, first ran into his parental home and eventually to his neighbours where he was ultimately arrested.

The court held that the accused's action to run away constituted sufficient *actus reus* but, since the accused was drunk, the State failed to prove that he intended to evade arrest when he moved away from the scene.

In the present case the State established both the requisite intent as well as the *actus reus* to find a contravention of s 27 (2) (a).

The court eventually held that even if the accused's actions in kicking the policeman and fleeing were regarded as separate, he had nonetheless acted with the single and continuous intention to escape from the police. The court set aside the conviction relating to the assault of the policeman.

The question of the splitting of charges was also discussed at length in *S v Longdistance (Natal) (Pty) Ltd*⁴⁶ where the two appellants had been convicted in a magistrate's court on two counts of contravening s 31 (1) (a) of the Road

45. 1993 (1) SACR 168 (O).

46. 1990 (2) SA 277 (A).

Transportation Act ⁴⁷ in that they had conveyed in two sets of vehicle each comprising a mechanical horse and trailer, sugar to a consignee in the then Eastern Transvaal. The transportation was not covered by any permits issued to the appellants concerned.

In addition to fines imposed on the appellants, the motor vehicles were declared forfeited to the State in terms of s 36 (1) of the Act. An appeal against the convictions, sentences and forfeiture orders was dismissed. A further appeal was noted by the appellants contending that the State had not discharged the *onus* of proving that the accused had the necessary *mens rea* that the conveyance of sugar was authorised.

On appeal it was also alleged that there was an unlawful duplication or splitting of charges that the sugar amounted to 50 000 kg that was conveyed, that it constituted one consignment, that the conveyance was performed at the instance of Export Transport Trading and that, although the conveyance was effected in two loads, it was in essence one transaction undertaken on one occasion with a single intent.

On appeal the court held that separate goods were conveyed for separate rewards in separate vehicles driven by separate permits. There can be no doubt that two separate offences and not a single offence, were committed. Therefore there was no duplication of charges in this respect.

47. 74 of 1977.

In *S v Mawelele*⁴⁸ the accused had been convicted in a magistrate's court on two counts of contravening of s 37 (1) (b) of Nature Conservation Ordinance,⁴⁹ in that he was found in possession of dead game of which there was a reasonable suspicion that the buck had not been lawfully hunted, and secondly of a contravention of s 16 (1), in that he had hunted without a permit.

The accused pleaded guilty and during the questioning in terms of s 112 (1) (a) and (b) of the Criminal Procedure Act, it transpired that the accused had set two wire traps alongside a river and by means thereof had caught the waterbuck.

On review the court held that the provisions of s 37 (1) (b) of the ordinance were not applicable to a person such as the accused in the instant case in respect of whom it had been proved that he was guilty of unlawfully hunting game.

The court held that a conviction under both ss 16 and 37 (1) (b) amounted to an improper duplication of convictions and that the magistrate in the instant case should have convicted the accused of a contravention of s 16 (1) only.

The conviction and sentence in respect of the first count were set aside and that in respect of the second count confirmed.

48. 1990 (2) SA 8 (T).

49. 12 of 1983.

In *S v Mtsweni*⁵⁰ the appellant was charged in the magistrates court with, in the first instance, reckless or negligent driving of a motor car in contravention of s 135 (1) read with s 135 (4) of the Ordinance.⁵¹

He was also charged with a contravention of s 137 (a) of the same Ordinance in that he had driven the same motor car on the same occasion under the influence of intoxicating liquor or a narcotic substance. He was also charged with a contravention of s 56 (1) read with s 56 (3) and s 146 of the Ordinance in that he had driven a motor car on a public road without a licence.

The accused was found not guilty on driving a motor vehicle without driver's licence and found guilty on driving a motor car recklessly or negligently and the charge of driving under the influence of intoxicating liquor. Both charges were treated as one for the purposes of sentence.

The accused was charged cumulatively with these offences and the court held that there was no splitting of charges.

In *S v Waites*⁵² the accused was convicted by a magistrate of housebreaking with intent to steal and theft and of attempted arson and arson. The accused broke into M's house and stole some paraffin , a ring, a knife, matches and a cigarette stub. After leaving M's house, he poured paraffin on curtains in the

50. 1963 (3) SA 398(T).

51. *Supra*.

52. 1991 (2) SACR 388 (NC).

house of A and thereafter on the house of P and set them alight.

On review the question that was raised was whether there had not been a duplication of convictions or a splitting of charges in respect of these convictions.

The court held that the distinction between motive and intent and the differences in the content of the intent required for the different offences should not be overlooked.⁵³ It was further held that the State had failed to establish the accuse's intention to enter M's house, whether it was for the purposes of obtaining paraffin in order to set alight the houses of A and P or to steal the items he stole.

Since the intention could not be ascertained, it could not be contended that the accused entered the house of M for the purpose of setting alight the houses of A and P.

It was argued and held that the content of the intent required for housebreaking with intent to steal and theft differed substantially from the content of intent required for arson. The accused's purpose in setting the houses alight was to damage the houses and to cause damage to the owners whereas the accused's purpose in entering the house was to steal.

As differences in the consequences in the acts committed, it was impossible to

53. At 391H.

accommodate the totality of the accused's criminal conduct within only one of the said offences.

After all the considerations including the decision in *S v Grobler*⁵⁴ it was held that the accused had suffered no injustice either in the conviction or in the sentence since the accused received a suspended sentence for the offence of housebreaking. No prejudice had been suffered in the conviction because the accused did commit an offence of housebreaking on M as well as arson and attempted arson on A and P.

After exhausting all the tests, the results were inevitable and the court held finally that there had been no splitting of charges. Therefore the convictions and the sentences were confirmed.

54. *Supra*.

CHAPTER 4

THE RIGHT TO A FAIR TRIAL INCLUDES THE RIGHT TO HAVE RECOURSE BY WAY OF APPEAL OR REVIEW AND TO LEGAL REPRESENTATION

4.1 INTRODUCTION

Cases which have been discussed show that, were it not for appeal or review procedures, accused persons would have suffered prejudice. Appeal and review courts played an important role in detecting splitting of charges otherwise the duplicated sentences could be served.

Section 25 (3) ¹ provides that every accused person shall have the right to a fair trial. This right includes not to be tried again for any offence of which he or she has previously been convicted or acquitted ² and to have recourse by way of appeal or review to a higher court than the court of first instance. ³

What follows is a brief discussion of appeal and review procedures.

4.2 APPEAL FROM A LOWER COURT

Any person convicted of any offence by any lower court, including a

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1. Of the Constitution of the Republic of South Africa Act supra.
 2. Subsec 3 (g).
 3. Subsec 3 (h).

person discharged after conviction, may appeal against such conviction and against any resultant sentence or order to the provincial or local division having jurisdiction. ⁴

The provincial or local division concerned shall have powers referred to in s 304 (2) of the Criminal Procedure Act. ⁵ In terms of s 304 (2) (c) of the Criminal Procedure Act the appeal court may:

- (i) confirm, alter or quash the conviction. In the event of the conviction being quashed where the accused was convicted on one of two or more alternative charges, convict the accused on the other alternative charge or on one or other of the alternative charges;
- (ii) confirm, reduce, alter or set aside the sentence or any order of the magistrate's court;
- (iii) set aside or correct the proceedings of the magistrate's court;
- (iv) generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question;

4. S 309 (1) (a) of the Criminal Procedure Act *supra*.

5. S 309 (3) of the Criminal Procedure Act *supra*.

- (v) remit the case to the magistrate's court with instructions to deal with any matter in such manner as the provincial or local division may think fit; and
- (vi) make such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally, in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court, seems likely to promote the ends of justice.

It is clear that appeal and review courts have very wide powers.

Any person who has been convicted in a lower court may appeal against such conviction and sentence or order.⁶

It seems to me that the right to appeal is very essence of justice. Local Divisions have no appellate jurisdiction. The exception is the Witwatersrand Local Division.⁷

4.3 APPEAL AGAINST THE JUDGMENT OF A PROVINCIAL OR LOCAL DIVISION

The Appellate Division of the Supreme Court shall be the court of appeal

6. E du Toit *et al* op cit 30-19.

7. S 315 (3) of the Criminal Procedure Act *supra*.

in respect of appeals and questions of law reserved in criminal cases heard by a provincial or a local division or a special superior court ⁸ after leave to appeal has been granted. ⁹

An appeal in a criminal case in respect of the judgment of a single judge of a local division other than the Witwatersrand Local Division may be heard by the full Bench of the provincial division which exercises concurrent jurisdiction in the area of jurisdiction of the local division concerned. ¹⁰

4.4 REVIEW OF PROCEEDINGS OF LOWER COURTS

Section 302 of the Criminal Procedure Act ¹¹ provides that certain judgments of lower courts are subject to review in the ordinary course or automatic review as follows:

Imprisonment for a period longer than three months is reviewable if it has been imposed by a magistrate who has not held the substantive rank of magistrate or higher for a period of seven years.

A term of imprisonment which exceeds a period of six months is automatically reviewable if it has been imposed by a magistrate who has

8. S 315 (1).

9. S 316.

10. S 315 (3) (b).

11. Supra.

held the substantive rank of magistrate or higher for a period of seven years or longer.

A sentence of a fine which exceeds the amount which is determined by the Minister of Justice from time to time (was R2 500 in 1995) if it has been imposed by a magistrate who has not held the substantive rank of magistrate or higher for a period of seven years and which exceeds R5 000 (as was in 1995) if it has been imposed by a magistrate who has held the substantive rank of magistrate for a period of seven years or longer.

These sentences are subject to review in the ordinary course by a judge of the provincial or local division having jurisdiction.

A sentence which has been imposed in respect of an accused person who was assisted by a legal representative is not subject to automatic review.¹²

Each sentence on a separate charge shall be regarded as a separate sentence. The fact that the aggregate of sentences imposed on an accused person in respect of more than one charge in the same proceedings exceeds the periods or, amounts referred to in subsect 1 shall not render those sentences subject to automatic review.¹³

12. S 302 (3) (a).

13. Subsec 2 (a).

The purpose of reviewing a criminal case is to find out whether or not the proceedings are in accordance with justice.¹⁴

The reviewing judge sitting alone shall not alter the judgment of a magistrate. At least two judges may do that.¹⁵

In s 24 of the Supreme Court Act¹⁶ grounds of review of proceedings of lower courts are listed.

In terms of s 304 A of the Criminal Procedure Act proceedings of a lower court may be reviewed before sentence.

Sentences which are not subject to automatic review may be reviewed if they are brought to the attention of the provincial or local division having jurisdiction.¹⁷

The powers of a provincial or local division which reviews proceedings of a lower court include those which are listed under s 304 (2) (c) and have been referred to in this chapter.

Appeal and review procedures protect the right of an accused person.

In some cases which have been discussed in the preceding chapters

14. S 304 (2) (a).

15. Ibid.

16. 59 of 1959.

17. S 304 (4) of the Criminal Procedure Act *supra*.

charges were improperly split and sentences were duplicated. On appeal or review judgments of lower courts were interfered with.

4.5 THE INTERPRETATION OF THE RIGHT TO APPEAL TO A HIGHER COURT

A few cases have been decided by the Constitutional Court of South Africa on this right.

In *S v Ntuli*¹⁸ the accused was convicted in a regional court of rape, attempted murder and assault with intent to do grievous bodily harm and was sentenced to 13 years' imprisonment. The accused had not been represented at his trial. He was immediately imprisoned after having been sentenced.

While serving the imprisonment he decided to appeal against the convictions and sentences. Unfortunately he could not secure legal representation to assist him in preparing and presenting his appeal. He decided to do this himself. He wrote a letter to the authorities protesting at the outcome of his trial.

The letter was submitted to the relevant Local Division of the Supreme Court. A judge considered the contents of the letter in chambers.

18. 1996 (1) SACR 94 (CC).

Treating the letter as a notice of appeal and an application for a judge's certificate in terms of s 305 of the Criminal Procedure Act, the judge wrote a short judgment to the effect that he saw no prospect whatever of an appeal court interfering with either the convictions or the sentences.

The judge did not refuse the application but he made an order *mero motu* referring to the Constitutional Court in terms of s 102 (1) of the interim Constitution Act of the Republic of South Africa ¹⁹ the question whether the provisions of s 309 (4) (a) of the Criminal Procedure Act read with s 305 of that Act which impose the requirement of a judge's certificate, were in conflict with the provisions of s 25 (3) (b) of the interim Constitution Act of the Republic of South Africa.

When perusing the record of the proceedings the Constitutional Court added a second question, namely whether the provisions referred infringed ss 8 (1) and 8 (2) of the Constitution, and, if so, whether such infringement was permissible under s 33 (1) of the Constitution.

Section 8 (1) of the interim Constitution provides that 'every person shall have the right to equality before the law' and subsect 8 (2) forbids 'unfair discrimination' against any person.

Section 33 (1) of the Constitution provides *inter alia*, that the rights

19. *Supra*.

entrenched in the Constitution Act may be limited in certain circumstances by the law of general application.

After noting that there was no procedure prescribed for the granting of Judge's certificate, the court remarked that the lack of statutory control fashioned a pattern with no clear design and that no uniform practice prevailed in respect of the obtaining of the court record.

The court held that the minimum that s 25 (3) (b) of the Constitution envisaged and implied was the opportunity for an adequate appraisal of every case and an informed decision on it and that s 309 (4) read with s 305 of the Criminal Procedure Act made no provision for that opportunity. The court went further and said that applications for such certificates accordingly did not amount to the exercise of the constitutional right. No other occasion for its exercise could arise once a certificate had been refused. It was said that the requirement was inconsistent with s 8 (1) of the Constitution as well as it differentiated between two groups of people and the result was that this amounted *per se* to unequal treatment.

The court remarked that the objective of blocking appeals that showed no prospects of success was a valid objective but one could not be certain that no appeal but those without substance get stopped.

The court accordingly declared s 309 (4) (a) of the Criminal Procedure

Act invalid. Parliament was required to remedy the defect by 30 April 1997.

Didcott J gave the judgment and the other Justices concurred.

The question whether the provisions of s 316 (1) (b) of the Criminal Procedure Act are constitutional was answered in *S v Rens*.²⁰

Section 316 of the Criminal Procedure Act provides that an appeal against the conviction, sentence or order of a superior court may only be made to the Appellate Division with the leave of that court. In *casu* the following question was referred to the Constitutional Court by Rose-Innes J of the Cape Provincial Division:

"Whether the provisions of s 316 of the Criminal Procedure Act 51 of 1977 relating to applications by an accused convicted of an offence before a superior Court for leave to appeal against his conviction or sentence and providing in terms of s 315 (4) of the said Act that such appeal shall be (heard) only if such leave to appeal is granted and not as of right, are unconstitutional by reason of inconsistency with s 25 (3) (h) of the Constitution of the Republic of South Africa 1993 and of no force and effect pursuant of s 4 of the Constitution." ²¹

The applicant in this case, Mr Peet Rens was charged with and convicted of abduction and of attempted murder. He received a suspended prison

20. 1996 (1) SACR 105 (CC).

21. At 105H-I.

sentence and a fine in respect of the first charge and ten years' imprisonment on the second charge.

The applicant then sought to appeal against the conviction on both counts as well as against the sentence which was imposed on the charge of attempted murder.

For purposes of the judgment Madala J who gave judgment found it unnecessary to deal with the grounds on which the application for leave to appeal was based or with arguments advanced in favour of or against the application. Rose-Innes J of the Cape Provincial Division had concluded that there was no reasonable prospect of another court reversing the conviction or interfering with the sentence of imprisonment and would have refused the application for leave to appeal.

Madala J referred to the provisions of s 25 (3) (b) of Chapter 3 of the Constitution which provides that every accused person shall have the right to a fair trial and this right entails having recourse by way of appeal or review to a higher court than the court of first instance.²²

In the court *a quo* it was argued on behalf of the applicant that s 25 (3) (b) referred to in the preceding paragraph afforded the applicant an automatic right to appeal and that as a result, the provisions of s 316

22. At 106H.

(1) (b) of the Criminal Procedure Act were unconstitutional in that they were in conflict with those of s 25 (3) (b) of the Constitution.

In the words of Madala J:

"If this submission is correct, it means that a person convicted in the superior Courts does not require leave in order to appeal to a higher Court than the Court of first instance." ²³

Reference was made to the case of *S v Madasie* ²⁴ wherein the same issue as in the present case was raised. In this case the accused had taken the point that the need for leave to appeal against the conviction and sentence had been eliminated by the provisions of s 25 (3) (b) of the Constitution. ²⁵

Responding to this contention Conradie J had said:

"The point is without merit. Section 102 (ii) of the Constitution Act makes it permissible for an Act of Parliament to require (as s 316 (i) of the Criminal Procedure Act 51 of 1977 does) leave as a condition for an appeal. Since both provisions are contained in the Constitution Act they must be accorded equal force. Section 102 (ii) therefore necessarily qualifies s 25 (3) (b). It follows that s 316 (1) (b) of the Criminal Procedure Act is not open to attack." ²⁶

23. At 106I-J.

24. Case No. SS105/94 unreported CPD judgment.

25. At 108G-H.

26. At 108H-I.

Section 102 of the Constitution refers to procedural matters relating to referral of matters to the Constitutional Court.

Subsec (ii) of the section reads:

“Appeals to the Appellate Division and the Constitutional Court shall be regulated by law, including the rules of such courts, which may provide that leave of the court from which the appeal is brought, or to which the appeal is noted, shall be required as a condition for such appeal.”

Conradie J, accordingly dismissed the application and refused to refer the matter to the Constitutional Court.

Having referred to several authorities Madala J made the following order:

1. that the answer to the question referred to by Rose-Innes J is that the provisions of s 316 of the Criminal Procedure Act are not inconsistent with the provisions of s 25 (3) (b) of the interim Constitution Act, and
2. that the case be referred back to the Cape Provincial Division to be dealt with in terms of this order.

The other Justices of the Constitutional Court concurred.

This judgment is, in my view, very sound.

4.6 THE RIGHT TO LEGAL REPRESENTATION

What follows is a brief discussion of this right. This right is important because an unrepresented person is unable to determine that a charge has been improperly split.

Section 73 of the Criminal Procedure Act ²⁷ provides that an accused who is arrested, whether with or without a warrant of arrest shall, subject to any law relating to the management of prisons, be entitled to the assistance of his legal adviser as from the time of arrest. ²⁸

Subsection (2) of this section provides that an accused shall be entitled to be represented by his legal adviser at criminal proceedings if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.

Section 25 (1) (c) of the interim Constitution of the Republic of South Africa Act ²⁹ provides that every person who is detained, including every sentenced prisoner shall have the right to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner.

27. Supra.

28. Subsec (1).

29. Supra.

Subsection (3) (e) of this section provides that every accused person shall have the right to a fair trial which shall include the right to be represented by a legal practitioner of his or her choice or, when substantial injustice would otherwise result, to be provided with legal representation at state expense and to be informed of these rights.

The Legal Aid Act ³⁰ provides that an indigent accused person may apply for legal aid. He/she goes through a means test and if he/she succeeds a legal representative is provided to assist him/her at State expense.

In *S v Rudman*, *S v Johnson*, *S v Xaso* and *Xaso v van Wyk N.O.* ³¹ two of the main grounds of appeal raised on behalf of the appellants related to an undefended accused person's right to be informed of his entitlement to legal representation as well as his right to apply for legal aid.

In each of these matters the appellant was not represented at his trial and in each case the appellant complained that the magistrate hearing his case had failed to inform him that he was entitled to the assistance of a legal adviser and also that he was entitled to approach the Legal Aid Board for financial assistance to secure the services of a legal representative.

30. 22 of 1969 as amended.

31. 1989 (3) SA 368 (E).

Counsel for the appellants contended that a judicial officer was under a duty to inform an unrepresented indigent accused that he is entitled to the assistance of a legal adviser and that a judicial officer's failure to inform the accused of his entitlement to such a right amounted to a gross irregularity which vitiated the proceedings.

The argument went further to say that, unless legal representation was provided for an indigent accused who applied for it, the judicial officer should decline to hear his trial.

It was submitted that the trial of such an undefended accused would amount to a denial of a fundamental right and would constitute gross irregularity. It was further argued that the failure to inform an accused of his right to representation and the failure to provide him/her with legal representation were irregularities which *per se* resulted in a failure of justice and vitiated the proceedings.³²

Cooper J referred to "... the unqualified use of the word duty ...". The learned judge said that it might be helpful to describe the different senses in which the word was used with reference to the effect a breach of a "duty" had upon the proceedings.

The judge went further and said that, accordingly, where the breach of a duty *per se* vitiated the proceedings, it might be described as a

32. At 370A-G.

directory duty to inform an undefended indigent accused person of his right to legal representation.

The court referred to works of several authors and decided cases including *S v Khanyile*³³ and *S v Nqula*.³⁴

Judge Cooper said that it might have been in the appellant's personal interest to have the proceedings vitiated but, because the appellant had admitted guilt, it would not be in the interests of justice to do so. The judge went on and said that if the court were to uphold counsel's argument and thereby give the appellant an opportunity to engage in a manoeuvre to avoid conviction, it would be countenancing a possible miscarriage of justice.

In the learned judge's view, any irregularity that may have occurred in the proceedings had not resulted in the failure of justice. The judge said that it was quite clear that no irregularity had occurred when the magistrate failed to inform the appellant of his rights.

The case of *S v Nqula*³⁵ came before the court on review and was supported by affidavits by the applicant and her attorney, to which replying affidavits were attached.

33. 1988 (3) SA 795 (N).

34. 1974 (1) SA 801 (E).

35. *Supra*.

It appeared from the applicant's affidavit that she had been arraigned before a regional court in Queenstown on the charge of culpable homicide and that of driving a motor vehicle without a licence. On the first count she had been fined R250 or, in default of payment, to undergo 125 days' imprisonment and a further six months' imprisonment was conditionally suspended for three years.

On the second count she was sentenced to a fine of R50 or 25 days' imprisonment.

On being charged with these offences she had consulted and retained an attorney, Mr Beukes of Queenstown. The applicant had made all the necessary arrangements to represent her at the trial.

On the morning of the trial, namely, 19 October she went to the offices of her attorney and discovered that he was not in Queenstown but had gone to Durban by plane but had been prevented from returning from Durban as a result of bad weather which prevailed at the time. She was informed at Mr Beukes' office that he hoped to be available later that day.

She proceeded to the court where she spoke to the public prosecutor. The prosecutor allegedly told her that she would be allowed two hours within which to find another attorney to represent her. She was eventually called into court where she was advised by the magistrate to

find another attorney to represent her. She said that she did consult another attorney who would not take her case as it was too late for him to consult and apprise himself fully of the merits of the case.

The applicant returned to court at about two o'clock that afternoon where she was informed that the absence of her attorney, Mr Beukes afforded no ground for postponing the trial. The magistrate insisted that she plead as the court was going to proceed with the case whether she had an attorney or not. The applicant said that she got "bewildered" as a result of this attitude of the court as she was not responsible for her attorney's absence, nor was her attorney, to her mind, at fault as a result of his absence. She said that the attitude of the magistrate appeared to be hostile. Under the pressure of the circumstances she says that she pleaded guilty and made no defence.

The record of the proceedings which were taken down mechanically read as follows:

"Aanklaer stel die eerste klagte

Accused: I have an attorney but the attorney is not present."

According to the record the court said the following to her:

"Yes, but now you indicated that this morning and the court said this case would stand down until 11 o'clock. You have now had another two hours, rather more than that. It is now half-past two and

the court told you that you must make arrangements by the time your case is called. What arrangements have you made? — I went to the attorney's office and I was told that he was delayed by heavy rains in Bloemfontein."

The magistrate then said:

"Yes, well, unfortunately he should not have been in Bloemfontein on the day when he had cases in Queenstown. This court has come all the way from East London to try the cases and in that case the court now orders that the case must proceed."

In this affidavit Mr Beukes confirmed that he had been instructed and retained by the applicant to appear on her behalf at the trial and that on the day prior to the trial he had telephoned the prosecutor of the regional court in Queenstown from Durban to say that he had flown to Durban by light plane and that, according to the meteorological office the weather which was inclement would remain unchanged the next day and that it was unlikely that he would be able to attend the trial on the 19th October. Mr Beukes said that the prosecutor informed him that he fully understood his position and that, if necessary, the matter would be postponed to the Friday morning, and that if by then he was still weatherbound in Durban, the matter could be postponed to a date to be arranged. Mr Beukes said that at no stage did the prosecutor indicate that the matter would proceed in his absence if he were unable to attend the court.

Although the public prosecutor admitted that Mr Beukes had phoned

him on the evening of the 18th October, he (the prosecutor) said that Mr Beukes had not asked him to arrange a postponement nor did he (the prosecutor) promised to arrange a postponement. The prosecutor said that he had asked Mr Beukes to phone him again at 07h45 the following day.

Eksteen J, said that the object of Mr Beukes' telephonic conversation with the prosecutor was in order to obtain a postponement and that the prosecutor must have understood the request in this way.³⁶

The applicant brought the proceedings on review on the ground that she had been deprived of a fundamental right to be represented at the trial by an attorney. The learned judge went on to say:

"It is to my mind a matter of considerable importance in the interests of justice and the administration of justice that every accused person should be accorded every opportunity of putting his or her case clearly or succinctly to the court and this can only be properly done when it is put by a person who is trained in the law.

Such a person must obviously be in a much better position to put the case of an accused person much better and much more clearly than that person could fairly do himself."³⁷

Eksteen J referred to the serious prejudice which any accused person

36. at 803H.

37. At 804E-F.

must suffer when deprived of the right which the statute gives her to legal representation at her trial.

Accordingly the learned judge concluded that the magistrate's refusal to grant a postponement in those circumstances amounted to a fatal irregularity, an irregularity which must have prejudiced the applicant. The convictions and sentences were set aside.

The case of *S v Khanyile*³⁸ also came before the court by way of automatic review. Payise Khanyile and Mkezi Mkwanyana stood trial together on a charge of housebreaking with intent to steal and theft. Each pleaded not guilty. However they were both convicted and sentenced to imprisonment for a year.

In the words of Didcott J (as he then was):

"Like so many South Africans who face criminal charges, like the vast majority indeed, the two men had no lawyer to advise and represent them. They therefore conducted their own defences, if their efforts may thus be described.

Neither cross-examined the first policeman or the second, asking no questions at all. A few were put by

38. *Supra* of *S v Mthwana* 1989 (4) SA 361 (N) in which the Full Bench of that Division did not support the judgment of Didcott J.

each to the third policeman, the expert, but these were perfunctory, superficial and aimless.”³⁹

It was held among others that the duty of a presiding officer, faced by an unrepresented accused, does not end when he has advised the accused of his rights, including the right to legal representation. Where an accused has been charged in a matter which is neither so serious that *pro deo* representation (as it then was) will be automatically appointed to assist him, nor so trivial that, were the accused able to afford legal representation, he would dispense with it but lies somewhere between the two extremes, and the accused is unrepresented, not because he has freely and deliberately chosen to be unrepresented, but because he is too poor to pay for representation, the presiding officer has a duty, prior to the commencement of proceedings, to assess whether the lack of legal representation will place the accused at so great a disadvantage that the ensuing trial would be palpably and grossly unfair were it to proceed without a lawyer for the defence.

Should it be found as demonstrated by the record of the proceedings in the lower court, that, in the judgment of the Superior Court, the trial already completed had indeed been grossly and palpably unfair, the court should set the lower court's verdict aside without hesitation since no conviction can ever be allowed to stand which is the product of a discredited trial.

39. At 797F.

Friedman J concurred.

In *Makami v Attorney-General Ciskei*⁴⁰ it was held that a presiding officer in a criminal case is obliged to inform an accused who is not legally represented that he is entitled to legal representation, to explain to him the need for such representation and the consequences of his deciding not to make use of legal representation. If a presiding officer fails to adopt this procedure it will constitute, *per se*, an irregularity. Any conviction and sentence in such proceedings should, therefore, be set aside. The presiding judicial officer should also record that the accused's right to legal representation has been explained to him.

Where a presiding officer has made an accused aware of his right to legal representation and has afforded him sufficient opportunity to obtain such representation but the accused has not succeeded in doing so, the presiding officer will be entitled to proceed with the trial.

This decision was followed in *S v Mthwana*.⁴¹

In *S v Rudman, S v Mthwana* 1992 (1) SA 343 (A) appeals of two Provincial Divisions concerning the issue of whether an accused person was entitled to be afforded legal representation in cases where, by reason of his indigence, he was unable to obtain such representation

40. 1989 (3) SA 655 (CGD).

41. *Supra*.

were dealt with. It was pointed out that in criminal appeals from lower courts to the Supreme Court where it was contended that there had been irregularities of procedure in connection with the trial, the Court of Appeal was not required to enquire whether the trial had been fair in accordance with notions of basic fairness and justice but the inquiry was whether there had been an irregularity or illegality, that is a departure from the formalities, rules and principles aimed at ensuring a fair trial. It was said that an irregularity in this context did not encompass every flaw in the way a criminal trial was run which rendered it truly unfair.

That the rule in the *Khanyile* case ⁴² was the elaboration and development of the right, well established in South African law, to a fair trial, the right to be represented on trial was rejected. The court held that no such right had ever been recognised either by statute or in the practice of the courts. The *Khanyile* rule was said to have been a new departure which could not claim legitimacy by reference to 'the right to a fair trial' because the right to a fair trial was not test of an irregularity or illegality.

It was held that the Supreme Court's power to regulate procedure in criminal trials was exemplified by numerous reported cases which formulated and implemented the rules which had been evolved for the

42. *Supra.*

assistance of undefended accused persons and to reduce the risk of an unfair trial.

It was further held that, in considering whether the *Khanyile* rule should be adopted, two questions arose namely, one of principle and the other of feasibility.

It was held further that, as to the question of principle, the adoption of the rule would constitute notice to the government that if legal aid on the scale required were provided, the prospect would have to be faced if numerous criminal trials being delayed and many convictions being upset on appeal because of the failure to provide accused persons with legal aid.

It was held further that the court had no power to issue a *mandames* to government to provide legal aid, and that it should not adopt a rule, the tendency of which would be to oblige the government to do so.

The court rejected the argument that the State was obliged to ensure that a person put on trial had a fair trial. The court held that what an accused person was entitled to was a trial initiated and conducted in accordance with those formalities, rules and principles of procedure which the law required and that he was not entitled to a trial which was fair when tested against abstract notions of fairness and justice.

It was held further that, as to the short-term feasibility of adopting the *Khanyile* rule as the funds available to the Legal Aid Board had always been insufficient to supply even its present needs, overnight implementation of the rule would be impossible. The reason would not only be that there were financial constraints on the Legal Aid Board, but also because of the intolerable burden which would be placed upon its organisation, its agents and representatives by the flood of applications which would ensue.

It was held that the court should not adopt the rule formulated in the *Khanyile* case.

The case of *S v Vermaas, S v du Plessis*⁴³ dealt, among others, with whether or not Vermaas and du Plessis were, or either of them was, then entitled, on the strength of s 25 (3) (e) of the interim Constitution of the Republic of South Africa Act,⁴⁴ referred to earlier, to obtain legal representation at the cost of the State. Didcott J said that no answer should be ventured by the Constitutional Court because that court was ill-equipped for factual findings and assessments which the enquiry entailed.

Didcott J went on to say that such a decision was pre-eminently one for the judge trying the case, a judge much better placed than the

43. 1995 (2) SACR 125 (CC).

44. *Supra*.

Constitutional Court to which the case had been referred, was to appraise, usually in advance, its ramifications and their complexity or simplicity, the accused person's aptitude or ineptitude to fend for himself or herself in a matter of those dimensions, how grave the the consequences of a conviction may look and any other factor that needs to be evaluated in the determination of the likelihood or unlikelihood that, if the trial were to proceed without a lawyer for the defence, the result would be "substantial injustice."⁴⁵

The two cases emanated from the Transvaal Provincial Division. Both trials were already in progress in that court. The one of Vermaas was before Kirk-Cohen J and that of du Plessis was before Hartzenberg J.

Vermaas faced 140 charges, some of theft, many of fraud and the rest laid under fiscal or commercial legislation. du Plessis was alleged to have committed 63 offences, 62 of fraud and one of corruption. The trials had started well before the interim Constitution came into operation on 27 April 1994.⁴⁶

Kirk-Cohen J expressed some doubt about the inability of Vermaas to present unaided an adequate argument at his trial, taking into account that he was an attorney by profession who had displayed a lively interest and taken an active part in the earlier management of his

45. At 133A-B.

46. At 128E.

defence.⁴⁷

Didcott J said that Kirk-Cohen J and Hartzenberg J would then have to consider the cases more fully and dispose of them in one way or the other. Hartzenberg J had already decided a single point which concerned the right claimed by du Plessis to pick the lawyer appointed for him. The learned judge held that no such right was derived from s 25 (3) (e) when the State supplied the lawyer's service.⁴⁸

Didcott J confirmed the decision of Hartzenberg J and, added that the effect of the disjunctive 'or', appearing in the section immediately before the reference to the prospect of 'substantial injustice' is to differentiate clearly between two situations, namely, where the accused person makes his or her own arrangements for the representation that must be allowed, and cases in which the assistance of the State becomes imperative, and to cater for the personal choice of a lawyer in the first one alone.⁴⁹

Didcott J added that no counsel on either side could then tell the court of any steps taken to establish the financial and administrative structures that were necessary to give effect to the part of s 25 (3) (e) providing for legal representation at the expense of the State. The court

47. At 133C.

48. At 133D.

49. At 133E-F.

gained the impression that nothing of such significance had been done in that direction since the Constitution came into force.

The court was mindful of the multifarious demands on the public purse and the machinery of the government that flowed from the urgent need for economic and social reform. The justice said that the Constitution did not envisage and will not countenance an undue delay in the fulfilment of any promise made by it about a fundamental right. The justice assumed that, in spite of the provisions of s 25 (3) (e) of the Constitution, the situation still prevailed where during every month countless thousands of South Africans were criminally tried without legal representation because they were too poor to pay for it.

The justice further presumed that such accused persons were informed in the beginning as the section requires them peremptorily to be of their right to obtain legal representation free of charge in the circumstances defined in the section.

Didcott J said that imparting such information becomes any empty gesture and makes mockery of the Constitution if it is not backed by mechanisms that are adequate for enforcement of the right.

The two cases were remitted to the Transvaal Provincial Division for the court to resume and complete the trials.

As I have said, the right to legal representation is important in that an

unrepresented accused person is unable to determine whether or not the charges against him have been improperly split.

What I have observed is that at the commencement of every trial an accused person is apprised of his right to legal representation. Surprisingly, some accused persons elect to conduct their own defence.

It appears that the right is not yet understood by many citizens, hence they view it with suspicion.

Failure to advise the accused of this right might constitute a fatal irregularity.⁵⁰

50. *S v Melani* 1996 (1) SACR 335(E). *S v Marx* 1996 (2) SACR 140 (W).

CHAPTER 5

CONCLUSION

5.1 FINDINGS

Were it not for the case of *Regina v Marinus*¹ and many other decided cases, the phrase “splitting of charges” would not be known in our criminal law.

The term “splitting of charges” was first used in the case of *Regina v Marinus*² as early as 1887.

Buchanan J said in his judgment that it was an “objectionable practice” to split charges to enable the magistrate to impose punishment, in the whole, far in excess of the limit of the jurisdiction conferred by him by the Legislature.

The leading case in the splitting of charges is that of *Ex parte Minister of Justice : In re Rex v Moseme*.³

In this case De Villiers JA said that it was, apparent that both in the Magistrate’s court and in the court *a quo* there had been a confusion of

1. Supra.

2. Ibid.

3. Supra.

two entirely distinct subject matters of the splitting of charges and the plea of *autrefois acquit*.

The learned judge of appeal said that there is a wide and essential distinction between the two matters.

An accused person can be charged in one and the same trial with several offences arising out of the same acts but such is immaterial, he cannot at a later stage plead *autrefois acquit*.

This rule does not owe its origin to an application of the *maxim nemo debet bis vexari pro uno et eadem causa*.

In this case the term "*autrefois acquit*" was regarded as a defence, not as a plea since it can only be raised if the indictment was correct and the acquittal was on the merits of the case.

To allow the acts to split into several offences is naturally to multiply the magistrate's jurisdiction to impose punishments far in excess of the required maximum.

In *R v Gordon*⁴ it was held that there is no general test when a formula has been set to enable the courts to say when an offence is in substance the same and when it is not.

4. Supra.

It should be mentioned that very scanty is provided by s 83 of the Criminal Procedure Act ⁵ in connection with improper splitting of charges.

This section provides that:

“... if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with commission of all or any of such offences ...”

The remarks in *S v Grobler* ⁶ were in regard to the predecessor of s 83 of the Criminal Procedure Act where the following was said:

“The state is at liberty to draw up as many charges as the available facts justify.”

The effect of s 83 is that at the commencement of the trial no objection can be made to the charge but the question of splitting of charges can only arise if the several offences are charged in one and the same trial. In such a case the accused can raise the question of splitting of charges but he cannot plead *autrefois acquit* or *convict*. ⁷

In the works of Kriegler it was said that:

“Where more than one charge is proved, the court will

5. Supra.

6. Supra.

7. Ibid.

convict on the charge which the facts best suit.”⁸

It is stressed in the judgments of our courts that when evidence has been led to support both of the alternative counts, it is the prosecutor’s right to withdraw on any count.⁹

In s 309 (3) of the Criminal Procedure Act it is provided that when a trial court has found an accused not guilty on the main count but guilty on the alternative charge, the court of appeal can reverse the finding and convict the accused on the main charge.

If the accused is convicted on the main count, a judgment on the alternative count is unnecessary.¹⁰

Section 336 of the Criminal Procedure Act provides that ... where an act or an omission constitutes an offence under two or more statutory provisions or is an offence against a statutory and the common law, the person guilty of such act or omission shall be liable to be prosecuted and punished under either statutory provision or the common law.

In the *Diab*¹¹ case the court held that if an act constitutes an offence under two statutes, the offender shall only be liable to be punished once.

8. Op cit 223.

9. *R v Zechlin* supra.

10. *S v du Toit* and *S v Ngcobo* supra.

11. Supra.

The interest to be protected in the splitting of charges is that of the accused person since the disadvantages he suffers as a result of a duplication of convictions are very serious.

Since there are a number of offences which differ in their elements, it is not easy to develop a single guiding principle which would apply to all of them with equal force.

In the decision in *S v Kuzwayo*¹² it was said that ... concerning the question of duplication, each case must be decided on the basis of sound reasoning and the court's perception of fairness.

It was also in this case where it was held that the tests that have been adopted in our law are not rules of law but are just practical guides and can be applied in a common sense view of the matter and to what could be regarded as fair to an accused person in a particular case.

Courts are also given a discretion to apply these tests.¹³

They are two tests that were introduced in our law and their purpose was to determine whether or not a charge has improperly been split.

These tests are the single intent or continuous transaction test and the general test. The first test is based on the enquiry into the nature of the

12. *Supra*.

13. *B v Verwey supra*.

criminal acts and the latter sets out the material facts which must be proved in order to establish each count.

Were it not for these tests, the question of splitting of charges would not have been detected by our courts.

In *S v Grobler*¹⁴ it was clearly said that the person to guard against the splitting of charges is the presiding officer since the prosecutor is the one entrusted with drafting of the charge sheets and cannot be certain prior to the trial as to which facts will be accepted by the court as proven.

It was in this case¹⁵ where it was said that the term "splitting of charges" appears to be a misnomer, as the purpose of a principle involved in a splitting of charges is not to avoid multiple convictions in respect of the same offence but duplication of convictions.

Most of the decided cases which I have discussed show that some presiding judicial officers are unable to detect that a charge has been improperly split. Were it not for the review and appeal procedures, some convicted and sentenced persons would have been wrongly convicted and sentenced. Unfortunately some sentences of magistrate's courts are not subject to automatic review. In such cases splitting of

14. *Supra*.

15. *Ibid*.

charges may not be detected by a higher court. Another unfortunate case is that of an accused person who was legally represented in a criminal trial. Such a criminal case is not subject to automatic review by the Supreme Court.¹⁶

Section 25 (3) of Chapter Three of the interim Constitution of the Republic of South Africa Act¹⁷ provides that every person shall have the right to a fair trial and this right includes not to be tried again for any offence of which he or she has previously been convicted or acquitted.

Appeal and review courts have very wide powers. Any person who has been convicted in a lower court may appeal against such conviction and sentence or order.

Persons can only appeal to Provincial Divisions since Local Divisions have no appellate jurisdiction with the exception of the Witwatersrand Local Division.

The purpose of reviewing a criminal case is to find out whether or not the proceedings are in accordance with justice.¹⁸

There is a proviso in terms of s 304 (4) of the Criminal Procedure Act that sentences which are not subject to automatic review may be

16. S 302 (3) (a) of the Criminal Procedure Act.

17. Supra.

18. S 304 (2) (a) of the Criminal Procedure Act.

reviewed if they are brought to the attention of the provincial or local division having jurisdiction.

The Constitutional Court has made very important decisions concerning an accused persons and a fair trial.

5.2 RECOMMENDATIONS

It has been pointed out that the feeling of our authorities has been that the two tests that serve as guides in our courts are not sufficient guides and that there must be a third test which would be a composite of the two tests.

To me these tests are adequate and must be retained. Even the second test namely, the general test, has a role to play and must also be retained.

For a sound and clear understanding of "splitting of charges" offences ought to be categorised or grouped according to their nature as has been done in this work. The categories are the following:

- (i) Possession of or dealing in various forms of prohibited dependence-producing substances. (The Drugs and Drug Trafficking Act.)
- (ii) Assault with intent to do grievous bodily harm and possession of

a dangerous weapon in contravention of s 2 (1) of the Dangerous Weapons Act.

- (iii) Culpable homicide and rape.
- (iv) Murder and rape.
- (v) Murder and robbery
- (vi) Culpable homicide and driving under the influence of alcohol.
- (vii) Negligent driving and driving a motor vehicle while the percentage of alcohol in the driver's blood exceeds the prescribed limit.
- (viii) Attempted murder and robbery.
- (ix) Multiple thefts.
- (x) Theft and fraud.

Splitting of charges may be reduced if public prosecutors who draw the charge sheets are subjected to adequate training.

The charge sheet is the foundation of a criminal trial. It stands to reason therefore that it must be drawn by a public prosecutor who knows and understands splitting of charges. Very often police officers suggest charges such as assault on police and resisting arrest or obstructing a police officer in the execution of his duties and assault on police. Public prosecutors should guard against such practice.

An accused person who has raped a woman in circumstances such as those in *S v W*¹⁹ should be charged with one count of rape.

A person who steals from a room items belonging to different owners should be charged with theft in respect of every item he stole if he knew that it belonged to a different owner. A person who draws a bomb which kills eight people is charged with eight counts of murder because he knew or foresaw that there were more than one person in the house.

Judgments of *Grobler*²⁰ and *Mooi*²¹ involving the intentional killing by a robber of the victim in order to rob him or her of his or her goods are to be supported as they do not constitute improper splitting of charges.

The judgments of the Constitutional Court in *S v Ntuli*²² and *S v Rens*²³ are to be welcomed. Indeed the right to a fair trial should include the right to have access by way of appeal or review to a higher court.

If an application for leave to appeal from a superior court is refused, the person intending to appeal may still petition the Appellate Division. This means that a court higher than the trial court considers the application.

19. Supra.

20. Supra.

21. Supra.

22. Supra.

23. Supra.

It is correct therefore that the provisions of s 316 of the Criminal Procedure Act relating to applications for leave to appeal, do not violate an accused person's right to a fair trial.

I further recommend that public prosecutors and presiding officers be provided with a comprehensive guide to serve as their book of life during court hours so that they detect charges which have been improperly split. Police officers as well ought to be trained in this respect.

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