

Explanatory Note

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*The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

The common law rules of privilege precluded an accused person from having access to the contents of a police docket in all circumstances. An accused person was in addition precluded by a common law rule of practice from consulting State witnesses without first obtaining the consent of the prosecution which was entitled to refuse consent in its sole and absolute discretion. The issue of the constitutionality of these rules was referred to the Constitutional Court from the Supreme Court.

The Court held that both rules are inconsistent with the right of an accused person to a fair trial in terms of s 25(3) of the Constitution because they preclude an accused from exercising his or her right to a fair trial in all cases and regardless of the circumstances.

In the opinion of the Court, an accused person should ordinarily be entitled to have access to those parts of a police docket that are relevant for him or her to exercise the right to a fair trial. The prosecution may resist a claim to access where it has reason to believe that access to the docket may lead to the disclosure of the identity of an informer, reveal State secrets, lead to the intimidation of witnesses, or otherwise impede the proper ends of justice. It is for the trial court in each case to decide what is required for the purposes of a fair trial in a particular case rather than simply denying an accused person access to the docket in every case.

An accused person should ordinarily be entitled to consult with state witnesses where his or her right to a fair trial would be impaired by being refused the opportunity to consult. A member of the office of the Attorney-General should be approached for consent to a consultation, and should be entitled to be present at the consultation. If consent is refused, the accused should be entitled to approach a court to obtain permission. No witness may be compelled to consult with an accused and the prosecution may resist the claim of an accused if it is able to show that it has reasonable grounds to believe that the consultation may lead to the intimidation of the witness, tampering with evidence, the disclosure of State secrets or the identity of informers, or that it might otherwise impede the proper ends of justice.

The judgment of the Court was delivered by Mahomed DP and was concurred in by all the other members of the Court.