

PART THREE

CHAPTER THREE

THE KEY WORDS: "PARTICIPATION", "MEANINGFUL" AND "INFORMED"

3.1 INTRODUCTION

The phrase "meaningful and informed participation" embraces the idea that an accused must be informed of the charges against him so that he will know what case he has to meet. Therefore, an informed accused will be able to prepare an adequate defence and take part in the criminal proceedings. The key words are important as they demonstrate that the accused has certain inviolable rights which must be respected in the criminal process. The following discussion on the key terms will be addressed in the following manner, firstly "participation", thereafter "meaningful" and finally "informed".

3.2 "PARTICIPATION"

The word "participation" literally means "the act of taking part in something".¹ The question arises whether the accused always had a right to take part in criminal proceedings. The examination of the historical context demonstrates that the accused was regarded as an object of the proceedings in primitive times.² People were superstitious in primitive times, and crime was regarded as an offence against the gods, with the criminal being declared an outlaw. Thereafter, with more community involvement, crime became regarded as an offence against the community. Thus, the focus shifted from the gods to the community. The reception of Roman law and the German concept of freedom is credited for the shift in focus to the protection of individual rights, and the advent of a right to a trial. Accordingly, the accused became a subject of the proceedings and the focus shifted to the protection of the accused's rights. Nowadays, the protection of criminal procedural rights of the accused is entrenched in statute and democratic Constitutions throughout the world.³ Therefore, any punishment meted out to the accused must conform with the principles of the Constitution, and he must be treated with fairness and dignity. Indeed, the barbaric practices of the past such as blood feuds and mutilation, to name a few, have been replaced with the right to a fair trial.

However, in order for an accused to take part in the criminal proceedings, he must be both physically and mentally present. This presupposes that the accused must be

¹ See Garner, editor of *Black's law dictionary* West Group (1999) at 1141. Also see Hanks *et al Collin's pocket reference English dictionary* (1992) at 347 and Sykes *The concise Oxford dictionary of current English* Oxford Clarendon Press (1982) at 746.

² Please refer to chapter 1, para 1.2 on "The Accused in Historical Perspective" for a more detailed discussion about how the accused was viewed in primitive times.

³ See, *inter alia*, the Act; the Constitution and the United States Constitution in this regard.

present in person at the trial, and that he must be able to understand and comprehend the proceedings.⁴ The accused must be “fit” to be tried. If the accused is incapable of understanding the proceedings so as to make a proper defence, he cannot take part in the proceedings.⁵ If the accused is not present at both levels, it cannot be said that he has had a fair trial.⁶ The accused’s right to follow and take part in the proceedings also entails that if he does not understand the language of the court proceedings, then it must be translated for him by a competent interpreter.⁷

3.3 “MEANINGFUL”

The word “meaningful” means “to be of great meaning and significance”.⁸ It has also been used to mean “significant” or “important”.⁹ In order for the accused to participate meaningfully in the proceedings, he must first and foremost have “presence of mind”. This means that he must be capable of understanding and following the proceedings. Therefore, the accused has a right to be present at the trial. If he is not present on a physical level or a cognitive level, then he cannot make a useful contribution to the proceedings.¹⁰ Thus, his participation depends on his presence. At the end of the day, there must be “meaningful participation”. However, the accused’s right to be present is not absolute. Circumstances will arise when the accused’s presence can be dispensed with.¹¹ The accused also has a right to confront his accusers and observe their demeanour at close quarters. This will enable him to challenge the opposing evidence effectively. Nevertheless, even the right to confrontation is not absolute. Certain circumstances will arise where the competing demands of public interest will prevail over the accused’s right to confrontation.¹²

⁴ See chapter 8 on “The Right to be Present” and chapter 6 on “The Right to Understand”, for a more detailed discussion about these principles.

⁵ An enquiry is held in terms of ss 77 and 79 of the Act to determine the accused’s capacity to understand and follow the proceedings. If the enquiry establishes that the accused is incapable of understanding the proceedings, then he is detained in a psychiatric hospital or prison.

⁶ However, there are exceptions to the right to be present, for example, where the accused continuously disrupts the proceedings. See s 159(1) of the Act.

⁷ See, *inter alia*, *Geidel v Bosman supra* at 253.

⁸ *Hanks et al op cit* 300.

⁹ See *Garner A dictionary of modern legal usage* Oxford University Press (1995) at 553 and *Sykes op cit* 628.

¹⁰ See chapter 8 on “The Right to be Present” for a more comprehensive discussion about this principle.

¹¹ See for example, s 159(1) of the Act.

¹² See for example, s 170A of the Act. Also see chapter 9 “The Right to Confrontation” below.

3.4 "INFORMED"

The word "informed" means to "have much knowledge or education, to be learned or cultured".¹³ Similarly, the accused must be "informed" of the charges against him, so that he knows what case he has to meet. If the accused has "knowledge" of the impending case against him, he can prepare a proper response. An informed accused will have relevant access to documents in the prosecution's possession to enable him to prepare his case.¹⁴ However, the accused does not have an absolute right to information in the prosecution's possession.¹⁵ An informed accused will also be advised of his right to legal representation.¹⁶ It is imperative that an accused be informed of his rights at all times so that he has ample time to conduct his defence adequately,¹⁷ and thus participate in the proceedings. To illustrate this, the failure to inform the accused properly of his rights amounts to an irregularity which can lead to an unfair trial.¹⁸ Therefore, an informed accused will be able to prepare an adequate defence, and be able to participate meaningfully in the criminal proceedings. This also entails that the accused must be on an equal footing with the prosecution in court.¹⁹

3.5 CONCLUSION

The key words "participation", "meaningful" and "informed" are inter-related and inter-twined. An uninformed and absent accused cannot participate meaningfully in the criminal proceedings.²⁰ If the accused knows what case he has to meet, then he can prepare meaningfully for his defence.²¹ Nevertheless, circumstances may arise

¹³ Hanks *et al op cit* 252. It also means "knowing the facts". See Sykes *op cit* 514.

¹⁴ See s 32 of the Constitution.

¹⁵ See chapter 5 on "The Right to Information" for a more comprehensive discussion about the accused's right to information.

¹⁶ This is especially pertinent to an unrepresented accused and an indigent accused who can apply for legal aid in terms of s 35 of the Constitution.

¹⁷ See *S v Radebe, S v Mbonani* 1988 (1) SA 191 (T).

¹⁸ See *S v Khuzwayo* 2002 (2) SACR 24 (NC), where it was held that the test to be applied in determining whether the accused has been prejudiced by the failure to inform him will depend on the circumstances of each case.

¹⁹ The "equality of arms" principle comes into play. The accused should be given the same opportunities as the prosecution. This raises the question whether expert services should be provided for indigent accused. See chapter 7 on "The Right to be Prepared" for a detailed discussion about this question.

²⁰ Trials *in absentia* are held in certain countries, such as the United States. Special procedures are employed to protect the accused's constitutional rights such as furnishing him with a transcript of the proceedings, and safeguarding the right to legal representation. See chapter 8 on "The Right to be Present" for a detailed discussion about trials *in absentia*.

²¹ Such an accused can challenge opposing evidence.

when the competing demands of public interest and society have to prevail over the accused's rights. In those instances, a proper balance must be maintained between the interests of society and the constitutional rights of the accused. On the whole, the rights falling under the phrase "meaningful and informed participation" form part of the comprehensive right to a fair trial. These rights are there to ensure fairness to the accused.