the appellants were these. Having formed the opinion that Dr Joubert was unable to act as an assessor, the trial judge was faced with three choices: to order the trial to proceed before the remaining members of the court (in terms of para (a) of s 147(1)); to order the trial to start de novo, and for that purpose to summon an assessor in the place of Dr Joubert (para (b)); or to direct that the trial be stopped and the proceedings be quashed (in the exercise of his inherent power). (Cf R v Matsego & Others 1956(3) SA 411 (A) at 417 H). His choice was a matter which affected the composition of the trial court, in which the accused were vitally interested, and on which they had a right to be heard. The learned judge was not entitled to assume that the accused would not prefer to start de novo. The fact that they made an application to quash the proceedings made it clear that they did prefer to have the trial start de novo. The

failure to give the accused a hearing was therefore an irregularity which vitiates the convictions.

Special entries 1.4 and 2 arise out of the learned judge's ruling that Dr Joubert's third report and paragraph 6 of his second report were inadmissible and could not be received in evidence; and that the contents of the statements made by the learned judge were not open to contradiction. The defence had sought to rely on material in Dr Joubert's reports both in support of the application to quash the trial, and in support of the application for the recusal of the trial judge, alternatively of Mr Assessor Krugel. The effect of the rulings, so they informed the trial judge, was to make it impossible for them to continue with the recusal application. (Here special entry 2 has application). The rulings also reduced the thrust of the appellants' argument for quashing. (Here special entry 1.4

has application.) At the end of the argument in this court counsel for the appellants stated that they would not ask for the inclusion of special entry 2 in any order the court might make on the petition. Consequently is it unnecessary to consider it further.

VAN DIJKHORST J dealt with the admissibility of the material concerned at pp 701 E - 704 H of the reported judgment. He said that, wisely, counsel for the accused did not dispute the existence of the rule that it is against public policy that there should be a disclosure of private discussions and deliberations between judge and assessors on the case before them, (at 702A). In this regard he conceived the case of a jury to be analogous (at 702 B). He said that contradiction of the detailed facts which the judge had put on record could not be allowed. "It would put the credibility of the court itself at issue. Such

a situation is unthinkable. It is also against public policy." (at 703 F - G).

Counsel for the appellants submitted that the rule of public policy concerning the inadmissibility of statements by jurors to impeach a verdict has no application to the present case. Here it was incumbent on the trial judge, once he had placed the 'facts' on record, to admit evidence in contradiction thereof. The rulings bear directly upon the fairness of the trial, and upon the propriety of the trial judge continuing to hear the case. Hence the irregularities fall into the first category of irregularities mentioned in S v Moodie, (1961 (4) SA 752 (A)) and have per se resulted in a failure of justice. In Moodie's case HOLMES J A said at 758 F - G that the following rules may be stated in regard to irregularities and the question whether they have resulted in a failure of justice:

"(1) The general rule in regard to irregularities is that the Court will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial Court would inevitably have convicted if there had been no irregularity.

(2) In an exceptional case, where the irregularity consists of such a gross departure from established rules of procedure that the accused has not been properly tried, this is per se a failure of justice, and it is unnecesary to apply the test of enquiring whether a reasonable trial Court would inevitably have convicted if there had been no irregularity.

(3) Whether a case falls within (1) or (2) depends upon the nature and degree of the irregularity."

It seems that the reference in counsel's argument to the first

category was an error; the justification put forward in the petition for the hearing of a preliminary appeal on the special entries on the basis of a limited record was that the general rule referred to in category (1) is not applicable.

CONCLUSION

In my opinion this case is of the exceptional kind which justifies the making of an order for the hearing of the appeal in two stages. For the reasons advanced by the appellants, it falls into a very special category. The proposed course would be convenient to all parties and the court, and it would not result in disadvantage to anyone. (A consideration not so far mentioned is the fact that some of the appellants are serving sentences of imprisonment. If their convictions are to be set aside, that should be done at the earliest stage possible.)

Special entries 1.1, 1.2 and 1.3, at

least, raise points of substance which, if decided in favour of the appellants, will probably be decisive of the appeal. The arguments advanced in support of them are cogent. (The argument in regard to special entry 1.4 is not as strong and even if it should be decided that the learned judge's rulings were erroneous, it may well be held that such rulings were not irregularities of the kind referred to in category (2) in Moodie's case.)

So far as the record is concerned, the Attorney-General's representatives did not at the end of the argument contend that adjudication of an appeal on special entry 1. as amended would require consideration of anything more than Annexure "A". Ex abundanti cautela, however, it will be made clear in the order that it is open to the State to make application to the court hearing the preliminary appeal to supplement Annexure "A" with other material which

is shown to be relevant to the issues in such appeal.

The following order is made:

1. Special entry 1.2 is amended by the substitution therefor of the following:

> "1.2 Thereafter, and on 10 March 1987, the trial judge, purporting to act in terms of section 147(1) of the Criminal Procedure Act, No 51 of 1977, acted irregularly by ruling, without hearing any argument thereon, that the assessor Dr W A Joubert, had to recuse himself and had become unable to act as assessor, notwithstanding that no application for recusal had been made either by the State or the accused, that Dr Joubert was not willing to recuse himself and that he was willing to continue as assessor."

2.(a) It is directed that the appeal on special entry No 1 as amended be heard as a preliminary appeal separately from the main appeal.

(b)(i) The record for the purpose of the adjudication of the appeal on the said special entry shall be Annexure "A" to the petition.

(ii) Leave is granted to the State to apply to the court hearing the preliminary appeal for leave to supplement the record being Annexure "A" with material which is shown to be relevant to the issues in such appeal.

3. In regard to the application in Case No 54/89, the date on or before which a petition seeking leave to

appeal upon grounds not granted by the trial judge shall be filed, is extended to the date fixed by the court hearing the preliminary appeal when giving its decision thereon;

(b) the duty of the appellants to order and prepare copies of the full trial record for the main appeal is suspended pending the outcome of the preliminary appeal and the outcome of the petition for leave to appeal referred to in sub-paragraph (a) hereof.

H C NICHOLAS A J A

CORBETT C J concur.
BOTHA A J