CASE NO.: CC 32/2001

SPECIAL INTEREST

SUMMARY

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

CALVIN LISELI MALUMO & 112 OTHERS

HOFF, J

17 February 2011

Pointing-out – essentially communication by conduct – amounts to extra-curial admission. Common law rule embodied in section 219 A of Criminal Procedure Act, 51 of 1977 applies, namely that it must have been made freely and voluntarily.

Where no warning given in terms of Judges Rules, and constitutional rights (i.e. right to legal representation, right not to be compelled to give testimony against oneself) not explained – factors which influence voluntariness and accused's right to fair trial violated.

Police officer must explain rights prior to any pointing-out. Accused person must be placed in position to make an informed decision.

Treating a person as a potential witness, extracting incriminating information and thereafter charge such person, inimical to fair pre-trial procedure.

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CORAM: **HOFF, J**

Heard on: 02 - 04 November 2010; 08 – 11 November 2010; 24 November 2010

Delivered on : 31 January 2011

Reasons on: 17 February 2011

JUDGMENT

Trial-within-a-trial - pointings-out

HOFF, J: [1] This is a consolidated trial-within-a-trial. During the testimony of a state witness Jacobus Hendrik Karstens who at that stage held the rank of detective inspector in the Namibian Police it became apparent that he had conducted pointings-out involving six of the accused persons.

Counsel appearing on behalf of these accused persons objected to the leading of evidence regarding these pointings-out on various grounds, namely that the accused

persons had not prior to these pointings-out been informed of their constitutional rights, had been assaulted and threatened and that as a result whatever was said or pointed out was not done or said freely and voluntarily.

[2] The State led a number of police officers who at that stage were involved in the investigation of the case subsequent to an armed attack on the town Katima Mulilo on 2 August 1999. The accused persons testified relating their versions to the Court.

[3] Some of the evidence led were common cause or not seriously in dispute whilst there were disputes in respect of some of the evidence presented to Court.

[4] I shall now in turn deal with the evidence presented regarding the respective accused persons.

Richard Masupa Mungulike

[5] It is common cause that he was arrested on 30 August 1999 at Lesebe village in the Kaenda area in the Caprivi region. The police officers involved in his arrest consisted of officers Evans Simasiku, Robert Chizabulyo, Haodom, Erastus Aupa and Mbinge. Inspector Karstens who was the head of the team was unsure whether he was present or not during the arrest. After the arrest the police conducted a search at his house but nothing of any significance was found. He was then taken to the Katima Mulilo Police Station where he was interrogated. He was detained in the police cells. The next day he was again interrogated. On 1st September 1999 he was taken to a village in the Kaenda area to point out persons suspected to have been involved in the attack on 2 August 1999. Inspector Karstens was the head of the investigating team and in charge of the pointing-out operation. The accused had not been warned of any

rights by Inspector Karstens because he (i.e. the accused) did not incriminate himself and the accused was treated as a possible witness. Prior to their departure to Kaenda village the accused was made to wear a police shirt and a balaclava in order to conceal his identity.

[6] What is in dispute is whether the accused was assaulted at his house on 30 August 1999 by members of the police. The police officers denied such assault. The accused testified that on 30 August 1999 he was confronted at Katima Mulilo police station with a list of the names of persons who had fled to Botswana and he was accused of having participating in the attack. He denied any involvement and was then assaulted. The police also denied this assault. The accused testified that on 31 August 1999 he was taken to the Zambezi river and tortured. This was denied by the state witnesses. It is in dispute whether the accused on 30 August 1999 was warned of his right to remain silent and his right to legal representation.

It is also in dispute that the accused was taken to court on 31 August 1999 for his first appearance. The version of the accused was that he was not taken to court but to an office at the police station where police officers were present but no magistrate. What appears from a charge sheet (Exhibit ENF) was that the accused person, with two others, appeared in Court on 31.08.1999.

On a sheet of paper attached to the charge sheet it is stated that the case had been remanded to 24.01.2000 and was signed what appears to be *"Insp. Theron"*. This may support the version of the accused person that he was taken to an office at the police station where no magistrate was present.

The accused testified that he never pointed out any person at a village but that he was forced to point-out certain villages to the police.

Moses Chico Kayoka

[7] It is common cause that he was arrested on 2 September 1999 by members of the Namibian Defence Force under the command of Captain Mwilima who in turn handed him over to members of the Namibian Police Force under the command of Inspector Karstens at a place called Kaliyangile in the Caprivi region. The police team included officers Evans Simasiku, Erastus Aupa and Mbinge. He was interrogated at the scene. His clothes were full of dust. He was nervous, had the *"fright of his life"* because people had been killed around him and his behaviour was not normal. He provided Inspector Karstens with the names of suspected rebels who were allegedly in that camp. It is common cause that the accused was not informed of any right because it was reasoned by Inspector Karstens that he (i.e. the accused) did not incriminate himself and the accused person was merely asked to provide the police with information. His hands had been tied behind his back. It is not certain whether he was handcuffed or his hands tied with a rope. He was subsequently taken to Katima Mulilo police station where he was detained.

[8] It is in dispute that officer Evans Simasiku (holding the rank of detective sergeant at that stage) had warned the accused of his right to remain silent and his right to legal representation. It is in dispute that the accused was assaulted by Captain Mwilima and officer Erastus Aupa and that officer Mbinge threatened to shoot the accused. Inspector Karstens denied that the accused had been assaulted there at the scene to such an extent that he, himself had to empty a bucket of water on the accused in order to resuscitate him.

It is in dispute that the accused co-operated voluntarily with the police. It is not clear whether Inspector Karstens conversed with the accused person in the Afrikaans

language or whether he made use of an interpreter in the presence of sergeant Evans Simasiku.

Elvis Matengu Puteho

[9] It is common cause that on 18 August 1999 he was brought to Inspector Karstens by Sgt. Simasiku for the purposes of a pointing-out at the village of his father at Libuku village in the Mosokotwani area. Chief Inspector Theron, officers Simasiku, Lumponjani and others accompanied Inspector Karstens. They drove to this village and thereafter returned to Katima Mulilo police station where the accused was detained.

[10] What is in dispute is that after his arrest on 2 August 1999 the accused had been assaulted and threatened by members of the Namibian Police Force at Katima Mulilo police station on more than one occasion.
It is in dispute that his constitutional rights had been explained to him after his arrest or before he was taken for a pointing-out.
It is in dispute that he voluntarily co-operated with the police officers.

Victor Masiye Matengu

[11] It is not disputed that he was arrested on 2 August 1999. On 19 August 1999 he was brought to Inspector Karstens by D/Sgt. Evans Simasiku since the accused apparently wanted to make a pointing-out in the Makanga area in the Caprivi region. Inspector Karstens was accompanied by officers Simasiku, Mbinge, Aupa, Lumponyani and members of the Reserve Field Force. It is not clear whether police officer Haodom was also present. They left for a place somewhere in the bush (not near a village) from

where the party proceeded for some distance deeper into the bush. Thereafter they returned to the vehicles and proceeded to a second place in Cameroon area apparently for the purposes of a second pointing-out. From this place in Cameroon area they returned to Katima Mulilo police station where he was detained.

[12] It is in dispute that after his arrest on 2 August 1999 he had been assaulted by officers Popyeinawa, Haipa and Inspector Karstens. It is in dispute that his rights had been explained to him on 19 August 1999 prior to the alleged pointing-out.
It is in dispute that he co-operated voluntarily with the police officers.

John Panse Lubilo

[13] This is one of the undefended accused persons who at some stage during proceedings in the main trial excused themselves from the court proceedings until such time when the State has closed its case. He was therefore not present in Court when evidence was presented by the State.

[14] The evidence of the State was that on 1st September 1999 Inspector Karstens was approached by police officer Mbinge who informed him that the accused wanted to make a pointing-out. Inspector Karstens testified that the accused was brought to his office where he informed him of his right to legal representation and his right to remain silent. He was not sure whether he addressed the accused in the English language or whether he made use of the services of an interpreter. The accused indicated his willingness to co-operate and they drove to Kaenda area. He was accompanied by officers Mbinge, Simasiku, Aupa, Chizabulyo and Haodom. They travelled in two vehicles. The accused was with him in the same vehicle.

At the scene of the pointing-out photos were taken by police officer Mbinge. He denied that the accused had been assaulted however he observed an injury to the left foot of the accused which could have been caused by a *"bullit*".
After the pointing-out they returned with the accused person to Katima Police Station.

Isaya Shaft Kamwanga

[15] Inspector Karstens also gave evidence in respect of this accused person. The accused is represented by Mr Samukange who informed the Court that he was unable to take instructions from the accused person since there are indications that the accused suffers from a mental illness. In subsequent proceedings this Court referred the accused person for observation at the psychiatric section of the Central State Hospital in Windhoek in terms of the provisions of sections 77, 78 and 79 of the Criminal Procedure Act 51 of 1977. Presently the accused is still awaiting for space in the hospital and he has not yet been admitted for observation. This Court heard evidence of one of the medical officers attached to the psychiatric section, Dr Mthoko that the reason why the accused person was not admitted was due to a lack of space.
I shall therefor not make any ruling regarding the admissibility of the pointing-out until such time that this Court has been provided with a report in terms of the provisions of the Criminal Procedure Act, referred to *(supra).* In any event, for the reason provided by Mr Samukange the accused person could not testify in this trial-within-a-trial.

[16] One common feature of those accused persons who testified in this trial-within-a-trial was that not one of them made any pointings-out to any member of the Namibian Police Force when they were taken to the different locations, as testified by the police officers.

[17] It was submitted by Mr January that at the time when objections were raised by counsel, the evidence led *prima facie* indicated that the accused persons did an act implicating them in the commission of a positive act, that the objections were raised in view of the fact that these positive acts (pointings-out) did not meet the admissibility requirements prescribed by law, and that when the objections were raised it was never indicated that the accused persons never made any pointings-out or put differently, it was never disputed that the accused persons did what transpired at the pointings-out.

[18] This Court was on this point referred to authority to the effect that in those instances (i.e. where an accused person denies the contents of an admission or an confession or that a pointing-out was made) it is a dispute of fact to be decided at the end of the main trial and in such an instance a court need not embark upon the exercise of a trial-within-a-trial.

[19] I agree with this submission and I would surely have questioned the necessity of holding this trial-within-a-trial had I known then that the accused persons would in their testimonies deny pointings-out. This consolidated trial-within-a-trial was in my view, with the wisdom of hindsight an unnecessary exercise and a waste of time. I say this despite authorities to the effect that where a court does in these circumstances embark upon a trial-within-a-trial that it does not constitute a misdirection.

It is of utmost importance that counsel in their role as officers of court take proper instructions *before* any objections are raised on behalf of their clients, since failure to do so would be a serious dereliction of duty on their side towards their clients as well as towards this Court. Such conduct has a real possibility of prejudicing the defence of their clients and may expose counsel to complaints of unprofessional conduct being lodged at the Disciplinary Committee of the Law Society of Namibia. A further consequence is that it has delayed the conclusion of this trial.

It is however at this stage water under the bridge.

[20] Mr January in his submissions in respect of the credibility of the accused persons emphasised the fact that the grounds of the objections raised were in conflict with the evidence presented by the accused persons (i.e. their denial of any pointings-out).

[21] He also submitted that according to the accused persons the alleged assaults and threats had no relation to the pointings-out since the accused persons had not been assaulted or threatened to do the pointings-out.

[22] Regarding the explanation of rights, it was submitted by Mr January, that in respect of Victor Matengu and Elvis Puteho it is common cause that they appeared in court on 12 July 1999 on a case of illegally entering Namibia and, that in spite of the denial by the accused persons, the case record reflects that their respective rights to legal representation were explained to them.

[23] Regarding Richard Mungulike and Moses Kayoka it was submitted that Sgt. Evans Simasiku warned them of their rights before departing for a pointing-out.

[24] It is trite law that the State has the burden to prove beyond reasonable doubt that there was a pointing-out. This is in fact what Mr January urged this Court to find namely that the State has complied with the admissibility requirements of the pointings-out.

[25] A pointing-out is essentially a communication by conduct.

(See *S v Sheehama 1991 (2) SA 860 (A)*).

[26] It has been held that a pointing-out in an appropriate case amounts to an extra-curial admission and the common law rule now embodied in section 219 A of the Criminal Procedure Act applies, namely that it must have been made freely and voluntarily.
(See *Sheehama (supra*).

[27] It therefore needs to be considered whether the pointings-out, on the State's version, were made freely and voluntarily. In considering this, whether or not a warning was given in terms of the Judges Rules may be a deciding factor. In addition constitutional imperatives must also be considered.

[28] I shall first deal with whether the accused persons had been warned in terms of the Judges Rules and whether they had been informed of their constitutional rights.

[29] In respect of Richard Masupa Mungulike, Inspector Karstens testified that he did not warn the accused person prior to the pointing-out, of any rights because the accused was willing to co-operate with the police in their investigation by pointing-out other suspected rebels at Kaenda, and because he did not incriminate himself. A third reason why he did not warn the accused person of any right was that he considered him as a possible witness.
D/Sgt. Evans Simasiku testified that he did not warn the accused person of his constitutional rights at Kaenda. The evidence reflects that neither did officers Aupa or Mbinge.
The testimony (in chief) of D/Sgt. Evans Simasiku was that when the accused person was brought to his office to be interviewed, the late Robert Chizabulyo warned him of his constitutional rights on 31 August 1999. However during cross-examination he testified that it was he himself who had warned the accused of his right to remain

silent, his right not to incriminate himself, his right to legal representation and even that he may get assistance from the Government should he be out of pocket to afford legal representation. Erastus Aupa (a constable at that stage) testified that it was Inspector Karstens who had warned the accused of his rights during the interrogation. Inspector Karstens never testified that he had warned the accused person of his rights. D/Sgt. Evans Simasiku never informed Inspector Karstens that he had warned the accused of his right to legal representation and his right to remain silent.

[30] In the light of the material contradiction between the evidence in chief of Evans Simasiku and his evidence in cross-examination, having regard to the evidence of Aupa (another contradiction) and having regard to the denial by the accused that his rights had been explained to him, this Court in exercising its discretion cannot accept the evidence of Evans Simasiku, on this point, namely that the late Robert Chizabulyo had explained any rights to the accused person. In any event the testimony of Inspector Karstens was that, for the reasons provided *(supra)*, he did not warn the accused of any right prior to the pointing-out.

[31] Regarding Moses Chico Kayoka Inspector Karstens testified that on 2 September 1999 when he found the accused person on the scene at Kaliyangile he questioned the accused person who revealed the names of other suspected rebels who had been in the camp. He did not inform the accused of any rights because the information from the accused could assist them in their investigation and because the accused could not have incriminated himself.

[32] In spite of the testimony of Inspector Karstens that when he questioned the accused, the accused had calmed down and had indicated he was wiling to co-operate, the following must be considered: this Court during testimony in the main trial was

informed that members of the Namibian Defence Force in a surprise attack on this camp killed some persons suspected to be rebels. The accused who was also a suspected rebel was captured. Other suspected rebels managed to flee. Shortly after this incident Inspector Karstens with his team of police officers arrived on the scene.
It is in my view perfectly understandable and I accept the evidence of Inspector Karstens on this score that when he first spoke to the accused person he could see that he (i.e. accused person) *"had the fright of his life"*, that he was nervous because people had been killed around him and that the behaviour of the accused was not normal. His hands had been tied behind his back. It is common cause that the accused did not make any pointing-out.

[33] In the light of afore-mentioned can it with any measure of conviction be argued that whatever information provided was done freely and voluntarily ? I have serious misgivings about the timing of the interrogation by Inspector Karstens. In my view, the accused person could not have given information freely and voluntarily in those circumstances. Here was a person who had a short time earlier stared death in the face, and the persons involved in the killings were still present there at the scene, the majority of whom had been armed. The information might have been useful in terms of the police investigation but what weight should a court of law attach to it ? Barely any in my view.

[34] Evans Simasiku in his evidence-in-chief did not testify about warning the accused person of his rights. It was during cross-examination that he testified that he informed the accused of his right to remain silent and his right to legal representation. He again did not inform his superior, Inspector Karstens, that he had warned the accused person because according to him he did not want to look like a police officer who did not know what he was doing. A similar reason was provided for failing to tell

Inspector Karstens that he had warned Richard Mungulike of his rights. This appears to be a case of the one hand does not know what the other hand is doing. It also creates the impression that D/Sgt. Simasiku did not regard himself to be under the command of Inspector Karstens who was in charge of the investigating team. The reason why he did not inform Inspector Karstens that he warned the accused persons sounds unconvincing. Officer Erastus Aupa during cross-examination testified that the accused person, Moses Kayoka, was warned of his rights by Inspector Karstens at the time when he received the accused from members of the Namibian Defence Force. In the light of the denial by the accused person that D/Sgt. Evans Simasiku had warned him of his rights and, that in my view it is highly unlikely that Simasiku would not have informed his superior, Inspector Karstens, had he informed the accused of his constitutional rights, that it has not been proved beyond reasonable doubt that anyone of the police officers had informed the accused person of his rights.

[35] A more discerning fact is that both accused persons Moses Kayoka and Richard Mungulike were viewed at the relevant time as potential State witnesses who could assist the police in their investigation of this case. They are now accused persons before this Court.

[36] They were viewed as potential state witnesses, interrogated by the police and now the State intends to use information obtained from them as evidence in these proceedings.

[37] This Court in a previous ruling *(S v Malumo and Others (2) 2007 NR 198)* in considering a similar senario, quoted with approval Satchwell J in *S v Sebejan and Others 1997 (1) SACR 626 (W)* and it is in my view useful to repeat what was quoted.

[38] *In Sebejan* the accused person was at some stage treated as a suspect. In the present matter the two accused persons were considered potential state witnesses and what was said in *Sebejan* apply equally in respect of these two accused persons.

[39] *Satchwell J at 633 f – g* stated the following:

> *"The crux of the distinction between the arrested person and a suspect is that the latter does not know without equivocation or ambiguity or at all that she is at risk of being charged."*

and at *633 i – 634 a*

> *"For an investigating officer to take a statement from a suspect in these circumstances would, in my view, be fraudulent of the constitutional imperative. There is a deception in treating a suspect no more than a witness and obtaining information from her under false pretences in the hope and belief that this can be used to further an investigation of and against that person. To then rely on that individual's ignorance and use whatever has been extracted during this time of deceptive safety in order to initiate or found or develop a prosecution of such a person is inimical to a fair pre-trial procedure."*

and at *634 b - c*

> *"An arrested person is certainly aware that she is in the firing line of litigation and the reasons therefor. The arrested person knows that she and the investigating officer do not enjoy parity of positions and community of interests. The lines have been drawn – their interests are inimical to one another. The arrested person knows the basis for such antagonistic status and is now in a position to attempt to formulate a response thereto."*

[40] I wish to reiterate what I said in *S v Malumo (supra) at 212 B* namely that though Judges Rules are administrative directives to be observed by the police, they

are not completely without effect and that a breach thereof may influence whether an incriminating statement (or in this instance a pointing-out) had been made freely and voluntarily or not.

[41] I further wish to endorse the finding in *S v Mafuya and Others (1) 1992 (2) SACR 370 (W)* namely, that an investigating officer who had disregarded the Judges Rules by questioning the accused while he was in custody ignoring the accused's right to remain silent, and inviting the accused to reply to allegations made against him had unduly influenced the accused to make a confession.

[42] The courts have a discretion to allow or to exclude evidence obtained in violation of the constitutional rights of an accused person.

[43] In *S v Shikunga and Another 1997 NR 156 (SC) Mahomed CJ* expressed himself as follows on the issue of constitutional and non-constitutional irregularities at 171 B – D:

> *"Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has been tainted by such irregularity. Where this question is answered in the negative the verdict should stand. What one is doing is attempting to balance two equally competing claims – the claim that society has that a guilty person should be convicted, and the claim that the integrity of the judicial process should be upheld. Where the irregularity is of a fundamental nature and where the irregularity though less fundamental, taints the conviction the latter interest prevails. Where however the irregularity is such that it is not of a fundamental nature and does not taint the verdict the former interest prevails."*

[44] Where there was a deliberate and conscious violation of constitutional rights by the State or its agents, evidence obtained in accordance with such violation should in general be excluded.
(See *S v Motloutsi 1996 (1) SACR 78 (C))*.

[45] The right to consult with a legal practitioner during pre-trial procedure and to be informed of this right is closely connected to the presumption of innocence and the right to remain silent and failure to inform accused person of these rights offends not only to the concept of substantive fairness but also to the right to equality before the law.
(See *Melani and Others 1996 (1) SACR 335 E at 347 e – h*).

[46] What the Constitution demands is that the accused be given a fair trial.

[47] Inspector Karstens, for the reasons mentioned earlier, deliberately failed to inform both the accused persons of their constitutional rights and their right to remain silent.

[48] To allow evidence obtained in violation of the aforementioned rights would in my view taint any subsequent conviction and would bring the administration of justice into disrepute.
Therefore, whatever incriminating was said or pointed out by the accused persons (i.e. Moses Kayoka and Richard Mungulike) should be excluded.

[49] In respect of Elvis Matengu Puteho there is conflict of versions regarding when, under what circumstances and by whom his rights had been explained.

[50] In this regard Inspector Kartstens testified that he was alone in his office on 18 August 1999 when he saw the accused person and warned the accused person of his rights. He never testified that he again at the scene of the pointing-out administered a warning. Officer Evans Simasiku testified that Inspector Karstens warned the accused again at the scene of the pointing-out.

Inspector Karstens testified that the reason why he as a rule usually see to it that he was alone with an accused person before warning him of his rights was to get such accused person to trust him, have confidence in him, and to create a condition in which an accused person was encouraged to speak freely. These were not what Inspector Karstens said verbatim but it is my interpretation of his testimony on this point. In contrast officer Evans Simasiku testified that he did not hand the accused over in the office of Inspector Karstens but somewhere between the office of Inspector Karstens and his own office and at that occasion he heard Karstens warning the accused person regarding his rights including that he may apply for Legal Aid. Inspector Karstens denied that he ever informed the accused person that he may apply for Legal Aid. D/Sgt. Simasiku during cross-examination insisted that Inspector Karstens informed the accused that he may apply for Legal Aid.

In his witness statement officer Simasiku never mentioned that he had warned the accused person prior to the interview neither that he had at that stage informed the accused that he may apply for Legal Aid.

The accused person denied that he had been warned by any police officer of his rights prior to the pointing-out. Officer Simasiku in his witness statement also failed to mention that the accused had been warned of his rights by Inspector Karstens.

In his witness statement Simasiku stated that it was Inspector Theron who had warned the accused person of his rights. When Simasiku was confronted with this fact during cross-examination he confirmed that it was indeed Inspector Theron who had warned the accused person, deviating from his earlier stance that Inspector Karstens

and he himself had warned the accused person. Officer Simasiku tried to explain this discrepancy by what he termed a *"misconception".*

Inspector Theron in his witness statement made no mention that the accused had been warned by himself, a fact which he confirmed during his testimony in Court. These are such material contradictions that this Court can come to no other conclusion, namely that the State has not proved beyond reasonable doubt that the right to legal representation, the right to remain silent, and the right not to incriminate himself had been explained to this accused.

[51] Although there is a dispute when exactly the accused had been arrested (either 2 August 1999 or 4 August 1999) it is common cause that a warning statement had been taken of the accused on 21 August 1999, three days after the alleged pointing-out.

In his warning statement the accused denied any involvement in the attack on 2 August 1999 and stated that he knew nothing about the allegations against him.

A question put to Inspector Karstens, by Mr McNally, during cross-examination, which remained unanswered, was why would an accused person first incriminate himself (by pointing-out a fire-arm) assuming he had been informed of his rights prior to the pointing-out, and when he had an opportunity a few days later to give a statement after his rights had been explained to him, when he gave his warning statement, he gave an exculpatory statement ?

It was suggested to Inspector Karstens, who disagreed with this suggestion, that had this warning statement been taken after the arrest of the accused person, he would not have participated in pointing-out.

[52] D/Sgt. Evans Simasiku testified in respect of a number of accused persons that he had explained their rights to them. During his cross-examination, in respect of

Elvis Puteho, by Mr McNally the Court asked officer Simasiku a question and his reply was quite revealing and disturbing.

I shall proceed and quote from the record at p 31447 lines 25 – 32 and p 31448 line 1:

> *"Court: Let me ask you this Inspector. Did you indicate to the accused at which stage he may exercise those rights that you explained particularly in relation to the right to legal representation ? --- That is correct My Lord*
>
> *What did you tell him when should he exercise those rights ? --- Whenever he appears before the Magistrate, My Lord.*
>
> *Before the Magistrate ? --- Yes, My Lord."*

[53] If this is true in respect of all those accused persons he had warned prior to pointings-out or prior to obtaining incriminating statements from accused persons then every subsequent pointing-out or incriminating statement must be ignored by this Court as evidence in this trial-within-a-trial. This in my view has the effect of not informing an accused person at all that he has a right to legal representation *at that pre-trial stage* (.e. before the pointing-out) and is nothing less than a deception.

[54] In *S v Melani and Others 1996 (1) SACR 335 (E) (a decision followed by Mtambanengwe J in S v Kapika and Others (1) 1997 NR 285 (HC)* Froneman J expresses himself as follows on the issue of legal representation on *p 347 e – h:*

> *"The right to consult with a legal practitioner during the pre-trial procedure and especially the right to be informed of this right, is closely connected to the presumption of innocence, the right of silence and the proscription of compelled confessions (and admissions for that matter) which 'have for 150 years or more been recognized as basic principles of our law, although all of them have to a greater or lesser degree been eroded by statute and in some cases by judicial decision' (in the words of Kentridge AJ Zuma's case). In a very real sense these*

> *are necessary procedural provisions of give effect and protection to the right to reaming silent and the right to be protected against self-incrimination. The failure to recognize the importance of informing an accused of his right to consult with a legal adviser during the pre-trial stage has the effect of depriving persons, especially the uneducated, the unsophisticated and the poor, of the protection of their right to remain silent and not to incriminate themselves. This offends not only the concept of substantive fairness which now informs the right to a fair trial in this country but also the right to equality before the law. Lack of education, ignorance and poverty will probably result in the underprivileged sections of the community having to bear the brunt of not recognizing the right to be informed of the right to consultation with a lawyer. (Cf S v Makwanyane (supra at [paras 49, 50 and 51])).”*

[55] I again endorse this dictum. (See previously *S v Malumo and Others (2) 2007 (1) NR 198 at 214).*

[56] In respect of Victor Masiye Matengu, Inspector Karstens testified that when the accused was brought to his office by officer Evans Simasiku he warned the accused of his rights, namely his right to remain silent and his right to legal representation. Officer Simasiku testified that Inspector Karstens informed the accused of his right remain silent. Officer Simasiku never testified that Inspector Karstens also explained to the accused his right to legal representation. The accused denied that his rights had been explained to him.

Warrant officer Liswani testified that he arrested the accused person on 2 August 1999 in the charge office of the Katima Mulilo police station at the stage when the accused was handed over to him by members of the Namibian Defence Force. At that stage he warned the accused of his right to legal representation.

[57] On 9 March 2010 in the main trial officer Liswani in his evidence-in-chief testified about the same incident. He testified that he questioned the accused about

his involvement in the attempt to secede Caprivi form the rest of Namibia to which the accused replied by vaguely referring to *"unfortunate circumstances"*. He then informed the shift commander to book the accused in for further investigations. He did *not* inform the accused at that stage of his rights because he (i.e. Liswani) himself *"was not feeling well"*.

[58] During cross-examination in this trial-within-a-trial officer Liswani testified that he did not only inform the accused person at that stage of his right to legal representation but also that he may apply for Legal Aid.
When it was put to him, that instructions given to counsel were to the effect, *inter alia*, that he did not advise the accused of his rights he replied: *"There is no truth of such a nature that is a lie"*.

[59] Clearly the witness must have forgotten what he had said during March 2010 and if his answer that an instruction given to counsel is a lie then it logically follows that he himself was lying under oath when he testified that the did not warn the accused person of his rights. Which one of these two versions is now to be accepted as the truth ? The State has an onus to prove beyond reasonable doubt that an accused person had been warned of his right to legal representation prior to the pointing-out. There is a material difference between the evidence of Inspector Karstens and the evidence of officer Simasiku on the issue of legal representation. The accused denied having been warned of any rights. This Court cannot accept the evidence of Warrant Officer Liswani that he had warned the accused of his rights because he contradicted himself. Due to these contradictions I must conclude that the State has failed to discharge its onus (referred to *supra*).
[60] It was submitted that in respect of Victor Matengu and Elvis Puteho that when they appeared in court on 12 July 1999 on a charge of illegally entering Namibia their

right to legal representation had been explained to them. They at that stage decided to conduct their defence themselves. More than a month later they were taken for pointings-out. The argument that they must have known of their right to legal representation cannot assist the State. The accused had been removed in space and time from the courtroom. The crucial question is whether they had been sufficiently informed prior to the pointings-out of their right to legal representation in order to make an informed decision ? I have indicated *(supra)* that this question must be answered in the negative.

[61] It was further submitted in respect of all the other accused persons (except John Lubilo and Isaya Kamwanga) that their objections were in conflict with their evidence reflects negatively on their credibility and that this Court should find that the pointings-out had been made voluntarily.

The fact that an accused person was an unreliable witness does not in itself mean that the State's burden of proof has necessarily been discharged. A Court is required to weigh up the evidence as a whole in order to decide whether the prerequisites to admissibility had been proved beyond reasonable doubt.

(See *S v Mofokeng and Another 1968 (4) SA 852 at 854 H – 855 A*).

[62] In the light of aforesaid I need not deal with the allegations of assaults and threats and whether or not there was any link between these assaults and pointings-out even though the evidence of some accused persons were to the effect that there was indeed such link.

[63] These were the reasons which resulted in this Court giving the following ruling on 31 January 2011:

"In respect of Elvis Puteho, Victor Matengu, Richard Mungulike and Moses Kayoka: the pointings-out are ruled inadmissible mainly because to allow such pointings-out or admissions may render the trial unfair.

In respect of John Lubilo (the undefended accused person) this Court will allow evidence to be presented in respect of a pointing-out.

In respect of Isaya Kamwanga this Court will not hear any evidence about a pointing-out until such time that this Court has been provided with the report in terms of sections 77, 78 and 79 of the Criminal Procedure Act, 51 of 1977 regarding the mental health of the accused person, and until such time this Court has made a ruling on the issue.

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HOFF, J

ON BEHALF OF THE STATE: **ADV. JANUARY**

(TRIAL-WITHIN-A-TRIAL – POINTINGS-OUT – (JACOBUS H KARSTENS))

Instructed by: **OFFICE OF THE PROSECUTOR-GENERAL**

ON BEHALF OF THE DEFENCE:	**ACCD NO. 34 & 47:**	**MR DUBE**
	ACCD NO. 50:	**UNDEFENDED**
	ACCD NO. 60 & 74:	**MR McNALLY**
	ACCD NO. 43	**MR SAMUKANGE**

Instructed by: **DIRECTORATE OF LEGAL AID**