CC 29/93

THE STATE vs ISMAEL JAGGER

O'Linn, J

1993/04/01

-~~CRIMINAL LAW~~

Pointing out by an accused constitutes in itself an admission and must be freely and voluntarily made.

The decision of State v Sheehama 1991(29 SA at p 860 A.D.
applied.

Sentence:

Sentence of life imprisonment only appropriate sentence for Murder where accused callously and cowardly killed a helpless victim in order to rob him of his money and thereafter put his body next to a railway line to give the impression that a train had run over him

CASE NO. CC 29/93

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IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

ISMAEL JAGGER CORAM:

O'LINN. J.

Heard on: 1993/03/04,05,08-10,26,29; 1993/04/01

JUDGMENT

O'LINN. J.: The accused, Ismael Jagger, appeared before me on the following charges:

1. Murder;
2. Robbery with aggravating circumstances.

These charges are formulated as follows in the indictment put to the accused:

COUNT I t

In that on or about 30 November 1991 and at or near **WINDHOEK AIRPORT** in the district of **WINDHOEK** the accused unlawfully and intentionally killed **ADOLF KARISEB.**

COUNT 2:

IN THAT on or about 30 November 1991 and at or near **WINDHOEK AIRPORT** in the district of **WINDHOEK** the accused unlawfully

and with the intention of forcing him into submission, assaulted **ADOLF KARISEB** by stabbing him with a broken bottle and beating him with a stick and unlawfully and with intent to steal took from him cash of R250-00, the property of or in the lawful possession of the said **ADOLF KARISEB.**

And that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present in that the accused was before, after or during the commission of the crime, in possession of a dangerous weapon, namely a broken bottle and a stick.

In the State's summary of substantial facts in terms of Section 144 (3) A of the Criminal Procedure Act, no. 51 of 1977, the State set out the alleged substantial facts as follows:

> " On Saturday 30 November 1991 at approximately 00:30, the deceased was at the compound at Windhoek International Airport. The then deceased decided to retire to his caravan. While the deceased was walking next to the railway line on his way to his caravan the accused approached him from behind and beat the deceased with a stick and stabbed him with a sharp object. Hereafter the accused robbed the deceased of R250-00. The accused then placed the deceased on the railway tracks where he was run over by a train at approximately 02:30. The deceased died as a result of trauma to the thorax."

Accused decided to conduct his own defence in view of the fact that he could not afford his own legal representatives and the Legal Aid Board has notified the Judge-President

that the government does not have not funds available to finance an appointment of counsel on behalf of any accused and that remained the position in the immediate future, but that funds will probably be made available in the next budget. That however does not necessarily mean that funds will be made available for the defence of this particular accused. The stand of the Legal Aid Board was explained to the accused. This case is a very serious case which merited the appointment of a legal representative. However the Court went out of it's way during all stages of the trial to explain the rights of the accused to him and to guide him particularly in regard to the cross-examination of state witnesses.

The accused pleaded not guilty to both charges. In his explanation of plea the accused said that at the night of the murder he was at a party. At about 12:00, midnight he heard from a certain Andries Losper that the deceased had been killed. The deceased was known to him by the name of "Choura". Saturday he stayed there, that is at the Windhoek Airport single quarters and on Sunday afternoon he went back to the Neudam Agricultural College and they arrested him on the Tuesday. He denied that he took any money from the deceased.

The State called the following witnesses:

3. Dr Linda Liebenberg
4. Martha Hoases
5. Andries Losper
6. Isaskar Afrikaner

7. Warrant Officer Dawid J.G. de Wee
8. Dirk Kotze van Zyl
9. Sgt. Johannes Jacobus Fourie
10. Sgt. Cecil Benjamin Isaacs
11. Serg. Johannes Jacobus Fourie
12. Warrant Officer Manfred Sass
13. Magdalena Uires
14. Christiaan Kampunga
15. Sgt. Marcelles Lind
16. Lydia Kereman
17. Detective Warrant Officer Coetzee.

The accused himself testified and he indicated that he wished to call 2 witnesses namely Joseph Pietman and one Levi Pavana Kariseb. The Court made the necessary arrangements to assist him in having these witnesses available and subsequently they were made available to the accused and the accused called them as witnesses on his behalf.

Now Dr. Linda Liebenberg who conducted the post mortem examination testified that she had found that the accused had died as a result of trauma of the thorax, i.e. injuries that were inflicted by force applied to the chest. It is of some importance to read from her findings in greater detail.

She said that the deceased had a height of 1.75m and an approximate mass of 64kg. He was of normal physigue and nutrition.

As to the injuries she said there were deep lacerations, that means tears that went through the skin into the soft tissue. On the right cheek measuring 60mm, the right

submental area, that means below the edge of the jaw on the right hand side, 40mm. Over the nuchal area, that means at the back of the head where the head joins the neck, measuring 40mm and then over the left chin. She said that injury was not exactly measured, but it was curved. And then there were multiple small abrasions over the left cheek. She said nothing abnormal was detected on the skull or the intracranial contents as well as the facial organs and neck structures. There was a collection of blood in the chest cavity, on the left 80ml on the right 200ml. Then there were rib fractures in the paravertebral region, that means where the ribs joins the vertebrae at the back. Right next to where they join the vertebrae there were fractures in ribs no 1,2,5 and 6 on the right and ribs 1-10 on the left. Then both lungs were extensively lacerated which fits in with the rib fractures. She also noted that these lungs were heavier than normal leading her to conclude that they were congested. She said there was a transverse tear in the descending thoracic aorta. Now the aorta is the largest blood vessel or largest artery in the body and in the chest part where this artery runs it was torn. She deals with some other injuries.

She also testified that she took a sample of blood for alcohol level determination and she received back a report stating the concentration of alcohol was 0.31g per 100ml of blood. She testified that the aorta, the spleen and the lungs were lacerated and that that indicated or was an indication of severe blunt force being applied to the deceased and that this type of blunt force could have been

inflicted if the person was struck by a train but not overrun by a train. At no stage did the State Advocate put it to the witness whether there was an indication of injuries or bruises inflicted by a possible other assault, such as the stabbing with a sharp instrument at the back of the head and neck or by hitting the person with a stick. It was the state's case that during the robbery the deceased was struck by the accused with the stick from behind on his neck and subsequently stabbed with a broken bottle.

It is unfortunate that the State never thought of putting this aspect to the doctor, however it seems that the injuries that the doctor found are not inconsistent with the alleged hitting with a stick and stabbing with a piece of bottle as alleged in the state's so-called substantial facts that I have referred to. However, the 40mm deep laceration over the nuchal area at the back of the head was curved and that was probably caused by stabbing with a broken bottle.

As to the meaning to be attributed to 0.31g of alcohol per 100ml of blood the doctor said that was very high and that that means that the deceased was very intoxicated at the time of his death.

Now the main witnesses for the State were the following and I am shortly going to deal with their evidence.

Firstly there was Martha Hoases. She stayed at the compound and she knew the deceased Adolf Kariseb. She lives with a boyfriend who also was a witness and who's name is Andries

Losper. She told the Court that almost from Wednesday preceding the night of the death of the deceased the deceased, Adolf Kariseb, was drinking and under influence of liquor most of the time when she had anything to do with him. The deceased had a substantial amount of cash with him and apparently because of his drunkness, he asked Martha Hoases to keep his money for him for the time being. Then on the Thursday the deceased took some of his money and at one stage of her testimony, she said that she returned the R240.00 to the deceased the Thursday or the Friday. She also testified that on the Friday evening when she returned from the farm she found there was some sort of party, dancing and drinking at room 4 of the compound near her place of residence. She also testified that at one stage during that period when the deceased was so drunk, the present accused was also present and he even assisted her in carrying the deceased at some stage to her home. According to her the accused at that stage demanded money from the deceased and threatened that he would kill him if he doesn't give him the money. Later on when she was further questioned by the state and the court it was indicated that it was not meant that he had threatened to kill the deceased but that he would do something to him. When the accused cross-examined the witness he put it to her that on the day of the dancing he was also drunk. I suppose he meant the night of the dancing and Martha Hoases replied that she did not see whether he was drunk but she saw him standing there at the place where the party, where the drinking and the dancing took place.

The State's next witness was Mr Andries Losper, as I have indicated, the so called husband of Martha Hoases. He basically confirmed the gist of her evidence regarding the money and the condition of the deceased. He said that he last saw the deceased on the Friday evening when he gave him some of his money, at that stage he said R240.00 and he then went in to his room and slept and he only heard that the deceased had been killed after he had woken up on the Saturday morning. He denied that he had ever at any stage told the accused that the deceased had been killed. The accused in cross-examination asked the witness whether it was not him who had told the accused on the Friday evening that the deceased had passed away on the Friday evening. The answer of Mr Losper was,

> "My Lord, the Friday evening when I came there we did not meet with the accused person. My wife is also my witness".

The Court then asked the witness:

> "Did you perhaps tell the accused at any later stage that the deceased had passed away?"

And the answer was,

> "We were never together, the only time when we met him was when the police collected them."

The accused put it to the witness that on the Saturday he was also at that place and that he left on Sunday. The witness replied,

"I have not seen you on Saturday, even on Sunday".

When the Court noticed that the accused had not put certain questions about the money to Martha Hoases, the Court recalled Martha Hoases to enable the accused to further cross-examine her and it was then when he asked her:

> "Were you told by me that the deceased owed me money?"

And the answer was,

> "Yes, you wanted to fight with the deceased in front of my house and you said he owed you."

The accused then also put it to the witness that on Thursday evening as he put it:

> "I could ask my money from the deceased because we drank together on that day".

And the witness, Hoases replied,

> "Yes, on that Thursday you argued with the deceased and I stopped you."

And she confirmed that on a question by the Court that the accused and the deceased did drink together at some stage and the accused wanted to fight the deceased. The accused then put it to her, that he does not know about the money that the deceased owed him. And he continued;

> "If the deceased owed me money, I could ask it on that Thursday in the day."

The indication was that the accused denied that he had said anything about money to the deceased, but then subsequently the accused put the following to the witness which was partly an explanation also by the accused to the Court;

> "My Lord, usually we made jokes with the deceased and on that day I made also a joke with the deceased and the witness told the joke what I made with the deceased."

In a further question the accused said:

> "I made a joke with the deceased and I told him you owe me and we will fight today. And then I told the deceased too, it was just a joke."

It was then that the witness, Hoases, explained also in reply to further questions by the Court that what the accused had said to the deceased was,

> "Give my money back what you owe me, if you don't give me the money I will do something."

And she further said on further questions the accused was aggressive when he talked to the deceased and he was looking for something to fight with, he was looking for objects, in other words he was not making a joke as far as the witness Hoases is concerned.

The next witness called by the State was perhaps the most important witness, and that is Isaskar Afrikaner. The State at the outset indicated that Isaskar Afrikaner is regarded by the state as an accomplice and requested the court to warn him in terms of Section 204 of the Criminal Procedure

Act. That was then done, the accused was warned in terms of Section 204 inter alia that if he gave his evidence in an honest and satisfactory manner the State will probably not prosecute him.

The story of Isaskar Afrikaner was shortly this, that he and the accused attended that drinking and dancing session at room 4 at the compound on Friday night. He testified that the deceased was also at the party, but he didn't dance, he was drunk. When the deceased was on his way to his house, he and the accused followed the deceased. They saw that he had money when he was buying liquor. He and the accused followed him and then killed him on the way. He said "we killed him with a stick and a bottle, first we assault him with a stick and thereafter we stabbed him with a bottle". The bottle they found at the compound even before they started following the deceased. The bottle was whole when they found it but the accused broke the bottle before they left the place to follow the deceased. He first tried to break it on a tree trunk but and then he broke it actually by hitting a wall. In reply to questions he said that on the way, while they were following the deceased they found the stick on the way and he himself, Isaskar Afrikaner, picked up the stick, but the accused person had told him to pick up the stick. When they caught up with the deceased the accused told him to hit the deceased with the stick, but he refused. The accused then took the stick from him and started to hit the deceased with it. He is not certain where he hit him but he was of the opinion that the accused hit the deceased on the neck. And then the

subsequent stage, the accused took the broken part of the bottle from his trouser pocket and he stabbed the deceased with it, on the back of his head and on top of the neck, basically as indicated by the witness, where the head joins the neck, high up on the neck or at the bottom of the head actually where the head joins the neck. He says that after the accused hit the deceased with the stick, the deceased fell down, and whilst he was lying on the ground, the accused stabbed him with a bottleneck and then he and the accused started to search the deceased's body for the money. The accused then found the money and took the money. Thereafter both of them picked up the deceased and put him next to the railway. He described how they put him next to the railway, not actually on the railway line but in a position alongside the line with his head not directly parallel with the line, but at some 90 degree angle with the actual line, and with the head of the deceased near to the actual railway line.

The witness further said that after doing that they left and he and the accused then went back to home. He didn't make it clear what was meant by home. He further said that he and the accused then divided the money and each one received R100.00. He admitted that it was both he and the accused's idea to put the deceased near the railway line. They actually talked about it, and they decided to put him next to the railway line and when he was asked,

> "and what did you hope to achieve by this, why did you place him there".

he replied

"so that people can think that he was trapped by the train."

I think by "trapped" the interpreter meant "getrap, dat hy getrap is deur die trein", that the train ran him over or collided with him. He said the accused said they must not put his head or body immediately actually on the railway line, but rather next to it. He said it was originally the accused's idea to rob the deceased.

Now, when the accused cross-examined Afrikaner, he first put it to Afrikaner as follows,

"The day when the deceased passed away, were we together?"

and the answer was,

"Yes, we were together."

Then the accused put it to him,

"I want to put it to you that on the day when the deceased passed away, I was on my own."

And the answer was,

"The accused is telling lies."

Then the accused suggested or put it to the witness, that he was telling lies and the witness answered,

"I see you are not telling the court the truth.

> I'm telling the truth what's happened. You are standing and telling the Court the lies."

The accused then put it to him,

> "You want that the court must believe you?"

Answer,

> "Yes, you are now busy with another thing. The day when we were arrested you also told me that we must plead not guilty if the court asks us."

And then the accused, accused the witness of having made a statement to the police behind his back and to that the witness replied:

> "My Lord, it's not, the accused was present when we gave the statement. He was also present."

It is clear from this cross-examination that the accused at no stage denied specifically any of the details testified to by Afrikaner, and this was probably because the accused generally took the line that the witness was telling lies and the defence on which the accused obviously relied on at the time is that contained in one of the questions that I quoted, namely that he was not with the witness Afrikaner that evening, that he was actually on his own. And because he alleged that he was on his own, he could not as a matter of course put any questions to the witness as to all the details. So, the evidence of Afrikaner was not specifically contradicted on any point except for this that it was denied by the accused that he was with the witness and actually that he, the accused, was on his own that night, the night

Now, there were then further questions by Mr Dicks on behalf of the state which elicited the answer that the witness, Afrikaner, received R100.00 but he doesn't know precisely how much money was found on the body of the deceased, and that means that he did not know precisely how much money apparently was kept by the accused, but that he himself received R100.00.

The witness, Martha Hoases was again recalled by the Court, this time to explain a suggestion that after the incident approximately on the Wednesday she and Losper had handed over further money to the police, which allegedly was the property of the deceased. When recalled, she admitted that that really happened and that this money was actually the balance of the money, kept by her and her husband on behalf of the deceased. That means that all the deceased's money was not handed back to him on the Thursday and Friday.

The witness, Dirk van Zyl, was a train driver of Trans Namib. The significance of his evidence is that on the Friday night actually, to be more correct and technical, during the early hours of the morning of the Saturday, the 1st December, the train he was driving collided with a body which was apparently lying near the line and this happened 2 to 3 minutes past 2:00 in the morning. He says when he saw the body afterwards where it came to rest, after being struck by the train, he saw the bleeding from the nose and that the clothes of the person was with his shirt back to

front. It was quite clear that he did not examine the body properly.

The next witness was Sgt. Fourie. He gave evidence or intended to give evidence about a certain pointing out by the witness, Afrikaner as well as by the accused. It appeared from his evidence that the accused had prior to a pointing out, made a statement which had the characteristics of a confession. The Court then pointed out to the state that it was of the opinion that what was said amounted to a confession, and that prima facie the Court was of the opinion that such a confession was inadmissible because it was not reduced to writing before a magistrate or justice. Mr Dicks then indicated that he wanted to lead evidence about the pointings out nevertheless and it then became clear from what the accused had to say that the accused would rely on an alleged assault, prior assault as a result of which his attitude was that whatever he had said or pointed out was not made freely and voluntary, and so not only the confession was also for that reason inadmissible, but that any pointing out and admissions that may have been made subsequently, were also inadmissible. The Court then ruled that the hearing should take on a form of a trial within a trial, in order to determine and to rule whether there were any assaults on the accused and whether it can be said that what he pointed out and what he may have admitted were done under duress and will therefore be inadmissible.

Several witnesses were called, including Fourie and the

accused. The accused, as his evidence progressed, the assault as his cross-examining progressed, added to the extent and seriousness of the alleged assault. He also said that he never pointed out anything on his own. What happened was, according to him, that the police just took him there after beating him, then they beat him up further over a considerable period at the scene and then he was forced to say something and because they had already taken him there to the place, he just broadly, indicated that "this is the place". He was very unclear about what he really pointed out throughout. At this stage the accused made a bad impression as a witness, whereas the police evidence could not be said to have been unsatisfactory.

The Court came to the conclusion that there was no such assaults as testified by the accused and as a consequence ruled, that the pointings out and the admissions which may have been made at that stage and which did not in itself amount to confessions, were admissible as evidence. As I understand the law, a confession is firstly inadmissible if it was not taken down in writing or confirmed in writing before a magistrate of justice. Now it is common cause that whatever the accused said in this instance was not taken down or confirmed in writing before a magistrate of justice, so to the extent that there may have been confessions those confessions were inadmissible on that ground alone. Obviously, if a confession is also made not freely and not voluntarily, that would also be a ground for a confession to be inadmissible. But it is clear that to the extent that there may have been a confession, the court ruled that that

confession was not admissible, not on the basis of assault or being not freely and voluntarily made, but solely on the basis that it was not taken down before a magistrate of justice or not confirmed before a magistrate of justice of the peace.

There is no need however to take down a mere admission even if it's a very incriminating admission, to take that down before a magistrate of justice of the peace, but what is required in the case of any form of admission, is that it must at least be freely and voluntarily made and if it was made pursuant to an assault, then it would also not be admissible.

It is also clear to the Court that a pointing out and admission made in consequence of an inadmissible confession will not be admissible if that pointing out and admission is not voluntarily made. Now, formerly there was some confusion as to whether a pointing out is in itself an admission. The Court held in State v. Sheehama, reported 1991 (2) SA at p.860 (A) that a pointing out is in itself an admission by behaviour and that an admission is inherent in such a pointing out, and therefore the pointing out itself must be freely and voluntarily made. It is useful to quote from the head note of the report of the case of State v Sheehama, because the head note to my mind sums up correctly what was found in the case of State v Sheehama:

> "A pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out. If it is a relevant pointing out

unaccompanied by any exculpatory explanation by the accused, it amounts to a statement by the accused that he has knowledge of relevant facts which prima facie operates to his disadvantage and it can thus in an appropriate case constitute an extra-judicial admission. As such the common law, as confirmed by the provisions of s 219A of the Criminal Procedure Act, 51 of 1977 they requires that it be made freely and voluntary. It is also a basic principal of our law that an accused cannot be forced to make self in-criminating statements against his will and it is therefore inherently improbable that the Legislature, with the view to sound legal policy, could ever have had the intention in Section 218 (2) of Act 51 of 1977 to authorise evidence of forced pointings out.

The decisions in the cases of State v Tsotsobe and others, 1983 (1) SA 856 (A), and State v Shezi, 85(3) SA 900 (A) to effect that a relevant pointing out does not amount to an extra judicial admission are clearly wrong.

The decision in the case of State v Ismail and Others, 1965 (1) SA 446 (N), which was followed in the cases of State v Bvuure. (1) 1974 (1) SA 206 (R); S v Nvembe 1982 (1) SA 835 (A), and in the Tsotsobe and Shezi decisions supra, that evidence of a forced pointing out is admissible in law is clearly wrong. The precedents set by these cases should also for another reason not be maintained, viz the objection in principle which exists against the admissibility of evidence of forced pointings out.

It was never the intention of the Legislature in s 218(2) of Act 51 of 1977 to admit evidence of a pointing out which was otherwise inadmissible as soon as such pointing out formed part of an inadmissible confession or statement. The section, on a correct interpretation thereof, provides that evidence of a pointing out which is

> otherwise admissible shall not be inadmissible merely by virtue of the fact that it forms part of an inadmissible confession or statement. Put differently: when evidence of a pointing out is otherwise inadmissible, it will not be admissible simply because it forms part of an inadmissible confession or statement."

The attitude of the State, as expressed by Mr Dicks was that they did not intend to rely on what was said at the time of the pointings out, but merely the fact of the pointing out, and as I understood Mr Dicks that the fact that the accused pointed out the scene amounts to a statement by the accused that he has knowledge of relevant facts which prima facie operates to his disadvantage. Because of the uncertainty of what precisely was said by the accused at the different pointings out, it is my view that the state correctly did not wish to take the pointings out further than to rely on it as indicating that the accused had knowledge of the scene of the crime, and in that sense the accused was making an admission.

Because of this allegation by the accused that there was a pointing out, not only by the accused but by the witness, Afrikaner, the Court thought it necessary to recall Afrikaner to establish whether he had ever pointed out anything. The state had failed to lead any evidence in this connection up to that stage.

On the Thursday when a trial within a trial was held, the witness, Afrikaner was sitting here in Court and he heard everything which the accused had testified in the trial

within a trial. He also heard the accused telling the Court that he had been assaulted and that when he arrived at the scene, he didn't know the scene at all, but because of the force inflicted on him, he just pointed out where he was standing really and said this was the scene of something to that effect. So, the witness Afrikaner knew precisely what was the stand taken by the accused when he was recalled on the following day. Both the accused and Afrikaner also knew on the Thursday that the Court intended to recall Afrikaner on the Friday because the Court indicated that in the course of the trial within a trial on Thursday. The witness Afrikaner said almost immediately after being recalled on the Friday morning that he had been forced by the police to point out the scene and that he did not know anything about the scene and the points at the scene but that he was taken to a certain place and there pointed out what was in front of him, and had said "this is the scene" or whatever. His evidence of this point was almost identical to that of the accused.

It was immediately apparent to the Court that there was something wrong with this witness. He appeared to be scared and suddenly extremely uncertain of himself. His demeanour was completely different from the previous day when he gave his evidence in a confident manner and reiterated what had happened when he was cross-examined. He then firmly said that the accused was telling the lies to the court and that the accused had tried to influence him to plead not guilty.

After a while and in the course of the examination by Mr Dicks of the witness Afrikaner, he confirmed his original evidence and explained that when he and the accused were taken together in the same vehicle and were admitted to the prison on Thursday, at the same time and place, the accused threatened him with death if he doesn't say what the accused had told the Court. He said he was very scared of the accused and that he knew that he would be detained with the accused in the same cell and that actually happened.

The Court then called several witnesses in a preliminary enquiry as to whether or not in fact the accused and the witness Afrikaner, were transported and detained together after they left the court on Thursday.

The accused gave evidence to the effect that he had never threatened the witness on the Thursday. He also even denied that he ever talked to him on the Thursday but that he only talked to him on the Friday when they were again transported admitted and detained together after appearing in this Court. I must comment at this stage that this transporting, admitting and detaining together on the Friday night, was done against express wishes of the Court and warning of the Court expressed in this Court on the Friday of that trial, to the effect that care should be taken that the accused and the witness Afrikaner should not again be transported and admitted and detained together. The court also indicated to the accused on the Friday after the evidence of Afrikaner that it is a very serious matter for an accused or any person to interfere with a state witness, and of course to

threaten him in any way. The accused's evidence nevertheless subsequently when he gave his evidence for the defence was that he never talked to Afrikaner on Thursday, but in fact talked to him on the Friday.

On this issue the Court was satisfied after hearing Afrikaner and the other witnesses, as well as the accused, that the story of Afrikaner that he was threatened by the accused is true. It is also probable from what I have said that that is precisely what happened and that could be the only explanation why suddenly the confident witness of Thursday becomes a nervous, scared, uncertain witness on Friday when recalled.

There is of cause the other crucial witness for the State and that is Lydia Kereman. Lydia Kereman testified that she was at a party and drinking on the evening in question, that she saw the deceased there drunk and that she saw him leave through a certain passage between the buildings and that she also saw the accused and Afrikaner together. She wasn't sure at one stage about the name of Afrikaner, and the state during an adjournment arranged for an identification parade. It is not in dispute that at that identification parade the witness Kereman pointed out without hesitation, Isaskar Afrikaner as the person who was with the accused on the night of the incident. Kereman said that she saw them together and what is more, they were standing during that night at some stage outside the room in a sort of open space. And at one stage he saw the accused pick up a bottle, and eventually he broke is against a cement

structure, a little wall, or whatever and she saw the accused and Afrikaner then leave through the same exit between the buildings as the deceased had previously left.

This witness was not in any way shaken in cross-examination and she continued throughout to give clear and confident answers and when the accused indicated his denial on certain aspects, she was almost aggressive in affirming what she had said in her evidence. So she appeared to be certain of her evidence and prima facie she appeared to be a good and convincing witness.

I now return to the evidence of the accused, the accused continued his denial of robbery or killing of the deceased but he now switched around and instead of saying that he was never with Afrikaner that night, he confirmed that he was with Afrikaner. He also no longer denied the story about the bottle that he broke, but tried to explain it. His explanation was that he and Afrikaner went through that exit that the court referred to, in order to smoke dagga through, and using the neck of the bottle as a pipe and that after about 12:00 that night, he and Afrikaner separated after returning from the smoking outside and he then went to sleep in room 5 and actually in the bed of one of the witnesses that he later called as a defence witness.

The witnesses that he called, namely Joseph Pietman and Levy Kariseb, both denied that he had slept in room 5 that night. Joseph Pietman, the first defence witness also denied as did

Levy Kariseb, that they had heard already that night that the deceased had been killed. Joseph Pietman, when it was put to him that the accused actually slept with him in his bed, he strongly denied that and suggested that the accused was just telling these lies to try and get him into trouble. It may of course be that the witness was scared of getting into trouble just because he is associated with the accused.

Kariseb said that he heard the next morning from his brother that the deceased had been killed because his brother was either a passenger on that particular train which had collided with the body of the deceased or intended to be a traveller that night. So the brother of Levy Kariseb actually told Kariseb about this. So, to sum up, both Kariseb and Pietman contradicted the accused completely.

When the Court compares the evidence of the main state witnesses, Afrikaner, Kereman and to lesser extent Martha Hoases and Andries Losper and the evidence of the defence witnesses, Pietman and Kariseb, with that of the accused, then the Court has no doubt that the evidence of the state witnesses and those of two defence witnesses should be accepted and that of the accused rejected.

Compared to these witnesses, the accused was a bad witness, not only at the time of the trial within a trial but in his main evidence. He also as I have indicated before, did not really contradict the evidence of Afrikaner except to the extent that he tried to say that he was not with Afrikaner that night. So when he later on in his own evidence changed

his story and explained that he was with Afrikaner but that they had gone outside to smoke dagga, he really destroyed his first defence namely that he and Afrikaner were not together. It was never put to Afrikaner that he and the accused were together and they just left through the same exit as the deceased to smoke dagga with the bottle.

The state witnesses and the aforesaid two defence witnesses called by the accused all made a good impression on the Court whereas the accused did not.

In the result the Court finds that the accused did, together with Afrikaner, assault and rob the deceased. It is possible on the medical evidence and the totality of the evidence that the deceased was not dead as a result of the actual assault by the accused and Afrikaner. It may be that he was still alive and that he was finally killed by the collision with the train. There is nothing inconsistent really in the medical evidence with the description of Afrikaner but it is clear that on the medical evidence itself, most of the injuries which the doctor described as having caused the death of the deceased, were possibly or even probably inflicted when the train collided with the deceased. But this possibility or probability that the train finally killed the deceased does not really affect the outcome of this case for the simple reason that the accused and the deceased deliberately put the body of the deceased near the railway line to give the impression that he was struck by a railway line. Even if he was still alive at the stage when they put him down it is their act of putting him

down next to the railway line which caused the train to collide with him. So in the result in any case the accused and Afrikaner caused the death of the deceased whether directly or indirectly. That the accused and Afrikaner had the intention to kill the deceased is not in doubt. Their acts caused his death and they intended to kill and to rob him.

The consequence is that the Court finds you guilty of the charge of murder as well as the charge of robbery with aggravating circumstances.

JUDGE