CASE NO. CA 89/2003

IN THE HIGH COURT OF NAMIBIA

In the matter between:

VIVIAN DAN FORBES **1ST**

APPELLANT

THOMAS MUNDJEGO **2ND**

APPELLANT

TOIVO VILHO **3 RD**

APPELLANT

versus

THE STATE

RESPONDENT

CORAM: SILUNGWE, J. *et* MTAMBANENGWE, A.J

Heard on: 2005.06.08

Delivered on: 2005.08.22

APPEAL JUDGMENT

MTAMBANENGWE, A.J.: The appeal by the three appellants in this case is against their conviction and sentence in the magistrate's court, Walvis Bay, on a charge of robbery with aggravating circumstances on 14 March 2002.

All of them pleaded not guilty but were nevertheless convicted as charged; the first and second appellants were each sentenced to a term of 10 years imprisonment of which 3 years were suspended for 5 years while the third appellant was sentenced to a 15 year imprisonment term 4 years of which were suspended for 5 years; the suspension of part of the sentence in each case was on appropriate conditions.

The appeals were argued before Silungwe J and myself. We, however, felt it was convenient to consider the appeal by the first two appellants separately from that by third appellant as different considerations apply. I therefore, in the first part of this judgment, deal with the first two appellants.

Both appellants one and two were employed by Pick ń Pay, at Swakopmund, the victim of the robbery in question which took

place on 6th June 1999. Pick 'n Pay was robbed of N$64 465.18 in cash and some cheques and telephone cards worth N$1 900.00 and N$9 298.75 respectively. Both appellants appeared together before a magistrate for a plea in terms of Section 119 of

the Criminal Procedure Act 1977 (the Act) on 8 June 1999. With the recovery of some of the cash stolen and burnt cheques the actual loss suffered by the complainant was N$12 925.51.

It is common cause that both appellants pleaded guilty to the charge on 8th June 1999 and were dealt with in terms of section 112(1)(b) of the Act, where after their case was remanded pending the decision of the Prosecutor-General.

The record of the proceedings in terms of Section 119 of the Act shows that the nature of the proceedings was explained to the appellants by the court, namely that they were appearing not for trial but by way of preparatory examination, "the charge will be put to them to which they must plead",

thereafter the proceedings would be stopped and the matter referred to the Prosecutor-General for his decision.

In answering questions put to them by the court in terms of S112 (1)(b) each of them made a long and detailed statement which was fully self incriminating, and also incriminating each

other. These statements were admitted in evidence against their makers in the trial that ensued before Mr Retief the (Regional) Magistrate at Walvis Bay. In the trial the two appellants were represented by Counsel, Mr Walters for appellant 1 and Mr Olivier for appellant 2.

On appeal the main and decisive point taken on behalf of the two appellants is reflected in the amended notice of appeal filed by Mr Hinda who represented the appellants before this Court. The amended Notice of appeal (applicable to both of them though filed in the name of second appellant only) reads:

"The learned Magistrate erred in admitting the statements made by the Appellant in terms of Section 119 of the Criminal Procedure Act, No. 51 of 1977 as evidence against him, in that:

1.1 The Appellant was not informed of his right to legal representation before he was required to plead in terms of Section 119,

1.2 The appellant was not afforded adequate time and facilities for the preparation of his defence 'in order to arrive at a mature and unhurried decision on how to plea(d) and how to conduct his case.'

1.3 The learned Magistrate failed to explain to the appellant the possible consequences of a conviction and to determine whether he did not require a greater opportunity to consider his position before he was required to plead.

1.4 The learned Magistrate failed to give the accused ‘an adequate and readily intelligible exposition of the charge against him’ before he was required to plead.”

These failures are of course alleged against the Magistrate before whom the appellants appeared to plead in terms of section 119 of the Criminal Procedure Act, No. 51 of 1977 (the

Act). The trial was before a different magistrate and there the accused were represented by Counsel. The point on appeal boils down to this, that the Section 119 proceedings should not have been admitted by the trial magistrate because of the irregularities alleged.

The record of the section 119 proceedings speaks for itself. It shows that the right to legal representation was not explained to the accused by the Magistrate. The whole record i.e. including what transpired before the s119 proceedings, the bail application by the appellants and the main trial, reveals the following facts:

1. The offence was committed on 6 June 1999.

2. The two appellants appeared before the Magistrate for a plea in terms of S119 of the Act on 8th June 1999.

3. The appellants were arrested by a police officer John Mujimba on the night of 7th June 1999 following

information received by the police from an informer. "The appellants were arrested between 10:00 and 11:00.

4. The appellants were interrogated by several police officers including Mujimba and Inspector Philander from 11H00 to some time after 02H00. They appeared before the magistrate at 14H00 for the aforesaid plea. In the bail application for appellant 2, Mujimba, the investigating officer, said "it took from 23H00 to 03H00 to interview appellant because a lot of police officers were involved" "to get more information from him", the appellant was not informed of his right to legal

representation nor was he warned in terms of the Judges Rules.

5. In the interview of first appellant he first denied involvement in the crime but after 2 hours of questioning he admitted.

6. In the bail application for appellant 2, the appellant alleged that he was tortured and threatened with death in

the course of his interrogation. The assault went on for ¼ of an hour but he still denied the charge. He also said when he appeared before the Magistrate he pleaded guilty because the police told him “to tell the story they told me” and that he was guilty, they had observed his house and listened to his conversations, if he did not tell that story they would bring him back to the police station “but this time it will be more severe than the previous.” It was his first appearance with the law and he as scared and nervous and wanted to avoid further

assaults. He said he himself had concocted the story he told the Magistrate. He said he was aware "that robbery especially where a dangerous weapon was used is a very serious offence and if convicted he would be punished severely."

He did not complain of the assault to any other officer and after court no further assaults were perpetrated against him.

Appellant 1 said before he and appellant 2 were taken to court for a plea they were locked in the waiting room

where appellant 2 told him he was also assaulted. Inspector Philander came in there and said he should tell the same story appellant 2 was going to tell. Appellant 2 did not like the idea "but 2 actually forced him to give a story so that we could just be out of the hands of the police", he gave appellant 2 "the picture of the story".

9. The magistrate took him through the answers he gave to questions put to him in terms of S 112 (1)(b) by Hoff, the

appellant confirmed his answers as reflected on the record of the proceedings and repeated that he had told that fabricated story because of fear to be subjected to further assault, but said now he no longer had that fear because “I have now trust into the court today and I have a legal representative here”. He could not identify the police who assaulted him but neither Inspector Philander nor the investigating officer assaulted him, he did not report the assault to the investigating officer however; (this answer was given despite the fact that he said Philander came into the room where he and appellant 2 were waiting to go to court and said the two must tell the same story in

court), if he had had a legal representative in the S119 proceedings he would have pleaded not guilty. Appellant passed standard 8 and was manager of a bakery at Pick ‘n Pay.

10. In the bail application for appellant 2, the appellant tells more or less the same story of being tortured during his interrogation except that in his case he says a police

officer called Musimwa and Inspector Philander took part in the assault meted out to him.

The prosecutor in this case took a cue from the magistrate to cross-examine the appellant on the content of his plea explanation given in the Section 119 proceedings, as if a trial within a trial was being conducted. When counsel for the appellant questioned the relevancy of this line of cross examination, the Magistrate referred to the fact that Mr Walters for appellant 1 had said that at the trial the appellant's statement would be challenged (possibly in a trial within a trial)

11. In his judgment the magistrate said:

"As conceded by the lawyers for accused no 1 and 2, the moment when the court ruled that the proceedings, the record of the proceedings as on the 8th June 1999, when they appeared before the Magistrate in Swakopmund, must form part of this proceedings as far

as accused no. 1 and 2 are concerned, their fate was sealed already on that moment. In that statements they made and under the questioning from the Magistrate, they clearly indicated their participation in the commission of this robbery on 6th of June at Pick ‘n Pay in Swakopmund.”

12. A suspect in the robbery was shot and killed by the police after he, the suspect, had shot and wounded 3 police officers who were pursuing him; one of the officers died as a result). N$22 050.00 in cash was recovered from the dead suspect’s body plus two (2) firearms and some telephone cards belonging to Pick ‘n Pay.

13. According to Inspector Philander, and Detective Constable Mujimbwa, the investigating officer, the two appellants were arrested following information from an informer. The police searched the house of appellant 1 and found a map “which accused always used to refer to as a map which was drawn by accused no. 1”. On

interrogation the two appellants admitted their involvement in the commission of the crime but “they did not want to make statements to the police” “both of them elected to come and tell their story to the Court”.

14. Mujimbwa did not take a statement from the appellants, he preferred that they make their admission or confession to the presiding officer.

He denied any knowledge that appellant 1 with whom he dealt and at whose arrest he was present, was assaulted or threatened.

15. In the trial Inspector Philander gave evidence that he arrested appellant no. 1. He said Appellant was informed

about the case being investigated “as well as his rights of a lawyer to represent him, his rights according to Judges Rules were explained viz he had a right to remain silent “and that he was under no obligation to tell us anything” concerning the alleged offence. He went on:

"I told him he has a right to a lawyer of his choice who can represent him right from the beginning and throughout this trial" .... "He (appellant) said it wasn't necessary at that point in time for a lawyer"

He said on 8th June he interviewed appellant 1 again, the purpose being "to inform him about his rights and also to obtain a warning statement from him in writing form to be filed in the case docket". The warning statement was produced as exhibit "E". It shows appellant 1 answering: "**I will give a detailed explanation in Court**," to the question do you wish to make a statement or do you only wish to answer questions after consultation with your legal practitioner or to remain silent? The statement was

recorded at 12:55 on 8 June 1999. Shortly thereafter, Inspector said, the appellant was taken to Court. This line of cross-examination was not pursued further.

16. Detective Constable John Mujimba testified to the same effect as Inspector Philander in respect of appellant 2 i.e. explained to him his right to remain silent, right to have an attorney, that if he made a statement it could later be used in Court.

This was through an interpreter Constable Njama. The appellant said he would state in court his involvement in the case. The warning statement was at 12:55 on 8th June. The interrogation of appellants 1 and 2 lasted 2 hours; it was done separately. They were arrested after 24:00. Appellant 2 told him of the incident.

In cross-examination Sergeant Majimbwa was reminded of his testimony in the bail application for appellant 1 where he said the appellant 1 was arrested between 22:00 and

23:00 on June, 7. "On the 7th we started with the interview. We interview them from 23:00 until 03:00".

> “That was a mistake if it was like that”. Counsel reminded him that he had said so under oath and in his evidence in chief, why make such a mistake under oath, he replied:
>
> “That was an estimation I put.”

He was also reminded that in the same bail application he had said that the appellants appeared in court at 08:00 and now he was saying they appeared at 14:00 on 8th June, and his reply was that he was not sure he said so, but he was sure they appeared at 14:00 because he took warning statement after 12:00. The officer was next asked why it took 4 hours to interrogate the appellant and he said because they had to get information from them and also that “a lot of officers were involved” interrogating them one after another.

The very pertinent question was asked of him:

> “Before you then started to interrogate accused no. 1 did you (say) to him I am a police officer, you are under no

> duty to answer anything to me, you can remain silent, but if you say something that may count against you later on. Did you warn him before you start interrogating the man, accused no. 1".

His reply was:

> "I don't think of such incident. I don't think of warning him of that."

Asked if he had warned the appellant that he was entitled to consult with a lawyer before he answered, the officer answered:

> "I don't warn him because when I came there, there was already some officers, so at my side, I didn't warn him. I didn't inform him at that stage."

Further the officer said it was correct, that the purpose of interrogating the appellant was to "extract information from him

of his involvement in the matter". He also agreed that after appellant two's warning statement was taken he was taken to Court, just after 14:06 where they pleaded to the charge.

It will be noticed that his evidence in chief is diametrically opposite to the above. But it is also noted that Mr Walters did not ask the witness to explain what he meant by the statement "I didn't inform him at that stage".

It will be noted that when the trial magistrate ruled the Section 119 proceedings admissible, no trial within a trial had been held as was done for example in *S vs Damons and Others* 1997(2) SACR 218(W) at 219 E. Counsel for the appellants apparently considered that such a trial would serve no purpose as it would involve a repetition of facts traversed in the bail application as well as in the trial itself involving the same witnesses, and as regards the fact that the magistrate before whom the appellants pleaded, did not inform them of their right to legal representation, the record spoke for itself, the fact was not in dispute. Both counsel thus confined themselves to addressing the Court on the applicable legal principles.

The challenge to the admissibility of those proceedings was twofold. The magistrate who conducted those proceeding, had not informed the appellants of their constitutional right to be represented by a legal practitioner of their choice before he asked them to plead to the charge and questioned them in terms of section 112(1)(b) of the Act. Secondly the appellants had not been accorded their constitutional right to prepare and present their defence. This challenge as well as the first challenge, involved Article 12(1)(e) of the Constitution which provides that –

> "All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trials and shall be entitled to be defended by a legal practitioner of their choice."

The appellants were arrested after 23:00 on 7th June 1999, interrogated until past 02:00 the following morning and again after 11:00, and by 14:00 they were before the magistrate for the plea in terms of S119.

Mr Walters for appellant 1 referred to many authorities both in South Africa and in Namibia which emphasise the importance of both points and Mr Olivier for appellant 2 associated himself with all the submissions made by Mr Walters. It is not necessary to repeat the various quotations Mr Walters made from the various cases. In *S vs Kau and Others* 1995 NR 1(SC) it was stated at 9 that Article 12(1)(e) "requires that the judicial officer hearing the trial must inform an accused of his right to representation unless it is apparent to him for good reason that the accused - is aware of his right." Dumbutshena AJA who delivered the judgment in that case with the concurrence of Mahomed CJ and Chomba AJA referred in this connection to *S vs Bruwer* 1993 NR 219 (HC) at 223 C-D and *S v Mabaso* 1990(3) SA 185(A) at 204 C-J. In the former case Strydom JP, as he then was, stated at 223 D said:

> "I am also mindful of the fact that reference in our Constitution to a fair trial forms part of the Bill of Rights and must therefore be given a wide and liberal interpretation. However, I fail to see how it can be said,

> even against this background, that a trial will be less fair if a person who knows that it is his right to be legally represented is not informed of that fact. Whether the fact that an accused was not informed of his right to be legally represented, resulted in a failure of justice is, as in most other instances where a failure of justice is alleged, a question of fact."

The Learned Judge President went on to say (at 223F):

> "On this point Mr Smuts was constrained to concede that in the case of an accused being an attorney, failure to inform him would not vitiate the proceedings because he is supposed to know what his rights are.
>
> Once this concession is made there can in principle be no difference between an accused being an attorney or any other accused who knows that he is entitled to be legally represented."

The question whether evidence unconstitutionally or unlawfully obtained should or should not be admitted has also received judicial attention in a number of cases both in this jurisdiction and in South Africa and elsewhere. In *S v Shikunga and Another* 1997 NR 156 (SC) Mahomed CJ considered the issue in light of the background of an admission of a confession pursuant to section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977. In that case there was evidence aliunde the confession, which "showed clearly that the conviction of the second accused would inevitably have followed even if the constitutional irregularity relied upon had not been committed" (contrast the present case where the S119 proceedings form the main basis of conviction of the two appellants). However, in his survey of the decisions on the approach to the question in various jurisdictions, the Chief Justice made certain important remarks which must be borne in mind in considering the question in this case – whether the irregularities alleged vitiate the proceedings. At pp 164 I to 165 C the Learned Chief Justice said:

> “There appears to be a tension between two important considerations of public interest and policy in the resolution of this problem. The first consideration is that accused persons who are manifestly and demonstrably guilty should not be allowed to escape punishment simply because some constitutional irregularity was committed in the course of the proceedings. ……
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> There is however a competing consideration of public interest involved. It is this: the public interest in the legal system is not confined to the punishment of guilty persons, it extends to the importance of insisting that the procedures adopted in securing such punishment are fair and constitutional and that the public interest is prejudiced when they are not.”

After examining the approach adopted in various jurisdictions, the Chief Justice formulated the proper approach as follows (at 170 F – 171 D):

“There can be no doubt from these authorities that a non-constitutional irregularity committed during a trial does not per se constitute sufficient justification to set aside a conviction on appeal. The nature of the irregularity and its effect on the result of the trial has to be examined. Should the approach be different where the error arises from a constitutional breach? That question assumes that the breach of every constitutional right would have the same consequence. In my view that might be a mistaken assumption and much might depend on the nature of the right in question. But even if it is assumed that the breach of every constitutional right has the same effect on a conviction which is attacked on appeal, it does not follow that in all cases that consequence should be to set aside the conviction. I am not persuaded that there is justification for setting aside on appeal all convictions following upon a constitutional irregularity committed by a trial court.

It would appear to me that the test proposed by our common law is adequate in relation to both constitutional and non-constitutional errors. Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits. 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 compelling 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 regularity, though less fundamental, taints the verdict the latter interest prevails. Where however the irregularity

is such that it is not of a fundamental nature and it does not taint the verdict the former interest prevails.

This does not detract from the caution which a court of appeal would ordinarily adopt in accepting the submission that a clearly established constitutional irregularity did not prejudice the accused in any way or taint the conviction which followed thereupon."

In *Vusimusi Ernest Ngeobo v The State* 1998(10) BCLR 1248 (N) Combrinck J discussed the approach adopted in South Africa to the question whether to admit or exclude evidence obtained in violation of an accused's constitutional rights at 1252 C – 1255 A. In the course of that discussion the Learned Judge said at 1252 F – 1253 A.

"The approach to be adopted to this type of evidence was laid down in *Key v Attorney General Cape of Good Hope Provincial Division and Another (supra)* and

endorsed by the Supreme Court of Appeal in *Khan v S* (1977) 4 All SA

435 (A). The oft-quoted passage (at 195G – 196C) in the *Key* judgment bears repeating:

"In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is a universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by Sate agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime, and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a

fair trial. Ultimately, as was held in *Ferreira v Levin* fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is

the person best placed to take that decision. At times, fairness might require the evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.

If the evidence to which the applicant objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise objections to its admissibility. It will then be for the trial Judge to decide whether the circumstances are such that fairness requires the evidence to be excluded."

And at 1254 E – 1255 A the Learned Judge had this to say:

"It is essential that society should have confidence in the judicial system. Such confidence is eroded where Courts

on the first intimation that one of an accused's constitutional rights has been infringed excludes evidence which is otherwise admissible. Such evidence is very

often conclusive of the guilt of the accused. It is either admissions or a confession made voluntarily and without undue influence wherein the accused implicates himself in the commission of the offence or it is the discovery either by way of a search or a pointing-out of objects such as the murder weapon or property of the victim which conclusively link the accused to the crime. At the best of times but particularly in the current state of endemic violent crime in all parts of our country it is unacceptable to the public that such evidence be excluded. Indeed the reaction is one of shock, fury and outrage when a criminal is freed because of the exclusion of such evidence. One need only postulate the facts of the present matter to illustrate the point. A defenceless woman and three men are gunned down in cold blood in the sanctity of their home in the middle of

the day. The slain woman's personal belongings taken during the course of the robbery are dug up by the appellant in a mealie field behind his parents' home the next night. Imagine the reaction of the man or woman in the street if the appellant

were acquitted because Captain Kweyama failed to again warn the appellant of his right to silence and the consequences of his act of pointing-out the stolen property.

It has become noticeable in appeals and reviews from the lower courts, which have come before us that at the first intimation that an accused's constitutional rights have been infringed the evidence tainted by such infringement is without further ado excluded. It is necessary therefore to emphasise the discretion which rests in the presiding officer to decide whether the evidence should be excluded. That discretion still remains as is apparent from the wording of section 35(5) of the final Constitution.

Whether to admit or exclude evidence so obtained must be decided in a trial-within-a-trial where it can be factually established whether there was a casual link between the denial of the right and the evidence obtained, whether despite the denial of the right the accused was aware of or

must have been aware because of his understanding of his rights and whether he knew or must have known what the consequences of his statements or conduct would be.

In the present case the learned judge *a quo's* approach was four square within the principles laid down in *Key's* and *Khan's* cases. The interests of the accused and the proper administration of justice given all the facts and circumstances were correctly weighed against each other and the result was manifestly correct."

The magistrate in the present case gave his reasons for admitting the statements made by the two appellants in the section 119 proceedings, he said:

> "The court took into consideration the seriousness of the offence and the degree of violation as pointed out in *S v Khan* 1997(2) SACR 611(SCA)
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> "While the nature of the confessed offence might in some instances carry no weight at all, where the confessed
>
> offence was by its nature a serious one this could, from the point of view of the interest of the public, be a relevant factor to be weighed with all others."
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> It appears as if the main question remains whether the admission of the evidence would bring the administration of justice in disrepute in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case.

Public policy plays a vital role in considering the admission of this evidence. In *Klein v AG Witwatersrand* 1995 (2) SACR 210 W the following was said at 224 a-b: "a rigid principle would operate to the disadvantage law enforcement and the consequent prejudice of the society which the law and the Constitution is intended to serve. Before any remedy can be enforced the nature and the extent of the violation must be properly considered. It is the duty of the courts to do so in fulfilment of their obligation to give effect to the principle of public policy."

In *S v Motloutsi* 1996 (2) BCLR 220 (C) it was observed: "that in every case (a) determination has to be made by the trial judge as to whether the public interest is best served by the admission or the exclusion of evidence of facts ascertained as a result of and by means of, illegal actions."

See also the cases of *S v Shaba and Another* 1998 (1) SACR 16 TPD and *Director of Public Prosecution, Natal v Magidela and Another* 2000 (1) SACR 458.

The following facts were considered in deciding whether the section 119 proceedings must be allowed as part of the evidence.

They were aware of their rights to be legally represented. They were so informed by the police at their arrest and during the taking of the warning statements. They are educated and industrious people in the society.

Accused 1 was fully aware of the factual issues as he was present at the scene and could claim to be a victim.

They must have been fully aware of the circumstances surrounding the investigation.

They informed the police that they would be prepared to make a statement to the court.

The charge was a simple one where one can either admit or deny participation.

They made certain admissions during the questioning by a magistrate in open court according to the argument by their representatives. They could hardly be under any false illusion as to what the effect could be.

The two appellants in this case were both working at Pick ‘n Pay. Appellant 1 was the Chief baker and appellant 2 also worked in the bakery. Appellant 1 was present at, and was

involved in, the robbery albeit as an ostensible victim of the armed robbery. There is evidence that appellant 2 went to Pick ‘n Pay in a taxi, admittedly remarking to the taxi driver that he wanted “to see whether there was something wrong at his workplace”. Though he denied the evidence of the police informer with whom he went to Pick ‘n Pay (whose information led to their arrests) that he claimed to have planned the robbery, the robbery was public knowledge before

the two were arrested. Both were represented at their bail applications.

In his bail application appellant 2 specifically said he knew "that robbery especially where a dangerous weapon was used is a very serious offence" that if convicted he would be punished severely and that the only punishment in such a case would be a custodial, a jail sentence.

The confessions or admissions made by each appellant in their long self and mutually incriminating statements in answer to questions in terms of S 112(1)(b) of the Act in the S 119 proceedings do not stand alone; they are in fact corroborated by

the evidence of Victor, the informer and the cousin of appellant 2, who said that appellant 2 said that they planned the story together with appellant 1. In light of this to suggest as Mr Olivier suggested, that the appellant did not appreciate the seriousness of the charge against them when they

pleaded guilty before the magistrate begs the question. On the contrary it shows that they knew their rights.

It is so that Mujimbwa contradicted his evidence in chief where he said he informed appellant 2 of his right to remain silent, to legal representation and in terms of the Judges Rules. The warning statements taken by the police from each and the oral evidence shows that they did not make any statements before the police; this is evidence too of the fact that they were informed of the right to remain silent and of the right to be represented by a lawyer. Their questioning by the trial magistrate and the prosecutor on the content of their S 119 proceedings statements shows that both lied to come up with the story that the story they told emanated from the police. It is also evident that their story about being assaulted by the police

is not credible, first, because they did not complain to anyone of the said assaults; second, because one would have expected them to make statements to the police to avoid being assaulted further rather than dare to resist that

compulsion. Thirdly it is inherently highly improbable that if the story was manufactured by the police both would remember all the details contained in those statements.

The magistrate's exercise of his discretion in this matter cannot be faulted. The two appellants were rightly convicted and their appeal should be dismissed.

As regards appellant no 3, the appeal grounds raise three issues, namely:

1. non disclosure of police docket before trial;
2. whether there was sufficient evidence by the State to rebut his *alibi*; and
3. failure to call or subpoena a certain witness.

Counsel for the appellant in this appeal submits that the failure by the State to disclose the contents of the police docket amounted to a denial of accused's right to be accorded adequate time and facilities to prepare and present his

defence. Counsel relies on *S v Nassar* 1995 (2) SA 82 where at 107 D – E Miller AJ said the prosecution must provide an accused with all relevant documentation without waiting for a request to be made in time to enable the accused sufficient time to prepare his defence.

This ground is advanced in appellant's notice of appeal in which he reveals that a lawyer appointed by L.A.C to represent him at the beginning of the case withdrew because she wanted him to plead guilty "because of this identification parade", and says.

> "37. I have not seen the docket and affidavits of the witnesses that was called against me. Could not prepare myself for cross examining them without the affidavits of the witnesses."

I will deal with this ground first. I shall assume in the absence of any indication on the record to that effect, that disclosure of the police docket was not made to the accused. After accused

was arrested he was put on a parade where various of the potential witnesses were asked to identify him. These were the very witnesses that gave evidence against him. The identification parade was done on 11 June 1999. On 14 June 1999 appellant appeared in court to be joined with appellant 1 and 2. On that day appellant was informed of his right to legal representation and he declined to plead that day and as a result the matter was remanded to 16 July 1999. On 15 July the matter was further remanded to 28 July apparently because Mr Walters appeared to make a bail application for appellant 1. On 2 August 1999 appellant and his co accused were again in court but the matter was again remanded, this time to September 9 “for plea (final),” when appellant had indicated to court that “My Lawyer is in NWB I don’t know his name”, and finally to 2 September when appellant pleaded not guilty in terms of S 119 of the Act. That day he stated before he pleaded:

> "I could not raise enough funds for a lawyer to day. I will proceed today without a lawyer for plea. I will get legal representation for the trial."

After several further appearances in court on 30 March 2000 the appellants were advised of the Prosecutor-General's decision, that they were to be tried in the Regional Court on 10 April 2000. They were all warned to make arrangements if they desired legal representation of their own choice or to apply for legal aid "so that their legal representatives are ready to proceed with plea in Regional Court on 14/2000."

On 10 April 2000 appellant informed the court that he would conduct his own defence "need no legal representation." Mr Olivier appearing for appellant 2 informed the court.

> "that the contents of docket not yet disclosed by the State although same already requested during August 1999"

The matter was further remanded to 26/5/2000, to 30/8/2000 to 10/8/2001 and then to 13/9/2001 and finally to

12/10/2001. That day the trial did not kick off. Mr Walters informed the court that he had spoken to a lawyer who was supposed to represent appellant 3 but who later informed him she was no longer doing so, he offered to represent the appellant if there was no conflict between him and appellant 1. Apparently there was such conflict because appellant 3 was given a further opportunity to appoint another lawyer and the matter was postponed to December 6, 2002 after the names of all potential State witnesses who were at Court were warned. It is significant that the question of the contents of the police docket was never raised again. Since it was requested according to Mr Olivier's statement on 10 April 2000 one would be justified to assume it was furnished, and if it was furnished to the legal practitioners appearing for appellants 1 and 2, there would be no reason why it would not have been disclosed to appellant 3 as well and why he would not complain to the court if it was not since the complaint by Mr Olivier that the requested docket contents had not yet been furnished was made in his presence on 10 April 2000.

The position them is that from 11 June 1999 appellant 3 knew 3 potential witnesses attended the identification parade, and identified him. His defence was an alibi. The trial commenced on December 6, 2002. This means that none of the appellants could reasonably complain that they were not afforded adequate time for the preparation and presentation of their defence. I fail to see how, in the circumstances of this case the failure to furnish the appellant with the docket and affidavits of the witnesses called against him would have affected the preparation and representation of his defence, the fairness of his trial, or how it could be said to have prejudiced him in the presentation of his defence what the three witnesses who identified him on the identification parade was already known to him.

This leads me to the consideration of whether sufficient evidence was adduced by the State to rebut his alibi. I take this issue together with the complaint that the court failed to call or subpoena a certain witness.

It must first be pointed out that Article 12(d) of the Constitution provides that all persons charged with an offence must be given an opportunity of calling witnesses in support of their case and of cross-examining those witnesses called against them. The trial magistrate carefully explained to the appellant the way the trial would be conducted and the procedure relating to how witnesses should be cross examined; his right to call his own witnesses even if he himself chose not to testify was also explained. At the end of the State case the magistrate said:

> "Accused no. 3, at the beginning of trial I explained to you the procedures that you may also testify at the closure of the State case, and that you may also call witnesses to come and testify. And if I remember correctly, on the previous occasion I again informed you that if you want to call witnesses, you must arrange that they be here present today, what is your situation? Do you prefer to testify or what do you want to do, or do you want to call witnesses what do you prefer to do?"

In his reply the appellant said he will testify and that he wanted to call a witness, his “alibi witness who knows my whereabouts on that specific occasion” … “I do have my witness here” and that he had seen the witness outside who was “the only one” he wanted to call.

In cross examination appellant said he had two witnesses to call, - a sister called Sara, to tell the court about a photograph of his which the police got from her, and an uncle called Steven Kalele with whom he lived in Kuisebmond to say he was with him all day on Sunday the 6th June 1999. As to the alibi appellant’s answers as to where he was the previous night and what time he woke up on Sunday whether early or late, were very vague, saying he spent (part) of the day cooking lunch, he could not remember what he was cooking.

He said although the police told him he was being arrested for the robbery that took place on Sunday, he did not tell them he had a witness who could confirm he never left the flat where he lived in Kuisebmond.

This was apparently the first time appellant mentioned that he was with Steven that Sunday.

The vagueness with which appellant answered questions continued to the end of his evidence as exemplified by the following questions put to him by the court and his answers:

> "COURT: Sir, person Nantanga, who also testified, he told us that he saw you in the presence of accused no. 2 in the flat where he stay, before the robbery, days before the robbery, you stay there in the company of accused no. 2, and he himself Nantanga, stayed in that flat, he stay there together with the uncle of accused no. 2, and he saw you there, sleeping in that flat and on the day of the robbery, you left early in the morning, before he woke up, you were not there anymore, you and this other person Geppy or something like that, what do you say about that? --- Your Worship I do not know the allegation and I got nothing to comment on that.

> And he also saw you with the jacket there, the jacket that was found on the trail of the robbers as they fled and
>
> he recognised that jacket and it was very positive that the person in that flat in Swakopmund, together with accused no. 2, were you? --- I was also hearing that witness as when he was testifying the same. And the way I look to this jacket, there are people who always intending to put some in trouble, like as I also put on the witness. I do not know the jacket, I do not know the witness, so this jacket also, I believe that he also put it on me, on (inaudible) manner, for his own professional reason. I do not know Your Worship."

The appellant's sister Sara was contacted by the police but she said she was not willing to come to court. Appellant was not clear what he wanted her to testify about, and when repeatedly asked by the prosecutor his answers were very vague. In the circumstances the court could not be expected to act in terms of section 179 of the Criminal Procedure Act 51 of 1977. Subsections (2),(3) and (4) of the section provide:

"(2) Where an accused desires to have any witness subpoenaed, a sum of money sufficient to cover the

costs of serving the subpoena shall be deposited with the prescribed officer of the court.

(3) (a) Where an accused desires to have any witness subpoenaed and he satisfies the prescribed officer of court -

(i) that he is unable to pay the necessary costs and fees; and

(ii) that such witness is necessary and material for his defence, such officer shall subpoena such witness.

(b) In any case where the prescribed officer of the court is not so satisfied, he shall, upon the request of the accused, refer the relevant

application to the judge or judicial officer presiding over the court, who may grant or refuse the application or defer his decision until he has heard other evidence in the case.

(4) For the purposes of this section "prescribed officer of the court" means the registrar, assistant registrar, clerk of the court or any officer prescribed by the rules of court."

In my opinion it would have been an exercise in futility even to explain the right to the accused as Counsel for the appellant submitted in his written heads of argument. I say so because the said witness was unwilling to testify and the evidence to be extracted from her would apparently be unrelated to his *alibi* defence.

To come to the question whether the State adduced sufficient evidence to rebut appellants alibi, first the nature of the alibi must be determined.

This emerges from appellant's evidence. In his evidence in chief the appellant stated:

> "Your Worship I was arrested on the 10th of June at my home place at Kuisebmond - ….. The officer approached
>
> me in my place and I was also with my uncle Steven at my home place that same time."

In cross-examination he was asked a questions about his uncle which he answered, as follows:

> "When did he arrive there at your flat? --- My flat, my uncle?
>
> No your witness what is your witness' name?
>
> --- Steven Kalele.
>
> When did Steven arrive at the flat?
>
> --- Sunday.
>
> Yes what time? --- No we wake up together.
>
> Do you live together? --- Yes."

Steven Kalele's evidence in chief was:

"I can recall the 4th during 1999 this gentleman came **to my house** on that day.

What gentleman are you referring to?

INTERPRETER: Pointing to accused no. 3 Your Worship.

COURT: Yes. --- Your Worship there we stayed together because he usually used to come here to Walvis Bay from Owamboland to buy his things and go back again. That (whole) week as from 4th over the whole weekend until on the 10th when he was arrested, we stayed together there **at my house**."

The identity of appellant was first addressed by Eino Nantanga a State witness who testified that appellant no. 2 as from February 1999 lived in La Paloma Flat No. 2 which belonged to his uncle. Appellant no 2 stayed with two friends one of whom was appellant no. 3 his name was Kapote and the other was Geppy. In cross-examining Nantanga appellant no. 3 denied having been or having stayed at the flat and, more significantly, that his name was Kapote but Nantanga insisted that he had seen the appellant at the flat from 28th May and

he last saw him there on the Saturday preceding and had not seen him on the Sunday i.e. June 6. He further said that he had heard appellant called Kapote by Thomas, appellant 2.

During some adjournment while the witness was still giving evidence apparently appellant 2 approached him. The prosecutor observed this and questioned the witness about it and the witness said appellant 2 had then said.

> “He told me that if I am asked in court if I know anyone I must just say no.”

In cross-examination on the issue that he was identified at the identification parade by four people the prosecutor asked him a direct question:

> “Who is Kapote?”

and he answered:

"Your Worship, to tell you the truth, my name is Kapote."

The three people who identified the appellant were Martin Lutaka, Lottie Isaks, Josephat Ludwig. Warrant Officer Carel Johannes Passano was in charge of the parade. Passeno's

evidence was that each witness picked up the person by placing their hand on his shoulder, Ludwig did so without hesitation Martin Lutaka was not very sure but after some hesitation he identified the appellant and Isaks immediately stepped forward and put her hand on appellant who had changed his position on the parade from number 3 to number 7. However she looked nervous. After each witness appellant was asked if he wanted to change his clothes or place; he in fact removed his jacket after he was identified by Lutaka.

In his evidence Lutaka admitted it was difficult to identify appellant at the parade. He said:

> "Actually, as I am saying that no it was difficult, but my mind just make me like a person whom I saw but I was

> not sure about. I just identify the person I saw but not hundred percent sure."

He was also hesitant to identify the appellant in the dock. Earlier in his evidence in Chief, Lutaka was asked if he had had

the opportunity to look at the robbers during the robbery. He frankly said he was afraid. He, however, said.

> "I can remember, I can say the short one, he was like having a black thing in his teeth, like his teeth was rotten or what --- The upper ones."

When accused gave evidence, in cross-examination the prosecutor asked him to show his teeth. She noted:

> "I see you have got a teeth, you have got a black mark there in between, is that correct?"

and appellant answered:

"That is correct."

Ludwig said:

> "When I come into the room I recognised accused no. 3 on his ears and he sweat a lot … I recognised him as the man who was there during the robbery"

These witnesses were employees of Pick 'n Pay who were all present together with appellant no. 2 when the robbery took place. The person who had ample opportunity to observe the robbers was Lottie Isaks. Her evidence was the following.

She was the Chief Clerk at Pick 'n Pay. She worked with money, petty cash and with cashiers cashing up on a daily basis. Appellant no 1 was also employed at Pick 'n Pay as a baker. On the morning of the robbery she opened the shop and as they were busy inside the shop the bell at the rear

entrance of the shop rang, the time was about 06:15 or 5:20. The back entrance is used for deliveries and as the staff entrance. She went to the door and looked through the keyhole when she saw nobody she then opened the door to see who was ringing the bell. As she unlocked the door two armed men charged into the shop pointing their guns at her. She screamed and the two

men forced her mouth shut and ordered her not to scream. The smaller of the two men held her by the shoulder and asked where the office was. This smaller person had round eyes, a narrow face and a long nose. She didn't make these observations there and then but at a later stage when she had a proper look at him. The taller man had a cream cap on and she could not see his eyes, he also had a big jacket on. At the swing door the smaller man asked if there was a telephone and she said there was. They went to the switchboard where the man pulled out the telephone wires and in another office the man chewed the telephone wires off. Meanwhile the taller man had disappeared. They then went upstairs to the office and when they got to the top of the stairs they found the

other man there with three of her co-workers. The smaller man asked her where the keys to the strong room were? She fetched the keys from a desk drawer, she went and opened the strong room whereupon the taller man stormed into the strong room. He took keys on a green holder from a board in the strong room. She said the significance of the green holder is that the small safe in the vault (strong room) has a key on a green key holder. She did

not know who told them about the green key holder. He tried to open the safe and when the key failed to unlock the safe the smaller man then pushed them all into the strong room threatening to shoot her unless she told him where the right key was. She told him to wait while she would go to fetch the spare key and opened the safe. He had a black rucksack which he took off and put the contents of the safe into it. In the safe were coins, pick up bags, telephone cards and notes. The rucksack could not take all the contents of the safe. The man then asked her to give him one of the big bags lying in the safe still all the contents could not go in, so they took a tin trunk and put the silver in it. The taller man did the stuffing of

the contents of the safe while the smaller one stood in the doorway holding a revolver. She said the third appellant was the person who robbed them.

On the identification parade her evidence was that she was taken to a room with a big glass window. Before she entered, she said, “I saw the man who was guilty, it was the small one the third accused.” She walked up and down the line of people

on the parade and identified the smaller man. She identified him by his face and his eyes. On the day of the robbery the man had a lot of hair on his head “but it was shaved off the next day but I still recognised him.” She was shown photographs of some items recovered during the pursuit of the dead suspect and recognised the rucksack they had, the navy jacket and the cap the taller man had on, on the day of the robbery. The witness also said the robbers locked them inside the strong room after they finished taking the contents of the safe and went outside.

In cross-examination Ms Isak told appellant no 3 that his physical appearance were round eyes, straight nose, narrow face and narrow chin. She was hundred percent sure when she identified him. In short she was not shaken in cross-examination by the appellant or the two legal practitioners for appellant 1 and no. 2.

The trial magistrate was criticised, rightly so in my view, for not dealing with this issue in his judgment, and for saying some

irrelevant things in connection therewith. The evidence however speaks for itself and on appeal this court is entitled in the circumstances to make its own assessment of the evidence. (See *R v Dhlumayo and Another* 1948 (2) SA p 77 (A) at 705 – 6). See also the oft quote remarks of Holmes, JA in *S v Mthetwa*, 1972 (3) SA 766 (A) at p 768 A-C).

I have recounted Ms Isaks' evidence at some length. This evidence shows that she had ample time to observe appellants during the robbery as he was in her sight

throughout right from the stage she opened the back entrance into the shop up until the two robbers left. While the taller of the two was stuffing the contents of the safe in the strong room the smaller person was standing guard at the door or in the doorway. That gave her a good opportunity to observe him. Her evidence as to the events on the day in question and as to her identification of the appellant on the parade was consistent and remained unshaken in cross-examination.

The appellant was also identified by Eino Nantanga who was also insistent that the appellant was one of the two persons who

stayed with Thomas at La Paloma Flats and who disappeared from there and were not seen there again on Sunday the 6th of June 1999 when the robbery took place. He had heard him called by the name Kapote. The appellant initially denied that name, but later admitted his name was Kapote thus corroborating Nantanga's evidence and thereby calling the bluff on the appellant's alibi. The alibi witness of the appellant who said appellant was staying with him at his house from 4th June until he was arrested on 10th June belied appellant's claim

that the house at Kuisebmond in Walvis Bay was appellant's home. The appellant was identified by Lukata as having something black on his upper front teeth which was confirmed in Court when he was asked to show his teeth. It would be a very remarkable coincidence that one of the men who robbed Pick 'n Pay had the same features with the appellant. I find that the alibi of appellant was rebutted by the State beyond reasonable doubt. His appeal against conviction likewise must fail.

Both in their written and oral submissions Counsel did not address the Court on sentence. There is no merit in the appeal by all three against their sentences in any event.

In the result the appeal of all three appellants, both against conviction and sentence is dismissed.

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MTAMBANENGWE, A.J.

I agree

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SILUNGWE, J.

ON BEHALF OF APPELLANTS **Mr G S Hinda**

Amicus Curiae

ON BEHALF OF RESPONDENT **Mr J Truter**

Instructed by: **Office of the Prosecutor General**