CASE NO. SA 5/2003

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

JOHN NARIB APPELLANT

And

THE STATE RESPONDENT

CORAM: STRYDOM, A.C.J., *et* TEEK, J.A., *et* O'LINN, A.J.A.

HEARD ON: 2004/04/13

DELIVERED ON: 2004/10/29

APPEAL JUDGMENT

O'LINN, A.J.A.:

SECTION I

INTRODUCTION: The appellant was one of four accused persons who appeared in the Namibian High Court on charges of murder and robbery. The said accused were arraigned in the following order:

Gustav Tjombala – Accused 1.

Lukas Tjombala – Accused 2.

John Narib – Accused 3.

Patric Somseb – Accused 4.

The indictment contained three counts which can be summarised as follows.

i) The unlawful and intentional killing of Ingeborg Schultz on or about 3 September 1994 at farm Olifantsfontein in the district of Grootfontein;

ii) The unlawful and intentional killing of Gustav Schultz on the same date and place;

iii) The robbery with aggravating circumstances in that the accused persons, unlawfully and with the intention of forcing them into submission, assaulted Ingeborg Schultz and Gustav Schultz, by shooting them with a firearm and unlawfully and with intent to steal, took from them a 7.65 mm pistol and an unknown amount of money, being the property of Gustav and Ingeborg Schultz.

All the accused pleaded “not guilty” and each filed an explanation of plea in terms of Section 115 of the Criminal Procedure Act 51 of 1977, as amended, denying complicity in the crimes charged. None of the accused raised the defence of an alibi in those explanations.

In the course of the proceedings, the admissibility of certain confessions or admissions by accused 1 and 2, was disputed by the accused and consequently the Court proceeded to conduct a “trial within a trial” to determine such admissibility.

At the end of the said trial within a trial, the Honourable trial judge, Gibson J, allowed the alleged statement by accused no. 1 but disallowed the alleged statement by accused no. 2.

At the end of the State case, counsel for accused 1 and 2 applied for their discharge. The Court *a quo* granted the application and discharged them.

However, no express finding was made reversing the original decision of the Court *a quo* admitting accused no. 1's statement to Inspector Knouwds as evidence in the trial and it must be assumed for the purposes of this appeal that the said statement of accused no. 1 remained part of the admissible evidence against accused no. 1.

The case now proceeded against accused 3 and 4. Accused 3 and 4 testified and also called several witnesses to testify on their behalf. At the conclusion of the defence case and after hearing argument – the Court *a quo* convicted both accused no. 3 and 4 on all three charges and sentenced both of them as follows:

(i) Imprisonment for life on each of the two counts of murder.

(ii) Ten years imprisonment on the robbery charge.

Accused no. 3 John Narib applied for leave to appeal but the Court *a quo* declined to grant leave. Thereafter the accused petitioned this Court which then granted leave to appeal against conviction but refused leave to appeal against sentence. Obviously, should the appeal against conviction succeed, it will follow that the sentence is also set aside. However, should the appeal against conviction fail, the sentence will also remain as before.

Mr Ndauendapo appeared for accused no. 1 and 4 in the Court *a quo* but after

the discharge of accused no. 1 at the end of the State case, and in the course of his cross-examination, accused no. 3, on behalf of accused no. 4, Mr Ndauendapo withdrew from the defence of accused no. 4. Accused no. 4 then decided to conduct his own defence from that stage. Mr Murorua appeared for accused 2 and 3 in the Court *a quo* and continued to appear for accused no. 3 after the discharge of accused no. 2 at the end of the case for the State.

On appeal before us, Ms Schimming-Chase appeared for appellant (accused no. 3) and Ms Verhoef for the State.

SECTION II: THE ISSUES AND ARGUMENT ON APPEAL

There was no dispute at the appeal stage about the fact that Mr and Mrs Schultz were brutally murdered in their farm-house on the farm Olifantsfontein in the Grootfontein district on or about 3pm Saturday the 3rd of September 1994, by being shot with an AK 47 rifle by one or more intruders and that they were also robbed of some of their belongings on the same occasion. It was also common cause that at least two intruders were involved. What remained in dispute was the identity of the intruders and their precise number.

Counsel for appellant Ms Schimming Chase summarized the issues on appeal in paragraph 2 of her written heads of argument as follows:

"2.1. The learned judge *a quo* erred in ruling that accused no. 1 should be discharged at the close of the State case;

2.2. The learned judge erred in accepting that the identification parade held

on 4th August was properly conducted;

2.3. the learned judge erred in accepting that the State had proved its case beyond reasonable doubt against the appellant;

2.4. the cumulative effect of the above resulted in a failure of justice."

Paragraphs 2.3 and 2.4 are generalisations. Paragraph 2.1 and 2.2 are more specific. Paragraph 2.1 relates to the discharge of accused 1 at the end of the State case. Its relevance to the case of the accused no. 3, the only appellant before us, can better be understood if it is considered in conjunction with paragraphs 43-48 of counsel's heads of argument.

These paragraphs, which were adhered to in counsel's *viva voce* argument, read as follows:

"43. It is common cause that only two people were involved in the commission of the offence in 1994.

44. It is further common cause that four people, including the appellant, were charged with the commission of the offence. In this respect, accused 1 and 2 and accused 3 and 4 were linked as co-perpetrators.

45. It is trite law that the State must prove its case beyond reasonable doubt. It is noteworthy that in view of this

burden, the State had four people on trial for an offence in which it was clear that only two people committed the offence.

46. It is submitted that one can only conclude that the State either had sufficient evidence to sustain a conviction in respect of all four accused, or was not able to build a strong case against any of the accused. The former conclusion would be illogical. The second conclusion creates confusion.

47. Even the judge a quo at the close of the State's case, put issues which reflected this state of affairs at page **844**, where she stated as follows:

> 'but what does puzzle me in this case and, is that you have, as it were a situation where you have one group of witnesses who accused certain persons as having been present at the scene and being seen at the scene and being identified. And another group of witnesses is brought forward by the State who claim that another set of persons were present at the scene at the time and no other persons were present and were recognized and identified. And I think it is clear on all accounts of the witnesses' evidence that there were only ever two persons seen entering. There were only ever two persons who were seen

> emerging from the house, who were seen running away, that there were two sets of footprints and so on. And yet here we have four suspects and in a civil case perhaps it might be explained, because the standard of proof is different, but in the criminal prosecution given the very high standard of proof, I really have some difficulty in understanding how the hearing (indistinct) State's counsel how one approaches a situation like that.'

48. It is submitted that in view of the above the State did not have *prima facie* evidence beyond reasonable doubt to convict any of the accused persons, and that it proceeded with the trial of this case on **"a trial and error basis".** On this basis alone, the judge erred in convicting the appellant and accused 4."

Counsel for the State supported the judgment of the Court *a quo*, including the decision relating to the admissibility of the confessions allegedly made by accused 1 and 2 as well as the discharge of accused 1 and 2 at the end of the case for the State. I do not accept that it was common cause that only two persons were involved in the commission of the crimes. But even if it was common cause, such assumption was ill conceived and based neither on the evidence, nor logic.

Even if some purported witnesses allegedly saw only two persons entering or leaving the house at a particular stage, it does not mean that there were only two persons actually involved. The persons involved may not all have entered at the same time and may not all have left at the same time or at a time when the purported witnesses focussed their attention on the farmhouse and its surroundings. Some of these alleged witnesses were dishonest. Others may have been scared to talk. There were several indications that more than two persons were involved. As to dishonesty the most prominent witness was Johannes Horaseb. He made several statements. In his original written statement to the police shortly after the murder on 5 September 1994 he stated that one of the two men that he saw, was his son-in-law Marcus Geiseb. The other one he recognised as Gustav, who was later charged as accused no. 1. Michael Geiseb, according to Horaseb, shouted at the other man to run. Michael Geiseb even ran towards him. He recognized Michael Geiseb on his face and voice. He was dressed in camouflage clothes.

Horaseb confirmed this statement in another statement dated 17.9.94. Then in a third statement on 11.8.95 he purported to withdraw his previous statements, because according to him, “he was under the wrong intention that the suspect was my son in law.”

This statement was taken after an identification parade on 4.8.95, where both Michael Geiseb and Gustav Tjombala as well as accused no. 3, John Narib were present as suspects. Horaseb now identified John Narib as the person he saw on 3 September 1994, coming out of the house after the shooting. In his statement dated 11.8.1995, he now confirmed that John Narib was the man he saw and no one else. Horaseb alleged that John Narib was clad in PLAN

uniform and he recognized him on his movement, voice and build. On that day, Narib had an object in his hand which appeared to be a rifle. He shouted in the Damara language – “Kom kom, laat ons gaan”. These words – freely translated into English – mean: “Come, come, lets go”. The second and third statements referred to above were sworn to by Horaseb.

When Horaseb testified in Court, he at times stated that he did not recognize any one of the two persons who came out of the house on the day of the shooting. When confronted in cross-examination with his previous statements, he said that he was forced to make them. Horaseb was totally discredited as a witness and no Court could place any reliance on his evidence if disputed unless it is corroborated by other credible evidence. It follows that his testimony about two persons he allegedly saw, is no basis for finding that there were only two persons involved.

Victoria Namises actually said in her written statement to the police dated 11.7.95 that at about 5pm she saw four men running about 500 meters past her. At the time she was staying at Plot Kede. The four persons were running from the direction of farm Olifantsfontein. She could not give the date of the incident but said it was on a day when Sergeant Geelbooi came to her at Plot Kede (Post Driehoek Form St Andrew) and asked her whether “she saw any tracks going by”. She further said: “I then answered that I saw four men ±1 hour ago running past ±500 metre from us. I could see them clearly and even called to them to come near, but they continued running. She further said: “I called to Markus Geiseb whom I recognized, but he did not answer me. The other man is Johannes, I do not know his surname, but he is the brother in law Marcus: Marcus had a white bag of a bank in his hand. Johannes had a black

rucksack on his back.

Markus was clad in blue trousers, a blue shirt and white trousers. The other two men were clad in a blue trouser and green shirt and was carrying a carry bag. The other one was clad in dark blue trousers and a jacket which was camouflaged and is usually worn by the army. They came from farm Olifantsfontein and proceeded in the direction of the tarred road.

I will be able to identify all the people, because I saw them clearly……”

At the identification parade on 4.8.95 she believed that she pointed out Markus Geiseb, but according to the police record, she pointed out Gustav Tjambala, later arraigned as accused no. 1. Victoria Namises confirmed in her evidence under oath in Court that she saw four persons, of which she knew one. She then said she saw all four accused running but only knew one, by name of Augusto. When asked to point him out in Court, she pointed out accused no. 1, the one she had also pointed out at the identification parade. She insisted, his name was Augusto.

She said it was about 6pm on the Saturday when she saw the four men running past. The witness was very confused as far as the identification of the four persons are concerned and obviously very little weight can be attached to her identification of any of the four individuals.

She however remained steadfast in regard to the four men she saw running late on the afternoon of the Saturday, the day on which Sergeant Geelbooi made the enquiries.

Sergeant Visser, who was one of those following the tracks on the Saturday and the Sunday, following the murder said they were following three (3) sets of tracks. Visser testified: "At the beginning there was three tracks and then the tracks split. So only two (2) tracks went one way and one track went the other way".

On the question – So there were three pairs of tracks? The witness replied: "That is affirmative, that we could find at that stage".

Inspector Van Zyl testified that when he interrogated accused no. 3, the latter told him that they were three persons who were involved, i.e. himself, Patric Somseb and one Dino, whom Van Zyl knew was Piet Haraeb. Knouwds, a former inspector in the Namibian police, testified that although he could not recall most of what accused no. 1 told him, one of the things that he could recall was that accused 1 and three other men went to a plot and caused trouble there. Knouwds however did not record any such statement by accused no. 1 in the statement he took down from accused no. 1.

The witness Willemse also testified that accused no. 4 had told him that they were three persons who went to the deceased's' home and that he himself remained in the orchard at the time of the crime. The persons who committed the crime, are obviously dangerous criminals. They committed these crimes in broad daylight at a farmhouse within sight of the residence of the employees on the farm. They must have known that they could easily be detected by such employees, particularly since they made use of an automatic firearm. It seems that the culprits were not scared of detection by and/or

interference from those on the farm. There must be a reason for that. The reason may be that there were some relatives and/or accomplices and/or sympathisers on the farm. On the other hand some of those employees or residents may have been too scared to tell the truth. This may explain why Johannes Horaseb originally incriminated his son in law Markus Geiseb, who according to him, moved in his direction after the shooting, but later the same Horaseb withdrew that statement and now incriminated John Narib, the appellant. John Narib was also convicted of robbery in another case, not related to the case before us. Some of the other witnesses had also been convicted of some crimes not related to the present. No wonder that most of witnesses called, contradicted themselves.

In these circumstances, it could not be inferred that only two persons were involved, being either accused no. 1 and no. 2, or accused no. 3 and no. 4. The argument by appellant that consequently it was either accused no. 1 and accused no. 2, or accused no. 3 and accused no. 4, cannot be correct. It appears that the Court *a quo* also made this assumption. Not only does this appear from the passages quoted by counsel for the appellant's heads of argument, but the Court went much further in the course of the argument by counsel in regard to the application at the end of the State case for the discharge of accused 1 and 2. The learned presiding judge even suggested that it may assist to "streamline" the State case if she discharged accused 1 and 2 in view of the alleged contradictory confessions made by accused 1 and 2 to which former Warrant Officer Silver and former Inspector Knouwds had testified, and the alleged confession by accused no. 3, to which Inspector Van Zyl and Chief Inspector Kaundu had testified. When State counsel Ms Jacobs after consultation with the Prosecutor-General told the Court that she wished

to withdraw her concession that accused no. 1 and 2 should be discharged, the Court put pressure on her not to withdraw her concession. Ms Jacobs nevertheless persisted in her withdrawal of the concession previously made.

The problem the Court had was that in the alleged confessions and/or admissions by accused 1 and 2, that they and they only were the perpetrators of the crimes, whereas on the alleged confession by accused 3, he and accused no. 4 were the sole perpetrators of the crimes. This problem is related to but is nevertheless distinct from the question whether or not the crimes were committed by only two persons. This problem could however not be solved by discharging accused 1 and 2 at the end of the State case in order to "streamline" the State case and in that manner bring an end to the important conflict in the State case.

The Court should rather have put accused no. 1 and 2 on their defence in order to have a fuller picture at the end of all the evidence to decide the number and identity of the culprits. It was further obvious that if accused no. 1 and 2 were discharged at the end of the State case, that no. 3 and no. 4 could take advantage of that discharge by alleging, that it is at least reasonably possible that accused no. 1 and 2 were indeed the culprits as appears from their alleged confessions and that accused no. 3 and 4 were indeed innocent, alternatively could not be proved guilty beyond all reasonable doubt.

This in itself may not justify declining an application for discharge as indicated in a fairly recent decision on the South African Court of Appeal, but the case against accused no. 1 is not a case where it could be said that there was "no

evidence" against accused no. 1 at the conclusion of the State case.[1]

An important feature of accused no. 3's case after the discharge of accused no. 1 and 2 was precisely that there was a reasonable possibility that the discharged accused no. 1 and 2 were in fact the perpetrators. Accused no. 1 was even called to testify on behalf of accused no. 3. In that testimony he even alleged that accused no. 4 was an old friend who exonerated accused no. 3 and incriminated Maleagi Rasta.

The Court had found in the trial within a trial that the confession of accused no. 1 was made freely and voluntarily and was admissible. The reason for discharging the accused at the end of the State case was stated as:

> "The evidence of the taking of the statement which I ruled admissible during the trial within a trial by Inspector Knouwds measured against that of Warrant Officer Silver in the main trial as well as his own, <u>is such that it was of such poor quality and so totally discredited when weighed one against the other, that no reasonable body of man or woman would have considered that evidence reliable</u>". My emphasis added).

It is not clear from this judgment in which both accused no. 1 and no. 2 were

1 S v Lubaya 2001 (4) SA 1251 at 1255 per B-1257H.
See also S v Shuping and Others, 1983 (2) BSC at 119.

discharged, whether the Court now reversed its decision on admissibility; whether it was now of the opinion that the alleged statements of accused no. 1 were never made; whether it was concocted from Knouwd's imagination; whether it was taken but was not given freely and voluntarily or which other specific finding on events, if any, was made following the aforesaid finding on credibility.

In the trial, within a trial, the Court had stated:

In regard to accused no. 1:

> "My ruling as regards to those admissions by accused no. 1, is that I do not find that there was any substance in the alleged impropriety on the part of the police officers. With regard to his arrest and detention and questioning,
>
> I shall give the full reasons for that rule in the course of the judgment. Accordingly I rule that those admissions were admissible".

As regards accused no. 2:

> "I cannot rule out the possibility that accused no. 2 was subjected to maltreatment as claimed. And accordingly my ruling is, that as far as the alleged admission by accused no. 2 are concerned, those were improperly obtained against his will by duress and his statement is inadmissible".

In discharging accused 1 and 2, the Court made much of contradictions relating to the times when certain actions relating to the arrest, questioning and taking down of statements took place and contradictions between police officers in that regard. Furthermore the Court was perturbed at the inaccuracy of the investigation diaries and the failure to catalogue the progress of the investigations timeously and accurately.

The Court was correct in pointing out the necessity for police officers to keep proper investigation diaries, pocket books and other records and to severely criticise the failure of the police officers involved to do so. However the Court in my respectful view overemphasized these failures and in so doing failed to focus on important indicators and probabilities and to put these failures in its proper context.

So for example it should be kept in mind that investigating officers may be overburdened with work as a result of the escalating crime rate, and a police force which is generally undermanned, under-trained, under-equipped and demoralized. In my respectful view, there are sufficient indications of this unfortunate state of affairs in this very case.

In these circumstances, it is understandable that even conscientious police officers may be inclined to spend their available time to investigate the cases on hand, and to bring their investigation to a conclusion by arrest and prosecution, rather than sit down to do the administrative work such as writing up investigating diaries and pocket books and preparing their own written statements.

Such delays in doing the paper work may lead to mistakes and inaccuracies when the police officers are required to testify after many months or even years and certainly led to such inaccuracies and even conflicts in this particular case, but that does not necessarily reflect on the officers' honesty, integrity and truthfulness.

One must keep in mind that the defence is entitled to copies of all the relevant statements and documentation before the trial begins whereas the prosecution is not entitled to see the statements of defence witnesses or be informed of the accused's defence beforehand. The defence thus has an unfair advantage on the prosecution. When the proper statements and the relevant investigation diaries, pocket books and other documentation are not prepared with care, the prosecution witness becomes an easy victim in cross-examination and is often embarrassed and confused to such an extent that his/her credibility as a whole is affected.

It is also evident from the testimony in the instant case, e.g. the case of former Inspector Knouwds, that he probably did not have a proper opportunity to consult with the representative of the Prosecutor-General and to refresh his memory from the statements of the accused before testifying, otherwise he would have remembered when cross-examined by defence counsel, what questions if any, he had asked the suspect and what answers the suspect had given. Prosecutors should always properly consult with state witnesses before calling them to testify. Police officers are also legally entitled to refresh their memories before testifying, *inter alia* from their own statements, from the statements of suspects and from all relevant documentary material.

Memory is of course always important for a police officer testifying in Court, but a memory test should not be the dominant feature of the judgment of his honesty and credibility.

The Court should always take care to distinguish the neglect of police officers and their unsatisfactory evidence in regard to dates and the meticulous recording of the progress of the investigation, from the larger issues and the probabilities.

The Court *a quo* in the instant case appears to have ignored certain important facts and probabilities. So e.g., it was a fact that after Knouwds had taken down the statement of accused no. 1, Knouwds alerted the investigating officer to arrest accused no. 2. This clearly indicates that he was told by accused no. 1 of the complicity of accused no. 2. The Court also erred in assuming that the only evidence against accused no. 1 at the time of the application for discharge was the alleged confession. At that stage there was the evidence of Victoria Namises that she had seen four men running in the veld from the direction of Olifantsfontein, the scene of the murder. At the identification parade she pointed out accused no. 1 as one of the four, although she was under the impression that the person she pointed out was Markus Geiseb. When she testified in Court, she again pointed out accused no. 1 as one of the four.

There was also the evidence of Warrant Officer Silver and Detective Visser about the three pairs of tracks they followed coming from farm Olifantsfontein as well as those going towards farm Olifantsfontein. According to both Silver

and Visser, the shoes which accused no. 1 had on when arrested were inspected and in their opinion the shoes appeared to correspond to the tracks that they had been following. They however also said that Sergeant Geelbooi, who was with them was the expert, and he confirmed that the tracks were similar to the shoes worn by accused no. 1. Geelbooi was never called. Inspector Van Zyl testified that Geelbooi had told him that the tracks led to nothing and that Geelbooi refused to make a statement. It was open to the Court to call Geelbooi as a witness, particularly because the Court remarked on the absence of Geelbooi who was stated to be the expert. Was it not for the hearsay statement of Van Zyl, a duty would have rested on the Court in terms of Section 186 of the Criminal Procedure Act to call Geelbooi. Alternatively, the Court, even if not compelled by law to call Geelbooi, would have acted wisely to call Geelbooi.[2]

The fact that Geelbooi was not called, left the evidence of Warrant Officer Silver and Sergeant Visser uncontradicted. As experienced police officers, their opinions in this regard was admissible, even though they themselves did not claim to be "experts" in this field. Obviously, their evidence although admissible, would not carry the same weight as that of experts. There was also the evidence by Visser that a woman in the veld where they were following the tracks told them that she saw "Bumper" in the veld in the area on the day she was questioned by Visser and Silver. The identity of this alleged women witness was not disclosed by Visser, but she may have been Victoria Namises, who also pointed out accused no. 1 at the identification parade as well as in Court, as one of the 4 persons whom she allegedly had

2 See in this regard the decision of this Court in David Silungwe v The State 8th December 2000; Albertus Monday v the State 21/2/2000, both not yet reported and the decisions referred to therein; State v Dawid, 1990 NR 206 HC.

seen running in the veld with three others on the day in question.

Insofar as the Court *a quo* based its finding to discharge accused no. 1 and 2 on an assumption that only two persons had committed the murders and robbery, the Court misdirected itself. Insofar as the Court apparently relied on the consideration that a streamlining of the State case can be achieved and that the conflict between the alleged statements by accused no. 1 and no. 2 on the one hand and the statement of accused no. 3 on the other, can in this way be avoided, the Court also misdirected itself.

I am satisfied that for the above reasons, the Court *a quo* erred in granting the application for discharge of accused no. 1 at the end of the State case in terms of section 174 of the Criminal Procedure Act no. 51 of 1977.

SECTION III

THE STATE CASE AGAINST THE APPELLANT:

My above findings are clearly not enough to let the appellant off the hook. Although the argument based on the assumption that there were only two perpetrators of the crimes charged, must fail, the conflict between the alleged version of accused no. 1 in his alleged confession and the version of accused no. 3 in his alleged confessions, supports the argument on behalf of appellant that the State has failed to prove the case against him beyond reasonable doubt. Whether or not the appeal should succeed, must however depend ultimately on the other evidence, directly incriminating the appellant. I will now deal with such evidence seriatim.

1. THE ALLEGED CONFESSIONS AND ADMISSIONS OF ACC. NO. 3:

The most important evidence against appellant is the alleged confession by him to Inspector Van Zyl and the admissions to Chief Inspector Kaundu. The Court accepted the evidence of Van Zyl and Kaundu, despite the appellant's denial that he had made those confessions. Although the accused admitted that he had visited the scene on two occasions, namely one occasion when Van Zyl was not accompanied by Kaundu and a later occasion shortly afterwards when he visited the scene with both Van Zyl and Kaundu present, he denied that he had pointed out any points and that he had made any confessions and/or admissions on any of these occasions. The explanation by the accused that Van Zyl himself in effect pointed out the various points of relevance was farfetched.

I can find no reason to reject or even seriously question or criticise this finding of the Court *a quo*. There is also no reason to find that even though the accused made those confessions freely and voluntarily, he made them falsely. Van Zyl explained the accused's motivation and the background to the confessions as follows:

> "On that particular day (i.e. 24/1/1995) I booked out accused no. 3 who was at that stage in custody already for investigation purposes. I was accompanied by Detective Sergeant Fourie. We drove to Tsumeb with a vehicle, because I had an informant which I needed to speak to there. On our way both Sergeant Fourie and myself spoke to the accused. I started to ask him about his whereabouts on the day of the murder. The accused told me that he was in Grootfontein. I told him that I am in possession of information that

he could possibly be involved in the murder. The accused denied everything. We arrived in Tsumeb where I spoke to my informer. Thereafter my informant returned to Grootfontein with us because I wanted him to obtain certain information for me there. On my way back from Tsumeb I decided to pay a turn at Olifantsfontein, because I have never been to the scene of the incident myself. I stopped in front of the farmhouse. The moment when I stopped and got out of the vehicle, then accused 3 told me that he wants to point out to us what happened on that day. I told him that he was not obliged to point out anything to me and anything that he might reveal can be used as evidence at a later stage. He then said that he would like to point out, because he wanted to get the thing off himself. Yes he then started to direct me to the orange trees, how they came from that direction and jumped over the fence. Yes, something that I should add what the witness said was that he was with accused no. 4, which he mentioned by name, who later became known as accused no. 4 as well as a certain Dino. In other words they were three people.

They went through the orange trees and accused no. 3 went around the house from the left side to the back. And accused no. 4 went around the house from the right side to the back. Both of them stood at the respective corners of the house and waited for a couple of moments. Accused no. 4 had an AK 47 rifle with him. Accused persons number 3 and 4 went simultaneously to the door of the house. Accused no. 3 entered the house first followed by accused no. 4. They went through the kitchen up to the back part of the

house where the bedrooms are situated. Yes, then the deceased woman came from the left side of the bedroom with a broom in her hands and stormed in the direction of the accused persons. Accused no. 4 then started to fire in her direction and she fell down. She fell down with the broom, a part of the broomstick underneath her. Then the deceased man stormed from a room with a spade in his hand. Then accused no. 4 also started to fire in his direction and he also fell down with the spade next to him. The accused no. 3 also pointed out to me the power box, electrical power box, which was damaged. He also told me that the house looked different at that stage when the incident took place, because there was an arch now in the place where a door was. I have to correct myself, My Lordship. There was a window now in the place where the arch was, meaning the window has replaced the arch, yes meaning the arch has replaced the window. And that there was also a door which is no longer there in place."

Van Zyl explained how Inspector Kaundu became involved. He said:

"And then I asked accused no. 3 whether he would be prepared to point out the scene in the similar manner as he did to me to an independent officer and he did not have a problem. I then drove to the police station and found Inspector Kaundu who was the station commander. I asked him whether he would be willing to accompany me to the scene where the accused would like to make certain indications, pointing out, and he said yes. Accused no. 3, Inspector Kaundu and myself then drove back to the farm again.

> Here again the accused pointed out the scene to Inspector Kaundu as well. I then gave instructions that accused no. 4 should be searched and arrested. He was also arrested on the same day. After accused no. 4 was arrested, then accused no. 3 ceased to cooperate and started to deny everything he has acknowledged at a prior stage to me."

Van Zyl said that he established that "Dino" was the nickname of Piet Haraeb but that this Piet Haraeb was already in custody for some other crime when the crimes at Olifantsfontein were committed. It is significant that accused no. 4 Patric Somseb was arrested on Van Zyl's instructions, as a result of the statement by accused no. 3, incriminating accused no. 4 and putting most of the blame on accused no. 4, leaving for himself mainly the rôle of bystander and accomplice.

The motive of accused no. 3 could certainly have been to ensure a lighter sentence for himself by confessing timeously and placing the major role and blame on accused no. 4.

The question then arises why he suddenly upon return from the scene of crime refused to further cooperate and again deny any knowledge of the incident, as testified by Van Zyl.

The answer probably lies in the fact that when they returned to the police station, accused no. 3 was confronted by his friend and co accused no. 4, who had in the meantime been arrested on the instructions of Van Zyl on

information provided by no. 3. Accused no. 3 now probably realized that accused no. 4 will assume that no. 3 had betrayed him and that they would now be used against each other.

Furthermore, accused no. 3 knew that he had not made any written statement and consequently it would be easy to repudiate whatever he had said before.

Kaundu testified and corroborated Van Zyl, although there was a dispute between them in regard to the reason why Kaundu never reduced his version to a written statement for the purposes of the investigation and preparation of the docket for trial. This dispute underlines the lack of proper cooperation and coordination between the police officers to which I have referred earlier and the apparent mistrust between police officers which was also commented on by the Court *a quo*.

The Court in regard to this dispute preferred Kaundu's version. I do not agree because Kaundu, as Chief Inspector and Station Commander of the police at Grootfontein at the time, should have known without being told by Van Zyl, that he was required in accordance with sound police practices, to reduce his observations and what he said to the accused beforehand, if any, and what the accused pointed out to him and said to him when they visited the scene of crime. Kaundu also explained that he had made notes and drew a sketch of the pointings out in his pocket book, but that the pocket book had gone missing.

When the Chief Inspector Kaundu commenced his visit to the scene with accused and Van Zyl for the purpose of pointings out by accused no. 3 he did

not ask Van Zyl to leave their company, seeing that Van Zyl was the investigating officer to whom a statement and pointings out had previously been made by the accused. Kaundu also failed to give the accused any warning in terms of judge's rules, as he should have done before the pointings out commenced. Instead of giving the accused the recognized warning, Kaundu, according to his evidence in chief, said:

> "On our arrival at the farm, before we went in the yard of the farm, the inspector stopped the vehicle and then he told me that okay, he must show you what he had shown me."

There was then some confusion on the side of the Court about who said what, but eventually it became clear that first Van Zyl had said to Kaundu – "Okay he must show you what he had shown me" and then Kaundu told the accused that he must show him what he had shown to Van Zyl. Kaundu continued:

> "And then I started asking some questions to the accused. I asked him if they are the ones who came in and entered into the farmyard? I then asked, where they passed when they came into the farm. And then he then first told me that no, they passed at the southern direction. They crossed the first wire, until coming to the next wire which is on the gravel road on the farm, from there we started moving, me and him in front and Inspector Van Zyl he was behind us with a camera, video camera. Then I and accused no. 3, we went up to the, we went up to a small gate, small gate for

people only. Its not for vehicles. By that time that small gate was locked and then I asked him how did you manage to go in, into the yard and he said we climbed the what we shall we call it and then we went in. Then we went into the yard and he showed me that. The accused indicated that they climbed over the gate."

Kaundu continued:

"Then we went into the yard and he showed me that. Now, when we came at this point, we divided ourselves. One of my friends went to the right direction of the house and I myself went to the left. And then we went up to the building. Then we get the first door of the kitchen. So we came up to the door of the kitchen and then he told me that 'my friend was standing somewhere here and I went to open (indistinct)'. (The witness is indicating towards the right hand side, Your Lordship). And we entered the room. We went to the kitchen there is a next door again which goes in the like a veranda. This is a wall whereby the left side wall whereby the left side wall is where the rooms are divided. In the corridor I experienced myself, because of the blood, that that was the scene of the incident. I could see the blood ……..when we came in that corridor we saw some blood on the floor and that showed that there were, I mean people lying there. I asked the accused that how and who shot, whether he's the one who shot the two deceased… Then he told me that he's not the one who was shooting. I mean the one who was shooting was accused no. 4, his friend. During that period I could not ask a lot of questions, simply because there

were no many owners and their relatives, those that know the items which was inside the what shall we call it, those that can say there is something which got lost, like this…….”

Kaundu then pointed out on the sketch plan handed in and prepared by Chief Inspector Malan, the direction followed by accused 3 and 4 as allegedly pointed out to him by accused no. 3. Chief Inspector Kaundu, who was the Commissioner of police at Gobabis when he testified, apparently did not know, when he accompanied the accused to the scene of the crime, that in order to ensure that the expected statement to him, if it amounts to a confession, would pass the test of being made by the accused freely and voluntary, in his sound and sober senses and without having been unduly influenced thereto, as provided for in section 217 of Act 51 of 1977, he should at least warn the accused in terms of judges rules that he is not compelled to make any statement or point out anything, but that should he do so, such statement and pointing out may be used in evidence against him at his trial. Inspector Kaundu obviously also did not tell the accused that he is entitled to consult with a legal practitioner. This failure is however mitigated, if not completely excused, by the fact that according to Van Zyl, accused no. 3 had, immediately before Kaundu was called upon consented to repeat the pointings out to another independent person. This was done after Van Zyl had properly warned accused no. 3 according to judge’s rules.

In this case no effort was made to take accused no. 3 to a magistrate to take down a statement when the accused allegedly stated that he wished to get the matter of his chest and according to Van Zyl and Kaundu, all the indications

were, that the accused was willing and ready to confess his part in the crime. Instead Inspector Van Zyl and Chief Inspector Kaundu took the easy way of pointings out and contemporaneous admissions and/or confessions to police officers, one of whom was the investigating officer Van Zyl who even was present when Chief Inspector Kaundu conducted the pointings out. It is significant that in addition, no written statement was taken by any of them from the accused and none of them explained why not. The need for reducing such alleged statements to writing is obvious. However, in view of the fact that the statements were made to police officers who, in view of their rank, were justices of the peace in terms of the law, such failure in itself does not make the statements inadmissible. The reason for not taking the accused to a magistrate for recording the confession was probably that as testified by Van Zyl, when they arrived at the police station and accused no. 3 was confronted by accused no. 4, he then refused to cooperate further.

When the matter was heard in the Court *a quo*, the Court did not consider the question of admissibility by means of the procedure of a trial within a trial. Again this failure standing alone does not amount to an irregularity in the proceedings, amounting to a failure of justice.

It does not appear from the record or the judgment of the Court *a quo* that any special consideration was given to whether the alleged statements to Van Zyl and Kaundu amounted to confessions or were admissions. It seems to me however that in view of the fact that it is trite law that a confession is defined as “an unequivocal admission of guilt,” the statement and pointings out to Van Zyl indeed qualify as a “confession”, whereas that to Kaundu should be regarded as admissions. The distinction is important. Not only can an

accused be found guilty in terms of section 209 of the Criminal Procedure Act 51 of 1977 on the single evidence of a confession by such accused, provided the confession is confirmed in a material respect by other evidence, or where the confession is not so confirmed, if the offence is proved by evidence, other than the confession, to have been actually committed," but the requirements for admissibility are also more stringent and extensive in the case of confessions compared to admissions. Section 217 requires *inter alia* a confession to have been made not only freely and voluntarily, but by the person "in his sound and sober senses and without having been unduly influenced thereto". Whereas the admission, not amounting to a confession, need only have been made voluntarily, in terms of section 219 A.

The version of accused no. 3, relating to the alleged statements and pointings out as testified to by Inspector Van Zyl, Sergeant Fourie and Chief Inspector Kaundu, was for the most part confusing and difficult to follow. Firstly, he alleged that Van Zyl threatened him with a pistol when he booked him out of prison on 24th January 1995 for questioning. Then when they visited the house and immediate environment where the murders and robbery were committed, he, the accused did not point out anything to Van Zyl. In response to questions about the interior layouts of the house, accused said that he had never been there before. According to him, Van Zyl took him out of the house and asked him silly questions such as – "what kind of tree is that…"

Accused no. 3 then related how they drove from the house at Olifantsfontein to the Chief Inspector's office and then returned to the farm with Kaundu. He said:

> "When we came at the door, Inspector Van Zyl told me that I should show Inspector Kaundu our movements that we have taken during our first visit to the farm, when he, Fiku and myself and Fourie were there. I was still handcuffed and we basically repeated the same movements that we executed during our first visit earlier the day. Thereafter Inspector Kaundu handed over the video camera to Inspector Van Zyl and then I was instructed by Van Zyl that I would walk with Inspector Kaundu. While I was walking with Inspector Kaundu, I told him that I don't know what Inspector Van Zyl's plans are with me. And then I also informed him about the fact that I was threatened with a firearm by Inspector Van Zyl and that I intended to open a case against him".

Accused no. 3's counsel Mr Murorua then asked no. 3 "now at that occasion, did you go inside the house accompanied by Inspector Kaundu" and he replied: "Not at all". The question and answers proceeded as follows:

Q: "So, was Inspector Kaundu taking notes as he was with you at the occasion?"

A" "Not at all."

Q: "So Inspector Kaundu informed this Court that he went inside the house with you, only the two of you?"

A: "That is a lie, it never happened."

Q: "And what happened from there?"

A: "We went back to the vehicle."

Q: "And then?"

A: “While we were driving back Inspector Van Zyl instructed Sergeant Timo over the radio that accused no. 4 should be arrested.”

Q: “And then?”

A: “We arrived at the charge office and the Inspector asked accused no. 4 what his name is and he told.”

“Go on please.” “Thereafter Inspector Van Zyl instructed the staff in the charge office that accused no. 4 and myself should be locked up and then accused no. 4 wanted to know from the officers in there why he should be locked up and then he was told, ask Inspector Van Zyl, because these are his instructions.”

It further appears from the evidence that accused did lay a complaint of “threatening with a firearm” against Van Zyl, but the Prosecutor-General refused to prosecute. In any event, this threat was not alleged in support of an objection to the admissibility of the alleged confessions and admissions. It is clear from the above that no objection was made at the trial by the defence against the admission of the alleged confession and admissions on the grounds specified on the aforesaid sections 217 and 219A. What accused no. 3 and his counsel raised, was a complete denial of the alleged pointings out, confession and admissions. This defence was so far-fetched that the Court had no difficulty in rejecting it as false, in the light of the evidence of Van Zyl, Kaundu and Fourie and notwithstanding strenuous criticism of aspects of Van Zyl’s evidence regarding the handling of the investigations.

The fact that Van Zyl, already instructed the arrest of accused no. 4 whilst on their way from the crime scene to the police station, is circumstantial evidence which strongly corroborates his evidence that accused no. 3 had incriminated

accused no. 4 in his statements to him on that very day and only as a result of that information was he in a position to order the arrest of accused no. 4. This fact also shows convincingly that accused no. 3's version that he had not pointed out anything to Van Zyl and Kaundu, was patently false.

Furthermore the fact that Van Zyl already contacted Kaundu soon after on his return from the crime scene to the Police Station to arrange for Kaundu's visit to the scene of the crime for the purpose of further pointings out by the accused, once again amounts to circumstantial evidence, which corroborates Van Zyl's evidence that accused had at that stage already pointed out certain points of relevance to him, had made certain admissions regarding his participation on the commission of the said crimes and had consented to again point out the relevant points to another police officer, who is not directly involved in the investigation. It is also highly improbable that Van Zyl would have called on Kaundu if he did not expect the accused in the light of accused's previous pointings out and consent, to make such pointings out to an independent police officer.

The requirements of the law regarding pointings out and contemporaneous admissions and confessions, were again discussed and applied in the decision of the Appellate Division of the Supreme Court of South Africa in a case of Namibian origin, namely *State v Sheehama*. [3]

I have already pointed out various defects in the procedures followed by Inspector Van Zyl and to a greater extent, that followed by Inspector Kaundu. The instant case can however be distinguished from the Sheehama case in

3 1991 (2) SA 860

various respects, *inter alia*:

(i) In the instant case, there is no allegation, and certainly no proof of any prior assaults on the accused.

(ii) The first confession and/or admissions to Van Zyl before the pointings out to him, were spontaneous.

(iii) Van Zyl did however warn the accused in terms of judge's rules.

(iv) Kaundu did not warn the accused in terms of judges rules, but shortly before any pointings out and contemporaneous admissions were made to Kaundu, Van Zyl had so warned the accused and had obtained the accused's specific consent to again point out the relevant points to another police officer not involved in the investigation.

(v) At the trial of the accused there was no formal objection by the defence to the admissibility of the statements of the accused on the grounds provided for in section 217 and 219A of the Criminal Procedure Act 51 of 1977.

There was some evidence that a video camera was used by Van Zyl to record the scene at the pointing out by accused no. 3. No photographs or video recording was however produced in Court, allegedly because the recording was defective.

The question arises why would the accused have made those confessions

and/or admissions and the pointings out if he was innocent. There is of course the alleged statement by accused no. 3 that he wanted to get this matter off his chest. I am not impressed by that alleged motivation, even if made. The most probable reason is that the accused had already committed other crimes, namely housebreaking and theft and robbery and had been sentenced to 9 years imprisonment in January 1995 for the latter crime. He foresaw the reasonable possibility of a conviction on the Olifantsfontein crimes and decided to place the blame, or most of the blame, on his co-accused, Patric Somseb and in that way ensure a better result for himself.

2. COURSE OF CONDUCT:

The accused no. 3 had prior to 3 September 1994, when the crimes at Olifantsfontein were committed, committed a serious crime together with accused no. 4, Patric Somseb. The following particulars appear from the record:

(a) In July 1994, the crime of housebreaking and theft, where a pistol was also stolen.

(b) In August 1994, the month prior to the commission of the crimes of Olifantsfontein, accused no. 3 and 4 were again charged together for the crime of robbery. Accused no. 3 was convicted in January 1995 for this crime and sentenced to 9 years imprisonment. It is unfortunately not clear from the record whether accused no. 4 was also convicted in that case.

It will be noted that the two crimes for which accused no. 3 were in fact convicted and sentenced, demonstrate a violent course of conduct, in order to rob and steal, with some features in common with the heinous crimes at Olifantsfontein committed on 3 September 1994 for which accused no. 3 and 4 have been convicted and sentenced. It is in regard to the latter conviction, that the present appeal has been brought by accused no. 3.

There is no reasonable doubt that accused no. 4 was one of the participants in the aforesaid crimes. The association of accused no. 3 with no. 4 as friend and as accomplices in another crime, who often stayed together, adds to the possibility that accused no. 3 also participated with accused no. 4 in the crimes committed at Olifantsfontein.

3. THE ALIBIS

Both accused no. 3 and 4 raised alibis at their trial but the Court *a quo* found that in the light of the evidence produced, these alibis were mere fabrications. I have no reason to differ from that finding.

4. JOHANNES HORASEB:

The witness Johannes Horaseb pointed out at an identification parade the accused as one of the persons he saw at the home of the Schulzes, immediately before or after shots were heard coming from the farmhouse and he confirmed that evidence under oath in his testimony at the trial.

Horaseb had however made at least two conflicting statements to the police.

In one of those statements he had implicated his son in law Markus Geiseb, also known as Hoddie. He was thus an extremely suspect and unreliable witness and could not be believed, except on aspects which were not disputed or in respect of which there was credible corroboration.

5. One of such aspects was that accused no. 4 often played soccer on the farm and was one of the players who usually received oranges from Mr Schulz. As to the identification of accused no. 3 as one of the culprits who ran towards or from the house at the time when the shots were heard, there are ample corroboration, including a confession and admission by the accused himself.

It follows that accused no. 3 knew Mr and Ms Schultz, the farm, the farmhouse the environment, and even some of the employees and residents on the farm. (See also in this regard par. 6 *infra*.)

6. Markus Geiseb, who had initially been implicated by his father-in-law Johannes Horaseb, as one of those running from the farmhouse after the shooting, and was consequently one of the suspects on the identification parade arranged by the police, testified in the Court *a quo*. By then Johannes Horaseb had withdrawn the allegation he had initially made against Geiseb and said that he had made a mistake. Geiseb was also one of the suspects on the identification parade conducted by the police, but he was not pointed out by any of the witnesses.

Geiseb's evidence in the Court *a quo* had nevertheless to be treated with some caution in view of the initial incrimination by his father in law. The Court a quo correctly considered his evidence "very cautiously". Marcus Geiseb however

also landed in prison as a result of a conviction for stock theft. He was asked by Warrant Officer Silver to attempt to obtain information regarding the crimes committed at Olifantsfontein whilst in prison. The Court *a quo* summarized his evidence as follows:

> "He said he knew accused no. 3 and 4 well, accused no. 3 from playing football at farm Olifantsfontein up to August 1994. He knew accused no. 4 at school. Markus said he happened to be in detention at the same time as the accused persons and shared the same cell at one stage at Grootfontein Police Station. He said one day he heard accused no. 4 talking. Accused no. 4 said accused no. 1 and 2 were innocent and should not be involved. Markus said he was also one of those who stood in the identification parade in August 1995. He said at the parade accused no. 3 was picked out and when that happened, he was angry and said: 'I will tell with whom I was, I will not go down alone.' He said that when he did get information he gave it to the man who took over from the warrant officer who had resigned. Markus Geiseb said on one of the days in the cell he saw and heard accused no. 3 demonstrating how he shot the people at the farm with a friend. He said this demonstration was in the presence of accused no. 4, accused no. 1 and Piet Araeb. Marcus later said accused no. 3 later changed this account and said it was in fact accused no. 4 who did the shooting. Accused no. 3 claimed that he tried to prevent the shooting Marcus elaborated in his evidence. He said that when accused no. 3 related these events accused no. 4 then interjected and said 'now I will tell you what you have to say in Court.' You must tell them

that the police assaulted and threatened you and that is why you admitted killing the people. He denied that accused no. 3 ever said that accused no. 1 was innocent. He contradicted himself later and said that accused no. 3 challenged accused no. 4 and said: 'You and I are involved in this. Why are you now involving accused no. 1 and 2.'

7(a). Chrisjan Nekongo testified that he was on a visit to his aunt at Plot Lemoentjie on Saturday 3 September, 1994. He was accompanied by a friend with the name Gabriel Kavendome during that evening. He testified that accused no. 3 and 4, were known to him also by the names Sikutuma and Dawena respectively. He said no. 3 bought beers, two bottles with N$10. Dawena had a pistol tucked into his trousers, but with part sticking out above his trousers. Nekongo had made a prior statement to the police but in that statement he mentioned only accused no. 4, Dawena. It is noteworthy that when accused no. 4 testified in the trial, he admitted that he was known by the name of "Dawena".

7(b). Gabriel Kavendome corroborated the evidence of Chrisjan Nekongo. He pointed out accused no. 3 and 4 in Court when he testified before accused no. 1 and 2 were discharged and when there were still 4 accused in Court. He referred to accused no. 3 as Sikutuma and accused no. 4 as Dawena. In his prior statement to the police he referred to the people they saw as "Tawena" and "Fiku". When questioned about the name Fiku he explained that "Fiku" is the abbreviation for Sikutuma. He said that he saw Sikutuma at the police

station three (3) days later where he was present when accused no. 3 gave his name to the police as Sikutuma. He also stated that the two accused passed at the Plot Lemoentjie on the same day that the people were killed at Farm Olifantsfontein. He also acknowledged that he did know the accused no. 3 and 4 before the evening of the 3rd of September. The police, according to him only arrived after the two accused had already left.

The learned judge *a quo* rejected both the evidence of Nekongo and Kavendome. For the purpose of easy reference when commenting, I have numbered the passages of the Court *a quo's* reasons:

(i) Court:

> "Both witnesses stated each in turn that the men did not stay long and left shortly after buying the beer. They said this rapid departure by the two men drew comments from the patrons and that is when they learnt of the names of the two men, Tawena and Sikutuma…"

Comment: Ad(i): The evidence of Nekongo and Kavendome is very relevant at least in so far as it - (a) fixed the presence of accused no. 3 and 4 on the evening of the murders at a place near Olifantsfontein, where the crimes were committed; (b) the observation that accused 4 had a pistol with him; (c) the accused left quickly and appeared to have been in a hurry and the people present observed that and commented on that observation. It is significant that the Court did not base its rejection of this and other parts of the evidence on demeanour, but only on alleged contradictions.

(ii) Court:

> "These two witnesses, however were not always consistent, one with the other or in their own evidence. (My emphasis added). Chrisjan Nekongo said that he slept at Plot Lemoentjie which is his aunt's place whereas Gabriel left that night. Gabriel however said they both left that night and this was after the police had visited and they had talked to the police. But Chrisjan said he only heard of the incident of the killing at Farm Olifantsfontein the following day when the police called at Plot Lemoentjie…"

Comment: Ad (ii): It was clear from the police evidence that they followed tracks and visited on the Saturday as well as the next day and even thereafter. It is obvious that they may have talked to a potential witness on one day and again thereafter, or that they talked to a specific witness on one day and to another witness the next day. So Nekongo could have talked to the police on the Saturday or both the Saturday and the next day, whereas Kavendome could have talked to the police on the Saturday and by the time he testified, he remembered the Saturday whereas Nekongo remembered the Sunday. Even if they were "not always consistent" that does not mean that one of them could not be correct.

(iii) Court:

> "The evidence of these two witnesses, save for their reference to seeing accused no. 3 and 4 at Plot Lemoentjie that evening, is so

confusing and contradictory, it is difficult to know which part to act on."

Comment: Ad (iii) Even if contradictory in the two respects mentioned by the Court, there was no good reason at all not to act on the evidence that they saw accused no. 3 and 4 at Plot Lemoentjie on the evening of the commission of the crimes charged. Surely the Court had no reason to think that Nekongo and Kavendome had fabricated the whole story, or had conspired to lie. There is also no reason to reject their evidence about their own observations and the reaction of the people present at the disco. And even if Kavendome had contradicted Nekongo in some minor respects, that does not mean that both were wrong and/or lying. One could be correct and the Court had to consider whether one of them may not be correct.

(iv) Court:

"Bearing in mind the very high burden of proof in a criminal trial it will be unjust and improper for me to find in favour of the State and find that these witnesses were reliable and I could act upon. At the end of the day it is difficult to say whether they did in fact witness what they say they witnessed and whether they did hear what they claim to have heard. I agree therefore with defence counsel, Mr Murorua, that the evidence be rejected as a whole."

Comment: Ad (iv):In my respectful view, the Court misdirected itself in its aforesaid approach. The Court was not required to find on the evidence of

these two witnesses alone, in favour of the State. The Court had to consider this evidence in the context of the whole of the evidence led by the State and the Defence and the probabilities, whether or not the accused's guilt had been proved beyond all reasonable doubt. Even if the witnesses had contradicted each other and themselves in certain minor respects, it does not follow that their evidence must be rejected as a whole," particularly not where there is some corroboration in favour of other witnesses.

8. Agnes Eibes, who resides at Plot Lemoentjie, saw accused no. 4, known to her as Tawena, arrive at Plot Lemoentjie at about 3pm on the Saturday. Although she did not mention accused no. 3 or directly incriminate him, she at least corroborated that his co-accused, accused no. 4 was in the neighbourhood at the relevant time and place and that he was known to her as "Dawena".

9. Victoria Namises, testified that on the afternoon of Saturday 3 September 1994, she saw four persons running through the veld near Plot Kede where she resided, from the direction of the farm Olifantsfontein. She insisted that she would be able to identify the four persons and actually pointed out all four accused in Court as the persons she saw running. She nevertheless testified that she actually knew only one of the four persons, but did not know anyone by name.

At an identification parade held by the police in August 1995, she pointed out one person whom she knows by the name of Augusto. When asked in Court whether the person she had pointed out at the parade is in Court, she pointed out accused no. 1 Gustav Tjambula. From the record of the identification

parade it is also clear that she there also pointed out accused no. 1, Gustav Tjambula. However, in her statements to the police dated 11 July 1995, she stated she had seen four men, two of whom were Marcus Geiseb, known as Hoddie and his brother in law, Johannes. In her second statement dated 16th August, she said that the person she identified at the parade was Marcus Geiseb and he was the same man she had mentioned in her previous statement. I have already shown that she must have been under a wrong impression when she testified that she had identified Marcus Geiseb on the parade. The evidence of identification of the four men she allegedly saw running was, as the Court correctly found, "totally untrustworthy". However her evidence that she saw four persons running, is uncontradicted and there was no good reason to reject her evidence in this regard.

It must be remembered that Sergeant Visser of the police, who was one of the police officers who followed the tracks on the afternoon of Saturday 3 September, also testified that they found a woman in the veld who told them that she had seen four persons running. The evidence referred to under points 1-8 *supra*, concludes the evidence directly implicating accused no. 3, the appellant.

I must now briefly deal with some further evidence and factors which are relevant to the question whether or not the accused no. 3 has been proved guilty beyond all reasonable doubt.

10. Harold Amgeibeb:

The State called as its witness one Harold Amgeibeb, at the time 17 years old,

who was an inmate of the prison, awaiting trial in 1995. He testified about conversations between inmates in prison in 1995-1996, which also involved accused no. 3 and accused no. 4. What the State counsel intended to achieve by calling this witness as a State witness is difficult to follow, because his evidence in the main is an incrimination of accused no. 4 and one Maleagi Rasta and the exoneration of accused no. 3. The only aspect from his evidence which shows up accused no. 3 in a bad light is the following:

According to Amgeibeb, "Accused no. 3 told him that Van Zyl had requested him to obtain information about the case. When he, i.e. accused no. 3, started to reveal the information which he had received or obtained, to Inspector Van Zyl to the effect that accused no. 4 and the person called Maleagi, had been making certain movements on the farm Olifantsfontein, but at all those times when he was writing the statement of accused no. 3, what Inspector Van Zyl did was, wherever accused no. 3 mentioned the name of the person Maleagi, he entered the name of accused no. 3 in the statement. And that is how accused no. 3 was charged with the case."

If accused no. 3 ever made such a statement to him, that would just underline the capacity of accused no. 3 to fabricate, as accused no. 3 had done in his version of the encounters with Van Zyl and Kaundu relating to the alleged pointings out and admissions to Van Zyl and Kaundu. The alleged statements by accused no. 3 to Amgeibeb, at least contains an admission that he did in fact make a statement to Van Zyl, whereas in his evidence in Court, accused no. 3 denied that he had made any statement about the commission of the crimes at Olifantsfontein to either Van Zyl or Kaundu.

As far as the contents of the alleged statement to Van Zyl is concerned, the question arises how Van Zyl managed to substitute accused no. 3's name for that of Maleagi Rasta in a statement made by accused no. 3 and which probably had to be signed by accused no. 3. It is also difficult to visualize what Van Zyl could have achieved by such a substitution of actors in accused no. 3's own statement. The intention to produce evidence to incriminate Maleagi Rasta as the partner in crime with accused no. 4 and to exonerate accused no. 3, is even more pronounced in another part of Amgeibeb's evidence under cross-examination by defence counsel Ndauendapo. Amgeibeb admitted having made a statement to Inspector Van Zyl.

In the first part of the said statement by Amgeibeb, he explained how it allegedly came about that he took a statement from accused no. 4. He said: "Patrick Somseb is my friend for the past 10 years and especially when we were in the cells that we are good friends, not family…In 1996, while I was awaiting trial, I cannot remember the exact date, Patric started talking with me about the murder case in which he is an accused. He said which questions he will ask, because he wants to use Afrikaans in Court and I have to write down his questions in Afrikaans while he is speaking Damara, because his Afrikaans is not so good…

Paragraph 5: I asked him whether he committed this murder and he said: 'I did it, but not with John Narib…" Amgeibeb was asked by counsel: "Is that what he said" and he answered: "That is". "John put himself in a fire with his tongue? And he answered: "Yes". Amgeibeb statement to Van Zyl continued: "I asked him with whom he was and he said: "Maleagi Rasta". "I asked him who shot him. He said, "Maleagi…" Amgeibeb continued: "I asked him who

shot him. He said 'Maleagi'. "I asked him to tell me how you came there and what you did? He said that 'Maleagi knows those farms as the palm of his hands and they planned and went to Olifantsfontein…" (My emphasis added).

The statement by Amgeibeb to Van Zyl then went into further detail about how accused no. 4 told Amgeibeb how the crimes were committed in which he and Maleagi allegedly were the only perpetrators. According to Amgeibeb's evidence accused no. 4 also told him how he and Maleagi Rasta split and how he then arrived at the house of Agnes Eibes and there bought two beers for N$10 and also paid the friend of Agnes for sex.

The evidence of Harold of what accused no. 4 told him obviously corroborates that of Agnes Eibes on that aspect. Amgeibeb's evidence as contained in his statement and confirmed in his viva voce evidence contained considerable and impressive detail of how the crimes were committed and what happened to the AK 47 murder weapon and pistol. Accused no. 4 denied the evidence of Amgeibeb. What is however extremely worrying about the evidence of Amgeibeb and which strengthens the suspicion of a fabrication to frame accused no. 4 and Maleagi Rasta in order to exonerate accused no. 3, was that the alleged original request by accused no. 4 to Amgeibeb to assist accused no. 4 in his preparation for the envisaged trial by writing down his intended questions in Afrikaans, turned out to be something completely different, namely questions allegedly asked by the young Amgeibeb about accused no. 4's complicity in the crimes, leading to and resulting in a complete confession by accused no. 4 of his complicity in the crimes, the incrimination of Maleagi Rasta and a total exoneration of accused no. 3.

The defence witness Gazie Mbizo: The suspicion of such a framing and fabrication is strengthened by the nature of the testimony of a defence witness, called on behalf accused no. 3 and in an attempt to corroborate Amgeibeb. Gazie Mbizo testified that on the Saturday 3 September he was also at Plot Lemoentjie at his uncle's house when accused no. 4 came to him where he was sitting. The evidence continued:

> "When he came to me, he told me that I should go with him somewhere. And I asked him whereto? He told me that he was going to tell me on the way. I told the accused that I was just about to go to my work… So we walked together in the direction of my workplace …at Ohama… While we were on our way accused no. 4 told me, lets go together and look for some meat. And I asked him whereto?
>
> And he told me this side and thus pointed a direction. They were two. The other person that was with accused no. 4 was at a distance away from me, a little far away…The other person who was with accused no. 4 was a distance away from us, but I could recognise him. I know his face.
>
> Then accused no. 4 told me that I should not be afraid, because the man has got a firearm with him in the bag, an AK47 and I could also see that…"

When asked who the man was whom he had recognized, he replied: "Maleagi Soreseb…" Mbizo continued: "Thereafter we walked a

> little distance further again, up to a road and when we came at the road accused no. 4 opened his shirt and told me 'Gazie, look here. You are the only man who has seen me and whom I have shown this. Look at this. Then he directed me to a pistol which was kept here at his waist on the left side. And thereafter he told me, 'if you ever go and speak about this, and anything happens to me I'll shoot and kill you'. Yes thereafter I parted with accused no. 4. He went on his way and I went to my work where I was told that I have to go to Ovamboland on Friday at 12:00".

On further questioning Mbizo said that: "when he returned from Ovamboland on the Monday following the Friday when he met accused no. 4 and Maleagi, he heard about the crimes that had been committed at Olifantsfontein". He then also allegedly caught up with a guy called Harold and "he has told me that he was told".

The above evidence appears to be extremely artificial with no understandable purpose of the alleged meeting, other than fabricating evidence of the complicity of accused no. 4 and Maleagi Rasta. Why would accused no. 4, on the very day of commission of the crimes call out Mbizo just to take him to Maleagi Rasta and to show him a pistol carried by himself and an AK47 carried by Rasta, incriminating both himself and Maleagi Rasta and then warning Mbizo that he would kill Mbizo, should he tell what he saw. How much easier and safer would it not have been for accused no. 4, if he never called out Mbizo to show him these weapons? Accused no. 4 denied this incident.

In cross-examination by prosecuting counsel Ms Jacobs it was confirmed that Mbizo had also made a statement to the police in which he made further incriminatory statements against accused no. 4 and Maleagi Rasta Soreseb.

According to this statement, accused 4 told him when they were both prison inmates at Grootfontein prison sometime after the meeting at Plot Lemoentjie, “that it was him and Rasta Soreseb, also known as Maleagi Rasta who killed the people on the farm.

Mbizo then went on to confirm in the course of cross-examination in regard to his police statement, that accused no. 4 admitted his guilt and had given details of how the crimes were committed by him and Maleagi Rasta. Accused no. 4 denied such a conversation in cross-examination of Mbizo as well as in his own testimony.

It seems that Mbizo was present at all the right places where accused no. 4 was ready to incriminate himself and exonerate accused no. 3. The only specific comment made by the learned presiding judge in the Court *a quo* relating to the evidence of Mbizo was in regard to Mbizo’s evidence relating to the meeting with accused no. 4 and Maleagi Rasta at Plot Lemoentjie on 3rd September. The learned judge said: “In my view this witness’s evidence was a little confused as evidenced by his reference to accused no. 4 being armed with a pistol on that occasion. There is no evidence in this trial that up until he went to Farm Olifantsfontein accused no. 4 had a pistol. The evidence is that the pistol was acquired at the time of the robbery and the murders.”

The learned judge, with respect, here misdirected herself. The fact that a

pistol of the deceased couple was amongst the goods stolen at the time of the murder of the Schulz couple, does not mean that accused no. 4 could not have had another pistol earlier that day, before the murders of the Schultz couple. It appears from the record at the sentence stage, that accused no. 3 and 4 had already stolen a pistol in the course of a housebreaking and theft for which both had already been convicted and sentenced in July 1994. The Court failed to consider and comment on the obvious improbability of a meeting and conversation, as related by Mbizo.

As to alleged conversation in prison between Mbizo and accused no. 3, the Court, only dealt with the thrust of the meetings in prison wherein Piet Araeb and Gustav Tjambula, (originally accused no. 1) participated and concluded:

> "But it would seem from all the witness' evidence in Court that while various other participants were changed, the role of accused no. 4 remained the same. In my view, having regard to all the evidence of these witnesses, the so-called attempt to fabricate a story to confuse the accused's role at the incident at Olifantsfontein, failed abysmally. Hence the slip up by Willemse whom accused no. 3 called. Willemse referred to accused no. 4 actually saying accused no. 3 was present on that occasion."

The witness Willemse: The Court correctly accepted the evidence that there was an attempt made by these witnesses to fabricate a story in terms of which it would be alleged that accused no. 4 and Maleagi Rasta Soroseb were the perpetrators of the crimes at Olifantsfontein and that accused no. 3 was not

involved at all. The slip up by Willemse is that he was called by accused no. 3 to testify that accused no. 4 had in the course of the alleged discussion in prison by the inmates, told them that he and Maleagi Rasta was involved, that he would admit his role as an accomplice, but would place the main blame on Maleagi Rasta by alleging that the said Maleagi was the one who shot and killed the Schulz couple and that he was mainly a bystander.

The slip up was that in the course of the cross-examination by prosecuting counsel, Willemse quite clearly stated that what Harold Eichameb had told him, was that accused no. 4 had told Eichameb that the second person involved with him was John Narib, accused no. 3. Willemse also stated that he even overheard accused no. 4 say at the reception at Prison the previous day, that "he begins to realize that the case is turning against him and he is not going to leave accused no. 3 behind, that he is going to drag him with".

When re-examined by accused no. 3's counsel Willemse contradicted himself by now saying: "I heard from Harold Amgeibeb and the accused himself that it was him and Maleagi Rasta. The accused was talking about two persons, but I don't know who the other person is, two other persons.

In cross-examination by accused no. 4 he said: "You told me that on that day in question when the two people were gunned down, you were in the orchard while the two persons went in and killed the old people. Ja, you were eating oranges.

You did not want to name the two guys, but at a later stage you revealed the name Maleagi Soroseb." The Court *a quo* did not deal at all with the

credibility of this witness and made no finding thereon, as it should have done.

The witness Piet Araeb: Piet Araeb was also called by counsel for accused no. 3 but said in Court that he knew nothing about the case except that the witness Marcus Geiseb had told him on one occasion that the police offered him N$500 as well as a discharge on the case for which he was in custody in exchange for any information with regard to this case. Later, in cross-examination by prosecuting counsel he said that he heard accused no. 4 saying to no. 3 that he, no. 3, was not involved in the case. He also heard him say at the prison reception that he will drag accused no. 3 with him.

One can only wonder why accused 4 would tell accused 3 something that accused no. 3 was supposed to know, namely that he, no. 3, was not involved. The Court again did not comment on this witness specifically.

The witness Gustav Tjambula: Counsel for accused no. 3 called as his witness accused no. 1, Gustav Tjambula, who had originally been charged as accused no. 1 but was discharged at the end of the State case. Tjambula now testified he heard in prison accused no. 4 saying to accused no. 3: “You are not involved in the incident. Why do you concern yourself with the case? It is me and Maleagi.”

However, it was quite clear that Tjambula was called to corroborate the evidence of the previous witness and gave almost identical evidence to that of Piet Araeb. Piet Araeb was not an accused. It seems to be quite a coincidence that he was also at the prison reception where accused no. 4 broadcast it to all those present that he intends dragging accused no. 3 with

him. The Court found accused no. 4 an intelligent person who conducted his case quite well after the withdrawal of his counsel. One wonders why such a person would declare his intention to incriminate another accused to all and sundry.

The evidence of the defence witness called to support the alibi of accused no. 3 and 4 were unable to support the alibis. Nothing more need be said about them.

Considerable argument was devoted in the Court *a quo* to the question why Maleagi Rasta was not one of the suspects on the identification parade, in view of the evidence of several witnesses, pointing a finger of accusation to him. Van Zyl explained that he had arrested Maleagi, but he had an alibi to the effect that he had been playing soccer at Grootfontein on the date and time in question. The Court accepted Van Zyl's evidence in this regard, which in turn was based only on the alleged statement by a police constable at Grootfontein that Maleagi Rasta was playing football as he alleged.

The policeman's name was not mentioned and no statement was taken from him and he was not called as a witness by the State or the Court. Van Zyl's evidence in this regard was pure hearsay. The Court, which had on other aspects severely criticised Van Zyl, now accepted Van Zyl's hearsay evidence without demur. It would have made the case against accused no. 3 stronger, if Maleagi Rasta's alleged alibi was properly investigated and the witnesses supporting the alleged alibi called and their evidence weighed in the scale. If those witnesses could not support his alibi, Maleagi should have been placed on the identification parade and charged, if pointed out. But even if Maleagi

was involved, that would not mean that accused no. 3 did not participate. The same applies to the possible involvement of Gustav Tjambula.

There was some evidence that a video camera was used by Van Zyl to record the pointings out by accused no. 3 to Van Zyl and Kaundu, but no recording was produced in Court. According to Van Zyl there was no record because of some defect.

Neither the murder weapon the AK47, nor any of the stolen goods were recovered. Many of the witnesses for the State and defence were prison inmates where there appears to be an abundance of potential and even professional witnesses and advisors, able to concoct any story required. Pitted against escalating serious crime and dangerous and devious criminal gangsters are a few police investigators and policemen with sufficient experience, expertise and dedication to bring criminals to justice, but their numbers are dwindling all the time.

SECTION IV

CONCLUSION:

The extremely difficult question is now whether the evidence adduced, much of which are flawed, was enough to prove the case against accused no. 3 beyond all reasonable doubt, whilst there remained a reasonable possibility that one or more of the suspects Gustav Tjambula, Marcus Geiseb, or Maleagi Rasta were participants.

The case before the Court *a quo* was difficult to decide and so is the appeal before this Court.

I have criticised in the course of this judgment several aspects of the judgment of the Court *a quo*. However the Court was justified in accepting the testimony of Van Zyl and Kaundu and rejecting that of the accused no. 3 in regard to his confessions and admissions. In view thereof that the crimes were proved beyond reasonable doubt, section 209 of the Criminal Procedure Act 51 of 1977 allows a conviction to follow without more.

As I have shown in my analysis of all the evidence, including the circumstantial evidence and the probabilities in the case, there is substantial additional evidence and other incriminating factors to support the verdict of the Court *a quo.*

For these reasons I am satisfied that it has not been shown that the Court *a quo* came to a wrong conclusion in convicting accused no. 3 as one of the participants in the gruesome crimes committed at Olifantsfontein on 3 September 1994.

Consequently, the following order should be made:

The appeal is dismissed and the conviction and sentence confirmed.

_____

O’LINN, A.J.A.

I agree

_____

STRYDOM, A.C.J.

I agree

_____

TEEK, J.A.

COUNSEL ON BEHALF OF MS. E. SCHIMMING-CHASE

APPELLANT

INSTRUCTED BY: DIRECTORATE OF LEGAL AID

COUNSEL ON BEHALF OF MS. A. VERHOEF

RESPONDENT

INSTRUCTED BY THE PROSECUTOR-GENERAL