CASE NO.: CC 32/2001

REPORTABLE

SUMMARY

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

CALVIN LISELI MALUMO & 112 OTHERS

HOFF, J

24 February 2011

Objection raised to bar State leading new evidence – a constitutional bar – based on the infringement of constitutional rights – violations of Article 12 (1)(b) – trial must take place within reasonable time, Article 12 (1((d) right to adduce and challenge evidence i.e. right to cross-examination, Article 12 (1)(e) righ to have adequate time and facilities for the preparation and presentation of defence before commencement of and during trial.

Where State in criminal proceedings intends to present evidence and accused person alleges that evidecne was obtained in manner which violates a fundamental right – concerns admissibility of evidence State intends to rely upon – onus is on State to prove beyond reasonable doubt that fundamental right not violated – no onus on accused person to prove breach of fundamental right.

Late discovery of witness statements tantamount to no discovery at all – may breach constitutional right of accused person to fair trial and may be excluded by Court.
State in conducting a continuous investigation during course of trial saddled with duty to respect and uphold fundamental rights of accused person.

If new evidence be allowed would necessitate calling of a number of witnesses who previously testified – prolonging trial.

Untimely disclosure of witness statements – defene counsel if they had known earlier in trial what they know now would have revised defences or asked other questions of previous witnesses.

Right of State to conduct investigations into circumstances of crime is circumscribed both in respect of the common law and the Constitution.

In spite of fact that it may have far-reaching consequences for State, Court may bar admission of evidence obtained in violation of accused's constitutional rights where its admission would render trial unfair or otherwise detrimental to the administraton of justice – State does not have unqualified right to produce new document or new witness during any stage of trial.
Contamination of statements – real risk – new statements may contain allegations based on information obtained by means of secondary sources and not from witnesses' original knowledge or memory of incidents.

Court would be unable to distinguish between original knowledge and "implanted" knowledge – creates real trial related prejudice.

Right of State to present evidence by way of continuos investigations during course of trial must be limited by the right of accused to fair trial.

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In the matter between:

THE STATE

and

CALVIN LISELI MALUMO & 112 OTHERS

CORAM: **HOFF, J**

Heard on: 09 February 2011; 14 February 2011; 17 February 2011

Delivered on : 24 February 2011

Reasons on: 03 March 2011

JUDGMENT

HOFF, J: [1] Mr Linus Kafuna, state witness number 350, was about to be sworn in when defence counsel, Mr Kauta raised an objection. The objection relates to the admission of the testimony of this witness, together with the testimonies of nine other witnesses, on the basis that should this Court hear their testimonies it would

infringe the accused persons' right to a fair trial in terms of the provisions of Article 12(1)(a) of the Constitution of Namibia.

Defence counsel Messrs. Dube, Kruger, Neves, Nyoni, Kachaka and McNally supported the objection.

Background

[2] On 31 August 2001 this Court refused an application for disclosure of witness statements to the defence. The evidence led on behalf of the State during that application was that some state witnesses had received death threats and had been intimidated by family members of the accused persons in order to prevent those witnesses from testifying against the accused persons. Subsequently at the commencement of this trial on 15 March 2004 a compromise was reached between defence counsel and state counsel which was made a order of court. The essence of this compromise was that the State must disclose at least 3 court days prior to a witness being called to testify, the witness statement of that state witness to defence counsel.

[3] On 10 September 2008 subsequent to an order by this Court to disclose all the witness statements of one of the investigating officers the State informed the Court that they had disclosed all the statements of state witnesses contained in the police docket.

[4] On 31 January 2011 the defence was provided with ten statements of state witnesses. From the written heads of argument of Mr Kauta the following (which is not disputed) appears:

(1) in respect of witness, Brogan Maumbilo, that the statement contains an account of events during the year 1998 relating how the witness was influenced to go to Botswana and his participation in an attack on Mpacha military base;

(2) in respect of Eustace Simataa, that the statement contains an account of events during October 1998 which relate to how the witness was approached on various occasions to be part of a group of persons who wanted to secede the Caprivi region by violent means;

(3) in respect of Precious Katanga Kabula, that the statement relates to events during 1999 on unknown dates how unsuccessful attempts were made to influence the witness to flee to Botswana for the purposes of liberating the Caprivi region from Namibian rule;

(4) in respect of Chikoma Tryphinan Sezuni, that the witness was approached by several persons who attempted to influence her to flee to Botswana in order to join the liberation army of Mr Mishake Muyongo and if she had agreed she would have secured employment in an independent Caprivi;

(5) in respect of Mukungu Mukangu Morricious, the statement relates a conversation how someone joined others in Botswana with the aim of liberating Caprivi from Namibian rule;

These aforementioned statements had been deposed to between 30 December 2010 and 28 January 2011.

[5] In respect of the other five statements the deponents were, Elasca Samwele Sitali, Linus Manga Kufuna, Chrispin Mulatehi Likemo, Edwin Sitali Mweti, and Primes Vitssentsius Amwaamwa. These statements had been disposed to during the period 28 December 2010 and 28 January 2011.

[6] Mr July appearing on behalf of the State submitted that these last mentioned statements are not new statements but additional statements. He stated that in respect of Elasca Sitali a previous statement had been deposed to on 14 August 2001; in respect of Linus Kufuna a previous statement had been deposed to on 18 February 2000; in respect of Chrispin Likemo a previous statement had been deposed to on 3 March 2001. It is not clear in respect of Edwin Mweti and Primes Amwaamwa when they had deposed to previous statements but it appears to be common cause that previous statements had been deposed to prior to September 2008.

[7] In respect of the first five witnesses mentioned they had not previously deposed to any other statements other than those statements disclosed to defence counsel on 31 January 2011 and labelled by counsel as “new evidence”.

[8] Mr July submitted that all the witness statements in broad would be dealing with factual disputes and that the objection raised by the defence affects not the admissibility of the evidence to be presented but only the weight to be attached to such evidence and thus counsel cannot object to the State leading such evidence. Other submissions were also made on behalf of the State to which I shall return to in due course.

The objection

[9] It was submitted on behalf of the accused persons that the objection in essence is a constitutional bar to leading new evidence by means of the testimonies of aforementioned witnesses.

The infringement of constitutional rights, it was submitted, relates to violations of Article 12(1)(b) of the Namibian Constitution which provides that a trial shall take place within a reasonable time, failing which the accused shall be released; Article 12(1)(d) the right of an accused person to adduce and challenge evidence; and Article 12(1)(e) the right of an accused person to have adequate time and facilities for the preparation and presentation of their defence before the commencement of and during their trial.

[10] It was submitted by Mr Kauta that from the evidence contained in the statements it is clear that the witnesses may give evidence which goes to the merits of the case; that it covers aspects of evidence which the State led over number of years and which had widely been published in the print and electronic media.

[11] It was furthermore submitted that the accused persons were not in a position to address those issues as and when they arose during the course of the trial; and that this impacted upon the manner in which issue was taken with witnesses on certain relevant facts in their *viva voce* evidence.

It was submitted that because witnesses who previously testified on relevant issues could not have been confronted with the contents of these new statements, since these statements had not yet been in existence, and similarly these new witness should they testify cannot be confronted with the replies of previous witnesses regarding the content of their statements since the versions of the new witnesses could not have

been put to the previous witnesses because of the non-existence of these new statements.

By way of illustration Mr Kauta submitted that on 21 July 2008 a certain state witness Richard Mbala testified and Richard Mbala was cross-examined by himself. Statements taken this year indicate that a state witness Primes Amwaamwa who was never cross-examined by himself is involved in the matter relating to the testimony of Richard Mbala. Furthermore that the defence of the accused person had been put to Richard Mbala and that Richard Mbala has never been confronted with the new statements the State now intends to use.

It was therefor submitted that if the new evidence is to be allowed it effectively means that Richard Mbala and Primes Amwaamwa need to be recalled.

The opposition to the objection

[12] Mr July in short submitted a number of points in opposing the objection raised by the defence.

[13] Firstly, he submitted that the State has in compliance with the 3 day rule referred to *(supra*) disclosed these ten statements to the defence and it thus cannot be argued that Article 12(1)(e) of the Constitution had been violated which stipulates that accused persons should be afforded adequate time and facilities for the preparation and the presentation of their cases.

[14] Secondly, that although it is labelled “an objection” what in essence is before Court is an application in which certain relief is prayed for and since it is an application counsel must prove what they submit i.e. they must prove how the fundamental rights of the accused persons are being violated.

[15] Thirdly, that there is insufficient information before Court in respect of the allegations that the right of the accused persons to a fair trial will be prejudiced.

[16] Fourthly, that the authority relied on by defence cousel in support of their objection, (*S v Motata Case No. 63/968/07 an unreported judgment delivered on 22.10.2008*) is a judgment of the Regional Court of Gauteng, in the Republic of South AFrica and cannot be any authority on which this Court may rely.

[17] Fifthly, that since the accused persons revealed no defences at the stage they pleaded to the charges, the State has the duty to present all the available evidence at the disposal of the State in order to prove its case.

[18] Sixthly, that the defence has a tool, namely cross-examination, with which the veracity of testimonies may be tested and counsel will have the opportunity to challenge the evidence of these state witnesses.

[19] Seventhly, a witnesses may in terms of section 167 of the Criminal Procedure Act 51 of 1977 be recalled and in terms of section 186 be subpoenaed by this Court if the evidence of such a witness appears to the Court essential to the just decision of the case. The question was posed whether it would also be a violation of the right to a fair trial should the Court decide to call a witness ?

[20] Eighthly, it is common cause between the State and the defence that there is a continuous investigation in this case by the investigating officers. Defence counsel is not bringing an application that the State should cease this continuous investigation. The State again asked the question, namely, what is the purpose of this continuous

investigation if evidence discovered during the course of the investigation may not be utilised by the State in order to prove its case ?

[21] Ninethly, it has happened during this trial that the Court allowed the State to lead the evidence of a witness who had not deposed to a prior witness statement, after the Court had ruled that a witness statement must first be obtained and disclosed to the defence in compliance with the 3 day rule. In this instance, it was submitted there was no objection by defence counsel that the accused persons had been prejudiced in their right to a fair trial.

Authorities in support of objection

[22] This Court was provided with a copy of a judgment by the Regional Court magistrate in *S v Motata (supra)* in which there was an application by the defence for an order to bar the evidence of an unidentified new witness on the basis that it would violate the right of the accused person to a fair trial in terms of the provisions of the South African Constitution. This application was granted *inter alia* on the basis of the timing of the disclosure of the witness statement .

[23] This Court is not bound by a decision from any lower court within this jurisdiction or outside this jurisdiction. In any event although *Motata* was referred to in his heads of argument ostensibly in support of his objection, Mr Kauta submitted that *Motata* was mentioned merely to illustrate the principle that a witness may be barred to testify by a court of law.

[24] It is at this stage trite law that an accused person, in compliance with the provisions of Article 12(1)(e) of the Namibian Constitution, is as a general rule, entitled

to disclosure of all witness statements and other relevant documentation (*S v Nassar 1995 (1) SACR 212 Nm at 240*) and that such disclosure should normally be made when the indictment is served on the accused person in order to provide him or her with sufficient time to prepare his or her defence.

Muller AJ (as he then was) in *Nassar (supra)* quoted with approval from the Canadian case *R v Stinchcombe 1992 LRC (Crim) 68 where Sopinka J* held that in as much as disclosure of all relevant information is a general rule, the Crown (State) must justify its refusal to disclose i.e. the Crown (State) must bring itself within an exception to that rule.

Sopinka J held that where disputes over disclosure do arise the trial judge may resolve them and that this may require not only submissions but the inspection of statements and other documents and indeed, in some cases, *viva voce* evidence. He further stated that a *voir dire* will frequently be the appropriate procedure in which to deal with these matters.

(See also *S v Shabalala and Others v Attorney-General of Transvaal & Another 1996 (1) SA 725 (CC)*.

I shall later return to this issue.

[25] In *S v Mlwandle 1999 (2) SACR 471 (CKHC)* in dealing with an application to challenge the right of the State to continue with its investigations, it was argued on behalf of the accused that such continued investigations whilst the trial was in progress, would deny the accused his right to a fair trial.

Ebrahim J at 474 h – i held as follows:

> *"At the same time, the right which the State, as prosecuting authority, has to conduct investigations into the circumstances of a crime is circumscribed both in terms of the common law and the Constitution. The State, in fulfilling this task, is saddled with the duty to respect and uphold the fundamental rights of the*

> *accused. Where it fails to do so, the admissibility of evidence obtained in violation of an accused's constitutional rights may be challenged by the accused and, if its admission would render the trial unfair or otherwise detrimental to the administration of justice, be excluded by the court."*

and continued at 476 f – g as follows:

> *"It seems to me that a situation may well arise where the investigations being conducted by the State, whether before or during a trial, may be of such a nature that a court is constrained to exclude the evidence obtained in consequence thereof. In my view it will depend on the facts and circumstances of a particular case whether such a decision is justified or not. Accordingly, the decision whether the State should be restrained from conducting further investigations should only be taken on a case-by-case basis."*

[26] Ebrahim J refused the application since he found that the application was based purely on speculative facts and were insufficient to enable the Court to evaluate whether the investigations were being conducted in violation of the accused's fundamental rights.

[27] The aforementioned dictum was quoted with approval in *Du Toit en Andere v Direkteur van Openbare Vervolging, Transvaal*: In re *S v Du Toit en Andere 2004 (2) SACR 584 (TPD) at 598 i – j – 599 (a). Jordaan J* in considering an application to prevent the State from adducing further documentary evidence which was not made available pursuant to a request for further particulars found on the facts of that case that the application was premature.

[29] Jordaan J held that a Court would only be in a position to decide on the admissibility of a document if the Court is made aware of the contents of such a

document. He quoted with approval the dictum in *S v Mlwandle at 476 g – h* where Ebrahim J expressed himself as follows:

> *"It is manifest, too, that the court must have insight into such evidence before it can be in a position to determine its impact on the accused's right to a fair trial and whether it is admissible or not. An order which interdicts and restrains the State from conducting further investigations and debars it from presenting the evidence obtained in pursuance thereof, has far-reaching consequences. In my view, it would be ill-advised, if not impossible for a court to decide on the admissibility of such evidence without it having been placed before the court for consideration."*

[30] Furthermore Jordaan J at 596 a – b and 598 f held that it could not be said that the investigation had to screech to a halt at the commencement of the trial and that further follow-up work could not be done. If a new document or witness comes forward, the respondent would be entitled to make use thereof. The mere fact that a document was discovered later did not mean that it could be excluded *on that ground alone.*

[31] I agree with this statement, but will examine it in the context of this case. I also agree with Ebrahim J in *Mlwandle (supra)* where he stated that an order which restrains the State from conducting further investigations and debars it from presenting the evidence obtained in pursuance thereof, has far-reaching consequences. Once again this statement must be considered in the context of this case.

[32] In the Canadian case of R v Antinello reported in the Canadian Rights Reporter, vol. 28 CRR (2d) 65 dated 8 March 1995 the Crown made late discovery of a witness where the accused person was charged with first degree murder. The Crown became aware of the existence of this witness eleven weeks prior to the commencement of the

trial and decided some ten days before the trial to call him as a witness. Three days after the start of the trial, defence counsel was told for the first time that the witness would be called. The defence counsel protested and asked for a mistrial, or a direction that the witness not be called.

[33] In an appeal from a conviction on a charge of first degree murder Kerans JA at paragraph 11 held as follows:

> *"It is common ground that the Crown had a duty to disclose to the defence the fact of the proposed Stapleton testimony. The learned trial judge held that the Crown was guilty not of a failure to reveal but rather arguably of an error about the timing of the disclosure. But the failure to make a timely disclosure is, nonetheless, a failure to disclose. It may breach the constitutional right of the accused to a fair trial if that failure denies to the accused a reasonable opportunity to prepare his defence."*

Kerans JA continued and emphasised this point at paragraph 25 as follows:

> *"That leaves one remaining factor to asses on the topic of timeliness, that is, the relationship between the day of disclosure and the day of trial. That, with respect, is what this ground is about. Disclosure, when it came, was too late to save this trial date and offer the accused a fair trial."*

[34] This Court was also referred to another Canadian case, a decision of the Ontario Family Court in the matter *R v B (S) reported in Canadian Rights Reporters, Vol. 1, CRR (2d) at 188 delivered on 29 June 1990.*

In this matter five youths were charged with the crime of assault with intent to steal and one of them was also charged with assisting a person escaping from custody.

The Crown on the third day of the trial disclosed "will say" statements to the defnce. Four Crown witnesses had already given their testimonies and the evidence-in-chief of a fifth witness had been led at that stage.

[35] James J at paragraphs 9 – 11 stated the objection as follows:

> *"Defence counsel argued that the disclosure precluded their clients' right to make full answer and defence to the charges they faced.*
>
> *The Crown has offered to recall prior witnesses for further cross-examination. Defence counsel argued that recall, even in the context of an order excluding witnesses, will nor cure the matter. Defence counsel argued that, if they had known earlier in the trial what they know now they would have revised defences or asked other questions of the first four witnesses.*
>
> *Neither, defence counsel advance, can the failure to disclose in a timely fashion be cured by an adjournment of the trial."*

and continues at paragraphs 16 and 17 as follows:

> *"It should not be the function of the trial judge in these types of applications to review the recently disclosed "will-say" statements and determine whether their content is contradictory, or whether counsel could or could not have asked other questions of previous witnesses, and whether rights have been deprived as a result. I ought to accept the statements of defece counsel that, had they received disclosure in a timely manner, they would have revised their defences, or asked other questions of previous witnesses.*
>
> *Adjournments will not cure the defect in this disclosure process. Recall, however graciously offered by the Crown, will not effectively restore the accused's options."*

[36] I shall now evaluate the submissions on behalf of the State in opposition to the objection. I shall deal with it in the same sequence as referred to *(supra).*

[37] Firstly, the 3 day rule came into existence to address specific competing needs at a specific period (explained *supra)* and must be seen in his context. It must also be considered in the context of what will further be said below in respect of the timeliness of the discovery and the right of an accused person in terms of Article 12 (1)(e) to be afforded adequate time and facilities for the preparation and presentation of their deference and Article 12 (1)(d) the right to call witnesses and cross-examine those called against them. This trial may have reached a stage where the 3 day rule does not serve any meaningful purpose.

[38] Secondly, in a judgment delivered on 3 November 2008 this Court held that an applicant must prove the existence and violation of a fundamental right applicable in those instances where an applicant alleges that a fundamental right has been violated by an Act of Parliament, regulation or other legal prescript and where such alleged violation forms the foundation of the relief sought by the applicant. It does not apply in a situation where the State in criminal proceedings intends to present evidence and an accused person alleges that the evidence was obtained in a manner which violates a fundamental right of that accused person.

[39] It is necessary to explain this by repeating what this Court held in the 3 November 2008 judgment and in particular paragraphs 19 – 24:

> "[19] In respect of the submission that a party seeking to establish the existence of a constitutional right bears the onus of proving the existence of such right and the violation of such right, this court has been referred to *van den Berg and Kauesa (supra)* in support thereof.

[20] In *van den Berg (supra)* the High Court of Namibia with approval referred to *Kauesa v Minister of Home Affairs and Others 1995 (1) SA 51 (Nm)* where it was held (per O'Linn J following the Canadian decision in *R v Oakes (1986) 26 DLR (4th) 200*) that the onus is on an applicant to prove that a fundamental right or freedom has been infringed. It appears from *Kauesa* that the reason why an applicant bears the *onus* to prove the existence and violation of a fundamental right is because of the presumption of constitutionality in respect of Acts of Parliament or regulations promulgated under statutes. In *Mathebula (supra)* Claasen J in answering the question who bears the *onus* of proving the violation of a fundamental right stated the following at 16 h – i:

> *"It is now settled law that the answer to the question is: the applicant who alleged and relies upon such infringement bears the onus to prove the existence of a constitutional right and its infringement."*

[21] A reading of *Mathebula* and *Kauesa (supra)* reveals that the authorities relied upon deal with applications in which the constitutionality of statutory provisions had been challenged on the basis of the infringements of fundamental human rights.

(See also *S v Smit NO and Others 1996 (2) SACR 675 Nm).*

[22] In *S v Mgcina 2007 (1) SACR 82 (T)* the Transvaal Provisional Division (consisting of three Judges) considered *inter alia* the finding of the court in *Mathebula (supra)* and concluded that the court was wrong in holding that the accused person in that case bore an *onus* to prove an infringement of a fundamental right when it is alleged that in the course of obtaining evidence against an accused person his fundamental rights have been infringed. The court in *Mgcina* held that it is important to distinguish between two distinct situations. The first situation is where an applicant alleges that a fundamental

right has been violated by an Act or legal prescript, and such alleged violation forms the foundation of the relief sought by such applicant. The second situation is where the State in criminal proceedings intends to present evidence and an accused person alleges that the evidence was obtained in a manner which violates the fundamental rights of such accused person.

[23] In the first situation a two-pronged enquiry is followed. It must first be determined whether there has been a violation of a fundamental right, and if so, is it justified to limit such right in any way ? In this situation the applicant must prove the existence and violation of a fundamental right. If an applicant is successful, then the party seeking to limit that right bears an *onus* to prove the justification of such limitation.

[24] The second situation (which is distinct from the first situation) concerns the question whether evidence has been obtained which violates a fundamental right. It concerns the *admissibility of evidence* the State intends to rely upon. In this situation an accused person bears no onus to prove anything. The onus is on the State to prove beyond reasonable doubt that a fundamental right had not been violated.

*(*See *Mgcina (supra) 94 h – 95 d).”*

[40] Thirdly, this Court was provided with statements deposed to by the five new state witnesses. In addition as was stated in R v B by James J this Court ought to accept the statement by defence counsel that had they known earlier in the trial what they know now they would have revised their defences or asked other questions of previous witnesses.

[41] Fourthly, I have already in paragraph 22 *(supra)* dealt with this issue.

[42] Fifthly, this issue will be considered in conjunction with the issue of the continuous investigation in this case.

[43] Sixthly, as was submitted by defence counsel this may be true in respect of the ten witnesses the State intends calling but not to those who had already testified and who could not have been cross-examined on the contents of these new statements and additional statements. In this regard the right to cross-examine witnesses in terms of Article 12 (1)(d) of the Namibian Constitution is violated and this in turn impacts upon the right to a fair trial guaranteed by Article 12 (1((a) of our Constitution.

[44] Seventhly the question whether it would be a violation of the right to a fair trial where the Court recalls a witness in terms of section 167 of the Criminal Procedure Act or subpoenas a witness in terms of section 186 of the Criminal Procedure Act will depend on the particular circumstances of each case and the need for a fair trial. In terms of section 166 (2) of the Act, a witness called by the Court may, with leave of the Court, be cross-examined by the prosecutor and the accused person. After the Court has called a witness an accused person must be given and opportunity to reopen his or her case in rebuttal.

(See *S v Zuma and Others 1996 (2) SACR 339 (N) at 340 a – c).*

Since a criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side and where a judge is an administrator of justice (*R v Hepworth 1928 AD 265 at 277)* it is a matter of common sense and fairness how far a court will go in each case to repair the carelessness of a party.

[45] Eighthly, the continuous investigation (as it was held in *Du Toit en Andere (supra)*) does not screech to a halt at the commencement of a trial and where a new document or witness comes forward the State would be entitled to make use thereof.

I am of the view, for the reasons provided below, that the State does not have an unqualified right to produce a new document or lead a new witness during any stage of this trial. If this is not correct it means that the State should in this particular matter be given free rein to present evidence even at this late stage.

The accused persons pleaded to the charges on 15 March 2004.

The State has already led 349 witnesses. There were a number of delays during the course of this trial where the Court was precluded from hearing evidence on the merits of the case. This Court due to a tragic incident, had to relocate from Grootfontein to Windhoek during 2005, resulting in a delay of five months. During the course of last year due to an appeal lodged against the judgment of this Court in consolidated trials-within-a-trial this Court was unable to sit for period of six months. This is a very protracted trial because of the large number of accused persons charged (there are presently 113 persons, some died in detention), each one of whom is facing 278 charges of very serious nature (high treason, murder, attempted murder, sedition, public violence and malicious damage to property, to mention some). As was submitted by counsel, from the discovery made on 10 September 2008 it is clear that the State has a least 523 witnesses at their disposal, and this Court is often being reminded by counsel that this case is not your ordinary run of the mill criminal case. I agree with counsel on this point.

This Court is not privy to how many more witnesses the State intends to call before closing its case. How many unforeseen future delays there will be is not known. What is to be expected though, is that when the State closes its case, defence counsel will in all probability launch an application for discharge in terms of section 174 of the Act in respect of some of the accused persons. Those accused persons who will be placed on their defence have the right to testify and the right to call witnesses to testify on their behalf. A question often asked and for which there is no answer is this: When will this trial be finalised ?

[46] I fully endorse what was said by Ebrahim J in *Mlwandle (supra)* namely that the right which the State has to conduct investigations into the circumstances of a crime is circumscribed both in respect of the common law and the Constitution and that the State in fulfilling this task is saddled with the duty not only to respect but also to uphold the fundamental rights of an accused person.

[47] Mr Kauta estimated that about 40 witnesses who had already testified would need be recalled in the event of this Court allowing the State to lead the evidence of these new state witnesses and hear evidence in respect of the other additional statements. Even if this is not an accurate estimation one is faced with the real possibility that in such a scenario this trial would become even more protracted. Furthermore should this Court allow the State to lead the evidence of these new witnesses there exist a real possibility that where in future whatever evidence is being dug up during this continuous investigation this Court has to bear with the testimonies of those surprise witnesses irrespective of the nature of those testimonies and the impact it may have on the defence of accused persons.

[48] It will depend on the facts and circumstances of each case whether a decision to exclude evidence obtained during a trial in consequence of continuous investigations, is justified or not.

[49] The principle enunciated in aforementioned authorities (*Mlwandle, Du Toit en Andere, R v Antinello* and *R v B (supra)*) is that in spite of the fact that it may have far-reaching consequences for the State a Court may bar the admission of evidence obtained in violation of an accused's constitutional rights where its admission would render the trial unfair or otherwise detrimental to the administration of justice.

[50] The State has an onus in criminal proceedings to show beyond reasonable doubt that the admission of evidence will not ultimately render the trial unfair.

[51] In this regard the State would do so by presenting evidence, *in casu* most probably, by leading investigating officers or other witnesses to show that the accused persons would not be prejudiced should the new and additional statements be admitted. Mr Kauta suggested to State counsel that the procedure to be followed in this instance would be to hold a trial-within-a-trial. This suggestion it appears to me was not seriously considered, since it appears from the submissions by Mr July that the State viewed the objection raised as a factor which affects the weight to be attached to evidence and not the admissibility of the evidence sought to be presented.
No evidence was presented by the State why these statements (i.e. the five new statements and the five additional statements) could not have been taken at an earlier stage. There is no answer to the question why it was necessary at this stage of the trial to take these statements. There is no evidence that the accused persons would not be prejudiced should these witnesses be allowed to testify.

[52] The constitutional rights that would be violated should these witnesses be allowed to testify are the right of an accused person to be released should the trial not take place within a reasonable time (Article 12 (1)(b)), the right to cross-examine witnesses and the right to adduce evidence (Article 12 (1)(d), and the right to be afforded adequate time and facilities for the preparation and presentation of their case (Article 12 (1)(e)).

[53] Ninethly, in this regard I shall accept that defence counsel did not object to the reception of the evidence at that stage of the trial since the accused persons had not been prejudiced by the admission of such evidence.

[54] It also appears from the authorities referred to *(supra*) that the late discovery of witnesses statements is tantamount to no discovery at all and where this failure can reasonably be expected to limit their right to cross-examination and the opportunity of accused persons to present their case, evidence based on these statements may be excluded.

[55] It is trite law that the judgments of other jurisdictions may have persuasive authority. This is particularly true in the present instance where no Namibian Court was previously required to rule on the issue of debarring a party from presenting evidence.

[56] Kriegler J in *Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC) at 811 I – 812 A* with reference to foreign judgments stated the following:

> "Comparative study is always useful, particularly where the courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a provision in our Constitution is manifestly modeled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted *their* precedential provision."

[57] This Court was in support of the objection, referred to "the risk of contamination" in respect of the statements discovered at this stage. The State did not specifically counter this submission. In a nutshell it relates to the vast media attention attracted by this case from its inception. Evidence has been disseminated on a continuous basis by way of the printed and electronic media. In addition it must be added that hundreds of state witnesses had already testified, the majority whom hail from the Caprivi area, the same area where the majority of the new witnesses reside.

[58] Even though there is no evidence to this effect before this Court, I am of the view, having regard to these factors, that there is a real risk that these new statements may contain allegations based on information obtained by means of secondary sources and not from the witnesses' original knowledge or memory of incidents referred to in these statements. I agree with counsel that it may be virtually impossible for this Court given these circumstances, to distinguish between original knowledge and "implanted" knowledge. This in turn creates a very real trial related prejudice, and the impression (as submitted by counsel) is created that the State patches up its case as gaps are discovered.

[59] I have indicated earlier that there is no explanation why this Court must at this very late stage admit the evidence based on these statements (i.e. new as well as additional statements) and furthermore there is no explanation why these statements could not have been provided much earlier during the course of the trial.

[60] The right of the State to present evidence obtained by way of continuous investigations during the course of this trial must be limited by the right of accused persons to a fair trial.

[61] These are the reasons why this Court made the following ruling on 24 February 2011:

1. That the objection in respect of witnesses Brogan Maumbwilo, Eustace Mukela Simataa, Precious Katangu Kabula, Chikoma Tryphinan Sezuni and Mukungu Mukungu Morricious is hereby upheld.

2. That the objection in respect of witnesses Elasca Samwele Sitale, Linus Manga Kufuna, Chrispin Mulatehi Likemo, Edwin Sitali Mweti and Primes Vitssentsius Amwaamwa is hereby dismissed.

   The State is however restrained from presenting evidence in this Court in respect of these witnesses founded on the contents of their additional statements.

3. That this ruling is based on the view of this Court, namely that to allow the first five witnesses to testify in respect of new evidence and last mentioned five witnesses in respect of what are contained in their additional statements would violate the fundamental right of the accused persons to a fair trial guaranteed by the provisions of Article 12 of the Namibian Constitution.

HOFF, J

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

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

ON BEHALF OF THE DEFENCE: **MR KAUTA**

MR DUBE

MR KRUGER

MR NEVES

MR NYONI

MR KACHAKA

MR McNALLY

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