

STATE
versus
SIMON CHIHUNGWA
and
TALENT MAWERE
and
TAFADZWA CHAYAMBUKA

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 9, 10 & 11 February 2016, 7 March 2016,
11 & 12 April 2016 and 16 February 2017

Criminal Trial within a Trial

E Nyazamba, for the State
R Chikwari, for the first accused person
N Chimuka, for the second accused person
F Chimwamurombe, for the third accused person

KUDYA J: The three accused persons were jointly charged with the murder of Tinos Chihoro who died at Parirenyatwa Hospital on 10 October 2014 from injuries sustained in the course of a robbery that took place in the early hours of 6 October 2014 along Leopold Takawira Street near the Harare Gardens in Harare.

In the course of the trial, the State sought to produce the video film and its accompanying transcript together with the written record of the indications that were made by each accused person. The accused persons duly objected to their production on the ground that they were not made freely and voluntarily without undue influence. A trial within a trial was accordingly held to determine whether or not they were admissible into evidence.

The onus to establish beyond a reasonable doubt that the video film and the written record of the indications were made freely and voluntarily without any undue influence lies on the State. In *S v Masera and Others* HH 50/2004 at p 39 of the cyclostyled judgment MUNGWIRA J stated that:

“The State has in its closing submissions set out correctly the law relating to the admissibility of extra curial statements in that first and foremost the onus is on the State to prove beyond reasonable doubt that a statement made by an accused is admissible. The general test on

whether there has been “undue influence” in the recording of a statement from accused being as formulated in *R v Ananias* 1963 R & N 938 as follows:

‘Was there anything in the facts of the case to suggest that the confessor’s will was swayed by **external impulses**, improperly brought to bear upon it, and calculated to negative his freedom of volition.’

See also *S v John* 1970 (2) SA 232; *S v Kasikosa* 1971 (2) RLR 13 at 16D.

To the same effect was DUMBUTSHENA CJ in *S v Dhliwayo & Anor* 1985 (2) ZLR 101 (S) at 112F that:

“There is no doubt that the State must prove that the statements made by the accused and which were not confirmed by a magistrate and which the State tenders in evidence, were freely and voluntarily made.”

In a bid to discharge this onus the State called the evidence of four police officers who participated in the video recording and the indications. These were Detective Assistant Inspector Kachidza, who was in charge of the indications, detective sergeant Mawire who acted as the interpreter, detective constable Matanhire, the video recorder and photographer and detective assistant inspector Mangena, the investigating officer. In addition the State produced the video film as exh 1 and a further 7 documentary exhibits. These comprised the transcript of the indications made by each accused person and its “accompanying indications and/or statements made at scenes”, the indications guide form. The indications guide form and video transcript for accused 1 was produced as exh 2A and exh 2B while those for accused 2 were produced as exh 3A and 3B and for accused 3 were produced as exh 4A and 4B, respectively. The State also produced an application for warrant for further detention for the second accused as exh 5. Each accused person testified in his own defence. Further, the second accused person produced a single documentary exhibit, his unconfirmed warned and cautioned statement as exh 6.

The following facts were common cause. The three accused persons were arrested at different times and places in Harare on 29 October 2014, as clearly indicated in exh 5 and not on 28 October 2014 as they vehemently maintained. The first accused was arrested in Epworth while the second was arrested at the intersection of Speke Avenue and Fourth Street, and the third at Bob’s compound in New Tafara. In the morning of 30 October 2014, as exemplified by exh 6, accused one and two were warned and cautioned by detective constable Hove and witnessed by detective sergeant Mawire while accused two was warned and cautioned by detective constable Zindoga and again witnessed by detective sergeant Mawire. The recital of the charge amongst other things identified the scene of crime as being

“along Leopold Takawira between Harare Gardens and Girls High School” and the weapon used as a stone to the head. In the afternoon of that date the impugned indications were conducted for each accused person in turn under the same procedure and team.

The team consisted of DAI Kachidza, DS Mawire, DC Matanhire and DC Mafusire, the driver. The procedure commenced in office 27 at the Criminal Investigations Department, CID, Homicide at the Harare Central Police Station. The general procedure common to each accused was that the team leader used English as the medium of communication. The interpreter translated the words of the team leader into Shona and the Shona responses of each accused into English. The process began with general salutations from the team leader which were responded to in kind by each accused. Each accused sat between the team leader and the interpreter and listened attentively. The hands of the first and second accused were hidden under the desk and were only exposed on signing exh 2A and 3A. The handcuffed hands of the third accused were at all material times on top of the desk.

The team leader introduced himself, recited the preamble of the charge and administered the caution and thereafter introduced his team and highlighted their respective roles. A privately marked police vehicle, a blue Mazda 323 hatchback was used during the indications. On request each accused related the route to the scene. The first accused pointed out the route commencing in Leopold Takawira Street to the scene while the second took the indications team along Inez Terrace, Robson Manyika, Julius Nyerere, Jason Moyo and Leopold Takawira to the scene. The third accused related the route from Julius Nyerere, across Samora Machel, turning westward into Park Lane passing in front of the Monomotapa Crowne Plaza Hotel to the back of Megawatt House and northward along Leopold Takawira Street. The team and the accused walked to the car park, boarded the vehicle with the accused sandwiched between DAI Kachidza and DS Mawire in the back seat while the recorder sat in the front passenger seat and the driver was led to the scene by the accused. The core indications commenced in earnest at the intersection of Samora Machel Avenue and Leopold Takawira Street.

The record of proceedings of the initial remand of the accused persons produced by the State at the request of the Court showed that the accused persons were arrested on 29 October 2014 and brought for initial remand on 3 November 2014. They each complained of police assaults and of external impulses having been brought to bear upon them to admit the charge. The magistrate remanded them in custody and ordered an investigation of the complaints.

The video footage of the first accused

The first accused led the police to the entrance of the Girls High School along Leopold Takawira Street. He pointed out a stone gate on the other side of the road. He indicated a spot where the deceased answered the call of nature. He related who his companions were and where they were going. He related the part played by each of them, the loot gained and the dispersal of all the parties involved. At the conclusion of the indications he again appended his signature as did the team leader and interpreter on exh 2A, the indications guide form. The whole process commenced in room 27 at 1320 hours and ended at the scene at 1350 hours. The digitalised timer was on from 13:48:17 hours to 14:13:46 hours, a period of 25 minutes 29 seconds.

He wore a Texas Broncs Pan American black T-Shirt. He had high cheek bones and thick cracked lips. In room 27 he pointed in the direction of Leopold Takawira with his right hand. He then picked his left nostril with his left forefinger and used his left palm to rub his lips while the team leader was writing down the directions. He moved from the office to the car park in leg irons. He used his left hand to push his chair backwards and to hold the desk. At the door he pulled it open with his right hand and walked to the car park with bended knee. His pace was restricted by the clanging leg irons. In the car park he bent over and rubbed his right foot with his right hand, which hand he again used to rub his right calf as he entered the car.

The video footage was not a complete and uninterrupted recording. There were some unexplained time gaps on the timer between 13:58:57 and 14:02:26 from the car park to the intersection of Leopold Takawira Street and Samora Machel Avenue. The accused is shown indicating the direction to take from this intersection. Recording stopped between 14:02:53 and 14:04:25 and resumed at the entrance of Girls High School. He pointed to the stone gate of the Harare Gardens on the other side of the street. The last break in recording was between 14:05:09 to 14:06:10. This covered the period it took them to travel from the school gate to the stone gate on the other side of the road. The 7½ minutes at the scene were characterised by a question and answer session between the team leader and the first accused with the accused leaning against the back of the police vehicle. He pointed to a concrete half wall as the place the deceased answered the call of nature. He related what transpired at the scene and how the parties involved left the scene.

He first folded his hands on his chest. He related the loot that had been taken and swerved to his right with his head bowed down for two seconds before bracing himself upright. In the process of relating the dispersal from the scene, he tugged at the hem of his T-Shirt, wrapped both his hands on the top and back of his head. He rubbed the top of his head and his right cheek with his right hand and folded both arms on his stomach. He then rubbed his mouth, nose and the back of his head with his right hand. He touched his right cheek and then rubbed his left shoulder with the same hand and scratched the back of his head and rubbed his forehead with the same hand. He then stood akimbo. He was requested to append his second signature on the indications guide form. He placed the form on his spread-eagled left hand and signed the indications guide form. He then bowed his head gazing at his feet, rubbed his stomach with left hand, again folded both arms on his stomach, rubbed his head with his right hand fingers, and bowed his head rubbing his face with the same hand. He stood upright and then akimbo and then placed his right hand under his left armpit and frowned and with darting eyes watched the team leader and then the interpreter append their signatures on the indications guide form.

The team leader proffered his thanks to the accused who stood akimbo and again rubbed his left cheek, pulled the car door open with his left hand and boarded the vehicle back to Harare Central, yet again sandwiched between the team leader and the interpreter in the back seat of the vehicle. The video footage lasted 15 minutes and 21 seconds.

Other than the discomfiture that I described, I did not observe any limp. The first accused still spotted the same high cheek bones and thick and cracked lips in court as he did when the video was taken some 18 months before.

The video footage of the second accused

The video footage of the second accused took 15 minutes and 39 seconds even though it commenced at 1415 hours and ended at 1445 hours. He wore braided hair, an unfastened sweater without an undershirt which exposed his chest. He held the pen with both the thumb and fore finger of his right hand and signed the form. A close up shot showed an old scar on his right high forehead. He rose by pushing the chair back with both hands. He grabbed the right top of the back flap with his right hand and pushed it further behind him. He then pushed the team leader's chair towards the desk with his right hand. The thumb held the inside top back pad while the other four fingers were behind that pad. He grabbed the top of that chair with his left hand as he walked toward the door. He pulled the door wide open with

his left hand while his right hand prevented it from banging against the wall. He hobnobbed to the car park, again with the clanging sound of the leg irons that restricted his pace permeating the air. He stood by the car with both hands free. He straightened his jacket but did not fasten the clasps. I got the distinct impression that he preferred to move around with an exposed chest. As he moved towards the backdoor of the Mazda he was impeded by the leg irons, stumbled and almost fell. The 13 minute journey, from 14:47:58 to 15:00:50 on the video time switch, from the car park to the intersection of Leopold Takawira and Samora Machel Avenue was not filmed. At his direction the car stopped after the intersection. He pointed to a spot along the wall of the Girls High School as the scene of crime. He disembarked from the vehicle. He placed his left hand into the left pocket of his pair of blue denims. He straightened his jacket with both his hands. Two bottom clasps were fastened while three top ones were open. He had the opportunity at that stage to fasten up his jacket but it seemed to me he elected not to do so and appeared comfortable in this state of dress.

He was at the scene for 6 minutes and 39 seconds. He gestured and gesticulated at the scene. He recounted the part he played and what his colleagues did. He described what transpired at the scene and how everyone involved left the scene. At the end of the indications he grabbed the pen from the team leader, and placed the guide indication form on his spread eagled left hand as a pad and signed it with his right hand with some flourish. He then placed his left hand in his pocket as he watched both Kachidza and Mawire append their respective signatures on the same form. They then crossed the road to the waiting car with the second accused's right hand resting on his lower back. But for the leg iron, his gaiety betrayed no limping. He was assisted cross the busy road by both Kachidza and Mawire who at various stages hand held him.

The tone and inflection of his voice and his gaiety from the time he was cautioned until the conclusion of the indications lacked any signs of stress, distress or anxiety. The leg irons restricted his speed. The placing of his hands in his pocket twice during the indications was consistent with a relaxed frame of mind.

The video footage of the third accused

He also went through the same process, which commenced at 1510 hours and according to exhibit 4A ended at 1536 hours. The video film covered 9 minutes and 37 seconds. He was in handcuffs and not in leg irons. He had big eyes and thick lips. Both his hands were on the desk and he signed the caution with ease. He sprang from the chair and did

not use his hands in leaving the office for the car park. His gaiety to the car park and his entry into the car was normal. There was a break in recording between 15:43:39 and 15:50:13 covering the journey from the car park to the intersection of Leopold Takawira and Samora Machel Avenue. At that intersection the team leader asked him to direct their further movements. In response, he directed the police to proceed along Leopold Takawira. The transcript ends with the team leader requesting him to stop the car when they reached the destination the third accused was taking them to. During the drive, the photographer's cell phone rang. It appears the video recording was terminated by that call. It actually ends with the recorder advising the caller to call him later as he was conducting indications.

On the face of it, exh 4A shows that the third accused confirmed by his signature that the indications ended at 1536 hours. The evidence of both the team leader and video recorder was that they carried on with the video recording of the indications oblivious of the fact that it had stopped along Leopold Takawira Street after they had driven past the intersection with Samora Machel Avenue. He only realised an hour after the recording during the transfer from the recording High 6 to the VHS tape for VCR viewing that the camera had malfunctioned. The recording light was on during the malfunction. It was their oral evidence that the third accused led them to the stone gate that had been pointed out by the first accused.

The total evidence

The team leader conducted the indications by the rule book and followed the strict requirements on the indication guide form, exh 2A, 3A and 4A that were video filmed in exh 1 and transcribed in exh 2B, 3B and 4B. The evidence from the indications team was that all the accused persons were in good health and in their sound and sober senses during the period of the indications. These witnesses averred that they were all aware of the general and not the exact area where the offence had been committed. None of the state witnesses including the investigating officer had visited the scene prior to the indications.

The investigating officer DAI Mangena did not take part in the investigations but first came into contact with the accused after their arrest on 29 October 2014 while D/S Mawire did so in the morning of 30 October 2014 when he witnessed their warned and cautioned statements recorded by D/C Hove and D/C Zindoga. The other members of the indications team did so at the commencement of the indications of each accused in the afternoon of 30 October 2014. The accused did not complain nor exhibit any apparent signs and symptoms of assault such as physical injuries, distress or anxiety. These police witnesses averred that they

did not by word or deed ill-treat any of the accused person nor witness anyone else do so. Rather, each accused was co-operative and gave his indications freely and voluntarily devoid of any external impulses calculated to negate his freedom of volition.

In cross examination by counsel for all the accused persons they individually ascribed the purported limping attributed to the first and second accused to the leg irons, which restricted their movement. They disputed the obvious signs of discomfiture exhibited by the first accused towards the tail end of the indications with Mawire incorrectly disputing that the third accused mentioned the Julius Nyerere Crowne Plaza route to the scene. They disputed that D/C Chatukuta, D/S Maigeta, D/S Madzivanyika, D/S Maromo, D/S Mawire, DAI Mangena and a woman detective whose identity the accused did not know all took turns to assault the accused persons on the soles and top of their feet at Machipisa, Braeside and Harare Central police stations prior to the indications. They disputed that an unidentified woman detective assaulted the third accused on top of one of his foot with the stiletto of her high heeled shoe. Mawire disputed undertaking a dress rehearsal of the indications with the first and third accused on the day of their arrest. He denied hitting the first accused on his knee and feet and the second accused on his hand with an iron rod to procure a confession and in the process deforming the hand of accused two. They also denied that after the indications and especially on 3 November after a magistrate refused to confirm their respective warned and cautioned statements detective inspector Nemaisa assaulted the third accused.

Kachidza and Mangena denied that an unidentified detective pointed a fire arm at the third accused. They attributed the state of undress of the second accused to preference rather than to any police brutality induced deformity of his right hand. That he was relaxed during indications was apparent from the two occasions he walked about with his hands in his pockets. In their view the results of each indication confirmed that the whole process was not tainted by any external impulses brought to bear on the accused.

The accused persons testified on what transpired between their arrest on 29 October and their arraignment on initial remand on 3 November 2014. The first accused implicated Chatukuta, Mangena, Maigeta and Mawire in first driving them from New Tafara past “the area where you committed the offence” along Leopold Takawira Street close to Harare Gardens enroute to Machipisa Police Station via Southerton Police Station. He implicated these four detectives of severely assaulting him on his knees on the way to and at Southerton Police Station. He was taken to Harare Central police station after the arrest of the second

accused where detective constable Hove stomped on the head and neck of the third accused. The second accused averred that he was assaulted in one of the CID offices on arrival for daring to enquire the basis for his arrest. He did not make reference to any further assaults on the day of his arrest.

The first accused stated that Mawire, Mangena and Hove took turns to hit them with a ½ m long metal rod under their feet over two days. He averred that an unidentified woman detective stamped his foot and calf. He bled from the injuries. He was assaulted by a coterie of detectives, whom he could not identify, as he lay prostrate on the ground. He sustained swollen legs knees and heels. He averred that a gun was pointed at the head of the third accused by Mangena and an unnamed detective. The first and second accused averred that they were detained over two nights at Braeside and Rhodesville police stations, respectively, from where they were brought to Harare Central Police Station where the third accused was detained for interrogation. On the second morning of detention the third accused was assaulted to induce them to give inculpatory warned and cautioned statements and indications.

The second accused stated that they were further assaulted on the soles of their feet, knees and backs by Mangena and Mawire. He was further assaulted with an empty coca cola bottle on the knee and slapped on the back each time he gave exculpatory statements. Mangena then hit him with an iron bar between the index and ring fingers, thus deforming his right hand in the process. He was manhandled and in the process the clasps of his jacket came off and his chest exposed for declining to go for indications. The pain precluded him from fastening his jacket. The assaults, torture and threats and in addition for the second accused the degrading treatment induced them to go for indications on 30 October 2014. They were taken to court on 31 October 2014 for an application for their further detention and 3 November 2014 for confirmation of their warned and cautioned statements and initial remand. They were returned to police custody on 31 October and on 3 November the magistrate declined to confirm their written warned and cautioned statements after they disclosed that the statements had been induced by duress. The first accused gave contradictory evidence on when they were taken to the scene of crime. In one vein he stated that it was on the date of arrest and in another after they had been remanded in prison custody. The allegation by the second accused that he was stamped on the head and neck by Nemaisa at the police station after the magistrate refused to confirm his statement was untrue as they were remanded into prison custody.

The third accused stated that on the day of his arrest he was driven along Leopold Takawira Street and shown the general area where the offence took place on his way from New Tafara to Harare Central police station. On the following day a gun was pointed at his neck. He was then assaulted with an iron bar on his joints and knees by Mawire, Mangena, Chatukuta and Maigeta for denying the charge. He was also assaulted by D/C Chatukuta, D/C Hove and an unidentified woman detective. He was hit under his feet with empty bottles and sustained internal injuries and swollen feet. Just before the indications he was threatened with death by the team leader if he led them astray. He identified the scene by reference to the back of Megawatt House reached by turning from Julius Nyerere into Park Lane past the Crowne Plaza Hotel. The police took him along Leopold Takawira across Samora Machel and proceeded north along Leopold Takawira until they turned back near Parirenyatwa Hospital and drove back to Harare Central Police station.

He went to court on 31 October where he returned for confirmation of his statement, exh 6, and initial remand on 3 November 2014. The magistrate declined to confirm the warned and cautioned statement recorded at 10 am on the date of the indications by detective constable Hove and witnessed by detective sergeant Mawire. In his handwritten notes of the proceedings the trial magistrate recorded each accused's complaint of assault by the police and undue force to admit the charges. He directed that the State to investigate the complaints and remanded them in custody. The third accused disputed the statement and indications on the ground that they were induced by a gun and an iron bar.

Under cross examination the first accused attributed his discomfiture towards the end of his video footage to a painful ribcage. He could not stand upright due to the pain and had to lean against the police car. He averred that he sustained swollen cheeks. He stated that he took the police to the area that they had earlier shown him but chose the spot he pointed out of his own accord. He disclosed for the first time that he was threatened with death at the habitat of crows near the National Sports Stadium. He also admitted that all the words he uttered at the scene were his own.

Under cross examination the second accused alleged that the police dictated to him the statements and indications recorded in the video exhibit 1 and transcribed in exhibit 3B. He was remanded in custody for medical examination but was only treated with pain killers. His hand healed before his release on bail after which he failed to raise money for an X-Ray diagnosis. All his co-accused were assaulted in his presence by a coterie of detectives.

In cross examination, the third accused conceded that the loot taken was different from the one reported by the deceased but disputed ever making reference to Megawatt House.

In my assessment, the police witnesses were professional witnesses who reinforced each other's testimony. They adduced evidence which was confirmed by documentary evidence in regards to the date the accused were arrested and on what transpired during the indications. On the other hand the accused misled the court on their date of arrest. The video footage demonstrated the absence of any visible injuries on their persons. Their respective body language and gaiety did not betray the existence of any hidden injuries on their person. They did not exhibit any signs of fear, anguish, anxiety or depression. In their respective testimonies they created new evidence which had not been canvassed with the State witnesses by their counsel in cross examination. It was never suggested to any of the state witnesses that the first accused had been assaulted in his ribcage. The suggestion that the second accused failed to button his jacket due to pain in his right hand was contradicted by the use he put the head to in office 27 and in signing the indications form. He was relaxed to such an extent that on two occasions he placed his hands in his pockets. The third accused denied ever making reference to Megawatt House when he clearly did so in room 27. I believed the police witnesses and disbelieved all the accused persons, wherever their evidence was at variance.

The law

In our law physical and psychological maltreatment especially of accused persons is outlawed by sections 50 (1) (c) and (4) (c), 52 (a), 53, 86 (1) (a) and (b) and 87 (4) of the Constitution. These sections provide as follows:

“50 Rights of arrested and detained persons

- (1) Any person who is arrested—
 - (c) must be treated humanely and with respect for their inherent dignity;
- (4) Any person who is arrested or detained for an alleged offence has the right—
 - (c) not to be compelled to make any confession or admission; and

52 Right to personal security

Every person has the right to bodily and psychological integrity, which includes the right—

- (a) to freedom from all forms of violence from public or private sources;

53 Freedom from torture or cruel, inhuman or degrading treatment or punishment

No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.

86 Limitation of rights and freedoms

- (3) No law may limit the following rights enshrined in this Chapter, and no person may violate them—
- (b) the right to human dignity;
 - (c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment

87 Limitations during public emergency

- (4) No law that provides for a declaration of a state of emergency, and no legislative or other measure taken in consequence of such a declaration, may—
- (b) limit any of the rights referred to in section 86(3), or authorise or permit any of those rights to be violated.”

In terms of s 70 (3) of the Constitution any evidence that has been obtained in a manner that violates any of the above cited provisions would be inadmissible in any criminal proceedings if such evidence renders the trial unfair or if it undermines the due process or the public interest. The allegations levelled against the State by the three accused persons necessarily calls for serious consideration and if found to be reasonably possibly true would render the video footage and its documentary attachments inadmissible in the ongoing trial.

Indications are regarded as mute statements. This was laid down by MCNALLY JA in *S v Nkomo* 1989 (3) ZLR 117 (S) at 129F in these words:

“In the final analysis, a pointing out must be seen as a mute statement--- or in appropriate circumstances as a mute confession.”

Video films and their accompanying transcripts cover the whole range of oral, written and mute statements. The basis for determining their admissibility in evidence is derived from s 256 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. It stipulates that:

“256 Admissibility of confessions and statements by accused

(1) Any confession of the commission of an offence and any statement which is proved to have been freely and voluntarily made by an accused person without his having been unduly influenced thereto shall be admissible in evidence against such accused person if tendered by the prosecutor, whether such confession or statement was made before or after his arrest, or after committal and whether reduced into writing or not:”

The meaning of this section was rendered in *R v Barlin* 1926 AD 459 at 462 by INNES CJ thus:

“The common law allows no statement made by an accused person to be given in evidence unless it is shown by the prosecution to have been freely and voluntarily made-in the sense that it has not been induced by any promise or threat proceeding from a person in authority....that is a principle covering all admissions or statements made by the accused; and apart from statute it would govern the admissibility of confessions properly so called. But s 273 deals specifically with confessions of the commission of an offence in terms wider in one respect than the rule of the common law. For the words “without having been unduly influenced thereby” are elastic and may operate to enlarge in some degree the area of exclusion.”

See also *R v Jacobs* 1954 (2) SA 320 at 323A-B and Reid-Rowland p 20-4 para (d). A more elaborate interpretation of the section was provided by MCNALLY JA in *S v Nkomo & Anor*, (*supra*) at 124 F-125 A. The learned judge of appeal stated that:

“No statement to a person in authority by an accused person, made outside the court room, may be produced (if it is in writing) or quoted (if it was oral), unless the rules have been observed, that is to say, unless the court is satisfied that it was made freely and voluntarily and without undue influence being brought to bear. That is what s 242(1) [the precursor to the present s 256 (1)] of the Criminal Procedure and Evidence Act means.

A statement is a statement, that is, it is something said by the accused. It may be recorded on paper, in which case it is called a written statement, or it may not, in which case it is an oral statement. It may be a formal statement made in an office before assembled witnesses; or it may be an informal statement, for example, chit-chat on the way to the scene of the crime. A police officer may not give evidence of any such statements unless he first satisfies the rules about admissibility. See *S v Ndlovu* 1988 (2) ZLR 465 (SC).”

The section thus casts the onus on the State to prove beyond reasonable doubt that the indications were freely and voluntarily made without any undue influence having been brought to bear upon the confessor’s will before they can be admitted in evidence.

Mr *Nyazamba*, for the State, submitted against the contrary submissions of counsel for each accused that the State had proved beyond a reasonable doubt that the indications were freely and voluntarily made without any undue influence.

In determining whether the statement was made freely and voluntary without any undue influence the judicial officer is required to look at and assess the intrinsic evidence derived from the video footage under consideration on the one hand and any extrinsic evidence availed by the parties to the proceedings, on the other. In regards to the intrinsic evidence Beck JA in *Attorney-General v Slatter & Others* 1984 (1) ZLR 306 (S) at 315E made the pertinent observation that:

“No part of the judgement suggests as far as I can see, that when it falls to be decided whether a statement was made freely and voluntarily and without undue influence the contents of that statement may not be looked at. It is a well-established practice in the Courts of Zimbabwe to do so.”

And at 315G-316A:

“Moreover it not infrequently happens that the accused’s challenge to the statement takes the form of alleging that the statement is not really his but was made at the dictation of the police from whose mouth alone came the allegedly false assertions implicative of the accused. In such cases it is not merely permissible but necessary for the Court to have reference to the contents and indeed the accused may be cross examined as to the truth of the contents. In such cases, too, the fact-if fact it be-that the statement contains exculpatory as well as incriminatory matter will often be relevant to the credibility of the accused’s challenge. Our practice in this respect has followed that of the South African Courts, for which regard may be had to *S v Lebone* 1965 (2) SA 837 (A).”

In the present matter except for the second accused who prevaricated on whether or not the indications and the accompanying statements he made came from the mouth of the police, the other two accused admitted that their respective indications and accompanying statements were their own. However, the challenge raised by all three accused in relation to the admissibility of the indications was that they were not made freely and voluntarily but were induced by physical assaults and threats of such assaults. In other words the challenge was based on the events that transpired prior to the recording of the video footage.

In this regard those police detectives who testified and came into contact with the accused persons from the date of their arrest to the date of the indications and even to the date of their initial remand testified that they handled each accused person in a professional manner. The cumulative effect of their evidence was that none of the accused persons was either physically or psychologically ill-treated in any manner. On the other hand, each accused detailed the alleged psychological and physical torture meted out against him by the police with the sworn intention to negate their freedom of volition.

The issue of whether each accused was physically and psychologically ill-treated is one of fact. The starting point in determining questions of fact is to assess the credibility of the witnesses called by the State and the probabilities. In doing so I bear in mind the timely and pertinent observation made by DUMBUTSHENA JP, as he then was, in *S v Slatter & Others* 1983 (2) ZLR 144 (H) at 174A-B that:

“The police deny these nasty, cruel and degrading and sometimes inhuman acts the accused alleged they experienced. It is easy for the police to deny such things. They are professional witnesses who have had allegations of assault and torture made against them many times over”.

It does not appear to me that the allegations of assault such as made by the present accused can be disproved by mere denials of the State witnesses where as in these circumstances the State bears the onus of proving beyond a reasonable doubt that the statements were made freely and voluntarily without undue influence having been brought to bear on the accused persons. The State must show beyond a reasonable doubt that the accused persons were not assaulted. One of the weapons in the State’s arsenal is the oral testimony of all the alleged perpetrators, which will be subjected to the rigours of cross examination to determine its probative value. MUNGWIRA J put it this way in *S v Masera and Others*, (*supra*), at p 40 of the cyclostyled judgment:

“The established position as I understand it is that where an accused alleges that he has been assaulted in order to induce him to make the statement being challenged it is essential that the evidence of the person or persons alleged to assault him should be led. *S v John* 1970 (2) SA 232 at 234H-I; *S v Donga* 1993 (2) ZLR 291 at 296A.”

The State did not call the evidence of all the police detectives who were implicated in the assaults and threats of assault. It elected to call DAI Mangena, DAI Kachidza and D/S Mawire and not DI Nemaissa, D/S Madzivanyika, Maromo, D/S Maigeta, D/C Hove, D/C Zindoga and the woman detective in stiletto shoes who were also implicated in the maltreatment of the accused. The evidence of Maigeta was alleged in the summary of the State case in the main matter to be similar to that of D/S Chatukuta who testified in the main trial. Chatukuta arrested the accused persons with detective sergeants Maigeta, Madzivanyika and Mangoma. The first and third accused alleged that they were assaulted by the pair of Chatukuta and Mangena and Mawire and Maigeta on the first day of their arrest. All the accused persons further testified that they were also assaulted by other detectives whose names they did not know in the presence of one or all of this prominent quartet. In my view, it would be absurd to require the State to call all the police officers implicated in the assault and penalize it for failing to do so especially in circumstances such as these where their evidence would in all probability be similar to that of the witnesses who testified. In the premises, the failure to call the evidence of these other police detectives, in the present matter, was not fatal to the State case.

The second weapon in the State’s armoury resides in s 113 (1), (4) and (5) and s 115 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. In relevant these sections provide:

“113 Confirmation or investigation of statement

(1) Where an accused has been brought before a magistrate, the prosecutor may apply to the magistrate for the confirmation of any statement alleged to have been made by the accused, whether in writing or orally, and reduced to writing.

(4) If the accused alleges that—

(a) he did not make the statement; or

(b) the statement was not made freely and voluntarily without his having been unduly influenced thereto; the magistrate shall request him to give particulars sufficient to inform the State of the facts upon which he relies for his allegation and, as far as is reasonably possible, to identify those involved in the allegation and shall inform him of the provisions of section *one hundred and fifteen*.

(5) The magistrate may require a person who makes an allegation referred to in subsection (4) to be medically examined and may make such other investigation as he considers necessary or desirable in the circumstances.

115 Failure to mention fact relevant to allegation may be used as evidence

If an accused alleges during the course of any criminal proceedings that a statement allegedly made by him which is tendered by the State in evidence was not made by him or was not

made freely and voluntarily without his having been unduly influenced thereto and it is proved by the State that—

(a) the same statement was produced in terms of subsection (2) of section *one hundred and thirteen*; and

(b) the accused, when requested to do so in terms of subsection (4) of that section, failed to mention any fact, being a fact which, in the circumstances existing at the time, he could reasonably have been expected to have mentioned; the magistrate or the court, as the case may be, in determining whether the statement was made by the accused or is admissible, may draw such inferences from the failure as appear proper and the failure may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused.”

In terms of s 113 (4) (b) a magistrate who declines to confirm a statement allegedly made by an accused on the basis that external impulses negated his freedom of volition is mandated to demand the facts that are reasonably within the accused’s knowledge on which the complaint is based for the benefit of the State and to warn him of the adverse consequences that might befall him if he seeks to introduce such facts for the first time at his trial. The evidence of what transpired during the confirmation proceedings was not produced. The duty to do so lay with the State. The evidence that was led established that on the same day the accused informed the same magistrate who had declined to confirm their written warned and cautioned statements at their initial remand of the assaults and duress they had suffered at the hands of the police. The magistrate ordered the State to investigate the allegations but did not refer them for medical examination. In the present trial the State did not produce the results of the investigation that was ordered by the magistrate.

Counsel for the accused persons contended that the failure to confirm their statements showed that there was a reasonable possibility that they had been forced to undertake the indications by both physical and psychological ill-treatment brought to bear upon them. Mr *Nyazamba*, correctly contended in line with the view expressed by GUBBAY JA in *S v Ndlovu & Ors* 1985 (2) ZLR 261 at 268D (S) that the purpose of a trial within a trial was to test the veracity of those allegations. It seems to me that s 113 (4) (b) of the Criminal Procedure and Evidence Act was designed to protect the integrity of the investigative process by alerting both the investigators and the accused that allegations of maltreatment would be subjected to careful and close judicial scrutiny. The wording of the section suggests that the enquiry is conducted for the benefit of the State. Where the confirming magistrate fails to execute this judicial mandate, it seems to me that the State is obliged to draw these requirements to his attention and impress upon him the need to fulfil this statutory duty in order to empower the State to fully investigate the complaints. Additionally, the disclosed

details would assist the confirmation magistrate determine whether to invoke the provisions of s 113 (5) of the Criminal Procedure and Evidence Act and order a medical examination or any other appropriate intervention. The importance of a medical examination cannot be gainsaid. It either confirms or contradicts the allegations of ill-treatment. The duty to call evidence to establish that the accused were not assaulted, according to the sentiments of MUNGWIRA J in *S v Masera & Ors*, (*supra*), again at p 40 citing with approval *S v Hendricks & Anor* SCD 19/1993 (A) referred to in Reid Rowland, *Criminal Procedure in Zimbabwe* at p 20-17 , lies on the prosecution. The State did not call any such evidence.

The duty to lead the evidence contemplated in s 113 (4) (b) and (5) of the Criminal Procedure and Evidence Act lay on the State. The failure to lead such evidence weakens the State's case and strengthens the complaints of police brutality that were made by the accused persons at the earliest opportunity.

However, instead of calling any medical evidence or relying on any investigations conducted in terms of s 113(4) (b) and (5) of the Criminal Procedure and Evidence Act, Mr *Nyazamba* strongly relied on the absence of any visible injuries on any of the accused persons in the video footage to dispute the allegation of police maltreatment and brutality. The first accused person contended that he sustained swollen cheeks. I did not discern any difference between his cheeks in the video footage and in his appearance in court some 18 months later. I was satisfied that his hobnobbing could only be ascribed to the restrictions to his movement by leg irons and not to any limp. The first accused explained that the discomfiture in the last four minutes of the video footage was caused by a painful ribcage arising from the brutal assault he received from the police. I dismiss the explanation for two reasons. The first is that the allegation that he sustained broken ribs was not canvassed by his counsel with the police detectives who allegedly assaulted him and witnessed others do so. The second is that it was inconsistent with his allegations of persistent and brutal assault to his knees and heels. The discomfiture did not only consist of rubbing his shoulder and folding his arms around his stomach and chest but also of rubbing his head, neck, cheeks and lips, which were all inconsistent with a painful ribcage. It seems to me that the discomfiture could very well have been caused by fatigue.

The gaiety and body language of the second accused was inconsistent with a limp. Like the first accused his hobnobbing was caused by the leg irons which restricted his movement and controlled his pace. The way he used his right hand in signing exh 3A, in pushing, pulling and holding both the chair and door in room 27 and in gesturing and

gesticulating at the scene he directed the police to satisfied me that his deformity was an old one. The way he walked was also inconsistent with severe assaults to his knees and feet that he alleged.

The third accused was in handcuffs and not leg irons. His gaiety and body language did not betray any signs of anguish, anxiety or distress. The video recording of the indications ended before he reached the destination he was taking the police to. His counsel was constrained to advance any argument against the admission in evidence of his video footage and transcript.

I am by law permitted to have regard to the contents of the transcripts of the video to determine whether the video indications were made freely and voluntarily. The first and third accused indicated the same side of Leopold Takawira while the second pointed out to the other side of the road. The presence of both inculpatory and exculpatory information in the accompanying statements of the accused tended to preclude any dictation by the police. In any event some of the information in their accompanying statements was at odds with the information that was already known to the investigating team before they were arrested.

In our law the evidence of a pointing out of a thing or a place during indications is admissible in terms of s 258 (2) of the Criminal Procedure and Evidence Act which reads:

“(2) It shall be lawful to admit evidence that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial.”

In *S v Nkomo*, (*supra*) at 131F it was held that this sub-section:

“must be interpreted in such a way as to excludethe mute confession element of the pointing out where the allegation of torture in relation to the pointing out is raised and not satisfactorily rebutted without shifting the onus to the accused as is the case of confirmed confessions.”

Counsel for the accused persons contended that as the police took the accused to a place about which they already knew, admitting such evidence would render the trial unfair as the weight accorded to the pointing out was considerably reduced. The contention of prior knowledge of the scene was based on both the charge espoused in the written warned and cautioned statement of each accused and the preamble to the indications in the indications guide form. The place of the robbery was identified in expansive detailed in exh 6 as “along Leopold Takawira between Harare Gardens and Girls High School” and in the respective indications guide forms and transcripts as being “at or near Harare Gardens”. It is correct

that s 70 (3) of the Constitution precludes the use of any evidence obtained through physical or psychological maltreatment of accused persons. It provides that:

“70 Rights of accused persons

- (3) In any criminal trial, evidence that has been obtained in a manner that violates any provision of this Chapter must be excluded if the admission of the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest.”

It does not seem to me that the contention holds any water for two reasons. The first is that para (b) of subsection (1) of s 70 of the Constitution requires that:

- “(1) Any person accused of an offence has the following rights—
(b) to be informed promptly of the charge, in sufficient detail to enable them to answer it;”

The Constitution requires that the information recorded in the written warned and cautioned statements and the transcripts and indications guide forms be promptly availed to each accused on arrest. The second, which accords with the probabilities, is that the evidence led during the main trial tended to show that the police did not visit the scene of the incident with the deceased or his companion before the indications were undertaken. They possessed a general rather than a specific knowledge of where the robbery that eventuated in death had taken place. In any event, even in the face of the unexplained gaps in the recording of the video film, it was never the allegation of any of the accused person that they were forced to point out at any specific place. The first and third accused persons averred that they pointed out the specific places of their own choosing. The averment by the second accused that the police dictated to him the place to point out was demonstrably false. He pointed out at a place that was not only different from those of his co-accused but that was also at variance with the place specified in the oral testimony of the deceased’s companion adduced in the main trial.

Thus even in the absence any enquiry in terms of s 113 (4) (b) of the Criminal Procedure and Evidence Act and medical evidence, I am satisfied from a close scrutiny of the video footage that the State has shown beyond a reasonable doubt that the three accused persons made the indications and accompanying statements crystallised in the transcripts and indications guide forms freely and voluntarily without any undue influence having been brought to bear upon them. Their allegations of police brutality cannot reasonably possibly be true. Accordingly, the video footage and its accompanying attachments are therefore admitted into evidence.

The National Prosecuting Authority, State's legal practitioners
Tafirei & Chikwari, 1st accused's legal practitioners
MawereSibanda Commercial Lawyers, 2nd accused's legal practitioners
Mberi Chimwamurombe Legal Practice, 3rd accused's legal practitioners