

Muller, A.J.

1992/07/06

CRIMINAL PROCEDURE.

Trial within a trial

- confession admitted after evidence
- other statements admitted.

THE STATE

and

1. PAULUS NDIKWETEPO
2. PRIMUS ANGULA
3. MATHEUS TJAPA
4. MWOOMA NGHIALEMHOTE
5. MICHAEL ANGULA
6. VENASIUS AMEHO
7. MARTIN KADWIKA

CORAM: MULLER, A.J.

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**JUDGEMENT ON THE ADMISSIBILITY OF THE STATEMENTS BY ACCUSED NOS. 3, 4 AND 7: MULLER, ACTING JUDGE:**

As this trial has already consumed a lot of time which made it very difficult for my two assessors to attend the whole trial and both assessors had problems at this point in time to sit in this matter, I discussed the matter with counsel and in the interest of the administration of justice have decided that I would deal with the trial within a trial in respect of the statements by these three accused on my own. Counsel were afforded the opportunity to discuss this with

their clients and upon instructions by them, both Mr Grobler, Mr Kasuto as well as Mr Small for the State indicated that they had no objection if I should decide in terms of Section 145(3) (b) to sit for the purpose of the trial within a trial alone. Consequently I sat alone and the judgment in respect of the admissibility of these statements is my own.

At the outset of the proceedings in respect of the statements by accused nos. 3, 4 and 7, Mr Grobler on behalf of accused no. 4, informed the Court that accused no. 4 has no objection to the handing in of his statement which consequently did not necessitate a trial within a trial with regard to accused no. 4. This statement has been handed in and will form part of the evidential material in the trial. In respect of accused no. 3 the State called Chief Inspector W.I. Terblanche who was at the time and still is, a Chief Inspector in the Namibian Police stationed at Katutura and a Justice of the Peace for the purposes of Section 217 of the Criminal Procedure Act. According to Chief Inspector Terblanche accused no. 3 was brought to his office on the 28th March 1991 and indicated that he wanted to make a statement. Chief Inspector Terblanche warned the accused in terms of the Judge's Rules whereupon accused no. 3 said he wanted to make a statement and Chief Inspector Terblanche then proceeded to take a statement in writing from accused no. 3. The statement was read out in Court and contained all the personal particulars of accused no. 3 in the first part thereof. He was informed that he was in the presence of a Justice of the Peace by Chief Inspector Terblanche and

was further informed that an offence of armed robbery is being investigated against him in respect of an attempt to rob a White man at a farm near Okahandja. After he had been warned that this is a serious offence and he is not obliged to make a statement, but that he is entitled to give an explanation in writing which may be used as evidence against him, accused no. 3 indicated that he was sober and by his full senses, not forced by anybody to make a statement and that he understood his rights. Thereafter the following questions were put to accused no. 3 and the following answers recorded in writing on the statement:

8. Do you understand or comprehend, the warning which has been given to you by me? Answer: Yes;

9. Were you assaulted by anybody or have you been threatened by anybody in order to give this statement? Answer: No;

10. Do you have any injuries of any nature and if any describe. Answer: No;

11. Did anyone make any promise to you in any way or persuaded you to make this statement? Answer: No;

12. Do you expect any benefits in case you make any statement? Answer: No;

13. Do you have any witnesses? Answer: No;

The statement was then taken down by Chief Inspector Terblanche but the content thereof was not at the time revealed to the Court. Accused no. 3 also indicated that the statement was read over to him, that it was correct and **that he signed it. Chief** Inspector Terblanche also **signed** it. No interpreter was used. It was indicated on the document that the statement was completed at 12 o'clock on

the 28th March 1991. According to Inspector Terblanche only he himself and accused no. 3 was present during the course of taking of his statement. People at times entered the office but then left again and while they were inside, Chief Inspector Terblanche didn't continue with the statement but waited until they were finished and left. During cross-examination by Mr Kasuto on behalf of accused no. 3, it was put to Chief Inspector Terblanche that according to accused no. 3 this statement was given **as a** result of threats and undue influence by Fillemon Kanaele, a police informant, who according to accused no. 3 brought him the previous evening to Chief Inspector Terblanche's office, but when accused no. 3 didn't want to make a statement, he was returned to the cells and again brought to Chief Inspector Terblanche's office on that particular morning **of** the 28th March 1991. According to accused no. 3 Fillemon Kanaele remained present in the room and had in fact a pistol in his hand with which he threatened accused no. 3 in the presence of Chief Inspector Terblanche and also made certain threats to accused no. 3 to the effect that he will be hurt if he didn't make a statement and also that the President of Namibia was very dissatisfied with what they have done. All these threats and the fact that Fillemon Kanaele was present and even had a pistol in his hand was vehemently denied by Chief Inspector Terblanche. Chief Inspector Terblanche stipulated that he would not have allowed Fillemon Kanaele who was a mere informant to be present during the course of **taking down** accused 3<sup>1</sup> **s statement and that he was in fact** not present. He further denied that he would have allowed any threat to be made or anyone having a weapon in his hand

to be present during the course of taking a statement from a suspect. The only uncertainty in respect of Chief Inspector Terblanche's evidence was whether Warrant Officer Nghosi brought the accused to his office, as was his impression initially, or not. It was put to him that Nghosi was not present. This was later proved by the evidence of Fillemon Kanaele that Nghosi in fact only accompanied accused no. 3 as far as Tsumeb. This statement taken by Chief Inspector Terblanche from accused no. 3 was provisionally handed in as EXHIBIT (ii). Chief Inspector Terblanche also submitted copies of pages of the occurrence book of Katutura Police Station in respect of the 27th and the 28th March 1991 and as far as it relates to accused no. 3 the following inscriptions appear from that occurrence book of which the copies have been handed in provisionally as EXHIBIT (i):

"Wednesday, 27 March 1991.  
 2970 18:50 Suspect detained: Warrant Officer Kurz  
 for Matheus Tjapa. POL 8 - 539/03/91  
 POL 10 - none on CR 60/3/91  
 Okahandja. Attempted Murder. Free from  
 injuries. Well detained"

On the 28th March 1991 the following inscriptions appear:

"3037 07:10 Suspect out of cells:  
 Constable  
 Fillemon with Matheus Tjapa"  
 "3048 09:05 Suspect back in cells:  
 Constable  
 Fillemon with Matheus Tjapa"  
 "3050 09:15 Suspect out of cells:  
 Detective  
 Sergeant Minnies with Matheus Tjapa"

Next page:

"3064 12:15 suspect back and released: Detective Warrant Officer Kurz for Matheus Tjapa"

Detective Warrant Officer Walter Kurz testified that in his private vehicle he accompanied accused no. 3 and another police officer who came from the North from Okahandja Police Station to Katutura Police Station and booked him on the late afternoon of the 27th March 1991 into the Katutura Police Cells. He returned the next morning and around 12:15 he took accused no. 3 from the Katutura Police Cells back to Okahandja Police Station where he was further detained. **He** was also under the impression that Warrant Officer Nghosi accompanied accused no. 3. According to Warrant Officer Kurz he didn't see Chief Inspector Terblanche on the afternoon of the 27th when he brought accused no. 3 to the Police Station at Katutura as the latter was already off-duty. The next day he noticed Fillemon Kanaele around the Charge Office. He also referred to EXHIBIT (i) and the particular entry in the Katutura Occurrence Book where he took accused no. 3 from the office of Chief Inspector Terblanche to the Charge Office Sergeant and booked him in and immediately out to himself whereafter he returned with accused no. 3 to Okahandja Police Station. Warrant Officer Kurz denied that the accused no. 3 was only taken to the Police Station in Katutura so that he could be forced to make a statement and said that Chief Inspector Terblanche took the statement because of his experience in this regard. He also said that Warrant Officer Nghosi was used because he was well-known in Owambo and an excellent Investigation Officer who could speak Owambo while they themselves didn't **have a person with similar capabilities and experience at** the Okahandja Police Station.

Detective Sergeant W. Minnies testified with reference to the Occurrence Book that he took accused no. 3 that particular morning to Chief Inspector Terblanche's office and confirmed the inscription in the Occurrence Book reflecting this which was signed by him. According to him he took accused no. 3 into the office of Chief Inspector Terblanche and he then attended to his court dockets before leaving that office. While he was still there, Fillemon Kanaele entered, greeted Inspector Terblanche and then left before Detective Sergeant Minnies left the office. According to Minnies Kanaele didn't talk to accused no. 3 and didn't have any fire-arm in his hands. Minnies then left Chief Inspector Terblanche and accused no. 3 remaining behind alone in that office and closed the door. He then continued with his own work and around 10 o'clock left the Police Station. According to him, there is another Constable with the name of Fillemon at the Katutura Police Station, namely either Filemon Petrus or Petrus Filemon.

Fillemon Kanaele was called to testify and according to him, he arrived from the north with Warrant Officer Nghosi and accused no. 3 after the latter had been arrested. Nghosi only accompanied them as far as Tsumeb and then returned to Owambo. He himself and accused no. 3 with another policeman continued with the accused and met Warrant Officer Kurz between Okahandja and Otjiwarongo. They stopped at the Otjiwarongo Police Station as accused no. 3 had a problem in respect of his private part which then prevented him to urinate. Warrant Officer Kurz assisted accused no. 3 to see a doctor in this respect. According to Kanaele they arrived



at the Police Station at Katutura late the afternoon of the 27th March 1991. Accused no. 3 was immediately booked into the Katutura police cells. As the telephones in the Charge Office were always engaged, he went to Nghosi's office from where he phoned Chief Inspector Terblanche, who was already at home and reported that he was there with accused no. 3. According to him he arrived the next morning at the Police Station and went to Chief Inspector Terblanche's office where he found Chief Inspector Terblanche, Sergeant Minnies and accused no. 3. Kanaele then greeted Chief Inspector Terblanche and then informed him that he has obtained a lift to Owambo and he is in fact returning for further investigation. He didn't stay longer than 3 minutes in Chief Inspector Terblanche's office, then left, closing the door and returned to Owambo. He was shown the Occurrence Book and denied that he was the constable Fillemon indicated there who took accused no. 3 that morning out of the cells and returned him later to the cells. He also denied that he took accused no. 3 the previous evening to the office of Chief Inspector Terblanche or that they spoke to Chief Inspector Terblanche as was put to him by Mr Kasuto. Kanaele also denied that he was present while Chief Inspector Terblanche took the statement from accused no. 3 or acted as an interpreter or had any fire-arm with him, or threatened accused no. 3 as put to him or in any other way. He confirmed that Warrant Officer Nghosi was not in Windhoek during that time. He also denied that any reference was made to the President of Namibia or warnings by the President in respect of accused no. 3.

Accused no. 3 testified that after he was arrested in Owambo he was brought by Fillemon Kanaele and Warrant Officer Nghosi as far as Tsumeb, where Nghosi left them to return to Owambo. He was then taken by Warrant Officer Marais and Warrant Officer Erasmus from Tsumeb to Otjiwarongo. From Otjiwarongo he was taken to Windhoek via Okahandja by Kanaele and Warrant Officer Kurz. At the Katutura Police Station he was first left in the Charge Office and then taken to the cells. Later he was taken out of the cells and up to Inspector Terblanche's office. This all happened on the 27th March **1991** according to accused no. 3. In Inspector Terblanche's office he was told "to give more evidence" which he refused to do and said he will only give his full name. The Inspector then told Fillemon Kanaele to take him back to the cells and bring him back the next morning. The Inspector saw him again the next morning when he was taken from the cells by Fillemon Kanaele and brought to the Inspector's office. According to him he was pushed in a threatening manner up the stairs to the office of Chief Inspector Terblanche. He was then told to give a true statement. Fillemon Kanaele grabbed him and had a pistol with which he threatened him. When he refused to make a statement, Fillemon Kanaele, still holding the pistol in his hands, accused him of having killed his brother Mwoonda. He was also told by Fillemon Kanaele to give "the true evidence", according to him, so that they can take it to the President who is not at all satisfied with what accused no. 3 has done. In his evidence in chief he said he heard Inspector Terblanche and Fillemon talking to each other. Fillemon interpreted in Owambo that the President has given

them the right to hurt him and even to use electrical wires for that purpose. According to him Inspector Terblanche told Fillemon Kanaele that if accused no. 3 makes a true statement they will try to "make the matter shorter and tell the President I'm not guilty". He then made a statement to Inspector Terblanche while Fillemon Kanaele interpreted. He testified that he does not understand Afrikaans at all. Inspector Terblanche also told him that he will go to the President and tell him that accused no. 3 must be released. He spent a long time in the office of Chief Inspector Terblanche. Because he was afraid he made a statement and also because he was told by Warrant Officer Nghosi that Kanaele had beaten his sister in Owambo. He identified his signatures on EXHIBIT (ii) and said that he was not warned at all by Inspector Terblanche. He was just told to sign. He said he wouldn't have made a statement if **he** wasn't afraid of Fillemon Kanaele as well as Chief Inspector Terblanche and in particular because of what they told him what the President said. He denied that he was taken to Chief Inspector Terblanche's office by Minnies or any other police officer and said that he was taken by Warrant Officer Kurz back to Okahandja after Fillemon Kanaele took him from Chief Inspector Terblanche's office to the cells. He denied that any police officer visited him or took him out of the cells early that morning. Initially, during cross-

examination, accused no. 3 was asked on how many occasions on the 27th and 28th March he was taken to Chief Inspector **Terblanche's office, whereupon he** answered **that he was taken** there once. He later changed this by saying that he was there once on the 27th and once on the 28th March. He also

repeated during cross-examination that he was on arrival on the 27th of March first locked up in the cells.

In respect of the statements by accused no. 7, Inspector Visser, the Commander of the Detective Branch at the Otjiwarongo Police Station testified that accused no. 7 made two statements on the 8th April 1991 to him. One statement was in respect of a certain fire-arm belonging to Mr Kriel and the other in respect of a fire-arm that was found on the person of accused no. 7. EXHIBIT (iii) being the statement in respect of the fire-arm found on the person of accused no. 7 was read into the record and after the relevant warnings were made to accused no. 7, according to Inspector Visser he made a statement, the content of which was not revealed to the Court. Accused no. 7 signed the statement as did the interpreter who was used and Inspector Visser. According to Inspector Visser this statement was freely and voluntarily made by accused no. 7 and no threat or undue influence of any kind was used. A further statement EXHIBIT (iv) in respect of the fire-arms of Mr John Henry Kriel was made by accused no. 7 after the warnings that appear on that document was read to accused no. 7. He signed the statement as well as the interpreter and Inspector Visser. Similarly the content of the statement was not revealed to the Court by the State. Also in respect of this statement, Inspector Visser testified that no undue influence, threat or any **force was used** to obtain this statement **and that it was** in fact freely and voluntarily made. It was put to Inspector Visser that because he interrogated accused no. 7 on the

28th March 1991 and accused no. 7 at that stage didn't indicate that he wanted to make a statement, the fact that he was confronted again with new evidence on the 8th April 1991 and thereafter made a statement, was somehow not proper. Inspector Visser said he could not see anything wrong with it as he obtained new evidence and confronted' accused no. 7 with it on the 8th April whereupon accused no. 7 freely and voluntarily decided to make the statements contained in EXHIBITS (iii) and (iv). Inspector Visser also said that he showed the 7.9mm rifle of Mr Kriel to accused no. 7. It was also put to Inspector Visser that the content of the statement was not what accused no. 3 said and further that because he realised that the interrogations will not stop and he therefore made a statement. Both these versions were rejected by Inspector Visser. On behalf of accused no. 7 Mr Kasuto put it to Inspector Visser that the statement was in fact that the two fire-arms found in the possession of accused no. 7 belonged to Mrs De Lange and that these two fire-arms were carried out by accused no. 6 who received it from Mrs De Lange inside the house after accused no. 7 requested his money and Mrs De Lange then handed over the fire-arms. Inspector Visser denied that anything of this kind had been conveyed to him but that the statement which was made by accused no. 7 was written down after it had been translated and read back to accused no. 7 whereupon he signed it. It was also put to Inspector Visser that in respect of both the statements no warning was given to **accused no. 7 before making the statements** which was denied by Inspector Visser. Inspector Visser repeated that he put it to accused no. 7 that he had information and that accused

no. 7 had the right to give an explanation whereupon he decided to make a statement. In respect of EXHIBIT (iv) accused no. 7 said that the statement didn't contain the correct statement and Mr Kasuto revealed the content of the statement to the Court by putting it to the witness. This statement merely said that accused no. 7 didn't have any knowledge about the robbery and that he only received the 7.9 mm rifle which had allegedly been stolen from Mr Kriel, the complainant, from accused no. 6. The Inspector remained adamant that nothing was said to him by accused no. 7 in relation to the De Lange case and the rifles taken from that farm.

The interpreter, Gerhard Tjimotjiwa, was called and identified his signature as interpreter on both EXHIBITS (iii) and (iv). He said he spoke Oshivambo to accused no. 7 and then translated it again into Afrikaans to Inspector Visser. He himself is Herero speaking but grew up between Owambo speaking people and speaks Owambo for more than 15 years. Although he cannot differentiate between the different dialects in the Owambo language, he and accused no. 7 understood each other and he had no problems during the translation. He was cross-examined in respect of the differences in the dialects in the Owambo language, but he remained adamant that they could understand each other. He was also cross-examined about his statement that he could not remember the type of weapon mentioned in respect of EXHIBIT (iv) **by accused** no. 7 and why "7.9mm rifle" was written in the statement. He repeatedly said that although he cannot remember that the specific type of fire-arm was

mentioned, he translated everything that was said by accused no. 7 to Inspector Visser who wrote it down and it was read back to accused no. 7 who did not object to anything in the statement. Accused no. 7 signed both statements after he made it and he also signed both documents after the warning had been given to him before he made the statements.

Accused no. 7 was called by Mr Kasuto to testify. According to him he was interrogated by Inspector Visser twice namely on the 28th March 1991 for the whole morning and part of the afternoon as well as on the 8th April 1991. On the first occasion he refused to make any statement and on the second occasion Inspector Visser asked him about weapons and said that he had more information about them. On that date he did make a statement. According to him accused no. 6 gave him the weapons after Mrs De Lange handed it over to them. In respect of EXHIBIT (iii) he denied that the statement was read over to him or that he told the Inspector that accused no. 6 gave him the weapon. He denied the contents of that statement. He, however, admitted that he signed the statement. In respect of EXHIBIT (iv) he also admitted his signatures on the statement and said that he was not informed about the charge as it appears on the statement. He said that he was not warned and the statement was not read to him. He said this was not the statement that he made. He again referred to the two fire-arms which he allegedly received from Mrs De Lange. He said that was what he in fact told Inspector Visser. He denied that any firearm of Mr Kriel was found in his possession. He said the interpreter interpreted to him in Herero while he was

answering in Owambo, but he said he understood the interpreter properly.

During cross-examination by the State he was shown EXHIBITS 2 and 12 which were the rifles of Mr Kriel and Mr De Lange respectively and he identified EXHIBIT 12 as the one that he had in his possession. He could not explain why it was not denied that EXHIBIT 2, the rifle of Mr Kriel, was in fact found in his house. He was also confronted with evidence which was not disputed that EXHIBIT 12, the rifle of Mr De Lange, was in fact found in the toilet of the house where accused nos. 1 and 6 were arrested. He denied this and could not explain why it was not disputed.

I shall first deal with the statement allegedly made by accused no. 3 and which was handed in as EXHIBIT (ii), although the content of the statement was not included in the document, neither was it revealed to the Court. Both Mr Small on behalf of the State and Mr Kasuto on behalf of accused no. 3 confirmed that this statement in fact amounts to a confession by accused no. 3. I have, consequently, only to decide whether this statement is admissible within the provisions of the Criminal Procedure Act or not. This statement was made to a Justice of the Peace, namely a senior officer of the Namibian Police, Chief Inspector Terblanche. This aspect was not disputed. The only dispute in respect of the statement is whether it was made freely and voluntarily or without any undue influence. It was averred by the State and Chief Inspector Terblanche that accused no. 3 was sober and in his full senses. This was



It is clear that there are two different versions between the State and accused no. 3 in respect of the manner in which this statement was obtained. Although accused no. 3 avers that he was afraid of Chief Inspector Terblanche, it is clear from his evidence as well as what was put to the State witnesses **that the** main reason for his objection to the statement as not being made freely and voluntarily and that undue influence was used by way of threats, was the conduct of Fillemon Kanaele. According to accused no. 3 he was afraid of Fillemon Kanaele because he did previously beat up his sister, which assault he did not see but heard of it from Warrant Officer Nghosi and further that Fillemon Kanaele in the police station at Katutura pushed him up the stairs towards the office of Chief Inspector Terblanche and in the office while telling him **to** make a statement, threatened him with a pistol and said that he may be hurt. Kaneale also made certain other threats of what the President allowed them to do to him. Finally he was promised that he would be released if he should make a statement. It is significant that he never averred that he was assaulted or threatened in any way by Fillemon Kanaele in Owambo or on their way to the Katutura Police Station or at any time before the **28th** of March **1991** until the time that he was taken, according to him, by Kanaele from the cells to Chief Inspector Terblanche's office. On his own **evidence Fillemon Kanaele was present during the course** of the time that the statement was taken and that, because he could not understand Afrikaans, Fillemon Kanaele acted as an

interpreter. I find it unbelievable that certain

conversations between Chief Inspector Terblanche and Fillemon Kanaele like the telephone call from Chief Inspector Nghosi and others would have been translated from Afrikaans to Owambo for accused no. 3 to understand. If those conversations did take place between Chief Inspector Terblanche and Kanaele in Afrikaans, there was no reason to translate it and that can only mean that accused no. 3 did in fact understand what they said and consequently understood the Afrikaans they spoke.

The version of accused no. 3, however differs materially from the factual evidence of what was entered into the Occurrence Book of the Katutura Police Station on those dates. In the first instance it appears clearly that every time the accused was taken to the cells or taken from the cells it was recorded. It appears also from EXHIBIT (i) that accused no. 3 was detained in custody at 18:50 on the 27th of March 1991 and not taken from the cells again on that day. According to that entry he was handed over at that time by Warrant Office Kurz. According to accused no. 3's own evidence he was taken to the cells and then later again taken from the cells on the 27th of March 1991 to Chief Inspector Terblanche's office by Fillemon Kanaele. This is not in accordance with the entries in the Occurrence Book made on that day.

Accused no. 3 was taken at 10 past 7 on the 28th of March from the cells and returned at 5 minutes past 9 to the cells by a Constable Fillemon. Both these occurrences are

properly recorded in the Occurrence Book. Accused no. 3 denies that this happened and there is no evidence of why he was in fact taken from the cells or for what purpose except for the entry itself. This does not take the matter any further but confirms that such occurrences are recorded in the Occurrence Book.

It is further recorded that Detective Sergeant Minnies at 9:50 took accused no. 3 from the police cells and that he signed for him. This was confirmed by Detective Sergeant Minnies in evidence and he said he took accused no. 3 to Chief Inspector Terblanche's office. I shall return to Minnies' evidence later.

It is further recorded that accused no. 3 was taken back to the cells and released at 12:15 into the custody of Detective Warrant Officer Kurz from where he was taken to Okahandja.

These entries are in direct conflict with the evidence of accused no. 3 and there is no reason to even suspect that the entries have been tampered with, neither has it been suggested. These entries are, on the other hand, in conformity with the evidence of Chief Inspector Terblanche, Detective Sergeant Minnies, Warrant Officer Kurz and Fillemon Kanaele. According to Chief Inspector Terblanche he was not on duty any more at the time when accused no. 3 was brought to the police station on the 27th of March 1991. This was confirmed by Warrant Officer Kurz as well as Fillemon Kanaele. Fillemon Kanaele denied that he took

accused no. 3 to the office of Chief Inspector Terblanche on that day and said that he did not find Chief Inspector Terblanche there and went to Warrant Officer Nghosi's office from where he phoned Chief Inspector Terblanche at his house and informed him that he has returned with accused no. 3. Consequently, I have no doubt that accused no. 3 was never taken on the 27th of March to the office of Chief Inspector Terblanche or that Chief Inspector Terblanche saw him on that day. His evidence in this respect must be rejected and that of the State witnesses as corroborated by the entries in the Occurrence Book, EXHIBIT (i), accepted.

In respect of what happened on the 28th of March **1991** Fillemon Kanaele denied that he had any right to take a prisoner from the cells and this was confirmed by Chief Inspector Terblanche and other witnesses. His evidence was that he arrived later that morning, found accused no. 3 in Chief Inspector Terblanche\*s office where he was busy with him and that he only greeted Chief Inspector Terblanche and informed him that he was leaving for Owambo because he obtained a lift. He then left the office and he also confirmed that Detective Sergeant Minnies was present. Detective Sergeant Minnies confirms this and in fact confirms that he was still in the office of Chief Inspector Terblanche when Fillemon Kanaele left the office and closed the door behind him. I have no reason to doubt the evidence of Detective Sergeant Minnies. He further confirms what **appears from the** Occurrence Book, namely that he was the person who took accused no. 3 to Inspector Terblanche's office. Warrant Officer Kurz also testified that he took

accused no. 3 from Inspector Terblanche's office and booked him out, whereupon they left for Okahandja.

Chief Inspector Terblanche testified that he was alone in the office with accused no. 3 and at times people entered the office, completed their business there and left and during those times he suspended his business with accused no. 3. He denied that Fillemon Kanaele was present during the course of accused no. 3's statement and said that he did not use an interpreter as they understood each other properly in Afrikaans. He denied any possible threat, inducement or that anybody had a pistol in his hand. Detective Sergeant Minnies also denies that he saw a pistol in the hands of Kanaele at the time when he entered for the short period the office of Chief Inspector Terblanche.

Looking at EXHIBIT (ii) it is clear that before paragraph 7 which contains the content of the statement, a number of steps had to be gone through and a number of questions had to be asked and answered which were duly recorded on that document. Accused no. 3 signed each page of the document and I was informed that he in fact signed each of the five pages of the statement. It also appears from the document as was testified by Chief Inspector Terblanche that the whole statement was read over to him after he made the statement and it was confirmed by his signature as being correct. Accused no. 3 testified that he only made a short statement and it is unclear to me where Inspector Terblanche would then have obtained a statement which covered five pages and which was apparently in detail.

The only real objections except for the allegations of undue influence and threats by Fillemon Kanaele, were the fact that the offence was vaguely recorded in the statement in paragraph 3 and that Chief Inspector Terblanche and even Warrant Officer Kurz were under the impression that Warrant Officer Nghosi was also present in Windhoek and may have brought accused no. 3 to Chief Inspector Terblanche's office. Neither of the objections have any substance. The vaguely recorded offence could have had an effect if the deponent of the statement did not understand it and could not make a statement in respect of this offence, because it was so vague. Apparently he understood it, because he made a statement covering five pages in respect of the particular offence. The fact that Warrant Officer Nghosi, according to Kanaele as well as accused no. 3, did not accompany accused no. 3 further than Tsumeb does not take the matter further as it is clear from the evidence of Detective Sergeant Minnies and EXHIBIT (i) that it was in fact Minnies who took accused no. 3 to Chief Inspector Terblanche's office. There is no other relevance or value to be attached to the wrong impression by Chief Inspector Terblanche and Kurz that Warrant Officer Nghosi also came to Windhoek. It does not affect the admissibility of the statement at all.

I have no doubt that the statement was taken without any undue influence or any threat and that it was in fact freely and voluntarily made as appears from all the questions and **answers contained in that document** before and after accused no. 3 made the statement. This statement is consequently **accepted to be admissible as evidence.**

I shall now deal with the two statements made by accused no. 7 on the 8th of April 1991 and put before me as EXHIBITS (iii) and (iv) respectively. These statements were also put before me excluding the contents thereof. The content of the statement contained in EXHIBIT (iv) was however revealed by Mr Kasuto during cross-examination when he put it to Inspector Visser. It was put to me by both counsel, Mr Small and Mr Kasuto, that neither of these statements contained any confession but were merely extracurial admissions. Inspector Visser testified that accused no. 7 had been properly warned and that the first part of the statement was read and interpreted to him by the interpreter, Mr Gerhard Tjimotjiwa, whereupon accused no. 7 signed it and thereafter made his statement, whereupon he again signed it as well as the interpreter and Inspector Visser. No allegation was ever made of any undue influence or a threat by Inspector Visser and the only suggestion of any incorrect procedure was that accused no. 7 had been forced to make the statement because he, after a long interrogation on the 28th of March 1991, did not make a statement and then later on the 8th of April after being confronted with new information he then made a statement. The only other criticism levelled at these statements were against the interpreter who is not an Owambo-speaking person but who spoke Herero according to accused no. 7. The interpreter said he spoke Owambo and that they both **understood each other. Accused no. 7 confirmed that he** understood the interpreter properly. It was further alleged that the contents of the statements were not correct. I did

not have the content of the statement contained in EXHIBIT (iii) before me but that of the statement contained in EXHIBIT (iv) was put to Inspector Visser. That statement merely denied any knowledge of the robbery and merely confirmed that the particular 7.9mm rifle which was allegedly stolen from Mr Kriel was received by him from accused no. 6. If Inspector Visser had any intention to put any prejudicial evidence against accused no. 7 in the statement, he could have done much better than this recording of a mere denial. The only possible prejudicial part in this statement was the reference to the type of rifle. Despite the criticism of the interpreter in respect of the "7.9mm rifle," he said he interpreted what accused no. 7 told him and it was read back to him whereafter he accepted it and signed it as being correct.

I have no doubt that accused no. 7 was properly warned and that he made the statements freely and voluntarily, which were then written down by Inspector Visser, read back to him and accepted by him as correct by putting his signatures on the documents. Inspector Visser is also a Justice of the Peace and I accept his evidence in respect of the taking of these statements. **These statements are admitted as evidence.**

A handwritten signature in black ink, appearing to read 'Muller', with a stylized flourish at the end. Below the signature are four small dots arranged horizontally.

MULLER, A.J.