

THE STATE

versus

SONNY NICHOLAS MASERA

and

FLETCHER DULINI NCUBE

and

ARMY ZULU

and

REMEMBER MOYO

and

KHETHANI AUGUSTINE SIBANDA

and

SAZINI MPOFU

Accused One

Accused Two

Accused Three

Accused Four

Accused Five

Accused Six

HIGH COURT OF ZIMBABWE

MUNGWIRA J

HARARE, 2 March 2004

Separate Issue

Mr *Wamambo* and Mr *Kandemiri*, for the State

Adv. *H. Zhou*, for the 3rd accused

Adv. *E. Mushore*, for the 4th accused

Adv. *E. Morris*, for the 5th accused

Adv. *D. Mehta*, for the 6th accused

MUNGWIRA J: The State having indicated that it intended to adduce evidence of warned and cautioned statements and video taped indications recorded from the accused, the third, fourth, fifth and sixth accused objected on the grounds that such evidence was inadmissible for the reason that it had been obtained by use of force and under duress. Such a challenge having been raised it then became necessary to conduct a trial within a trial.

The inquiry into the admissibility of this evidence was protracted and involved the calling of a number of witnesses.

The first state witness was Detective Inspector Hita, the officer in charge of the police Law and Order section, Gweru.

He testified as to how he first came into contact with the 5th accused, Khethani Augustine Sibanda, in the early hours of 12 November 2001. He had come to know of the arrest of this accused when he received a report from the duty inspector, whilst he was at his home. He had upon receipt of the report proceeded to Gweru Central Police station where he had directed that the fifth accused be brought to him, his intention being to interview the accused in connection with the disappearance of the late Cain Nkala.

In the company of a Detective Constable Chibharo, he had cautioned the fifth accused who had responded to the effect that he was willing to cooperate with the police. Having heard the accused's account he 'reminded' the accused that he was lying as his movements had been monitored on the day of his arrest. As a result of this reminder he said that the accused had changed his story.

This accused was, according to the witness, relaxed, looked normal and did not complain of having been maltreated.

On the witness' instruction Detective Constable Chihuri had compiled a police log diary entry detailing the content of the interview. This document had been handed to the investigating officer, Detective Superintendent Matira upon his arrival from Bulawayo the following morning.

Hita explained that he did not record a statement from the fifth accused, Khethani Sibanda, at the time of the early morning interview as he had not at that stage obtained details of the crime from the Bulawayo police who were responsible for the investigation. All that he had done was, upon reporting for duty that morning, to inform the Bulawayo Law and Order section that the accused had been arrested. He expressed ignorance as to who it is who informed Superintendent Maketo of Bulawayo and who had issued the instruction for the accused's arrest, of the arrest shortly after the interview and at about 0200 hours. He, however, could not discount the possibility that that information had been communicated to Maketo by someone who did not fall under his command.

The witness denied that in the office where he interviewed the fifth accused there were any other persons besides himself, Chibharo and the accused. He was adamant that at no time was the accused threatened, intimidated or shown sjamboks, electrical cords or weapons which the accused had alleged were stored under a bed in the room.

He remarked that he found nothing strange or irregular in that he cautioned and interviewed this accused in connection with a matter in respect of which he had no knowledge of the nature of or the details of the allegations which had resulted in the arrest. If one were to accept what he said, he took it upon himself to proceed on the assumption that the accused had been arrested in connection with the kidnapping of the late Cain Nkala and proceeded to interview him without seeking any relevant information from the officers responsible for the investigation.

This witness would, in my view, have been more honest were he to

have, at the very least, admitted to his having had some fore knowledge of the matter. The scenario that he painted is such that he must have had prior knowledge of the matter and was therefore untruthful when he stated that he did not. The conclusion that any reasonable person would arrive at after witnessing the performance of this witness is that there is more to his concealment of the facts than meets the eye.

The second witness was D/C Chibharo who was on duty in the Law and Order offices at Gweru on the night of 12 November 2001. It is he who was present when the fifth accused was interviewed by D/C/I Hita. His evidence, briefly, was that the Accused was informed of the allegations against him, that is the kidnapping of Cain Nkala. The accused was, he said, verbally cautioned and asked if he required the services of a legal practitioner, an offer which was declined.

His testimony was for the major part in line with that of Hita. He said that the accused did not at that stage implicate himself in the kidnapping. He denied that there was any intimidation of the accused or threats uttered. Given his rank and position it is hardly surprising that he did not give any evidence which conflicted with that of Hita.

The third witness was Detective Inspector Masuna, a member of the Bulawayo Law and Order Section involved in the investigations of the disappearance of the late Cain Nkala. It is he who was responsible for the initial entries in the police investigation diary before the case was assigned to Detective Superintendent Matira. He was in the team which proceeded to Gweru on 12 November in the company of D/S Matira and other officers to collect the fifth accused.

He stated that he first learnt of the arrest of the fifth accused in the course of a briefing on the morning of 12 November 2001.

Only upon arrival at Gweru did he discover that the fifth accused had been detained with four other persons.

Upon arrival at Gweru D/S Matira had been given a private briefing by D/C/I Hita. He had not been advised of the content of that briefing. Thereafter the fifth accused had been booked from the cells before being taken to a room where he was interviewed. The fifth accused had at first denied any knowledge of the case but had thereafter given various versions of events relating to his movements on the previous day. Separate interviews had been conducted with the other four persons and the decision

had been made to release two of those persons and the other two, Ronnie Moyo and Simon Mambongo were to be conveyed to Bulawayo along with the fifth accused for further investigations and clearance. According to the witness these other persons were not at that stage being treated as suspects.

When proceeding to Bulawayo he had travelled in the same vehicle as D/S Matira and the fifth accused whilst the other two persons were in another vehicle .

En route to Bulawayo the fifth accused had been subjected to further questioning in the course of which he furnished the officers with a different version of events to that which he had given at Gweru.

Towards the Fort Rixon turnoff, the fifth accused had voluntarily identified the person then known to the officers by the name of Ronnie Moyo as being one Remember Moyo. D/S Matira had in response to that information immediately parked the vehicle which he was driving. He had in the company of the witness disembarked and approached the second vehicle. Upon being questioned the fourth accused had without much ado admitted that he was in fact Remember Moyo.

D/S Matira had thereafter given the instruction that the witness and a Detective Constable Ndlovu convey the 5th accused to Esigodini police station whilst he and the other officers took the 4th accused to Mbembesi police station, he being a suspect in the Nkala case.

In compliance with D/S Matira's instructions the 5th accused had been driven to Esigodini. Upon arrival at Esigodini the 5th accused had upon being informed that he was to be detained there overnight done an about turn and had indicated his willingness to come clean. He had thereafter made a confession and further expressed his willingness to direct the police to the place where the body of Cain Nkala had been buried. In the opinion of the witness the accused was at that point in time unperturbed and relaxed.

It is the witness' evidence that at no stage during his presence was any force brought to bear on the accused and that no threats were uttered. He denied that the accused was assaulted at Gweru or in the motor vehicle. He further disputed the accused's assertion that at Esigodini he was taken to Ncema dam where the police officers threatened to feed him to the crocodiles if he did not confess. As far as he was concerned once the accused had made it clear that he wished to come clean with the police the witness had at about 1800 hours telephoned his superiors in Bulawayo to

inform them of that fact.

From Bulawayo the accused had directed the officers to a farm in the Solusi area where a grave had been located. D/S Maketo had followed in his vehicle.

Support Unit details who had arrived at the site in the company of Matira were left guarding the grave.

The 5th accused who had been cautioned by Matira at the burial site then directed the police to various residences mainly in the high density suburbs of Bulawayo which were visited and the sixth accused was arrested.

D/I Masuna denied that an assault was perpetrated upon the person of the 6th accused, his girlfriend or brother.

D/C Ndlovu had made notes of the details of the 5th accused's confession on the return journey from Esigodini but no formal statements had been recorded. Asked why there was no record of the indications on the night of 12 November 2001 the witness explained that these were what he termed 'informal' indications and that the formal indications which were recorded were those that took place the following day.

On the morning of 13 November 2001 he had witnessed the recording of a formal statement from accused 5. The recording detail was D/C/I Makeleni who had since died and was thus not available to testify.

The witness was grilled on various aspects of the content of the police diary log, Exhibit 35.

As to the involvement in the investigations of members of the President's office and the 5th accused's allegation that he had been threatened and assaulted by members of the Central Intelligence Organisation the witness was wooly.

He was non committal on the issue of the composition of the ferret team, which is reflected in the police diary log as having been engaged in information gathering and dissemination. The composition of the Joint Operation Command (the 'JOC') also presented the witness with difficulty.

Asked to explain the irregular and inconsistent entries in the diary log, the witness, although admitting the existence of these, attempted to distance himself from the authorship thereof and urged the defence to seek answers from the investigating officer and team leader, D/S Matira.

He attributed the recording, in the diary log, of events as having occurred before or after the dates and times borne out by the oral testimony

of the witnesses to a 'mix up' and that he could not foresee how events could happen before the dates on which they are alleged to have occurred. At one stage he referred to a reference number for an entry in the log which he said had been deleted and at another point he made an observation about the incorrect sequence of the pages and other defects in the diary log.

The witness was hard put to explain the entries in the diary log which reflect at least four different versions of the circumstances surrounding the arrest of the 3rd accused, Army Zulu and other inaccuracies pertaining to the arrest of the 1st accused, Sony Masera and the visits by police to a certain residence in the Killarney area of Bulawayo.

He sought refuge in stating that he was not part of the team which conducted certain of the investigations which gave rise to the diary entries and that other entries could be attributable to grammatical errors.

When it was put to him that a witness in the main trial, Jemitias Sibanda, a Support unit detail had in the main trial given testimony to the effect that D/S Matira was present and alone at the burial site when the Support unit team arrived, his response was that that was not the case.

He was further questioned on the evidence of another State witness, Thembelani Mnkandla who had implicated him in an assault perpetrated upon her person by police officers. The question was met with denial.

His evidence in regard to the 4th accused, Remember Moyo, was that no interviews were conducted with that accused during the period of his detention at Mbembesi between the 12 and 15 November. He disputed that he had at any stage visited the 4th accused at Mbembesi. His role had, he stated, merely been to uplift Remember Moyo from Mbembesi on the morning of 15th November. He denied that on the way from Mbembesi to Bulawayo he and other details had on that day proceeded to the home of the 4th accused where a search was conducted.

This witness claimed to have no knowledge of the circumstances surrounding the recording of the 4th accused's statement and was reluctant to comment on whether or not the 4th accused had ever been subjected to a medical examination.

In response to a question by the defence as to the grounds on which other persons in the company of the 5th accused had been detained, his response was alarming in that he admitted that at the time of the 5th accused's arrest the police did not harbour any reasonable suspicion that

the other four persons had committed any offence but that they held out a hope that such reasonable suspicion would be established only after investigations had been conducted.

He denied that he had in February 2002 paid a visit to the 4th accused who was in prison custody to advise him that his home had been burnt down but he did accept as fact that the home of this accused was destroyed by fire.

The fourth witness was Detective Constable Ndlovu, a member of the team headed by D/S Matira which proceeded from Bulawayo and Gweru after the arrest of the 5th accused on 12 November 2001.

Before 12 November he had been involved in investigations making follow ups on information. He was evasive when questioned about the investigations conducted at the scene of the kidnapping and information given to the investigation team.

He stated that it was a practice within the Law and Order section for daily morning conferences whereat information would be exchanged and investigating details would be updated as to developments in the case and tasks would be delegated.

Contrary to Masuna's evidence he stated that at the morning meeting of 12 November the officers present were not informed of the offence in respect of which the 5th accused had been arrested. Only on the way to Gweru was the team told, and this without elaborating, that the 5th accused had been arrested in connection with the present case and another matter which had occurred at Lupane.

At Gweru the 5th accused and four others had been booked from the police holding cells. He had received instructions to interview two of these persons whilst the other two were taken to a separate room. He had later briefly entered the office where the 5th accused was being cautioned. At no stage had he seen the 5th accused being assaulted.

He disputed that there could have been as many as fifteen police officers with the 5th accused although he accepted that amongst the officers questioning the 5th accused there could have been some officers who are stationed at Gweru.

The first he had heard the 5th accused's story was in the vehicle ferrying that accused to Bulawayo. In the vehicle certain questions had been posed to the accused but he could not recall the specifics.

His evidence was that there was nothing unusual about the manner in which the 5th accused suddenly and inexplicably revealed to the officers the identity of the 4th accused, Remember Moyo.

At the Fort Rixon turn off he had not alighted from the vehicle in which he was travelling. He did not, he said, witness any assault on the 4th accused.

At the time the team departed from the turn off the 5th accused was not aware that he was to be taken to Esigodini. The reason for withholding that information from the 5th accused was best known to his superior, D/S Matira.

His account of events from the turn off was that he in the company of Masuna and other police details proceeded direct to Esigodini as instructed with no stop over in Bulawayo. He denied, as had Masuna that at Esigodini the 5th accused was taken to Ncema dam and threatened.

The confession and offer to make indications by the 5th accused had been made out of the blue just as he was about to be detained overnight at that station. His observation was that at the time the 5th accused was 'smiling', 'relaxed' and 'showed no remorse'.

On the way from Esigodini to Bulawayo it is he who had made handwritten notes in his note book as the 5th accused changed his mind and made a full confession.

At Bulawayo and outside the CID offices at CABS building the accused had again been cautioned. He had thereafter directed the police to the site of the grave and the accused had continued to relate his story as they made their way to the site.

He stated that nothing 'official' had been recorded as these were 'informal indications'. He described what he considered to be the differences between informal and formal indications. According to him the indications conducted on the following day were formal indications as they were recorded for the purpose of showing the court that the indications were made freely and voluntarily. He accepted that the importance of indications was to show knowledge on the part of the 'indicator' that only a guilty or involved person could have.

He went on to say that he did not have instructions to record or make notes of the indications. He was not able to produce the notes he said he had recorded of the 5th accused's confession for the reason that the notes had been misplaced.

He stated that he had no recollection of whether or not the 5th accused had been offered the services of a legal practitioner.

This witness was asked why the time recorded on the indications sheet as the time at which indications by the 6th accused were concluded did not correspond with the time which appears on the video clip of indications which was suggestive of the indications sheet having been completed prior to the indications. He was unable or unwilling to comment, his response being to 'pass the buck' to the investigating officer and Maphosa, the officer who had accompanied the accused when indications were made, disregarding the fact that he was present and appended his signature as a witness to the indications form. He sought to limit his role to that of a mere driver. When questioned as to why the video clip did not include footage of the journey to the burial site he again referred the questioner to Maphosa for an explanation.

He was adamant that the 6th accused was not assaulted on the night of his arrest but stated on the other hand that he did not enter the house where the arrest of the 6th accused was effected as he had remained in the police vehicle with the 5th accused.

Turning to the 4th accused, his evidence was that he had not seen the 4th accused when he was interviewed at Gweru. To his knowledge the formal arrest of the 4th accused was effected en route to Bulawayo and at the Fort Rixon turn off. The allegations levelled against the 4th accused were in connection with the Cain Nkala murder and the murder of another person which offence had been committed at Lupane.

D/C Ndlovu denied that he was in the company of other officers who interrogated, threatened and assaulted the 4th accused at Mbembesi police station during the period between the 12th and 15th November 2001. He stated that he was not present when the 4th accused was conveyed from Mbembesi to Nkulumane police station and claimed that his next encounter with this accused was when he, acting on the instructions of D/S Matira, booked him out of prison and took him Bulawayo Central Police station.

It was put to the witness that the 4th accused had registered with his lawyers a complaint which mentioned specifically and identified an officer with prominent thick lips as having been amongst the number of police officers who had assaulted him. The witness' attitude to that was that he was not the only person with thick lips.

I consider it appropriate to comment at this stage that from the time the witness took the witness stand one could not help but make the observation that the lips of the officer testifying were indeed prominently thick as described by the 4th accused. His lips were so strikingly and unusually prominent as would provoke comment from one meeting him for the first time.

This particular witness was eloquent, gifted with a good measure of intelligence and revealed a remarkable eye for detail. It was in light of the foregoing therefore surprising that he was given to a highly selective recollection and that he would suffer inexplicable lapses of memory when he perceived that a response he might proffer to a particular question might place him in an awkward position. This in my view rendered doubtful his trustworthiness as a witness.

Detective Sergeant George Levison Ngwenya was the 5th witness. He was in the team which proceeded to Gweru after the arrest of the 5th accused. He stated that at Gweru he was assigned the task of guarding the suspects and played no part in the interviews which were conducted.

Contrary to D/C Ndlovu's evidence he stated that the suspects were five in number and were subjected to separate interviews.

On the way back to Bulawayo he was in the same vehicle as the 4th accused.

He described the brief stop at the Fort Rixon turn off where D/S Matira and D/I Masuna alighted from their vehicle, approached the vehicle carrying the 4th accused, questioned the 4th accused about his identity and when the 4th accused confirmed that he was indeed Remember Moyo gave orders that he be handcuffed. Thereafter D/S Matira took over the steering wheel of that vehicle and drove the 4th accused to Mbembesi police station where he ordered the witness and two support unit details to make arrangements for the detention of the 4th accused whilst D/S Matira departed for Bulawayo for the reason that he was in a hurry to inform his superiors of the new developments, that is of the arrest of the 4th accused.

At Mbembesi the witness had simply handed over the 4th accused to the charge office details. He had not taken part in the detention process and had after the hand over loitered on the charge office veranda in the company of the support unit details whilst awaiting transport to Bulawayo which transport arrived at about 2000 hours. The hand over process had taken approximately 15 to 20 minutes.

He claimed to have had no further dealings with the 4th accused. He denied that he had assumed personal responsibility for the detention of the 4th accused at Mbembesi and that once he taken him to the cells the 4th accused had been, tethered or chained to an iron object, his shirt removed for mosquitoes to feed on him and instructions had been issued for the cell light to be switched off and for the accused to be denied food. He further denied that he had returned to Mbembesi police station the following day when it is alleged that the accused was subjected to an assault by police officers. He was, he stated, not in the team which transported Remember Moyo from Mbembesi on 15 November 2001. He accepted, however that he at one stage took possession of the 4th accused's cellular phone but explained that D/S Matira was the person best able to comment on what happened to the phone.

The witness confirmed that he had been identified by a state witness Thembelani Mnkandhla as one of her assailants. She, he claimed had levelled false allegations against him designed to injure him in his reputation. He said that he was not a person of a violent disposition.

He was quizzed on his omission to mention in his evidence in the main trial his involvement in the investigations conducted on 12 November. His response was that he had not in the course of the examination in chief considered that to be a matter of any importance as all he had done was to guard the suspects.

He described as unfounded the allegation that he was party to the assault allegedly perpetrated on the 6th accused at Nkulumane police station on the morning of 13th November 2001.

This witness did not impress in what I saw to be an overt attempt to minimise his role in the investigation process. He played, when one reads between the lines, a much more active and participatory role than that which he would admit to. The extent to which he went to paint himself as a person of good repute with no tendency for violence was overstated. It is nigh impossible for this court to ignore the evidence of another state witness who testified to the witness' having participated in an assault on her person which evidence counsel for the accused has correctly highlighted was not impeached and is a factor which immediately casts doubt on the veracity of the witness.

The 6th prosecution witness was Detective Superintendent Matira, the

man described by all previous witness as the investigating officer but who chose to describe himself as a co-investigator. It is in the course of this witness' testimony that we first learnt of the existence of a co-investigator in the form of one Chief Inspector Mukahlera.

D/S Matira spoke of how on, on 7 November 2001, a raid was conducted at the Movement for Democratic Change offices at Bulawayo, which raid led to the arrest of the 1st and 3rd accused persons.

He had at about 0730 hours on 12 November 2001 received instructions from a Chief Superintendent Maketo to proceed to Gweru to pick up the 5th accused who had been arrested by Gweru police.

At Gweru he cautioned the 5th accused in connection with the kidnapping of the late Cain Nkala. He stated that he asked the accused whether he wished to have his lawyer present and that the offer was declined. After the 5th accused had given his story the investigation team, together with the 5th accused and two others set off for Bulawayo.

It is noteworthy that the version of events which D/S Matira stated was related to the officers at Gweru by the 5th accused is that which Masuna and Ndlovu say was given to the police whilst the vehicle was en route to Bulawayo. There was a patent conflict in the evidence of D/S Matira and these two witnesses as to what was said by the 5th accused and when.

As had D/C Ndlovu before him he attempted to dismiss some of the shortcomings in his testimony and the omissions of relevant information from his statement as being due to the statement having been a mere summary of events.

At about the Fort Rixon turn off the 5th accused had revealed the true identity of the 4th accused who had initially told the police that his name was Ronnie Moyo. In his opinion it was not unusual for a suspect who was initially uncooperative to subsequently open up.

His version of events at the Fort Rixon turn off was that he merely stopped his vehicle, approached the 4th accused who was in the second vehicle, and confirmed his identity before setting off for Mbembesi. He disputed that the 4th accused was pushed violently out of the back of the vehicle in which he was travelling resulting in his landing on the ground and that he thereafter took running jumps and landed on the 4th accused's private parts with his feet.

Armed with that knowledge the 4th accused had been formally arrested in connection with the Lupane murder. At that stage there was no

mention of his involvement in the Cain Nkala matter. He had thereafter driven the 4th accused to Mbembesi police station where he had left D/S Ngwenya with instructions to have the 4th accused detained at that police station and also to obtain the full particulars of the accused for the purpose of verifying his identity. He in the meantime rushed to Bulawayo to inform Maketo of these developments as it was 'knocking off time'.

He denied that the 4th accused had been detained at Mbembesi in order to conceal his whereabouts and that he was, whilst at Mbembesi, tortured and interrogated in connexion with the Lupane murder

Before he could contact Maketo, Masuna had between 1830 hours and 1900 hours telephoned him to advise him that the 5th accused had confessed. He in turn had informed Maketo to contact Masuna. In a subsequent call to D/S Maketo he was informed that D/S Maketo and Masuna were on their way to the burial site. He was given instructions to arrange for the place to be guarded.

In a later conversation with D/S Maketo he was advised that D/S Maketo had left the burial site and had left Masuna, Ndlovu and the 4th accused at the scene. It is then that he contacted the officer in charge of Fairbridge Support Unit to arrange for a guard detail. He disputed the evidence of the Support Unit detail, Jemitias Sibanda who had testified in the main trial, to the effect that the instruction to Fairbridge Support Unit to provide a guard detail was received at Fairbridge as early as 1800 hours contrary to his evidence that this was done at a later hour. Maphosa's evidence was not contradicted and implies that the instruction to guard the grave was given before the police at Bulawayo had been informed that the 5th accused had made a confession and deducing from Masuna's evidence shortly before or at the exact moment that the 5th accused is said to have suffered a change of heart. D/I Maphosa is the officer who led both him and the Support Unit details to the site.

He had arrived at the burial site at about 2200 hours and was upon arrival briefed by Masuna after which he approached the 5th accused and 'told him of his lies' before proceeding to caution him and inviting him to indicate to the police his accomplices.

He disputed that the indications of that evening were a dress rehearsal for the so-called 'formal' indications of the next day or that these indications were, as suggested by the defence dramatised with the contents

of the statements having been dictated to the accused in order to lend credibility to the story given to the 5th accused by members of the President's office.

Relying on information furnished by the 5th accused various residences in the high density suburbs of Bulawayo were visited and these visits resulted in the arrest of the 6th accused. The arrest was effected without recourse to threats or force. A query arose about two conflicting diary log entries which dealt with the recovery of a pair of shoes belonging to the 6th accused. The entries reflect that the shoes were recovered on different dates and at different places. The inconsistency was compounded by the fact that in the shoes were two exhibit tags which displayed conflicting information. The witness could only say that one of the tags had been falsely manufactured without saying by whom or when it had been manufactured.

As far as he could tell the 5th accused was throughout free to the extent that he would at times engage in 'chit chat' with the police on general topics.

He pleaded ignorance of any assault perpetrated on the 6th accused when he was arrested at his girlfriend's house, in the vehicle which ferried him to the police station, as he was removed from the vehicle and when he was interrogated at Nkulumane police station. The 5th accused, he stated, did not receive any threats that his family home would be burnt down if he did not confess.

At Nkulumane police station arrangements were made for indications to be carried out by the 5th and 6th accused.

The late Detective Chief Inspector Makeleni and D/I Maposa were in charge of the indications by the 5th and 4th accused respectively. The witness had not himself taken part in the indications save that he later in the course of that day proceeded to the scene where he witnessed the exhumation of the body of the late Cain Nkala.

He referred the question of how the television people had come to be in attendance at the indications to his superiors who were responsible for the arrangement and agreed reluctantly that such an arrangement was prejudicial to the investigations and irregular.

The witness denied that the 5th accused revealed the identity of the 4th accused after he had been assaulted and threatened with a pistol. He in fact disputed that any of the detectives on his team were armed and stated

that the only arms in sight were those in the hands of the Support Unit details.

He explained that he had ordered that the 5th accused be detained at Esigodini and the 4th accused at Mbembesi as there was need to guard against the risk of communication and collusion between the two accused and other suspects who were being held at various police stations in Bulawayo. When subjected to further questioning it however emerged that that explanation could not have been true for the reason that given the number of police stations in Bulawayo there was no need to detain the 2 accused in police stations which were situated a fair distance from Bulawayo, this more so when one considers that in order to get to Esigodini it was necessary for one to drive through Bulawayo. The lie was further exposed by an admission that at one particular police station, Sauerstown, there was more than one suspect who had been detained in connection with this case. The untruth was also compounded by the fact that at Nkulumane police station on the morning of 13 November 2001 the 4th and 6th accused were detained in the same cell before their respective statements had been recorded and before indications were conducted.

He denied that the 4th accused had been detained at Mbembesi in an attempt to conceal his whereabouts and to render him inaccessible. He further disputed that the 4th accused was, whilst at Mbembesi, tortured. The impression he gave was that that accused was detained at that station in connexion with the Lupane murder with no mention being made of the present case. When asked why the 4th accused was not taken on indications he said he could not remember if that was so or not as he was not involved in directing the indications.

The witness produced what he said was the police diary entry recorded by D/C Chibharo at Gweru.

He further made mention of statements recorded from accused 4 and accused 5 at the time he requested them to identify a vehicle which was believed to have been used in kidnapping the late Cain Nkala, (Exhibit 36). He stated that both accused had made certain admissions relating to the vehicle but these assertions were as it turned out not borne out by the statements which were upon examination contained in a colourless document.

He testified to the accused having at all times been treated fairly and

in accordance with the accepted rules of practice and referred specifically to the 1st and 2nd accused having been afforded access to their legal practitioners from the time of their arrest. He gave an example of how the officer in charge of Nkulumane police station telephoned him to advise him that there were lawyers who wished to see the accused persons. He mentioned that he had authorised the officer in charge to allow the lawyer for the 5th accused access to his client.

He conceded that up until 15 November 2001 two legal practitioners, namely Mr Mathonsi and Mr Tshuma were making continuous enquiry as to how and when the accused were to be taken to court.

He claimed that the third accused Army Zulu was interviewed in the presence of his lawyer and that the legal practitioner gave the go ahead to record a statement. He went on to say that whenever he, personally, recorded verbal statements from the 4th, 5th, and 6th accused, especially the 5th accused, all accused would dispense of the services of a legal practitioner.

It was put to him that the first time the 3rd accused had been permitted access to his legal practitioner, Mr Mathonsi was on 14 November 2001 and not as he was stating on the morning of his arrest. It was drawn to his attention that there are several conflicting entries in the police diary log which reflect that the 3rd accused was arrested at different places, times and dates between 7 and 8 November 2001. His comment was that there could have been two different persons by the name of Zulu who shared similar particulars or it could be that the entry which refers to the 7th November could have been typed after that date. It was put to the witness that the 3rd accused was in fact arrested in the early hours of the morning of 9 November 2001.

In respect of another entry which refers to the arrest having been effected on 14 November he stated that this was attributable to an error of grammar as the entry was made at the time the statement of the accused was recorded. He was he stated not the person responsible for the entry. As for the entry dated 16 November which reflects that the 3rd accused and other persons were arrested at the MDC offices his attitude was that the contents of the particular entry were correct but were recorded late. At the end of the day we have five versions of one incident.

As to why the allegations against the 3rd accused in his statement are those of contravening section 51 of the Law and Order Maintenance Act as

opposed to murder which is the charge he is facing in this court he stated that as a police officer he harboured a reasonable suspicion that the 3rd accused was involved in the Lupane murder and he had all along believed that the 3rd accused had been cautioned in respect of the Lupane murder and had unfortunately previously not had sight of the statement. The witness however then went on to agree that the 3rd accused was not one of the persons awaiting trial for the Lupane murder. It proved, I must confess, a mammoth task to make head or tail of what it is that the witness was trying to say in regard to the 3rd accused.

The 3rd accused to his knowledge had been implicated by the 5th accused whilst at the burial site. As to why the statement of the 5th accused omitted mention of the 3rd accused he was unable to explain.

He was unaware the 3rd accused had been assaulted by police officers on the day of his arrest. He disputed the allegation that he issued an order that the 3rd accused be denied food whilst in custody. He was, he stated in constant contact with the defence lawyers and they would have complained to him had this been true.

In relation to the 5th accused he was asked to account as to why the details set out in the preamble of his statement were inconsistent with the information the police had gathered and on the basis of which they charged this accused. His answer was that he did not know what information was in the hands of the recording details. He said he was unable to comment as he was not present when the statement was recorded.

He denied that there was any connection between the prosecution of this case and his sudden rapid rise within the ranks of the police force in what had been hitherto a lacklustre career spanning in excess of two decades.

The witness' performance particularly under cross examination provided comic relief for the audience in what was otherwise a grave and weighty matter. His responses to the questions put to him gave rise to much mirth to such an extent that it became necessary to remind the witness to conduct himself with more dignity and to accord to the matter the weight it deserved. At times his answers to questions bordered on the incomprehensible and at other times he was patently evasive.

He claimed to be ignorant of a number of pertinent and important issues and relied for his excuse on his unsubstantiated statement that as a

co-investigator he was not privy to all the developments in the case. This assertion is in my view frivolous as the weight of the evidence before this court showed that D/S Matira was in fact pivotal to the investigations and was as such very much aware of all the events relating to the case. The evidence of his subordinates who testified before he did leaves one in no doubt in respect of that conclusion. It is only after Matira had testified that there was a sudden deluge of evidence which made reference to the existence of a co-investigator. This was one of the striking instances of what I detected to be a common thread that ran throughout the evidence led in the state case of communication between the police witness resulting in evidence being tailored and ameliorated to avoid certain pitfalls that had evinced themselves in the testimony of previous witnesses .

The existence of a co-investigator was introduced after D/S Matira had been questioned in connexion with certain statements he had made in affidavits (Exhibits 41 and 42) prepared on 21 November 2001 for the purpose of assisting the state in opposing the bail application of one Simon Darren Spooner. His response was that what he stated in the affidavit was based on hearsay and was as such perfectly admissible in a bail application. His lie became evident when it was drawn to his attention that by the time the affidavit was compiled there was in existence a confession from the alleged perpetrators of the crime which contained facts which contradicted those set out in the affidavit.

The explanation tendered by the witness was that at the time he deposed to the affidavit he was unaware of the confessions. When told that that could not be so he being the investigating officer that is when he introduced the aspect of there having been a co-investigating officer and the many teams assigned different tasks resulting in his not knowing all the events that were taking place.

His attention was directed by the defence to the first paragraph of Exhibit 41 wherein he referred to himself as being the investigating officer and that in the circumstances he could not claim ignorance of such a major breakthrough as a confession. His response was that he could have the knowledge although he had not had sight of the document, thus making a nonsense of his previous explanation. He however reiterated that the principal investigating officer was Mukahlera and distanced himself from all the persons responsible for the recording of statements from the accused persons. He was asked why when a request was made in the further

particulars for trial for the names of the investigating police officers Mukahlera's name was not included he stated that by the time the further particulars were requested Mukahlera was no longer a member of the investigating team as he had retired.

On several occasions the witness would proffer or volunteer information on issues raised in the cross-examination of previous witnesses which matters were such that it was unlikely he would have addressed without his having discussed with those witnesses their evidence. He for instance without prompting made reference to the matter of the use of electrical equipment in the threats uttered to the 5th accused which is an issue that arose only in the evidence of D/I Hita and D/C Chibharo. Asked how he could have acquired this knowledge if he had not discussed the matter with those witnesses after they had testified he gave a somewhat fickle explanation in that this had come about in the course of his 'chit-chat' with the 5th accused who had told him that he had to lie to his colleagues that he had confessed after he had been electrocuted.

The witness was challenged as to the authenticity of the warrants of further detention and the fact that the signatures of D/S Maketo which appeared thereon differed substantially from other signatures on other official documents. He suggested that the documents be subjected to expert examination as he was not qualified to comment on handwriting. Whilst I would accept that the signatures on these further detention warrants do indeed differ from other signatures in documents before the court I am not entirely certain that the evidence led suffices for this court to reach an adverse finding in that respect.

An interesting and seemingly insurmountable hurdle presented itself in the form of questions put to the witness about the interchange between D/I Hita of Gweru and the Bulawayo police. This gave rise to some concern as to how Hita could have, in light of his evidence that he was unaware of the details of the allegations against the 5th accused, informed him that the 4th accused had been arrested in connexion with the murder of Cain Nkala. It was inconceivable if the police evidence is to be believed that there could have been such a communication as the police claim to have become aware of the death of Nkala only on the evening of 12 November 2001, a good 20 hours after the arrest of the 5th accused.

In commenting on Hita's evidence that he had informed The 5th

accused that his movements had been monitored throughout on the day of his arrest he stated that it would be surprising for police officer to monitor a suspect all day long without arresting him. In his opinion Hita could not have told the 4th accused this and would at most have told the accused that he had information in respect of his movements on that day. He stated that personally he was not privy to the information transmitted to the Gweru police by D/S Maketo which led to the arrest of the 5th accused and he was not aware of the source of Maketo's information although it could well be that Maketo had obtained fuller and more detailed facts pertaining to the movements of the 5th accused after the arrest.

D/S Matira conceded that he found Hita's unsolicited act of interviewing and cautioning a suspect who was wanted in connection with a crime committed outside his area of jurisdiction and without having obtained the details of the allegations very strange. Further difficulties arose in accounting for the diary log entry which is said to have emanated from D/C Chibharo in so far as it states that the 5th accused was believed to have been the driver of a vehicle which was used in the abduction of one 'Caleb Nkala'. Given the fact that both Hita and Chibharo both stated that they were unaware at the time of the early morning interview of the details of the offence and the nature of the information furnished by the 5th accused at that stage and the time at which he is alleged to have eventually confessed the document can only have been compiled *ex post facto* and not at the time testified to by Hita and Chibharo. Further to that the entry contains information which was not known to the author thereof at the time he alleges it was compiled. It is remarkable that it was only through D/Supt Matira that we heard for the first time that the 5th accused was in the early hours of 12 November 2001 believed to be the driver of the kidnapper's vehicle.

D/Supt Matira denied knowledge of the mystery man John, a member of the President's office who the 4th accused alleges abducted him shortly after the kidnapping of the deceased and as a result of assaults and threats induced him to adopt a story which would implicate members of the Movement for Democratic Change party in the commission of the offence and the same John who visited him at Gweru Central police station to remind him of the harm that would befall him and his kin should he fail to cooperate. Whilst accepting the involvement of members of the ferret team in some aspects of the investigation he disputed the presence of a 'third

force’.

As to the whereabouts of the notes which were recorded in the course of interviewing the 5th accused on 12 November 2001 D/Supt Matira explained that it is Masuna who made notes whilst at Gweru and that Ndlovu later recorded notes of the confession. He confirmed that the notes had been misplaced and gave three different versions of when it is that he had discovered that the notes had gone missing. Counsel for the defence delved at length on the content of the police investigation diary log and the procedures adopted in the compilation thereof. Unlike Masuna he conceded that whether investigations proved fruitful or not it was vital that all police activities were logged in the diary and that where there was an omission the established practice was for one to fall back on the policeman’s notebook. None of these notebooks was made available for inspection.

D/Supt Matira told the court that in the normal course the docket remained in the custody of the investigating officer but that in this instance the docket was not under his sole control as he was working with a co-investigator who was his superior and that there was movement of the docket between various other officers such as the late D/I Makeleni and D/Supt Maketo. He stated that he was not responsible for all the entries in the docket.

He admitted that the entries in the docket were defective but attributed the ‘mix up’ to the fact that the diary entries would be recorded after the event and at times the facts were reconstructed in a clumsy fashion. He however seemed to accept that some entries could have been tampered with.

He explained that the structure of investigations in the instant case differed from the norm in the sense that other senior officers were involved and would unbeknown to him allocate tasks to other teams and he would not be given feedback on their findings. In a normal case involving a sole investigating officer he or she would issue directions to the various teams and would coordinate the investigation to prevent duplication of tasks or overlapping of functions to ensure the smooth operation of an investigation. He admitted that this was not the case in this matter. He however went on to say that in this case planning meetings would be held. He also admitted that he was fully aware of the status of investigations at the time the accused were taken to court albeit he had not had sight of all the relevant

documentation as there was a time when the system changed and he was bypassed.

It was clear that the witness was hard put to explain the glaring inconsistencies in the police diary log where there are numerous instances of events having been recorded on dates and at times before they are alleged to have occurred, and where some incidents are alleged to have occurred more than once and on different dates. The extent of the inconsistencies and the inability of the witness to proffer some cogent or rational explanation for this state of affairs defies mere clumsiness, error or incompetence and was sufficient to set the alarm bells ringing. This court further made the observation that what have been referred to as mix-ups in the diary log only commence after entry 13 which is the time at which the witness took over the investigation of the case.

Matira was asked about statements from potential witnesses which statements had not been made available to the defence and he stated that he was not aware of the whereabouts of the statements.

On being questioned as to the reason why the statements of the accused had not been confirmed by the court the officer cast the blame on the senior public prosecutor whom he said had been handed by the statements but had forgotten to attend to the confirmation. He claimed to have no knowledge of the letter complaining of ill treatment by the police written by the legal representatives of the accused to the senior public prosecutor, Bulawayo.

The next witness was former Assistant Inspector Jamela who was attached to the Bulawayo police press and public relations office. He stated that he was a journalist by profession and the holder of a basic certificate in photography and video filming. It is he who was assigned the task of recording on video the indications. His evidence was that he first filmed the 5th accused and the officers accompanying him outside the Nkulumane police station as they administered the caution before they set off for indications and thereafter the same procedure was repeated for the 6th accused. The two accused were transported in two separate vehicles and he himself was a passenger in a third vehicle. He had not taken note of the number of vehicles which were in the convoy to the site or the order in which they were as that had nothing to do with him. He did not film the journey to the site for the reason that he had according to his calculations inadequate battery power. In his opinion both accused when cautioned,

looked relaxed and did not seem apprehensive or anxious.

The first accused and the team accompanying him were at the site when he arrived. He described the indications made by both accused at the burial site which indications he recorded and stated that the indications were made freely and voluntarily.

Under cross-examination he acknowledged that it was it was desirable for him to capture on film all the events from the police station to the burial site but because he had only one fully charged battery for his camera it became 'important' for him to select to film what he considered 'the most important part of the proceedings in order to save power. He stated that he had no prior knowledge of the location of the grave, the distance which was to be covered in the course of the indications or that there had been informal indications conducted the previous day. He was asked why he had made reference to informal and formal indications and it was put to him that the reference thereto was indicative of his having discussed the issue with previous witnesses. He denied that this had happened.

He agreed with the defence that the importance of indications lay in the spontaneity with which they were made.

He was he said not in a position to comment on the presence of the other cameramen who were at the police station and at the burial site as he had no business with them, his role being merely to record the proceedings.

When he was asked to account for the time gaps in the video of the indication he explained that he had forgotten to turn on the time switch.

The witness did not dispute that in the video footage the 5th accused had marks on his face or that there was a bloodstain and tear on the shirt of the 6th accused.

This witness steered a safe middle of the road course and distanced himself from the conduct of the indications. The striking feature of his evidence is that the video film of the indications is not a complete and uninterrupted recording and that according to the witness it was in his discretion to elect which portion of the proceedings to record and which to omit.

After this witness came Collin Dhlamini, a former member of the Criminal Investigation Department scenes of crime section. He is one of the officers who was in the vehicle which transported a the 5th accused on

indications on 13 November 2001. The other police officers in his company were the driver of the vehicle D/I Moyo and D/I Makeleni. His role was to take photographs whilst D/I Makeleni took notes as the accused directed the police to the burial site.

He outlined the nature of the directions given by the 5th accused. It is his evidence that at one point the vehicle stopped under an umbrella tree near two roads as the accused was uncertain as to which road was to be followed. The point at which the vehicle stopped was rather hazy as he referred at one stage to the vehicle having come to a halt under a tree about 50 metres from the grave. He later did an about turn and denied that such a stop had been made.

He stated that the vehicle in which he was travelling was the first to arrive at the burial site and that the video cameraman arrived after indications by the 5th accused were already in progress.

He had signed the indications form, Exhibit 52, as a witness upon completion of the indications. When put to him that the time recorded as the time of completion was 1300 hours whereas the indications by the 5th accused were concluded later than that his comment was that he did not record the indications and had no knowledge of the contents thereof. He made the rather strange remark that as far as he knew the documentation was done by the investigating officers in conjunction with the court prosecutors.

In response to a question regarding a visit he had made to the scene of the kidnapping, he denied that he had ever been there. Within a short space of time he suffered a change of heart and admitted that he had visited the scene where he observed tyre marks but had not taken any photographs of the tyre marks as they were not very visible. He attributed the initial denial to a lapse of memory.

The evidence of the witness was littered with contradiction and I would not give him any plaudit for honesty.

Detective Inspector Maphosa in his evidence stated that he was the duty inspector on the 12 November 2001 when he received instructions from C/Supt Maketo to meet the Superintendent at the CID offices at CABS building. He met D/Supt Maketo at about 1915 hours and was told that he was to accompany Maketo to a destination that was not revealed to him. Having boarded Maketo's vehicle he was informed that there was someone in the vehicle ahead of theirs who was to indicate the remains of the late

Cain Nkala. The witness described the route which they used to the burial site.

At the site Masuna, Ndlovu and the 5th accused alighted from their vehicle and went over a fence whilst he and Maketo remained in their vehicle. After the three returned he and Maketo left their vehicle. Maketo after being briefed by the officers gave orders that they were to remain at that spot whilst he drove back into town.

Back in town Maketo had met up with Matira, a D/S Ncube and members of the Support Unit. The witness thereafter dropped off Maketo and drove back to the burial site followed by members of the Support Unit team. At no stage during the course of that night did he go near the grave.

The following morning he received instructions to assist with the investigations. He was at Nkulumane police station and assigned the specific task of interviewing and recording from the 5th accused a statement. He had seen the 5th accused who had agreed to be taken on indications.

Outside the charge office he had cautioned the 5th accused and these proceedings were recorded on film. The 5th accused was relaxed and had no complaints. After the caution the accused had been led to a vehicle which was driven to the Norwood farm burial site. It is, he said, the accused who gave directions to the driver of the vehicle.

Matira, he said was nowhere in sight when the caution was administered. His attention was drawn to the video recording which clearly shows that Matira was present when the witness was cautioned.

The witness admitted that had the normal procedure for indications been adopted the indications would have commenced from the Nkala residence where the kidnapping occurred and not from Nkulumane police station as occurred in this case. He said that this was not done for fear of endangering the life of the accused. The witness was asked to comment on a diary log entry which showed that the accused made indications from the scene of kidnapping. He was he stated unable to comment as he was not involved in the compilation of the diary. He however agreed that that entry was false.

It was put to him that the notes of the indications as they appear on the indications form, Exhibit 55, are indicative of the directions having been given in advance, the future tense having been used.

His evidence in respect of the 6th accused is that he was not aware of

any assault that had been perpetrated and neither did he observe any injuries or bloodstains on the person of the accused. He was questioned on the questions put to the 6th accused in his statement in that these questions did not arise from the response of the accused. The witness believed that those matters had been discussed when the 6th accused had been interviewed at some other time.

Another suspect, Gilbert Moyo, had, the witness said, refused to be taken on indications because he could not remember the place.

The then officer in charge of Mbembesi, who was not in the initial line up of state witnesses was called. She testified to the effect that she had little recollection of the 4th accused. She was, she said away from the station on the evening of the 4th accused's detention. She had encountered him for the first time while conducting a cell inspection on the morning of 13 November 2001 She had asked each detainee routine questions such as the reason for detention. She had not received any complaints from the accused or any of the other detainees. To the best of her recollection the only issue that had arisen was that the cell toilets had not been flushed. She had concluded her inspection after ordering that the detainees bedding be spread out and that food be prepared for the prisoners. She had left the station the following morning.

She denied that she had been given orders regarding special treatment to be meted out to any detainee or that she had any communication with D/Supt Matira between the 12th and 14th November 2001 nor had she received any reports of the accused having been visited or interviewed by anyone in her absence. At no time whilst she was at her station did she take members of the CID or Central Intelligence Organisation to the accused's cell.

She had not bothered to enquire of Matira why the accused had been detained at her station although it was not normal for a suspect to be detained at an outlying station in circumstances such as this.

The witness denied that she had gone against the Instructions of the Law and Order section by according humane treatment to the accused.

I gained the general impression that the witness was basically an honest and conscientious individual who was unhappy to have been called to testify and found herself in a tight spot. She exhibited signs of discomfiture as she gave her account and preferred to have nothing to do with the whole matter. It was obvious that she knew much more than she

was willing to reveal. It is highly improbable that she would have little recollection of the period that the 4th accused was detained at her station or the allegations against him given that even without mention of his connexion to the Nkala case the Lupane case was on its own a fairly high profile case. A further factor is her admission that she was familiar with the accused prior to his detention at the station and that she knew his father.

Detective Sergeant Shumba, a retired officer was the next to testify. It was he who recorded the statement of the 3rd accused on the instructions of D/S Matira. He described the accused's appearance as normal. He said that he read the preamble to the accused who elected to give a verbal reply in Ndebele. D/Supt Ncube acted as the witness to the recording. The statement was translated into English with the assistance of D/S Ncube as he himself was not very proficient in the Ndebele language.

He explained that it was a slip of the tongue to say that the statement was verbal. He went on to elaborate and in so doing explained that he had first had a discussion with the accused and only after that did he suggest that the accused make a statement in his own handwriting.

It was in cross-examination put to him that the handwritten copy had been signed before the statement only after signature of the typed statement was the accused told to make a handwritten statement. He was in proof of that referred to the Ndebele version of the typewritten reply which did not correspond in some aspects with the handwritten version in that in the typewritten version the accused was admitting knowledge of the use to which the handcuffs he had given to the 5th accused were to be put. The handwritten copy is to the contrary. His immediate response was that the difference in the typewritten copy was as a result of a typographical error and an omission on his part.

It was suggested to him that the reason for the discrepancy was that that piece of information did not emanate from the accused. He went on to say that the Ndebele version was prepared by Ncube who was unavailable to testify as he was not feeling well

He could not recall if the accused had at any stage requested the assistance of a legal practitioner. The accused in his view did not in fact need to request for the services of a legal practitioner as lawyers were 'coming in and going out.' He however concluded by saying that the accused never asked that his lawyer be in attendance.

He was not aware that the 3rd accused had been assaulted by the police after his arrest and disputed that the accused had been assaulted by Ncube whilst he was present.

The witness initially denied that he had participated in the indications conducted on 13 November 2001 but when his attention was drawn to his appearing on the video recording of the indications he accepted that he had in fact been present at the indications. He also denied that he, on the night of 12 November 2001 paid a visit to the 4th accused at Mbembesi police station in the company of war veterans

The evidence of the witness speaks for itself and is clearly unreliable.

Joel Moyo is the officer who drove the vehicle which carried the 5th accused for indications. From his observations the 5th accused seemed a 'happy' man. This he concluded from the body language of the accused and that he was talking freely. He described the route taken to the burial site and stated that the accused gave directions to the site in a relaxed fashion. Contrary to the evidence of D/S Dhlamini the witness stated that on the way to the site the vehicle had stopped as the 5th accused was uncertain of which of two roads to follow. According to his testimony, it is he who brought the vehicle to a halt for the purpose of confirming the directions which had been given by the accused. There was some confusion on his part as to whether or not this took place at the umbrella tree or some other tree.

His attention was drawn to his affidavit statement where he stated that he stopped the vehicle at the Norwood farm turn off at the request of the 5th accused. He explained that that was a typing error and that he had erred in signing the statement in that form. This explanation however caused some difficulty for the witness in that he accepted that it is he who personally prepared the affidavit and the error referred to was an error of fact.

Detective Constable Themba Sibanda testified to the effect that he on 13 November 2001 and at Nkulumane police station booked the 6th accused from the police cells and took him to an office where D/I Maphosa advised him that he was to record a statement. He was unable to dispute that the 5th accused was being held in the same cells as the 6th accused.

After he had been cautioned the accused wrote out his statement in long hand which statement was subsequently written.

When he was through with the hand written statements certain questions were put to the accused and his answers were recorded.

The accused appeared normal and elected to give a statement in English. He exhibited no signs of assault or injury.

He in his evidence indicated that present in the office were D/I Masuna and D/S Ncube. He however corrected this by substituting Maphosa for Ncube. Masuna, he said, was 'just seated' whilst the statement was recorded. He was personally unaware of Masuna's role in the investigations save that Masuna had been to Gweru the previous day and had conducted investigations overnight in Bulawayo in connexion with the 5th and 6th accused persons.

He was asked whether the content of the accused's handwritten statement was the same as that appearing on the typewritten version with his attention being drawn to certain differences. The witness conceded the differences and indicated that he was not responsible for the typewritten version but that the errors could be typographical or grammatical and further submitted that the omission of words or grammatical errors did not affect the import of the statement.

He denied knowledge of any assault perpetrated upon the accused by police officers early that morning or that he had been present when the accused was threatened by D/Supt Matira at Khami prison. He did not, he stated, observe any bloodstains or tear on the shirt of the accused.

D/Supt Ncube who was the then officer in charge of Nkulumane police station was next to testify. His evidence was to the effect that on the night of 12 November 2001 he teamed up with D/Supt Matira at about 1800 hours. He had knocked off duty and had gone to the CID offices as he was anxious to find out from Matira what he had discovered at Gweru, his interest being purely personal.

Whilst he was in Matira's office and sometime shortly after 1800 hours, Matira had had a telephone conversation with D/Supt Maketo. Matira had informed the witness with whom he had as yet not held a discussion concerning the case, that it was likely that the 5th accused would indicate to the police the spot where the body of the late Cain Nkala had been placed. He had in addition been told of the need to make arrangements with the Support Unit for a guard detail. D/Supt Ncube was non-committal in his responses when asked whether there had at that stage been any calls between Matira and Masuna or that Matira had telephoned Maketo to inform him of the developments at Esigodini. When told that at no stage had Matira

indicated that he had received a call from Maketo he said merely that there was a telephone conversation and had not mentioned who had phoned who and that he could have been in error if he had said that Matira received a telephone call from Maketo.

Matira had telephoned Fairbridge Support Unit .In a subsequent telephone conversation between Matira and Maketo, Matira had been informed that the 5th accused had made indications after which he was given instructions to proceed to West Commonage police station where he was to meet Maketo. At about 2100-2200 hours there was another call to the Support Unit to advise them to send details to preserve the scene. He and Matira had proceeded to the burial site led by Maphosa present in a motor vehicle at the site were Masuna, Ndhlovu and the 5th accused. He and Matira did not go to the grave. They both approached the vehicle in which the accused was. The accused was verbally cautioned. He elected to relate his story and implicated other persons in the commission of the murder.

The witness was unable to comment on the evidence of the Support Unit detail, Jemitias Sibanda to the effect that a Detective Inspector Kunyongana of CID had visited Fairbridge in person to make arrangements for the guard detail resulting in the witness having had to seek the authorisation of his superiors to make the necessary arrangements. He did however state that that witness' evidence to the effect that Matira was alone at the burial site when the Support Unit details arrived is incorrect.

Thereafter various places were indicated to the police by the 5th accused. The 6th accused was arrested in the course of that night. He denied that he intervened to stop Matira and Masuna from assaulting the 6th accused at the time he was arrested. The brother and girlfriend of the accused were not, he said, assaulted. As far as he was concerned the police had knocked politely at the door to the house of this accused's girlfriend and having been allowed into the house were civil in their dealings with the 6th accused.

I must here comment that Matira made no mention of the presence of Ncube at his office when he returned from Gweru.

After the arrest of the 6th accused he had returned to Nkulumane police station.

On the morning of 13th November D/Constable Ngwenya had been given instructions to go to the MDC offices where he was to collect certain documents and to bring in one Thembelani Mnkandla, an MDC employee for

questioning.

The 4th accused was on 15 November 2001 brought to his office for questioning by Detective Constable Mpofu and another officer. After handcuffs had been removed the 4th accused had been advised of the allegations against him. The accused had elected to make a statement in the Ndebele language and had asked for a piece of paper on which to write. The accused had upon being asked stated that he had no legal representative.

There was no one else in the office besides himself, the accused and D/C Mpofu. He denied the presence of war veterans who assaulted the accused to the extent that he had to intervene to stop the assault. He further disputed that after the assault the accused had requested food and drink or that he had responded to the request by telling the accused that food and drink would be plentiful only after he had made his statement.

When he was through the witness had instructed a police officer to take the statement to West Commonage police station where it was to be interpreted into English. That having been done both the Ndebele and English versions were typewritten. The accused adhered to and signed the statement. D/C Mpofu acted as a witness to the recording. The witness did however concede that the handwritten statement was not signed.

It was disputed that the statement had been pre-written in the English language and that what happened was that that pre-written document was taken from a drawer and translated into the Ndebele language which the accused was required to record. The witness denied that he had told the 4th accused that the British sponsor ZANU PF and that once the MDC was banned that they would look after the accused. This after telling the accused that he himself had been sponsored by the British to undergo certain studies in the United Kingdom. He stated that the reason the accused had made mention of the British and sponsorship was that he had taken a stroll around the office of the witness and had seen and discussed some certificates which were hanging on the wall in the office of the witness. This, according to the witness, also served as evidence of the fact that the accused was not subjected to any duress or inducements to make a statement.

It emerged from questions put to the witness that another statement in connexion with the Lupane case was also recorded from the accused on

that date.

In the witness' opinion the accused appeared relaxed and was cooperative. He did not observe any signs of injury or assault on the accused. He further denied responsibility for the alterations to the accused's statement.

He claimed to have no knowledge of whether or not the 4th accused had been admitting the charges prior to 15 November 2001 and was unable to say why the 4th accused had been detained at Mbembesi police station

The witness was questioned on the treatment meted out by the police on a State witness Sihle Ndlovu who had in her evidence in the main trial claimed that she had been assaulted and threatened by the police when she was interviewed at Nkulumane police station. He denied that threats were uttered to the witness that her house would be burnt down if she failed to cooperate with the police. He was adamant that she was not subjected to harassment or degrading conduct. He was, he said, someone who respected humanity.

He denied any involvement in the assault perpetrated by police officers upon state witnesses, Thembelani Mnkandla and Sihle Ndlovu.

The witness was questioned with regard to several diary log entries which reflected that all four accused had confessed by 1900 hours on 12 November 2001 (entry 32) and that by 0900 of that same day Maketo had already issued instructions for Simon Darren Spooner to be picked up in connexion with enquiries into the murder of Cain Nkala (entry 33) whereas other evidence points to the allegations, at that stage, as having been those of kidnapping. His answer was that he was not in a position to comment as he was not the author of these entries. As for the fact that Spooner was on 20th November charged with the murder of Cain Nkala after facts had come to light which exonerated Spooner, his sole remark was that that decision was solely within the discretion of the investigating officer.

He had no knowledge of why the 4th accused was not taken on indications as he was not involved in the indications.

He was questioned by counsel for the 3rd accused as to why he had initially denied that after his first statement had been recorded he had been instructed to make a further statement. His attention was drawn to an entry on the diary log by Assistant Inspector Tonde, entry 86, to the effect that he was to deal with the 4th accused in more detail in his statement. It was during the course of this questioning that the copy of the statement which

had been handed to the witness by the prosecution was in fact marked and had notes scribbled on it. The witness when asked by the defence for sight of the statement was visibly shaken and reluctant to surrender the statement and remarked without prompting that he believed the notes to have been made by the prosecutor for the purpose of highlighting certain areas to be canvassed in re-examination of the witness. The prosecutor when asked as to the availability of a clean copy indicated that there was none and that the prosecution was unaware of the existence of two statements and had been taken by surprise at the mention thereof.

The witness when asked if he had been given a copy of the statement for the purpose of refreshing his memory confirmed that to be so and that the copy given to him had been unmarked.

When the trial resumed the following day the state surprisingly indicated that they had on that morning located clean copies of the witness' statement.

The witness claimed ignorance of the person to whom the notations in paragraphs 4,9,10 and 13, on the statement which read 'to be prepared for cross-examination' were addressed.

It was highlighted and correctly so that the notations appear in the second statement wherever that statement bears amendments or additions to the initial statement prepared by the witness. The witness attributed the notations to the public prosecutor. Asked if he recalled that he had only raised the issue of the existence of the notes in protest to a request by the defence to have sight of the statement the witness simply said that he had not taken issue with the notes earlier as he had not had time to peruse the notes and neither had he had any interest in the notes. He said that he in addition found the notes difficult to read or understand. He was adamant that he had had no prior warning of what to expect in cross-examination.

The witness' response on this aspect is not convincing. The notations clearly refer to cross-examination and could not by any stretch of the imagination have been intended to deal with issues to be addressed in re-examination. The witness' reaction to the production of the statement was evidence of his having been aware of the irregularity in the statement. It is highly improbable that he only became aware of the notations and the import thereof when asked by the defence to surrender the copy of the statement. The very nature of the notations whether made by the

prosecution or any other person and the witness's clear discomfiture and reluctance to have the statement produced lends itself to no other conclusion than that the witness was coached. In other words the statement was not used solely for the purpose of refreshing memory.

The witness was cross-examined on the inclusion of the 3rd accused as a participant the actual perpetration of the offence. His response was that he had only come to know of the 3rd accused at the burial site and that he had, personally, had no communication with the 3rd accused. Although he had been involved in the investigations from 10 November 2001, he was unaware of the arrest of the 3rd accused in connexion with this case. From the briefing that he had received it was clear that no arrests had by then been made.

He was unaware of the reason for the arrest of the 1st and 3rd accused persons and could or would not say that these arrests were effected in anticipation of their being in the commission of the offence by the 5th accused.

He, as had other witnesses before him, admitted to the existence of false entries in the running diary and commented that the person making the entries made a lot of mistakes. One entry that deserves particular mention is that relating to the recovery of a pair of shoes belonging to the 6th accused, which shoes are recorded variously as having been recovered from different places and under different circumstances and which are at odds with the evidence elicited from various police officers.

The final witness in the state case was Detective Constable Mpofo.

His evidence was that at about 0730 hours on 15 November 2001 he left Bulawayo for Mbembesi in the company of other officers. At about 0800-0830 hours they left Mbembesi with the 4th accused. On the way to Nkulumane there had been no conversation between the accused and the officers. He denied that on the way to Nkulumane the police diverted from their route and went first to the house of the accused. He stated that the 44 kilometer journey to Mbembesi from Bulawayo took considerably less time than the return journey which took more than 3 hours as the vehicle developed mechanical problems.

He acted as a witness to the recording of a statement from the accused who was aware of the charge that he was facing he having been informed of the charges by D/I Hita and the investigating team. The charge as it appeared in the detained book was that of kidnapping.

He said that, after he was cautioned the accused was given a piece of plain paper on which he wrote his statement in the Ndebele language. Only he and D/S Ncube were present in the office with the accused who made the statement freely and voluntarily and without undue influence. Masuna was in another office and there were no war veterans present at the recording. Mr Tshuma, a legal practitioner, was at the station at the time but the accused had refused legal representation. He did not witness any injuries on the accused. The accused was not slapped several times to convince him that it was in his interests to make a statement.

He went so far as to state that the accused at one stage stood up in Ncube's office and admired pictures and certificates which were on the wall.

The statement, once complete, was thereafter sent to an interpreter at Tredgold Magistrates court where it was translated into English. The whole process took, he said about 5 to 7 minutes. In his estimation West Commonage magistrate's court was about half a kilometre from the police station, with the distance to Tredgold magistrates court being about 3-4 kilometres. It emerged that the witness was not confident as to the exact place at which the statement was interpreted and neither he nor D/S Ncube had sought to satisfy themselves as to the accuracy of the translation in other words no effort was made to ensure that the English translator of the statement represented what the accused actually said or wrote. No evidence was led to show that the statement was correctly interpreted. It has been held by the courts that failure by the prosecution to call such evidence means that what the person producing the statement says is hearsay and thus inadmissible (see Reid Rowland on *Criminal Law and Procedure in Zimbabwe* at pp 20-21G. The identity of the interpreter was not confirmed or ascertained.

The accused elected to give evidence.

The third accused, Army Zulu testified to his having been arrested at about 0400 hours on 9 November 2001 at his house in the Sizinda suburb of Bulawayo. The arrest was, he said, effected by about 8 police officers but he was only able to identify one of the officers by the name of Mpofu. He was, when arrested, not advised of the allegations against him.

Before being taken to Nkulumane police station he was driven to the low density suburb of Woodlands to the home of the Vice President of the MDC and from there to Brady barracks where one of the arresting details

alighted from the vehicle and went into the army camp.

At about 0700 hours he arrived at the police station where he was detained in the cells without being informed of the charges he was facing. He was later on that day taken to the offices of the Law and Order section where he was questioned whilst handcuffed by about 10 officers who formed a circle around him. He was asked to relate his life history and it had been alleged that he had gone to South Africa to train as a soldier. He was further questioned as to where the MDC kept its arms cache. He having responded negatively to the questions put to him he was assaulted for close to an hour until one of the officers suggested that he be left alone as there was no information forthcoming from him. He was then taken back to cells.

He was detained incommunicado in the cells from the 9th to the 14th November 2001. He says he was not afforded the opportunity to speak to his lawyers or any member of his family.

At about 1100 hours on 14 November 2001 he was taken to the Law and Order offices where he was made to sit on the floor. Present in the room were 2 officers, Ncube and Shumba. He was asked for his name and then told that he was to be charged with the murder of Cain Nkala. He was asked if he knew the person who had given to the 5th accused the pair of handcuffs which had been used in the murder of Cain Nkala. After he had denied knowledge of the matter a typed document which he was asked to sign was prepared.

He had requested that he be permitted access to a legal practitioner, a Mr Nicholas Mathonsi. The request was turned down. He had refused to sign the typed document and Ncube had stepped on him and kicked him. Soon thereafter another officer entered the room and indicated that they were late for court. He was then given the piece of paper and the Ndebele version and told that if he did not sign the document he would be killed. He had then proceeded to copy the contents of the document in his own hand, but had not copied the statement given to him to the letter. Shumba was responsible for the typing of the statement whilst Ncube did the talking.

The account of the 4th accused was that when detained along with the 4th accused and 3 others he identified himself to the police as Ronnie Moyo.

At the police station at Gweru he was advised that he would be informed of the reasons for his arrest by the Bulawayo police. An attempt to contact a legal practitioner on his cellular phone had resulted in the confiscation of the phone. It was generally accepted and uncontradicted

that at the time he was detained the Gweru police had no instructions to do so and neither was there at that stage in existence a reasonable suspicion that the 4th accused had committed any offence. It is also common cause that at the time he was placed on the Bulawayo bound vehicle he still did not have any explanation as to the reason for his detention. According to the accused he was bound by handcuffs and leg irons although this was denied by the officers who testified.

His evidence is that on the way to Bulawayo, his correct identity had come to light. He had immediately thereafter been subjected to a vicious assault which had commenced with his being hit with the butt of a firearm by a support unit detail who was in the vehicle with him and his being pushed violently from the back of the vehicle in which he was travelling. He had been subjected to a vicious assault by Matira, Ngwenya and others. His head had at one stage hit against a tyre of one of the vehicles. Matira had inflicted the most injury when he had taken running jumps landing on the accused genitals with his shoed feet whilst the accused was being held by the other officers. Matira had ordered Ngwenya to lay the accused on his back with his legs spread out.

He described how he had bled from the nose and ears and that at some point during the course of the assault he lost consciousness due to the pain he was experiencing. He stated so badly injured that he could barely walk. He recalled hearing Matira accuse him of taking Cain Nkala to Botswana. At Mbembesi his particulars were recorded but he was not told the reason for his detention. He was assaulted and whilst handcuffed and in leg irons he was chained to an iron object in a cell. He was stripped and left bare and exposed to mosquitoes. Later on that night he had received a visit from certain members of the Law and Order section who were accompanied by some other persons. He identified one of the persons as an Ian Sibanda, a former MDC security officer. These people had taken turns to assault him as they wanted him to reveal the location of MDC arms. They left him bleeding all over the floor from his nose and mouth.

At about daybreak on 13 November 2001, he was again visited by another group of people one of whom he recognised as Jabulani Sibanda, the chairman of the Bulawayo War Veterans Association. He was again assaulted and asked for information as to the identity of MDC agents within ZANU PF.

On the following day, 14 November 2001, the officer in charge of Mbembesi police station disregarding the instructions to deprive him of food and water ordered that he be fed and provided with water and that his cell be cleaned and implored him not to reveal that she had done so as this would jeopardise her position.

Later that morning two persons had visited him and conducted what he described as an amicable interview. He was asked if he knew anything about Cain Nkala. After these two had left he received a visit from two other men who put certain questions to him about Cain Nkala and MDC personnel who had links to ZANU PF. At no stage was mention made of a murder enquiry or that he was to be charged with the murder of Cain Nkala.

He alleged that when he entered Ncube's office on 15 November 2001 there were two elderly gentlemen in the room who assaulted him immediately he entered into the room.

He explained that he had signed the statement as he was hungry and in pain and also because D/Supt Ncube had knocked him on the head and poked him in the back. The police he stated were in a hurry and eager to leave for the courthouse.

The 5th accused gave the most detailed account of his treatment by the police from the time of his arrest on 12 November 2001 up until his court appearance on 15 November. He also narrated at length his encounter with members of the Central Intelligence organisation on 7 November 2001 as he was on his way from Killarney where he had left an MDC vehicle which was to be serviced.

The account he gives is of his having boarded a vehicle which stopped at a point where he was waiting for transport into town. He was taken aback by the fact that the occupants of this vehicle knew him by name. He had thereafter been abducted and was whilst blindfolded driven to an unknown house. There he was detained, threatened and assaulted. He was then informed that he was required to assist these persons who identified themselves as members of the Central Intelligence Organisation by adopting a story which would implicate the MDC and its members in the abduction of and murder of the late Cain Nkala whom they admitted to having killed. In this way they could weaken and discredit the MDC.

He told of how he was then told the details of the story that he was to tell and the names of the persons he was to implicate. He was asked to rehearse the story until he was word perfect. His resistance had been

broken down by the assaults and threats of harm to his kith and kin, in particular his parents. He had been convinced that these people meant business when they had shown that they had extensive knowledge of his background and his parents' whereabouts and movements.

From the house and under cover of darkness he had been driven to the burial site where he had again been tested on the version he was to give and where it was ascertained that he had grasped the directions to the site.

He was in such fear that he had not revealed to anyone the events of that day and he had not sought medical assistance for the wounds and injuries inflicted during the assault as he had been warned that there were state agents in every institution should he seek assistance. He did not reveal to anyone this ordeal until 2002 for the reason that he was in fear of the safety of his parents. He had been prompted to speak out to his lawyer in 2002 after he had seen his mother at prison for the first time since 7 November 2001 and had satisfied himself that his parents were unharmed.

He was, he stated arrested on the night of 12 November 2001 after he had embarked on a journey which had been arranged for him by the CIO. He described his interview with Hita which was designed to ensure that he abided by the CIO story and the threats and intimidation. He told of how on the same night he had been confronted by a certain CIO officer by the name of John and who had been one of his abductors who had reminded him to maintain the charade. He spoke of assaults and threats by members of the Bulawayo Law and Order Section and a harrowing journey back to Bulawayo during which he was subjected to assaults culminating in his revealing the correct identity of the 4th accused. This he had done after the Matira had pulled out a firearm and threatened to shoot him.

He stated that he initially denied all knowledge of the offence but that the breaking point came at Esigodini after he was driven to Ncema dam and received threats to the effect that if he failed to cooperate he would be fed to the crocodiles.

Whilst in the cells at Nkulumane he had confessed to his colleagues who had been none too pleased at his having caused their arrest.

He attributed the making of both the 'formal' and 'informal' indications and his statement to the use of duress. He was, he stated, briefly allowed access to his legal practitioners before being taken to court and filed his complaints of ill-treatment at the earliest possible opportunity.

He, in summary told the court how he was interrogated by the police for a period in excess of 24 hours. He testified to his having been taken for indications after he had managed to snatch only about an hour of sleep and upon return from indications the statement was recorded. He further stated that he was deprived of food and water whilst he was in police custody.

The 6th accused testified as to a raid conducted by Matira and his team at the house of his girlfriend in the early hours of the 13th November 2001. The police were, he stated, armed and behaved in a threatening and menacing manner. His girlfriend who was not fully dressed and his brother who had led the police to his girlfriend's house were assaulted. He himself was assaulted, kicked and punched by Matira, Ncube and others. He was taken to his house and had found that police officers had broken into his room and had conducted a search.

From there he was after a lengthy drive through the suburbs of Bulawayo during which he was assaulted before being taken to Nkulumane police station where he was again assaulted before being removed from the vehicle. As he was being assaulted he was told to implicate certain persons. He testified to further interrogation and assaults once in the police station and before he was taken on indications.

In the police cells he met the 5th accused who convinced him that the police were serious and meant business and that he should, in the circumstances tell them the story outlined in the warned and cautioned statement. He denied that he participated voluntarily in the indications.

In the afternoon of the same day a statement was recorded from him.

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 the 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 @16D-E.

In respect of the 3rd accused, Army Zulu, the State submits that the accused did not challenge the admissibility of his statement until the onset

of the trial when an amendment was made to his defence outline and there was what the state considers to have been a late incorporation of a letter to the senior Public Prosecutor, Bulawayo by Mr James, a legal practitioner in which it is said that the challenge to the statement is very short and is couched in general terms. The state is correct in this regard and those failures could indeed be considered as weighing against the accused but that on its own would not suffice in arriving at an adverse finding against the accused.

Firstly, the accused alleges that he was threatened by one Petros Shumba and his fellow officer, Ncube. Ncube as the defence has correctly observed was not called to testify. Shumba, in passing explained that Ncube was ill. This averment was not substantiated nor did the State make any effort to proffer some reason as to why it was unable to call Ncube as a witness. The fact, if it was at all true that he was unwell is neither here nor there in the absence of an attempt to address the question of his unavailability. 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, supra*, @ 234 H-I; *S v Donga* 1993 (2) ZLR 291 @ 296A.

The state having failed to call Ncube, his evidence could not be subjected to a test.

The defence again points at the failure of the state to call a Dr Mtupha whom the accused alleges examined him and treated him for injuries sustained as a result of the assaults he claims were perpetrated by the police. His assertion that he was examined by Dr Mtupha was not challenged. The defence has submitted that the state is mistaken as to the question of onus on this aspect, as evidenced by questions put to the accused in relation to the assaults as the authorities are clear that if an accused person alleges that he has been medically examined by a particular person, that person 'should be called by the prosecution'. *S v Hendricks & Anor* SCD 19/93 (A) referred to with approval in Reid-Rowland, *Criminal Procedure in Zimbabwe*, @ 20-17.

A disturbing feature which arises from the statement is that the allegations which were put to the accused were of contravening section 52(2) of the Law and Order Maintenance Act [*Chapter 11:07*] with no

mention being made of the allegations of murder. The defence, and here again I find myself compelled to agree, points out that the preamble to the warned and cautioned statement is a condensation of the State's version of the case against the accused person. *S v Kasikosa, supra* at 19C. The preamble having been recorded after the alleged confession by the 5th accused and after the exhumation of the body of the deceased it is strange that the preamble should relate to a contravention of a section of the Law and Order maintenance Act and kidnapping and totally omit mention of the murder more so that the accused is in the present proceedings facing a charge of murder. I would in the circumstances not hesitate to agree with the defence that the preamble in question is 'apparently contrary to the facts known to the police at the time the preamble was formulated and may have given 'rise to the question whether this may or may not have amounted to undue influence by lulling the (appellant) into a false belief that the State was accepting, as the correct version of the case against him, a less blameworthy account, than it eventually alleged against him, thereby improperly inducing him to make a statement. *S v Kasikosa* @19G-E.

Mr *Zhou* on behalf of the 3rd accused still relying on the *Kasikosa* case went on to submit that if in the formulation of the preamble to a warned and cautioned statement, a police officer puts to an accused facts which are contrary to those known to that officer to be the true position, thereby lulling an accused into a false belief that the State was accepting, as the correct version of the case against him a less blameworthy account of the crime, such a deception could amount to such undue influence as to justify the court in ruling the statement, thus obtained to be inadmissible and in the words of Lewis AJP at page 19G-I of the *Kasikosa* case:

"On the application of general principles, however, one may safely assume that if a deception of this type is practised on an accused person it could, in appropriate circumstances, amount to such undue influence as to justify the court in ruling the statement, thus obtained, to be inadmissible. As an example of the possibilities which suggest themselves, one could have a situation where a police officer, having met with no success in obtaining any admission of the more serious version, indicates to the suspect in some way that he is prepared to accept a lesser version, for the purposes of securing his admission that he was there at the scene of the crime and, thereafter, of reverting to the more serious version of the offence in the charge and the subsequent prosecution of the suspect. It seems to me, in those circumstances, that would be improper influence brought to bear upon an accused person which would render the statement inadmissible."

The foregoing remarks, it is contended, apply to the instant case in that when Shumba was asked under cross-examination as to who had given him the instruction to charge Army Zulu with contravening the section of the Law and Order (Maintenance) Act, his response was that he had been given the instruction by Matira whereas Matira had professed ignorance of the contents of or responsibility for the warned and cautioned statement of the 3rd accused and had referred all questions on that score to Shumba and the prosecutors.

The State made no attempt to controvert the foregoing but summarily dismissed the issue of the charge preferred in the preamble by saying that the preamble set out clearly the circumstances in such a way that the accused suffered no prejudice from a murder charge not having been specifically alleged in the preamble.

As emerges from the *Kasikosa* case the matter is not as simple as the state would seek to make it and given the quality of the evidence of the state witnesses it would not be fanciful to accord some weight to this submission by the defence.

In referring to the quality of the state evidence I refer firstly to the failure to advance some cogent reason for the arrest of the accused on the 9 November 2001. On that date the 5th accused had not been arrested and if one is to believe the police witnesses no reasonable suspicion had been formulated against the accused that he had committed the present offence. In matter of fact the police state that they only learnt of the demise of Cain Nkala on the evening of the 12 November 2001, some three days after the arrest of the 3rd accused. There was the suggestion by Masuna and Matira that the 3rd accused was in fact arrested in connexion with the Lupane murder. But as counsel for the accused pointed out they were misleading the court as:

- (i) entry 10 of the police diary log, Exhibit 35, state that Zulu and two other persons were arrested and were being questioned in connexion with 'the two cases'.
- (ii) no statement was ever recorded from the 3rd accused in connexion with the Lupane case
- (iii) the unchallenged evidence of the 3rd accused is that after his arrest, accused was questioned not in connexion with the Lupane case, but about undergoing military training in South

Africa.

There are numerous conflicting entries in the diary log as to the circumstances surrounding and place of arrest of the 3rd accused.

The evidence of the police is clearly unreliable if not palpably false and the evidence of the accused is to be preferred.

That this is the case is further highlighted by the fact that the statement itself has some fundamental inconsistencies.

Counsel for the 3rd accused observes accurately that according to the handwritten statement, which is in the Ndebele language, the accused whilst he admitted that he gave the 4th accused a pair of handcuffs states that he did not know the use to which the handcuffs were to be put. The typewritten Ndebele version on the other hand states that the accused was aware of what the 5th accused intended to do with the handcuffs. This is contrary to the English version wherein it is stated that he did not know what the handcuffs were to be used for.

These inconsistencies it was contended render worthless the statement as the need to ensure that the English version of an accused's statement is consistent with the statement in the vernacular language has been repeatedly stressed, *S v Ndlovu* 1981 ZLR 618.

A disturbing feature of the evidence of Shumba is that he actually admitted that words were added onto the typed Ndebele version words which do not appear on the handwritten version. He admitted that he added the words himself. The explanation that he gives for this is that, to use the witness' own words, he was elaborating that the accused was talking about the handcuffs which he gave to the 5th accused. He stated that he might have overlooked that he should have included that issue when the statement was originally recorded. He went on to say that he might have given the accused back the handwritten statement for him to include the words in the handwritten statement in order to make it consistent with the typed version.

Asked why he would have given the statement back to the accused if he was merely extracting the typed version from the handwritten version his answer was that his 'intention was to have him 'expanding'.

It goes without question that the conduct of Shumba in amending the statement was highly irregular and is deserving of the severest censure. Fitting words are to be found in the judgment in *S v Ndlovu* 1981 ZLR 618 @ 620D-G. where the learned judge stated:

"I cannot express myself too strongly in my condemnation of what has taken place in this case. On the face of the exhibit the police officers responsible for its preparation inserted a crucial sentence explaining the reason for the complainant's failure to resist. There is therefore very grave suspicion that the police officers appreciated that the actual words of the appellant may not have been sufficient to amount to a confession. And added words in order that the statement should be so read. If that suspicion is well founded their conduct is a disgraceful attempt to manufacture evidence in order to secure a conviction."

The foregoing remarks apply equally to this case.

As the defence suggested the conduct of the officer is such that given his evidence where he started off by saying that there was no handwritten version and that the accused signed only the typewritten version and his about turn when confronted with the handwritten statement that one should be chary of dismissing the accused's version that he was in fact handed a typewritten version which he was made to copy in his own handwriting.

If one still needed further persuasion of the impropriety of admitting the statement in evidence one would have further regard to the period over which the accused was detained without informing him of the charges being levelled against him.

The issue of the warrants of further detention also raises an eyebrow and more than a mere suspicion of fabrication. As pointed out by Advocate *Zhou* for the accused the signature on the warrant, Exhibit 38E is notably different from that of Supt Maketo on other documents and called for an explanation from Maketo. For some unknown reason there was a deafening silence as to the availability of or whereabouts of Maketo. Maketo was in my view a vital witness. He was not called to clarify the glaring anomalies in not only the warrant for further detention of the 3rd accused but all the warrants purportedly issued in respect of all the accused persons. The warrant for the 3rd accused besides bearing the wrong dates also reflects that the accused was facing a charge of murder when no such charge was ever preferred.

I have after having heard the evidence of the state witness' no hesitation in making the finding that contrary to the testimony of the police witnesses the accused was not afforded access to his legal representation after he had requested for a legal practitioner by name.

There is an abundance of authority in this jurisdiction for the proposition that where there is a flagrant and wilful denial of access to a legal practitioner this will warrant the exclusion of any extra-curial

statement or indication made prior to allowing access to a legal practitioner.

S v Woods 1993 (2) ZLR 258 (S) @ 263H-266B the court stressed that :

‘One simply cannot condone this blatant refusal of access by the police. It was conduct which brings the administration of justice into disrepute it warrants the exclusion as evidence of any extra-curial statement or indication made prior to the (accused persons)....being allowed proper communication with their lawyers. To hold otherwise would be, so it seems to me, prejudicial to the public interest in the integrity of the judicial system.

In *S V Slatter & Ors* 1984 (3) SA 798 (ZS) @ 801A-B the Supreme Court held that:’ It goes without saying that access to legal advisers for consultation before the proceedings are commenced is an integral part of the accused person’s right to the assistance of his advisers while the proceedings are being held. (T)his court’s predecessor emphasised the fundamental nature of this inherent right.’

The defence highlights a catena of cases in which the proceedings were held to be vitiated because there had been a denial of the accused’s right to legal assistance. See *S v Mkhize* 1978 (3) SA 1065 (T); *S v Seheri & Ors* 1964 (1) SA 29 (A); *Kumbusa & Ors v S* 1977 (1) SA 394 (N). These cases it is submitted further point out that the right is breached where an accused person has been ‘in any way prevented from having legal assistance’, even though there is no allegation that he wished to be legally represented.

It is the contention of the defence that the incarceration of the accused without notifying his relatives and legal practitioners as to his whereabouts alone would be a violation of the right, as if that were permitted, then a citizen could simply disappear for a day or several days, and no one would know of his whereabouts except the police who had him in their custody. The prisoner, if he has to remain in custody, is equally entitled, through his relatives or friends, to gather up evidence that will prove him innocent, as the police are entitled to gather up evidence that will prove him guilty. The lawyer is an officer of the court and it is the function of the courts to administer justice according to the law. To prevent an officer of the court from conferring with the prisoner which is fundamental to our system for the administration of justice. *Regina v O’Connor* (1964) 48 DLR 110 @ 115 cited with approval in *S v Slatter and Ors* and *S v Woods and Ors, supra*.

The violation of this fundamental right clearly vitiates the process of recording of the statement.

An additional and even more compelling feature of this case was the failure to have the statements confirmed. The attempt by Matira to shift the blame onto the prosecution was not convincing. To accept that the prosecution merely forgot to have the statements confirming and that the police themselves failed to make a follow up on the statements and the issue of confirmation in a case of this magnitude defies reason and such an explanation can only appeal to the most gullible of persons. I say so against the background of the undisputed evidence that complaints of ill-treatment by the police and the use of duress were made at a very early stage of the proceedings.

The contradictory entries in the police diary log did not help the state case, more so that the state witnesses, in particular Masuna and Matira compounded the state of confusion by contradicting the contents of the diary log. The defence cannot in my view be faulted in its submission that the importance of police diary log entries in assessing the credibility of police witnesses where the admissibility of statements is being challenged has been underscored by the courts:

“While accepting that the Investigation diary was ‘inadequate and possibly inaccurate’, the learned judge a quo seemed to ignore that very important factor in assessing the credibility of the police witnesses. The learned trial judge’s remarks on the inaccuracy of the Investigation diary were a correct expression of the inefficient manner in which the record of investigations relating to the appellants was kept by the police who were giving evidence on what happened during the investigations These general remarks are germane to the making of a finding on voluntaries. The doubts the learned judge entertained plus the allegations made by the appellants seem to lead me to one conclusion, that there is a possibility that the police were not being honest about the events and happenings during those long days when the accused were in their custody. In the light of the learned judge’s observations the contradictions made by the appellants pale into insignificance when compared with the inaccuracies in the evidence of the police, in their failure to keep a complete and accurate record of the dates of the arrest, the detention and the interrogations of the appellants in the Investigation diary.” (*S v Dhliwayo & Anor* 1985 (2) ZLR 101 (SC) @ 118D-E).

In the present case, and this observation applies to entries affecting all the accused who have challenged their statements, the state of the police diary is such that one cannot satisfactorily attribute the contradictions and duplication of the entries to mere oversight or inefficiency and I would go as far as to say that it appears more to be an

appalling work of fiction and a dismal failure to coordinate the compilation thereof. I am convinced that that is the more probable explanation by the manner in which the police witnesses testified and the extent to which they spewed forth untruths.

Turning to the 4th accused, the state contends that it led sufficient and cogent evidence to rebut the allegations of assault and undue influence made by this accused. It is submitted that the alleged assaults were not only unbelievable but improbable. According to the state the state witnesses who were involved with the accused in their evidence gave the same broad version of events and corroborated each other on essential details. There was a concession to the existence of minor imperfections in the evidence of these witnesses but it was suggested that overall their evidence had a ring of consistency and truth. Issue is taken with the failure to mention in Exhibit 25, the letter of complaint emanating from the legal practitioners, D/Supt Ncube as one of the perpetrators of assault or undue influence on the accused. The reasons given by the accused for complying with D/Supt Ncube's directives are unconvincing and it could not possibly be true that the accused was denied access to a legal practitioner as the Superintendent had asked him if he required the services of a legal practitioner and further to that a legal practitioner, Mr Tshuma had been to the police station to ask for the 5th accused and had made no mention of the 4th accused. In addition the accused had under cross-examination stated that he had only asked for a legal practitioner after the statement in this case had been recorded and when a second statement in connection with the Lupane matter was about to be recorded.

It is highlighted that the accused was given to exaggeration and made up his story as the trial progressed, as he claimed firstly that at the initial remand the presiding magistrate observed that he was injured whereas this is not borne out by the record of the initial remand, and secondly his allegation that, the police who escorted him from Mbembesi police station stole his property including writing pads and parker pens when they passed through his house. It is according to the state hardly believable that police officers engaged in such a serious investigation would steal items such as these from a suspect.

It was further submitted that the accused was incoherent and inconsistent when questioned about the statement, Exhibit 39, which relates to the identification of the vehicle allegedly used in the abduction of Cain

Nkala.

The state considers the content and extent of detail in the statement as being indicative of the voluntariness with which the statement was made.

The defence in its submissions goes much further than the State, in that the argument presented is not limited solely to considerations of credibility and encompasses the circumstances surrounding the arrest and incarceration of the accused pending his initial court appearance.

First and foremost the court's attention is drawn to section 13(3) of the Constitution of Zimbabwe which makes it mandatory that a person who is arrested or detained shall be informed as soon as is reasonably practicable the reasons for his arrest and detention and the entitlement of an arrestee to be afforded an opportunity at his own expense without delay to a legal practitioner. The section does not confer upon the police or any other persons the authority to arrest a person without reasonable suspicion and is designed to curb the arbitrary use of the powers of arrest and detention. It is the contention of the defence that a person who is detained without being informed of the reasons behind his arrest or his right to legal counsel is bound to be vulnerable to suggestions that he may be offered freedom in exchange for 'cooperation' and that the law recognises that the power to detain an innocent individual arbitrarily is an act of itself of profound undue influence. Reliance is placed upon *S v Woods & Ors* 1993 (2) ZLR 258 (S) in which case the Supreme Court took upon itself the task of outlining that the courts will not brook such conduct where at the end of an infringement guaranteed under the Constitution coupled with a submission by an accused that he suffered undue influence, the discretionary power vested in the court will weigh heavily in favour of the accused.

I did not hear the state to make any submissions to the contrary and subscribe to the foregoing. The uncontroverted facts in this case are that there were committed by the police conspicuous breaches and, from the time of the arrest, flagrant violations of the fundamental rights of the accused. From the time of his detention on the evening of 11 November 2001 and up until he was conveyed to Bulawayo the evidence of the state is that the accused was not advised of the allegations against him. The defence is also correct in its observation that evidence from the accused to the effect that his cellular phone of the accused was confiscated by the police at Gweru after he attempted to telephone a legal practitioner and

that he was advised that he could not contact a legal practitioner pending the arrival of the Bulawayo police on the morrow was largely uncontradicted by the police witnesses.

Judging from the evidence of Matira and his subordinates and the clearly unsatisfactory explanation of the reason for the choice of Mbembesi police station as the place at which the accused was to be detained, the conflict in Matira's and Ngwenya's evidence as to Matira's instructions and what was to be done with or to the accused upon arrival at Mbembesi, and following upon this the evidence of virtually all the police officers which is to the effect that from the time of his detention at Mbembesi there was no further communication with the accused until the morning that he was transported from Mbembesi to Nkulumane police station. I have no hesitation concluding that the police officers who testified were given to falsehood and would find myself in total disagreement with the state in its submissions that whatever discrepancies arose in the evidence of the witnesses were minor and thus of no consequence. The inconsistencies are in fact major and go to the heart of the witnesses' credibility and reveal the lie. The most probable explanation for the lie is that the accused was most likely telling the truth when he indicated that he was during the period of his detention being subjected to interrogation and duress to 'soften' him up. It is highly improbable that the accused was detained for such a prolonged period at Mbembesi without his having been interviewed. The officers could only have denied visiting the accused at Mbembesi for fear of their being drawn to reveal the details of their visit and, if the visits were above board with no untoward conduct on their part, there would have been none to conceal the fact of the visits. The evidence of the accused was rendered credible by the fact that despite the treatment meted out to him by certain police officers he was willing to give credit to those who had rendered him assistance such as the officer in charge of Mbembesi, Mhlope. Had she not exhibited some kindness and fairness in her dealings with him there is no reason why he should have alluded to that fact

The officers who conveyed the accused from Mbembesi deny that a search was conducted at the home of the accused before they took the accused to Nkulumane police station and yet we have evidence from a witness that the journey from Mbembesi to Bulawayo took in excess of 3 hours whereas the outgoing journey had taken in the region of 30 minutes. Although one of the witnesses sought to explain that there was a

mechanical problem on the return journey the tenor of the evidence as a whole supported the diversion to his home as testified to by the accused.

The likelihood of the accused who had been hitherto ignorant of the charges against him having without ado succumbed and confessed to his role in the offence within minutes of his having been advised by the recording detail for the first time the charges against him is highly questionable.

The evidence for the state speaks for itself and is of such poor quality that one cannot but avoid the conclusion that the accused was deliberately detained at Mbembesi for the purpose of rendering him inaccessible to his family, friends or for that matter any legal practitioner who might have sought to establish his whereabouts.

It is, in my view, hardly likely that the accused should have made a voluntary confession at the time he is alleged to have done and that shortly thereafter when he had access to his legal practitioners that he would have sought to resile from the statement a short while later as is evidenced by the letter of complaint, Exhibit 35.

Another aspect which remains unexplained by the police witnesses is the failure to include the 4th accused in the party which proceeded on indications. None of the state witnesses was willing to provide the court with a reason for the omission, the general response having been to divest oneself of responsibility for the conduct of indications. The accused's case on the other hand was that he was not taken for indications as he had been so badly assaulted that his injuries and the effects thereof would have been exposed. Matira's evidence was to the effect that because the indications were televised nationwide it would have been prejudicial for the accused to be taken on indications does not hold water as those were the circumstances in which the indications of the other 5th and 6th accused were conducted.

The accused gave a detailed account of his ordeal at the hands of the police and I am once again constrained to concur with the defence that the style of cross-examination adopted by the State was not in the form of a challenge but was such that what was merely sought was confirmation and elaboration from the accused as to his evidence.

The evidence of two State witnesses to the effect that they had been assaulted ,threatened and intimidated by the police accompanied by denial

of access to legal representation was again raised.

Issue was taken with the failure by the state to produce the notes arising from the interrogations and the absence from the police diary log of any reference to the whereabouts of the accused during the period of his detention at Mbembesi. *S v Mutasa* 1976 (1) PH H 24 (R) was cited as authority for the proposition that the failure to produce notes after police interviews is highly suggestive that undue influence was applied during interrogation.

It is common cause that the assaults were reported to the courts and that despite the complaint there was no follow up on the complaints. The accused was despite the complaints not subjected to medical examination. As with the other accused persons his statement was also not confirmed.

Whilst I would not describe the accused as having been a particularly compelling witness and I find some of the criticism levelled against his evidence by the State to be warranted, the evidence of the State witnesses is in itself far from reliable and so tainted that the shortcomings thereof far outweigh those in the evidence of the accused and render unsafe the admission of the statement of the accused in evidence.

The State makes much of the late stage at which the 5th accused sought to raise the issue of the involvement of the Central Intelligence Organisation in his arrest and their input in the statement which he gave to the police. The CIO are, the State pointed out, not mentioned in Exhibit 25, the letter of complaint addressed to the State.

The story of CIO inducement is according to the state unbelievable as firstly the date on which they allegedly abducted the accused was given as being around 7 November in cross-examination of the state witnesses. The accused in his evidence states that he was accosted by and abducted by the CIO details on 6 November 2001. This uncertainty and the failure to mention the role of the CIO from the onset should, it was submitted, be held against the accused as should be the fact that he failed to seek medical attention for the injuries he said he sustained at the hands of the CIO or inform his parents or seniors within the MDC party of the incident. He was, the State argued, not to be believed for the further reason that after his arrest and up until Esigodini he did not relate to the police the story allegedly given to him by the CIO operatives. His statement that he was promised that if he went along with their plan he would be assisted with education in countries such as Malaysia or China was, it was submitted, inconsistent with the instruction

that he should proceed to Harare and that once he was in police custody he was to relate the story implicating the MDC in the abduction of Cain Nkala. The court was asked to take into account police evidence to the effect that the accused was cooperative throughout although he kept telling them different stories.

The State contends that the making of the 'informal' indications, his subsequent confirmation of the confession to Matira and the detail in the statement all serve as ample proof that the statement and indications were made freely and voluntarily and without undue influence.' Another imported feature is the evidence of the statement itself. The actual statement itself may often be the most important evidence in determining whether or not that statement is made voluntarily. A long rambling statement which goes into great detail many of which details are proved true by independent evidence, is much more likely to be made voluntarily than involuntarily. A man whose mind has been overcome by compulsion is unlikely to go into such detail'. per BEADLE CJ in *Joshua Werekwete vs The Queen* AD 115/66.

The allegations of duress levelled against the late D/C/I Makeleni were, it is said, subdued with the major fear having arisen from the alleged threats by the CIO operatives. In regard to the indications it is submitted that no allegations of undue influence are made against the officers who accompanied the accused on indications. It is the state's case that in the video recording of the indications the accused does not exhibit any signs of assault.

The State submitted that account should be had of the fact that the accused did not allege undue influence by the police in the recording of Exhibit 39, the statement recorded from him when he was requested to identify the vehicle allegedly used in the abduction .

The defence on the other hand addressed the discrepancy between the 'facts' contained in the accused's confession and the facts which were in the possession of the state agent's when the investigation was launched and concludes in that an examination of these facts lends itself very strongly to the conclusion that the confession is untrue. Specific reference is made to the original complaint lodged with the police soon after the kidnapping of Cain Nkala and the description of events and the weapons borne by the criminals which is at odds with what the 5th accused, in his statement, alleges to have occurred. The defence further comments that

entry 13 of the diary log, Exhibit 35, where Deputy commissioner Mpofo instructed the investigation team to investigate all murders going back two years where firearms were used and to look at the Martin Olds and Patrick Nabanyama dockets is evidence of the fact that the police took the facts of the original complaint seriously.

The failure by the police to conduct any investigations which might have corroborated, or alternatively proved unreliable the facts of the complaint, it is argued, is suspicious and indicative of a failure to carry out simple standard police procedure and point to the probability that it was deliberate and designed to ensure that no evidence came to light that might exonerate the accused.

Issue is taken with what is described by a failure the police to present any real evidence from eye witnesses and the like, which could throw light on the question of who the perpetrators are, although there was an abundance of such witnesses, for example the youths who were interviewed and who saw the alleged perpetrators prior to the kidnapping and others who could have identified the men lurking in the neighbourhood of the Nkala residence prior to the crime.

Concern is expressed at the lack of detail in the diary log, in that where suspects were picked up and released State witnesses such as Masuna and Matira told the court that they were cleared, but nothing appears in the diary log and what evidence was found to cause them to be cleared.

It is submitted that there can be no question that the Gweru diary log entry, Exhibit '40', was manufactured *ex post facto*, as the contents differ completely from the evidence given by Hita and Chibharo and the accused himself as to what happened at his interview and far more importantly, it contains information that was not supposed to be known until some 13 hours or so after the document had been prepared. This court has been further urged to have regard to the fact that the document was not produced through its author, Chibharo, nor the person who gave instructions for its compilation, Hita, but through Matira thus depriving the defence of the opportunity to question the Gweru policemen on the discrepancies between their evidence and the contents of the diary.

Upon a reading of the Gweru diary log and consideration being had to the evidence of the state witnesses it is exceedingly difficult for me to dismiss as frivolous or unfounded the submissions of the defence or

unreasonable the inference which the defence would have this court draw that the document, Exhibit '40' is not genuine.

I further find that the remarks by the defence that the diary log, Exhibit '35' is a dog's breakfast and in such a state that it is hard to accept that it would have passed the scrutiny of the stature of the Director of Public Prosecutions in the state that it was presented at the trial are not without substance.

The defence described the story given by the accused as to his having been picked up by members of the CIO and forced into complicity as a strange one and that such story might be difficult to accept if it did not receive strong corroboration from no less than the police themselves.

Reliance for the foregoing is placed on, firstly, the affidavit of D/Supt Maketo which showed that he knew in advance of the accused's journey to Harare on 11 November 2001 and his intention to make a stop-over at Gweru where he intended to attend a football match. It is suggested that Maketo could only have known of the journey if he was in contact with the accused.

The evidence of Hita is described as extraordinary in that the word to arrest the accused was sent out in connexion with the Lupane murder whereas when he was awoken at about 0100 hours, Hita guessed that the accused had been arrested in connection with the kidnapping of Cain Nkala and proceeded to warn and caution him accordingly.

The admission by Hita that after the accused gave him his initial story in response to the caution, Hita proceeded to 'remind' the accused that he was lying because his movements had been 'monitored' throughout the course of that day and that after the accused had related a different version to him he pronounced himself satisfied and retired to bed without contacting or warning anyone that the accused had informed him of the 1st and 3rd accused's intention to skip bail. As it turned out the evidence shows that there was no bail hearing scheduled for the 1st and 3rd accused at that stage. I would agree with the defence, that this goes against all logic and common sense in that these questions had little bearing on the kidnapping case. The nature of the questions put is inconsistent with Hita's evidence that up until he was informed of the arrest of the accused and even when he interviewed the accused he was unaware of the circumstances surrounding the arrest or the details of the allegations against the accused. I would in fact go so far as

to, as the defence has submitted, deduce from his conduct and the nature of the questions put that he had some foreknowledge of the matter.

Further concern arises as the evidence of Hita is to the effect that he did not inform the Bulawayo police of the arrest of the accused in the early hours of that morning and that he only did so after daybreak when he reported for duty. Hita also testified to the effect that he did not issue instructions to anyone to notify Bulawayo of the events that had occurred whereas Matira in his affidavit statement stated categorically that he was informed of the arrest of the 5th accused at about 0200 hours on the 12 November 2001. The mystery of who it is that contacted Bulawayo as stated by Matira was left unresolved.

Matira, himself, conceded that the conduct of Hita in interviewing him in the circumstances he did was highly irregular. Given the glaring inconsistencies and the unusual conduct described above would one be wrong to say that this unusual and inexplicable conduct of the witness can only destroy the witnesses credibility and weakens the state's case and does indeed point at the involvement of some other external force? I believe not.

A peculiar feature of the case against the 5th accused and one which is impossible to ignore is that is that from the time of the interview with Hita up until Esigodini the accused gave numerous and varied statements none of which came anywhere near the final version which he gave at and after Esigodini. According to the evidence he initially gave an account of his journey on the particular day and was cooperative with the police. The following morning and to the Bulawayo police he admitted to his having some knowledge about the abduction of Cain Nkala with no personal involvement on his part. En route to Bulawayo we have evidence of a sudden decision by the 5th accused to divulge the identity of the 4th accused. From there the 4th accused is driven past Bulawayo and to Esigodini where shortly after arrival and when he is advised that he is to be detained overnight he undergoes what the defence has aptly described as a Damascene conversion. I would point out at this stage that the reason given for taking the accused to Esigodini, is itself highly unsatisfactory and suspect.

The explanation tendered for the change of heart by the accused is that he was reluctant to be detained at Esigodini. He then volunteers to take the police to the spot where the body of Cain Nkala is buried and informal

indications are conducted at which none of the senior officers involved in the investigation and in attendance at the scene take the trouble to personally verify and ascertain for themselves the exact burial spot but left the accused to go to the grave in the company of Masuna and Ndlovu. Thereafter the accused leads the police through the high density suburbs of Bulawayo in search of his accomplices. The witnesses went into overkill and were far from convincing in their attempts to persuade the court on the extent to which the accused was relaxed and cooperative. They in fact made it seem as if the accused was quite carefree and unconcerned about his fate to the extent of engaging in 'chit-chat'.

The incongruities in the confession were brought to the fore and one cannot but fail to make the observation that there are varying versions within the various confessions on matters such as the identity of the actual murderers and the nature of the instrument used to strangle the deceased. The suggestion by the defence is that the overwhelming probabilities are, not that the various accused forgot something that must have been etched indelibly into their brain, but they have confused the story that they were told and the police details who recorded the statements, not being central players in the conspiracy, were too poorly briefed to pick up discrepancies such as those mentioned, and obviously did not compare notes afterwards, perhaps owing to the importune visit by the legal practitioners. The State did not seek to enlighten the court as to any possible explanation for the major and substantial variations in the statements. Matira studiously avoided comment on this aspect and distanced himself from the statements, claiming a lack of knowledge of the contents. His evasiveness I found disturbing as it is inconceivable that given his status in the conduct of the investigation he was ignorant of the content of such crucial evidence as the alleged confessions. His denial only lent ammunition to the allegations of the accused.

The State witnesses went to great lengths to show themselves as having handled the matter according to the strict letter of the law and rules of practice with the accused being cautioned at every turn.

Having heard and assessed the state evidence and after weighing it up against that of the accused I can best describe the State case as having an air of surrealism about it which renders more credible the evidence of the accused whom I found, for one of such youthfulness to be consistent,

composed and possessed of a quiet air of dignity that the quality of his delivery and testimony far outstripped the more seasoned and largely mendacious officers who testified on behalf of the State and who failed dismally to concoct some form of intelligible and cohesive story.

There is, in my view a hollow ring to the police evidence and an attempt to escape accountability through oversimplification.

Despite evidence to the effect that notes were recorded of the interrogation of the accused, which spanned a period of in excess of 24 hours none of the notes were available for the reason that they had been misplaced. The diary log omits mention of the trip to Esigodini.

Reference was made to various entries which are indicative of the entries having been made in advance and in anticipation of what the accused was going to say. Some of the specific examples which were cited are entries number 26 to 31 in the diary log which show events happening on the 11 November 2001, which is common cause did not happen on that date but at a later date. It is submitted that most bizarre of all is the fact that some of the 11 November entries contained information, consistent with the state case that was absent from the entries made against the correct date, such as the recovery of certain exhibits, more specifically the shoelaces and the shovel handle.

The evidence speaks for itself. There can be no doubt in my mind that the police witnesses were, to put it mildly, not candid with the court and that the evidence of these witnesses is suspect. The question then arises as to why they indulged in untruths and evasion. The answer can only lie in that they did in fact treat the accused in a manner that was not above board and that there must be substance to the allegations levelled against the police by the accused. The fact that a complaint was made to the court by the legal practitioner of the accused at a very early stage of the proceedings and that there is evidence, which has not been rebutted, that the first time the accused saw of a legal practitioner was shortly before his court appearance, and that there was then insufficient time to brief him fully lends credence to his story.

As to the accessibility of a legal practitioner to the accused, the very fact that there was an admission by one or two State witnesses that there were lawyers all over the station in search of their clients makes one wonder why the accused did not get to see a legal practitioner earlier. The general picture that emerges is that the police were not keen to allow the accused

access to legal practitioners before they had the confessions in place and this remark I believe applies to all 4 accused persons. Having heard Matira and his colleagues testify this seems to me to be the most likely scenario.

His story of the existence or presence of a third force cannot be discarded as a figment of his imagination as the state evidence tends to show that the police were not solely responsible for the conduct of the investigations. The reluctance or desire to deflect questions on or to conceal the extent of the participation of other agencies by the witnesses was obvious and did little to enhance the state case.

Once having determined that the evidence of the accused is in all probability much more reliable than that of the state witnesses and taking into account that in an inquiry of this nature one must take into account the cumulative effect of an accused's experience and consider whether this might have resulted in an influence that was undue:

'It seems to me that where it is proved that the circumstances of torture complained of prevailed - that is, assaults, water torture' starvation and prolonged detention - it would be wrong to isolate each incident in making a finding on the admissibility or otherwise of the statements, especially when the evidence as to the time when the appellants were arrested and detained is not satisfactory. In my view the cumulative effect of the various allegations of torture must be considered together in order to decide whether in the circumstances then prevailing they did or did not induce the appellants to make confessions.

It is against the same background that I must consider the evidence pertaining to the propriety of admitting the video film and written record of indications. The circumstances surrounding the making of the indications are so intricately entwined with those under which the warned and cautioned statement was made and cannot be divorced with the result that the reasons for rejecting the indications and accompanying statements apply similarly.

The State made the bald submission that the accused was free to make indications, exhibited no signs of assault and that his movements show an eagerness to make indications. This with respect, is not an entirely correct observation. And I hesitate to label the demeanour of the accused as eager.

The State in its submissions appears to overlook firstly that the

accused did not allege that he on the 13th November made indications as a result of any undue influence having been exerted by the officers who accompanied him on these 'formal' indications. He had, he stated already been subjected to coercion and threats from the time of his interview with Hita, from Gweru to Esigodini against the background of the persons he described as CIO agents. There is nothing to suggest that the situation had improved the following day.

Another consideration, these remarks are also pertinent to the indications made by the 6th accused, is the manner in which the indications, which were described as a politically contrived media circus, were conducted. The detail responsible for the recording of the film made the startling admission that it was entirely within his discretion as to what portion of the proceedings were to be filmed. He did not travel in the same vehicle with the accused and failed to capture on film the journey from the police station to the burial site. He further testified to his having arrived at the burial site after the 5th accused had started making his indications. The same witness also conceded to having at some time forgotten to activate the time switch on the video camera. It is therefore not possible to formulate a clear and complete picture of the proceedings as the film lacks continuity. Part of the proceedings are constituted of question and answer sessions and directions from the accompanying details.

It is relevant to note that the 6th accused was taken to the burial site by officers who had been to the site the previous evening and knew the route to and the whereabouts of the burial site.

The State submitted in respect of the 6th accused that the police evidence that the accused was not assaulted was consistent and should be accepted at face value. This court was urged to disbelieve him in that after his encounter with accused 5 in the cells he volunteered information to the police and because his reasons for making indications were hazy. It is submitted that his reasons for making a statement were brief and 'unbelievable'. The additional information that he was under added pressure as a result of what the 5th accused had told him in the police cells renders him less credible.

The evidence of Maphosa is said to be corroborated by that of Ndlovu in that it is the accused who voluntarily directed the police to the burial site. The body language of the accused is said to be suggestive of one who had prior knowledge of events.

The totality of the evidence would suggest that the team which arrested the 6th accused in the early hours of the 13 November 2001 was in an uncompromising mood. I was far from impressed with the evidence of the officers that when they approached the home of the girlfriend of the 6th accused in order to effect his arrest they acted in a polite and a civil manner. The probabilities support the version of the accused as to the events preceding his arrest. The evidence of the accused was graphic and cannot be attributed to a recent creation as the complaint registered in the letter is similar in substance. As with the other accused the complaint was not, it seems, investigated and disproved. Matira testified to the fact that the statements of all the accused were handed over to the State prosecutor for confirmation but that this did not happen.

There was no evidence that rebutted the defence's submission that close scrutiny of the video of indications clearly showed that the clothing, that is the shirt, worn by accused 6 was torn, and that there was soiling on the front of his shirt which suggests a splattering of blood.

Reference was made to the chronology of events on the 15th November 2001 when it is said that an attempt was made to force through the remand of the 6th accused without any notification to the lawyers for any of the six accused but that fortunately representation had been available. It was submitted that the court record referred to during the course of the hearing clearly showed that the State was advised of the various assaults and complete disregard of legal representation timeously. The complete silence of the State to address and respond to the issues raised in Exhibit 25 was alluded to.

The defence emphasised that the threats of reprisals against his family continued whilst he was incarcerated in Khami prison, despite the court order obtained for his release, with the attendance by the police in February 2002 to bolster their threats.

I am of the opinion that the state witnesses made such a poor showing and the evidence adduced is indicative of a gross lack of good faith on their part. It would in the circumstances be foolhardy to conclude that on the facts presented. The State has discharged the *onus* on it. It is in other words not safe to accept the State evidence and to find that the accused's version can be rejected beyond reasonable doubt as false. *S v Munyai* 1986 (4) SA 713; *S v Rebecca Masawi & Anor* HH 111/94.

In conclusion I would comment that overall the evidence of the State witnesses who are police officers is fraught with conflict and inconsistencies. The witnesses conducted themselves in a shameless fashion and displayed utter contempt for the due administration of justice to the extent that they were prepared to indulge in what can only be described as works of fiction as is especially illustrated by the state of the investigation diary. The fears expressed by the defence, albeit at times exaggerated, were not without substance as the witnesses showed signs of having colluded. In fact it was at times beyond doubt that the evidence adduced from a particular witness was discussed outside the courtroom.

The magnitude of their complicity was such as put paid to this court attaching any weight to the truth or accuracy of their statements. The ultimate result was that when considered alongside the evidence adduced by the defence this court had little choice but to find that the allegations by the accused of threats and assaults were likely to be true.

In the result the warned and cautioned statements, indications statements and video recording sought to be produced by the State against each of the accused are ruled to be inadmissible.