

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

7 November 2024

DATE

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SIGNATURE

CASE NUMBER: SS33/2022

In the matter between:

THE STATE

and

NTHAI AZWIHANGWISI SETH

Accused

Coram: DOSIO J

Heard: 7 November 2024

Delivered: 7 November 2024

Summary: Interlocutory – Allowing a witness who is abroad to testify via video link. Objection raised by defence. Section 158(2) of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977') distinguished from s2(1) of the International Co-operation in Criminal Matters Act, 1996. Order – the witness from overseas can testify via video link in terms of section 158(2) of Act 51 of 1977.

ORDER

The application in terms of s158(2) of Act 51 of 1977 is granted.

JUDGMENT

DOSIO J:

Introduction

- [1] This is an interlocutory application, wherein the State requests that the witness Mario Marcenaro, an Italian citizen, who currently resides outside the Republic of South Africa, present his evidence by way of electronic media and or video link.
- [2] The State has argued that this application is just and in the interest of justice for the following reasons:
- (a) It shall prevent unreasonable delays, in that a State witness is willing and readily available to give evidence despite the passage of time between the date of the incident and the current proceedings.
 - (b) It shall save costs to the State in that the witness will not need to be physically in attendance at Court and thus will dispense with the State having to incur the costs of paying for travel arrangements for the witness from Italy.
 - (c) It shall be convenient for all parties involved taking into account the history of this matter.
 - (d) It will prevent the likelihood that prejudice or harm might result to any person if he testifies or is physical present at such proceedings.
 - (e) The evidence of this witness is crucial as the case for the State stemmed from his evidence.
- [3] The defence has opposed the application citing the following reasons:
- (a) The state has not provided any reasons for the absence of the witness in South Africa or why the witness is not able to be present at Court to testify, despite the witness having been present in the Republic at the time he presumably made a statement in the case.
 - (b) The witness has offices in Johannesburg and has a residential address in the city.

- (c) The investigating officer tendered evidence that for a period of at least 8 months he was not able to secure the witness until he eventually met the witness at the office of his attorneys where a statement was obtained. The reason why a meeting was arranged at the offices of his attorney is because this witness intimated that he was anxious to meet alone with the investigating officer.
- (e) the witness was never subpoenaed in the case.
- (f) the accused has the right to expect a witness to be present in Court to adduce and challenge his evidence, such right being embodied in s35(3)(e) and (i) of the Constitution. By allowing the State to lead evidence by way of a video link the accused would not be able to adduce or challenge evidence, thereby affecting his right to a fair trial.
- (g) There is no bona fide application before the Court which contains any of the requirements as set out in s158(3) of Act 51 of 1977.
- (h) The State has failed to deal with the nature of the evidence sought to be tendered.
- (i) The state has not provided evidence that the witness consents that he may give evidence by means of remote media which is a prerequisite in terms of s158(2)(a) of Act 51 of 1977.
- (j) The state has not provided the Court with an indication as to the preferred language of the witness given that he is an Italian citizen and can only testify from Italy.
- (k) The state has failed to provide the necessary evidence that facilities are readily available, or that the evidence by means of CCTV would prevent unreasonable delays, save costs, be convenient, be in the interests of the security of the state or public safety, or that it would prevent the likelihood of harm resulting to this witness should he testify in open court.
- (l) that the criminal proceedings against the accused herein do not relate to any charge contained in s153(3) of Act 51 of 1977, furthermore, the witness is not a minor and thus s153(5) of Act 51 of 1977 do not apply.
- (m) the state has not provided evidence to show that the witness's testimony is necessary in the interests of justice and that the attendance of such a person cannot be obtained without undue delay, expense and/or inconvenience as is required in section 2(1) of the International Cooperation in Criminal Matters Act, 75 of 1996 ('Act 75 of 1996')
- (n) Section 158 makes it very clear that it was not meant to apply to witnesses based abroad. If the legislature intended the section to apply it would have made the relevant provision for it because as there are other sections in Act 51 of 1977 that specifically refer to instances abroad.
- (o) unless otherwise provided for under legislation or common law, the powers of the National Director of Public Prosecutors and those of the prosecutors generally, 'extend

only to the borders of the country [South Africa]'. Reference was made to the case of *Minister of Defence v Potsane and another, Legal Soldier (Pty) Ltd and others v Minister of Defence and others* ('*Minister of Defence v Potsane*').¹ As a result, a South African prosecutor is generally not empowered to conduct prosecutorial activities outside South Africa.

- [4] The defence referred to the case of *Goldberg & Another v Boshoff N.O. & Another*² where the court held that the provisions of s158(2) to (5) of Act 51 of 1977 'do not permit a procedure for the taking of evidence across borders by electronic means at a local criminal trial.'³

Evaluation

- [5] Section 158 (2)(a) of Act 51 of 1977 reads as follows:
'A court may, subject to section 153, on its own initiative or an application by the public prosecutor, order that a witness, irrespective of whether the witness is in or outside the Republic, or an accused, if the witness or accused consents thereto, may give evidence by means of closed-circuit television or similar electronic media.'
- [6] Section 158(2) (a) has been amended by the Criminal and Related Matters Act 12 of 2021 to provide that the subsection now applies to a witness 'irrespective of whether the witness is in or outside the Republic'.
- [7] Section 158(3) reads as follows:
'A court may make an order contemplated in subsection (2) only if facilities therefore are readily available or obtainable and if it appears to the court that to do so would-
- (a) prevent unreasonable delays;
 - (b) save costs;
 - (c) be convenient;
 - (d) be in the interest of the security of the State or of public safety or in the interest of justice or the public;
 - (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.'

¹ *Minister of Defence v Potsane and another, Legal Soldier (Pty) Ltd and others v Minister of Defence and others* 2002 (1) SA 1 (CC); 2001 (11) BCLR 1137 at para 24

² *Goldberg & Another v Boshoff N.O. & Another* (2010) ZAGP JHC 164, 30 July 2010

³ *Ibid* para 16

- [8] Prior to the amendment of s158(2) of Act 51 of 1977 there was no enabling legislation to allow a witness in a criminal trial, who finds him or herself outside the republic, to testify with the usage of a closed-circuit television or similar electronic media. This has now changed.
- [9] The defence has referred this Court to the practice directive of this division dated 8 July 2022 where it is stated that cases that shall be heard physically by default will be all criminal cases and all civil cases where oral evidence is to be heard, but that in the case of civil cases at the discretion of a judge, such cases may be heard in part physically and in part by way of video link or wholly by video link if such sound reasons are present to do so.
- [10] Notwithstanding this practice directive, this Court is aware that s32 of the Superior Courts Act 10 of 2013 states that:
 '32. Proceedings to be carried on in open court
 Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court.'
- [11] This is because the basket of rights which would be undermined includes the right to: enjoy the physical presence of the witness before the Judge and the parties in the court room, thereby allowing for the observation and scrutinising of the behaviour of the witnesses in an open Court, which encompasses face-to-face and immediate engagement and assessment.
- [12] However, the practice directive has allowed for a deviation from physical presence to video link in civil cases.
- [13] Recently, in the matter of *VJS v SH*,⁴ the Court held that:
 'Recently, section 37C of the Superior Courts Act 10 of 2013...enacted to permit courts to receive evidence via remote audiovisual links.... Section 37C (5) of the Superior Courts Act establishes that a witness who gives evidence by means of an audiovisual link is regarded as a witness who was subpoenaed to give evidence in the court in question. In other words, a witness who takes

⁴ *VJS v SH* [2024] ZAWCHC 333

oath and testifies via audiovisual link is considered as a witness who testified physically in court. Section 37(6) provides that for purposes of this section, 'audiovisual link' means facilities that enable both audio and visual communications between a witness and persons in a courtroom in real-time as they take place. Section 158(6) of the CPA reinforces these important sentiments, underscoring that:

"For purposes of this section, a witness who is outside the Republic and who gives evidence by means of closed-circuit television or similar electronic media, is regarded as a witness who was subpoenaed to give evidence in the court in question."⁵

'These developments, in my view, are a testament that the benefits of technology should be utilised and incorporated into our justice system to improve the efficiency of civil litigation in our courts. This will go a long way in optimising access to justice for civil court litigants. I understand that different divisions of the High Court in our country have adopted CaseLines, where pleadings, affidavits, and relevant documents are uploaded to the CaseLines portal. In my opinion, this clearly demonstrates that the courts are acknowledging the significance of technology and the advantages it brings. This recognition reflects an evolving understanding of how technology can enhance legal processes and improve access to justice.'⁶

- [14] The matter in casu is a criminal trial and the question this Court must consider is, should there be any difference between a civil court allowing evidence via video link as opposed to a criminal trial.

- [15] It is clear that s158 of Act 51 of 1977 has made provisions for a witness to give evidence by means of closed-circuit television or similar electronic media, whether it is an initiative taken by the Court itself, or by the State or any other party in criminal proceedings.

- [16] The primary purpose of this section is to ensure that proceedings before courts are fair. The qualification is that courts in exercising this power must take into account the interests of justice.

- [17] In the matter of *S v Lenting and Others*⁷('Lenting') the Court stated that:
 'The right of an accused person to be present in court throughout the trial and to observe his accusers and those who testify against him is a fundamentally important right and should not be lightly interfered with. However, as previously stated, section 158 of the CPA does permit exceptions in a number of cases. I am mindful that the interest of the accused must be borne in

⁵ Ibid para 26

⁶ Ibid para 27

⁷ *S v Lenting and Others* (CC08/2018) [2023] ZAWCHC 168; 2023 (2) SACR 409 (WCC)

mind when it comes to whether or not closed-circuit television ought to be used. It must be asked whether this prejudices the accused and, if so, whether a fair balance has been struck between the various interests. Section 158 (4) provides that the prosecutor and the accused have the right, by means of that procedure, to question a witness and observe the witness' reaction. In my view, section 158 (4) serves as a safety net for any prejudice that may be suffered by an accused during cross-examination. The court, the defence and the State will be in a position to see the witness's reaction and demeanour during cross-examination.' [para31]

- [18] The matter of *Lenting*⁸ is the only decided case post the amendment of s158(2) in 2021.
- [19] Prior to this amendment, in the matter of *S v McLaggan*,⁹ the accused, a 30 year old South African male, was charged with the rape of an 18 year old student from the United Kingdom who was visiting South Africa at the time of the rape. The State brought an application in terms of s158 of Act 51 of 1977 to lead the evidence of two witness who were abroad via a virtual link. The State argued that the witness, namely doctor Spoudeas, could not physically fly to South Africa from abroad.
- [20] In the matter of *McLaggan*,¹⁰ the s158 application was opposed by the defence in that the defence contended that:
 'The fundamental requirement of fairness required that the accused be entitled to confront any witness who would testify and that the inroad into this right should be permitted only in exceptional circumstances. This required that the court should consider the nature of the evidence to be given. Where such evidence was irrelevant or where its probative value in relation to essential matters in dispute is limited, the deviation from the requirement that the proceedings be in the presence of the accused should not be permitted.'¹¹
- [21] The High Court in the matter of *McLaggan*¹² allowed the state's applications for the evidence of experts, based in the United Kingdom, to be led through a video-link on the basis of s158 of Act 51 of 1977, on the basis that the witnesses were too busy to travel to South Africa. The first witness was a medical specialist paediatrician and endocrinologist (Dr Spoudeas) who gave evidence at the trial. The second witness

⁸ Ibid

⁹ *S v McLaggan* [2012] ZACGHC 63

¹⁰ Ibid

¹¹ Ibid para 71

¹² Ibid

was a neuro-psychologist (Ms Smit) who gave evidence at the sentencing stage. Both experts were familiar with the mental state of the complainant before and after the rape.

- [22] On appeal, the defence never raised the issue that the Court a quo had erred in invoking s158 of Act 51 of 1977. The Supreme Court of Appeal in the matter of *McLaggan v S*¹³ did however state the Court a quo was correct in accepting the evidence of doctor Spoudeas and Ms Smit and never criticised the Court a quo for allowing their evidence to be presented via video link.
- [23] Likewise, in the matter of *S v Mabena*¹⁴ ('*Mabena*') the State brought an application in terms of s158 of Act 51 of 1977 to allow a witness who was far from the court's sitting to testify virtually. The State counsel in that matter explained that the witness was since deployed to Cape Town where his investigative skills were needed. For that reason he was not in a position to come to Gauteng, where the court was sitting, to testify, and that there were no prospects of him returning anytime soon. The Court held that the witness could testify virtually. The court said this would avert a delay, save costs and would be convenient to both the parties and the court.¹⁵
- [24] It is clear from the above-mentioned cases that the High Courts and the Supreme Court of Appeal have held that a witness can give evidence by means of closed-circuit television or video link, especially if they are far from the court or when they are abroad.
- [25] In the matter of *S v Domingo*¹⁶ the Court held that:
 'It is clear from the wording of the subsection that the Legislature envisages the application of the section in a variety of circumstances all aimed at, in broadest terms, serving the interests of justice. In terms of the subsection, the Court may make an order contemplated in ss (2) if it appears to the Court that the making of the order would expedite proceedings, save costs, serve the convenience of the parties and the Court, be in the interests of the State or public policy, be in the interests of justice or the public, and prevent the likelihood that prejudice or harm might result to any person if he or she gives evidence at proceedings.'¹⁷ [my emphasis]

¹³ *McLaggan v S* [2013] ZASCA 92

¹⁴ *S v Mabena* [2023] ZAGPPHC 1189

¹⁵ Ibid para 64

¹⁶ *S v Domingo* 2005 (1) SACR 193 (C)

¹⁷ Ibid para 198

- [26] Section 35(3)(e) of the Constitution dictates that the trial of an accused has to take place in his presence.
- [27] The State has argued that the witness is a busy businessman who travels the world and that he currently finds himself in Italy and that he only travels to South Africa when he is required to do so. At this stage, there appears no requirement for business purposes that he should be in South Africa.
- [28] This Court has considered the provisions of s158(2) of Act 51 of 1977 and asked itself whether it would be necessary in the interest of justice to ensure the attendance of the said witness via a virtual link, bearing in mind whether it can be obtained without undue delay, expense or inconvenience.
- [29] This Court has borne in mind what the defence has stated that if this witness can travel to many other countries, why can he now not travel back to South Africa. Apart from the financial costs to be incurred by the State, which the Court has already dealt with, there is an added complication. This matter was set down for five days, however, since the commencement of the proceedings, this is the third ruling this Court has had to pronounce upon due to the objections raised by the defence. The accused is entitled to object as many times as he wishes, but this will inevitably delay the finalisation of the proceedings. So too will it prevent the State from obtaining a clear date when to tell this witness to be in South Africa to present his evidence. Had this Court reserved this judgment and handed it down in a few days' time, this too would have made it impracticable for the State to have given a definitive date for this witness to be in South Africa. We are one and a half court days away from the date when such witness is to testify by way of video link. This Court finds that the request to proceed by way of video link is justified.
- [30] It is clear that there are exceptional circumstances in the matter in casu why the State is applying for the evidence of this witness, who appears to be a key witness, should be allowed, via a virtual link. The State argues that the entire case revolves around what he has to say as well as the exhibits that will be presented during his evidence.
- [31] In considering the above provisions this Court finds that:
- (a) It would be efficient and practicable for the said witness to testify, especially since he currently finds himself in Italy and it appears there will be logistical and financial

implications to get him to South Africa to testify. To allow this witness to testify via video link will prevent unnecessary delays in ensuring that he travels to South Africa, thereby wasting more time and creating more delays in finalising the matter. It is clear that allowing him to testify via video link will also minimise the expenses the State will incur to pay for any flight and accommodation costs to and from the Republic of South Africa. In fact, by testifying remotely, it will allow this trial to keep moving forward. One way or another, the participation of this witness will allow this Court to reach a fair decision either in favour of the State or the accused.

- (b) to allow the witness to testify via video link will ensure the witnesses' participation and input in this trial, thereby preventing the State from not leading all its witnesses. It appears this witness is willing to testify and that he understands English.
- (c) It appears there are facilities and equipment in place to receive the evidence of this witness via video link.
- (d) This Court has considered the interests of the accused and this Court finds that the video link will allow the accused to see and hear the witness clearly and to cross-examine him. This will in no way deprive the accused of confronting the witness with his version of events. It appears that the State has the facilities to present this video link by way of MS Teams and that should any exhibits be referred to during the testimony of the witness a physical set will be available in Court for the accused to peruse and via a video link the witness will be immediately directed on MS Teams to the exact document and page. By allowing a witness to testify via MS Teams will not deprive the accused of a public trial and neither will such means of presenting evidence amount to a secret trial. In fact, to the contrary, it will contribute to the public confidence in the justice system that criminal trials can continue even if such witnesses are not present in the Republic of South Africa.

[32] By allowing the witness to testify by video link does not amount to the accused conducting a legal warfare in a manner that departs from the rules of court, in that s158(2) of Act 51 of 1977 has specifically been amended to cater for instances where witnesses are abroad.

[33] This Court does not find that the accused's rights in terms of s35(3)(e) of the Constitution are infringed. The trial is taking place in his presence and he will be able to see and hear the witness clearly via video link. There is no application in terms of s153 of Act 51 of 1977 and this trial will proceed in open court and the public are able to attend.

- [34] The defence has contended that s2(1) of International Co-operation in Criminal Matters Act, 1996 ('Act 75 of 1996') should have been used by the State to obtain the evidence of this witness overseas. Section 2(1) of Act 75 of 1996 states the following:
 '2. (1) If it appears to a court or to the officer presiding at proceedings that the examination at such proceedings of a person who is in a foreign State, is necessary in the interests of justice and that the attendance of such person cannot be obtained without undue delay, expense or inconvenience, the court or such presiding officer may issue a letter of request in which assistance from that foreign State is sought to obtain such evidence as is stated in the letter of request for use at such proceedings.'
- [35] The purpose of Act 75 of 1996 is to facilitate the provision of evidence and the execution of sentences in criminal cases and most importantly the confiscation and transfer of the proceeds of crime between the Republic and foreign States.
- [36] The word 'evidence' in Act 75 of 1996 refers to:
 'evidence" includes all books, documents and objects produced by a witness' which applies to mainly questions around foreign confiscation orders, foreign restrain orders or a foreign sentence that may be enforced.
- [37] The procedure as envisaged in s2(1) of Act 75 of 1996 is quite a lengthy and detailed procedure in that it entails the following:
 '(2) A judge in chambers or a magistrate may on application made to him or her issue a letter of request in which assistance from a foreign State is sought to obtain such information as is stated in the letter of request for use in an investigation related to an alleged offence if he or she is satisfied-
- (a) that there are reasonable grounds for believing that an offence has committed in the Republic or that it is necessary to determine whether an offence has been committed;
 - (b) that an investigation in respect thereof is being conducted; and
 - (c) that for purposes of the investigation it is necessary in the interests of justice that information be obtained from a person or authority in a foreign State.
- (3) Subject to subsection (4), a letter of request shall be sent to the Director-General for transmission-
- (a) to the court or tribunal specified in the letter of request; or
 - (b) to the appropriate government body in the requested State.
- (4) (a) In a case of urgency a letter of request may be sent directly to court or tribunal referred to in subsection (3)(a), exercising jurisdiction in the place where the evidence is to be obtained, or to the appropriate government body referred to in subsection (3)(b).

(b) The Director-General shall as soon as practicable be notified that a letter of request was sent in the manner referred to in paragraph (a) and he or she shall be furnished with a copy of such a letter of request. Attendance at examination

3. (1) Where a letter of request has been issued in terms of section 2(1), any party to such proceedings may, provided that it is permitted by the law of the requested State-

(a) submit interrogatories which the court or presiding officer issuing the letter of request may attach to the letter of request; or

(b) appear at the examination, either through a legal representative or, in the case of an accused who is not in custody or in the case of a private the prosecutor, in person, and may examine, cross-examine and re-examine witness.

(2) Where a letter of request has been issued in terms of section 2(2), the person in charge of the investigation relating to the alleged offence may, provided that it is permitted by the law of the requested State-

(a) submit interrogatories which the judge or magistrate issuing the letter of request may attach to the letter of request; or

(b) appear at the examination and question the person concerned.

(3) (a) Where proceedings have been instituted and the application for a letter of request is made by the State the court or presiding officer may as a condition of the letter of request order that the costs of legal representation for the accused be paid by the State.

(b) Notwithstanding the fact that a presiding officer has made an order contemplated in paragraph (a), he or she may, if he or she is of the opinion that a refusal by the accused to admit the evidence obtained by means of the letter of request is unreasonable and unjustifiable, at the conclusion of the proceedings make such order against the accused as to the costs of sending the letter of request and all proceedings to give effect thereto as he or she may reasonably deem appropriate.' [my emphasis]

[38] There appears no refusal by this witness to testify as a result it is nonsensical for this procedure as envisaged in s2(1) of Act 75 of 1996 to be followed. Firstly, it will be a costly exercise for the State as set out in s4(3)(a) of Act 75 of 1996. Furthermore, it will be prejudicial and costly to the accused in terms of s4(3)(b) of Act 75 of 1996 should this Court find that the refusal of the accused to admit such evidence is found to be unreasonable and unjustifiable as the costs incurred by the State would then revert to the accused.

[39] In light of the simpler and cost-effective provision in terms of s158(2) of Act 51 of 1977, as compared to the costly and lengthy procedure as contemplated in s2(1) of Act 75 of 1996, this court finds it is not in the interests of justice that the latter procedure as

envisaged in s2(1) should at this stage be followed by the State. This Court has a duty to case manage the finalisation of this trial. Whether the State was correct or not in not utilising s2(1) of Act 75 of 1996 has no bearing on this Court's case management at this stage of the proceedings. The accused is equally entitled to a speedy finalisation of this criminal trial.

- [40] This Court has considered the matter of *Minister of Defence v Potsane*¹⁸ however that matter referred to an aspect pertaining to disciplinary hearings to be dealt with in a military court in terms of sections 13(1)(b), 14(1)(a) and 22 of the Military Discipline Supplementary Measures Act 16 of 1999 ('Act 16 of 1999') and whether the provisions of Act 16 of 1999 (the Act) conferring authority on military prosecutors to institute and conduct prosecutions in military courts were to be struck down for their inconsistency with the provisions of section 179 of the Constitution and the conflicting provisions of s179 of the Constitution which sets out the functions and powers of the prosecution authority. This case is of no assistance in regard to whether a witness abroad can testify in regard to a criminal trial of which it is alleged the crime was committed in the Republic of South Africa..

As to whether a witness may testify who has not been subpoenaed

- [41] The State has argued that the witness in Italy be regarded as subpoenaed for the purpose of this application.
- [42] Section 158(6) of Act 51 of 1977 states that:
'(6) For purposes of this section, a witness who is outside the Republic and who gives evidence by means of closed circuit television or similar electronic media, is regarded as a witness who was subpoenaed to give evidence in the court in question.'
- [43] Subsection 158(6) of Act 51 of 1977 was added by s 6(b) of the Criminal and Related Matters Amendment Act 12 of 2021.
- [44] The newly inserted section 158(6) of Act 51 of 1977 makes it clear that a witness who is outside the Republic and who gives evidence by means of closed-circuit television or similar electronic media, is regarded as a witness who was subpoenaed. It makes it clear

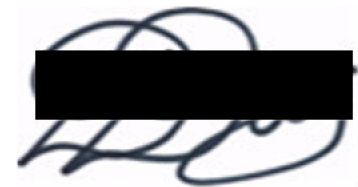
¹⁸ *Minister of Defence v Potsane* (note 1 above)

that even if he was not subpoenaed s158(6) creates a presumption that such a witness is considered to be subpoenaed as his/she is not in the republic giving evidence by means of closed-circuit or similar electronic media.

- [45] Accordingly, this Court finds that the State has set out sufficient grounds to substantiate their request as to why s158(2) of Act 51 of 1977 should be applied to allow this witness who is abroad to testify via video link.

Order

- [46] The application in terms of s158(2) of Act 51 of 1977 is granted.

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D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

ON BEHALF OF THE STATE:

Adv. B Masedi

Instructed by the Office of the National
Director of Public Prosecutions

ON BEHALF OF THE ACCUSED:

Adv. D Pool

Instructed by Denga Incorporated