



A REPORT BY THE OMBUDSMAN ON THE CIRCUMSTANCES WHICH LED TO THE DETENTION OF A FOUR YEAR OLD BOY WITH HIS MOTHER IN THE WANAHEDA POLICE CELLS

An omission to act or a dereliction of duty – Who is to be blamed?

1. Introduction

1.1 The detention of persons who are awaiting trial, is a matter of special concern. Their situation is quite different from that of persons who have been convicted and serving custodial sentences. They have yet to be found guilty and is therefore presumed innocent in the eyes of the law. In reality they are often detained in the most restricted conditions, conditions which in some cases are an affront to human dignity.¹ The unending postponement of cases contribute to their misery and cause more overcrowding in detention facilities. Namibia is no exception to this general statement.

1.2 In this Report I will not deal with the facts or circumstances which led to the death of the deceased – that is the duty of the police to investigate the incident:

- I will limit my investigation to the circumstances which led to the detention of the 4 year old Fortuna Tenete (with his mother) in the Wanaheda Police Cells;
- I will deal shortly with the international standards in regard to the detention and treatment of trial awaiting prisoners, especially women.
- Look at domestic legislation, guidelines, policies, etc in regard to detention of trial awaiting women with children.
- Briefly discuss the principle of "***the best interest of the child***"
- Examine the responsibilities of the duty-bearers in order to determine whether there exists an omission to act by a person in the employment of the State.
- Ascertain the facts and then apply the legal principles to the facts.
- I will conclude with my preliminary findings, but before I make my recommendations, I will first submit my report to the Inspector-General of the Namibian Police Force for his comments to be incorporated into this Report. I have received the comments which are included in this Report.

¹Human Rights and Prisons: Manual on Human Rights Training for Prison officials, OHCHR, United Nations, 2005 p.150

2. **Mandate of the Ombudsman**

- 2.1 In any instance or matter in respect of which the Ombudsman has reason to believe that an omission to act by a person in the employment of the State diminishes or derogates from the fundamental rights and freedoms, he may investigate it out of own motion.²
- 2.2 The prominence which the incident received in the media and my reason to believe that an omission to act may have led to a breach of a fundamental right, prompted me to investigate the matter and report on it.

3. **Women in Prison**

3.1 International Standards

- 3.1.1 The situation of women in prison does not receive a great deal of attention in the international human rights instruments and that of trial awaiting women is nowhere mentioned.
- 3.1.2 There are however essential principles regarding women in prison which have their basis in international human rights law. The principles are:
- women are entitled to equal enjoyment and protection of all human rights.³
 - women prisoners shall not be discriminated against and shall be protected from all forms of violence and exploitation.⁴
 - women prisoners shall be detained separately from male prisoners.⁵
 - women prisoners shall be supervised and searched by female officers.⁶
 - pregnant women and nursing mothers who are in prison, shall be provided with special facilities which they need for their children.⁷

²Section 3(2) (a)(i) of the Ombudsman Act 7 of 1990

³International Covenant on Civil and Political Rights

⁴Convention on the Elimination of All Forms of Discrimination against Women

⁵ UN Standard Minimum Rules for the Treatment of Prisons (Rule 8)

⁶Ibid (Rule 53)

⁷Ibid (Rule 23)

4. Domestic Standards

4.1 Neither the old Prison Act⁸ nor the new Correctional Service Act⁹ makes special provision for the detention of female trial awaiting offenders. The Correctional Service Act provides in general for the custody of remanded offenders¹⁰ and in particular for the custody of female offenders who must at all times be under the care, custody and supervision of female correctional officers.¹¹

4.2 Section 62 deals with the admission of female offenders with infants and provides as follows:

- *"A female offender may be admitted into a correctional facility for custody with her infant.*
- *A infant referred to in subsection (1) must be supplied with clothing and other necessities by the State until such infant attains the age of two years, in which case the officer in charge must, on the recommendation of the medical officer and on considering the best interest of the infant –*
 - *on being satisfied that there is a relative or friend of the infant able and willing to support such infant, cause the infant to be handed over to such relative or friend; or*
 - *if in his or her opinion there is no relative or friend able and willing to support that infant hand such infant over, subject to the relevant laws, to the care of such welfare authority as the Commissioner-General may approve for that purpose."* (emphasis added)

4.3 Neither the Police Act¹² as amended nor the Regulations¹³ makes provision for the detention of prisoners. It is provided for in the Operational Manual. Chapter no 5 deals with the safe custody, treatment, escort and continued detention of prisoners (emphasis added) and places the following responsibilities on different members of the Force:

⁸Act No 7 of 1998

⁹Act No 9 of 2012

¹⁰Section 68

¹¹Section 66

¹²Act No 19 of 1990 & Police Amendment Act No 3 of 1990

¹³Regulations made under the Police Act (Act 19 of 1990)

- *"The strictest precautionary measures **shall be** taken to prevent children from coming into contact with adult prisoners.*
 - *Children under 16 years **shall not** be detained in police cells if it is possible to accommodate them in any other **approved place**.*
 - *Young offenders under 18 years **shall** be detained separately from adult prisoners" (emphasis added).¹⁴*
- *"Station Commanders **shall** appoint a full time prison guard whenever police have ten or more prisoners in a cell (emphasis added):*
 - *Guards shall not be assigned any additional tasks while performing guard duty" ¹⁵*
- *"Station Commanders are responsible for the health and safety of prisoners and conditions in the police cells."¹⁶*
- *"The Namibian Police is responsible for the **well-being and protection of persons in its custody**" (emphasis added)¹⁷*
- *Where there is 24 hours charge office service the charge office sergeant must inspect ordinary prisoners in cells every hour.¹⁸*
- *Prisoners with children:¹⁹*
 - *If it is necessary to arrest a person with a child(ren), consider placing the children in the care of a relative/friendly adult.*
 - *Do not leave the child alone.*
 - *Take the child along with the prisoner, if there is no-one to look after the child.*
 - *If at the station, consider releasing the prisoner on own recognisance, on bail or if possible take the prisoner to the magistrate immediately.*
 - *If detaining a prisoner with a child that is not nursing, contact the nearest Health and Social Services worker or assign female member or suitable woman to look after the child, until Welfare and Social Services takes over.*

¹⁴Paragraph C4

¹⁵Paragraph C9

¹⁶Paragraph H1-3

¹⁷Paragraph D 4

¹⁸Paragraph H1-3

¹⁹Paragraph I: 1-4

- *If the child is nursing, detain the prisoner with the child at the prisoner's residence or other suitable place.*
- *As a last resort, detain the prisoner and the child either in a room at the station or segregated in a cell.*

4.5 It is interesting to note that the Manual contains a number of peremptory provisions in which the words "***shall be***" or "***shall not***" are used. A peremptory provision requires strict compliance; failure to comply with a peremptory provision will leave the ensuing act null and void.

5. ***The "best interest of the child"***

5.1 The Namibian Constitution provides for the protection and promotion of a wide range of human rights and freedoms²⁰ Children's rights are provided for in Article 15. Our Constitution does not specifically provides that "***the best interest of the child shall be a primary consideration***". However this lacunae is filled by the Convention on the Rights of the Child²¹.

5.2 Article 3 of the Convention provides:

"In all actions concerning children, whether taken by public or private social welfare institution, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration"

5.3 Article 4 of the African Charter on the Rights and Welfare of the Child,²² provides:

"In all actions concerning the child undertaken by any person or authority the best interest of the child shall be a primary consideration"

5.4 *"The principle of the best interest applies to all actions concerning children and requires active measures to protect their rights and promote their survival, growth and well-being....."*²³

²⁰Chapter 3

²¹Namibia has ratified the Convention on 30/9/90, it is now part of the body of laws of Namibia and thus applicable in Namibia by virtue of Article 144

²²Namibia ratified the Charter on 23 July 2004, it is also part of the body of law in Namibia

²³General Comment No 7 of the Committee of the Rights of the Child

- 5.5 The arrested, detained and imprisoned child has additional rights on account of his/her young age which requires that the treatment of the child be adjusted so as to meet his or her specific needs. In other words, the treatment of the child must be at all times be defined according to his or her best interest.²⁴
- 5.6 This specifically child-oriented approach implies that:
- *"every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age"*²⁵
 - *"every child accused or found guilty of having infringed penal laws shall have the right to special treatment...."*²⁶
- 5.7 The duty of the State to provide special treatment to detained and imprisoned children adjusted to their needs, is an expression of the "**best interest**"; an approach which permeates the entire Convention and Charter.
- 5.8 The deprivation of liberty should be a measure of last resort and for the shortest appropriate of time.
- 5.9 This specifically child-oriented approach is in fact a human rights-based approach.
- 5.10 If the arrested, detained and imprisoned child shall have as a very minimum the above guarantees, what about the guarantees of an innocent four year old toddler detained with his accused mother. Was this detention authorized, if not was this detention unlawful or was he just a victim of circumstances?

6. **The Facts**

- 6.1 The following are common cause:

²⁴Human rights in the Administration of Justice: A manual for Judges, Prosecutors and Lawyers; OHCHR in cooperation with the I.B.A, 2003 P.422

²⁵Article 37(c) Convention on the Rights of the Child

²⁶Article 17(1) Africa Charter on the Rights and Welfare of the Child

- 6.1.1 Ms Kaarina Mateus was arrested on 22 November 2013 at 17h29 on a charge of theft. She gave her name as Alina Shigweda to the police and that is the name under which she was charged at Windhoek Police Station under CR 738/11/2013. It is also the name which appears on the charge sheet in case no WHK-CRM 22682/2013. She was released on bail the same evening at 20h15 and warned to appear at the Windhoek Magistrate's Court on 25 November 2013.
- 6.1.2 She failed to appear in court on 25 November 2013 and a warrant for her arrest was issued, bail provisionally cancelled and the bail money provisionally forfeited to the State. The charge annexure reveals that she was charged for theft of goods valued at N\$ 430-00.
- 6.1.3 On 26 November 2013 at 15h25 Ms Mateus was again arrested. The deceased was with her and they were taken to the Windhoek Police Station where she was charged for theft under CR 834/11/2013. This time she gave her name as Selma Alina Shigweda Endjambi to the police. On the same day at 18h20 she together with the deceased were transferred to Wanaheda Police Station where they were detained.
- 6.1.4 According to the record of proceedings, of case no WHK-CRM-22682/2013, she appeared on 28 November 2013 in the Windhoek Magistrate's Court, the charge annexure alleges the crime of theft with no particulars of what are alleged to be stolen and the value thereof. According to Ms Mateus, she took the deceased with her to court and left him in the care of police officers when she entered the court room.
- 6.1.5 It appears from the record of proceedings that she appeared before Magistrate Anna Andrias, who postponed the case to 6 February 2014 for further investigation. The Magistrate ordered that she remained in custody at the Windhoek Police Station. No bail was granted and Ms Mateus was not informed of her right to apply for bail.
- 6.1.6 It further appears from the record of proceedings that Ms Mateus was before court on 24 January 2014 at 15h35 and the Prosecutor informed the court: "*Acc appeared last time when Magistrates were on retreat, no bail was granted to the acc, request bail to be fixed at N\$ 150-00.....*".
- 6.1.7 Ms Mateus thereafter also appeared on case no WHK-CRM 22032/2013 at 15h45 and bail was granted in the amount of N\$ 150-00. The bail money was paid and she was released on bail.

- 6.1.8 On 6 February 2014, case no : WHK-CRM-22682/3013 was postponed to 25 March 2014 finally for further investigation and on 25 March 2014, it was postponed to 26 June 2014 for plea and trail.
- 6.1.9 The charge annexure alleges the crime of theft with no particulars of what are alleged to be stolen and the value thereof.
- 6.1.10 On 21 January 2014 at 12h00, the Station Commander transferred nine female detainees to other police stations *"to allow for improved cell management and as a precautionary measure for the safety and well-being of the children in the cells"*
- 6.1.11 The investigating officer, recommended bail of N\$ 500-00 for the release of deceased's mother, but on her appearance in court on 28 November 2013, the prosecutor decided not to recommend the release of the mother because of her previous arrest.
- 6.1.12 It does not appear from the record of proceedings that the magistrate was informed that the deceased was detained with his mother.

6.2 The following are not common cause:

- 6.2.1 The Station Commander of the Wanaheda Police Station maintains that he reported the presence of the children in the cells to the Women and Child Protection Unit (WACPU) either on 31 December 2013 or during the first week of January 2014.
- 6.2.2 He further recalls that Sgt Tibiyane and a social worker from the WACPU visited the police station on the same day. He did not accompanied them to the cells, but he spoke afterwards with the social worker about the children who *"promised to make an effort with respect to the children,"* although she is only temporarily attached to the WAPCU until 15 January 2014. They promised to visit the station again after the public holidays.
- 6.2.3 According to the Station Commander, social workers of the Ministry of Gender, Equality and Child Welfare visited the station on 26 November 2013. They informed him that *"they wanted to assess the conditions of the holding cells for juveniles"*. He informed them that the male juveniles are detained in separate cells, but the female juveniles are detained with female adults. He accompanied them to the cells. The deceased was not in the cell, but there were other children with their mothers in the female cell. The social workers did not remove the children, because they do not have facilities to accommodate these children.
- 6.2.4 The Station Commander, supported by the Regional Crime Coordinator, confirmed that they did not receive assistance from the social workers of the

Ministry of Gender Equality and Child Welfare, to remove children detained with parents, because they do not have facilities to accommodate these children.

- 6.2.5 The Station Commander also recalls that officials of the Ombudsman visited the Wanaheda police cells during December 2013, but they did not remove the children.
- 6.2.6 On the other hand, the social worker who accompanied Sgt Tibiyane to the Wanaheda police station denied that she entered the station, she never interviewed anybody and never heard of children detained with their parents in the cells. At that time she was not allowed to do any social work; she only done receptionist duties at the WACPU.
- 6.2.7 According to the social workers of the Ministry of Gender Equality and Child Welfare, they went on 26 November 2013 during the morning to the Wanaheda and Katutura police stations on a routine visit according to their child justice programme to count the number of juveniles in detention, to determine whether their parents were informed of their detention, whether they have appeared in court and whether they were assessed. They were never in the female cells; only in the juvenile cells and nobody informed them of the presence of children in the female cell. The Station Commander did not tell them of the presence of the children and they did not tell him that they do not have facilities to accommodate these children. In fact they do have places of safety to place children in need of care.
- 6.2.8 According to the Chief Social Worker in the Ministry of Gender Equality and Child Welfare, for the Khomas Region, she was never contacted by the police for assistance to remove children detained with mothers in police cells. Previously, she was attached to the WACPU and was also not requested to assist with children detained with their mothers.
- 6.2.9 According to the complaints investigators of the Ombudsman, they visited the Wanaheda police station during December 2013 to investigate a specific complaint of a male detainee. While they were there, no police officer informed them of the presence of the children and asked for assistance to remove them to a place of safety.

7. Responsibility of Duty-bearers

7.1 The State

- 7.1.1 The central responsibility for protecting human rights rests with government. In ratifying the International Covenant of Civil and Political Rights, the Convention

on the Elimination of all forms of Discrimination against Women, the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, government assumes the responsibility to respect, protect and fulfil the rights they contain.

7.1.2 To **respect** means that the State cannot take any action or impose any measure that is contrary to the rights guaranteed by the treaty. To **protect** means that the State must take positive action to ensure that an individual is not denied his or her human rights. Mechanisms, through which human rights are protected must be put in place. Adequate legislation, an independent judiciary, the enactment and enforcement of individual safeguards and remedies, and the establishment and strengthening of democratic institutions – all require State action. The responsibility to **fulfil** requires a State to take positive steps beyond mere prevention. States are required to take "*all appropriate steps*", including but not only legislative steps, to ensure that rights are realized at State level. These steps are what is meant by "*effective national implementation*"²⁷

7.2 The Judiciary

7.2.1 Article 12 of our Constitution guarantees all persons a fair and public hearing by an independent, impartial and competent court. The principle of the independence of the judiciary requires the judiciary to ensure that court proceedings are conducted in a fair manner and the rights of the parties are respected.²⁸

7.2.2 The right to participate effectively in the court proceedings, to understand what is going on in court and to be understood as well as the right to be informed of all trial rights, not only of the right to legal representation, are not separate rights, but are aspects of the right to a fair hearing.

²⁷National Human Rights Institutions: History, Principles, Roles and Responsibilities; OHCHR, 2010 p.5

²⁸Basic Principles on the Independence of the Judiciary, 1985, (Rule 6) General Assembly resolution 40/32 of 29/11/1985

7.2.3 The presiding officer in control of court proceedings; role to play in postponement of cases:

In this regard, I wish to refer to two statements

- *"Presiding officers are solely and directly in control of and accountable for, the conduct of the court proceedings..."²⁹*
- *"It would appear (from review records) that whenever the State is not ready to proceed on a trial date, it would simply ask for a postponement for **further investigation** without explaining to the court to what extent the investigation is incomplete. Presiding officers, without enquiring about the reasons for the postponement, would simply grant a postponement time after time, instead of treating it as an application, in which case the applicant needs to submit convincing reasons to the court why the matter has to be postponed for "**further investigation**" and the accused be given the opportunity to oppose the application. Presiding officers should thus play a more active role in the postponement of cases and treat it for what it is, namely, an application during which the audi alteram partem rule applies and the court's findings need to be recorded on the record of the proceedings. I take the view that only in exceptional cases should a matter be postponed for longer than 14 days – which would require from an investigation officer to apply his or her mind to the docket and finalise the investigation as soon as possible. From the public's view point this is one area where the police are dragging their feet."³⁰*

7.2.4 Section 60³¹ provides that *"any accused who is in custody in respect of any offence may at his or her first appearance in a lower court or at any stage after such appearance apply to such court....to be release on bail in respect of such offence"*

7.2.5 The Presiding officer's duty to inform or explain

- Article 7 of our Constitution guarantees the right to liberty and as a corollary to this right, an arrested or detained person does not have a right to bail, but a right

²⁹Unreported Judgement: Graham Travers v The Minister of Justice, delivered on 18/8/2005(TDP)

³⁰Justice P T Damaseb, Judge-President of Namibia: Remarks at a workshop on overcrowding of police cells and delays in finalization of court cases – proposed solutions, 29/5/2009

³¹Criminal Procedure Act, no 51 of 1977 as amended

to apply for bail. If there is no duty on the judicial officer to inform the undefended accused of his right to apply for bail, it would make this right invariably inaccessible to most undefended accused. They would be ignorant of the fact that they may apply to be released on bail and may not even know how to substantiate a successful bail application.

- It is submitted that the right to apply for bail and be released on bail is not a separate right but is an aspect of the right to a fair trial. Therefore Article 12 read with Article 7 of the Constitution and Section 60 of the Act places a duty on the Magistrate to explain to the undefended accused his right to apply for bail and how to substantiate it. This explanation needs to be recorded on the record of proceedings.

8. The Police Force

8.1 Section 13 of the Police Act³² sets out the functions of the Force which *shall be* the preservation of the internal security of Namibia, maintenance of law and order, investigation and prevention of crime and most importantly the *protection of life* and property (emphasis added).

8.2 From the discussion of the domestic and international standards above, it is clear that the police has the following general responsibilities in regard to children in its custody:

- to protect their lives;
- to ensure their well-being and protection;
- to prevent children from being detained with adults;
- to ensure their health and safety;
- to appoint a full-time prison guard where there are more than ten prisoners in a cell;
- to inspect prisoners in cells every hour;
- to provide special treatment to arrested or detained children, adjusted to their needs.

³²As amended by the Police Amendment Act No 3 of 1999

8.3 If the circumstances necessitate the arrest of a woman with a child, the arresting officer has the following options:

- consider leaving the child in the care of a relative or friendly adult, but never leave the child alone;
- if no one can be found to look after the child, take the child along with the arrested woman to the police station;
- after charging the woman, consider releasing her on bail or warning, if not possible, take her immediately to court for a bail application;
- if the child is not nursing, contact the nearest social worker and in the meantime assign a female member or suitable woman to look after the child until Welfare and Social Service takes charge of the child;
- if any of the above is not possible, then as a last resort, detain the woman and child in a room at the station or separately in a cell.

Discussion of the facts

It is always difficult to choose between two mutually destructive versions, especially when one does not have the benefit of versions tested under cross-examination. Be it as it may, I am not called upon to determine which side of the story is true, but I am called upon to determine whether there exist an omission to act on a person in the employment of the state.

Above facts, although contradictory in nature brought to light the following concerns:

- The Station Commander admits that he only brought the presence of the children in the cells under the attention of the WACPU on 31 December 2013 or during the first week of January 2014. At that stage the deceased was in detention with his mother for more than a month; other children were in detention for a longer period;
- The concern is: why was the social workers not informed on 28 November 2013 after the case against Ms Mateus was postponed to 6 February 2014?
- A further concern is that the Station Commander did not follow up the promise of the social worker who "*promised to make an effort with respect to the children*".
- The Station Commander admits that female juvenile offenders were detained with female adults in the same cell;

- The concern is: why was that practice allowed to happen contrary to police's own guidelines and international standards?
- Referring to officials of the Ombudsman who visited the cells during December 2013, and did not remove the children, the Station Command stopped short to state whether he informed them of the presence of the children;
- The concern is why did the Station Command fail to state whether he informed the officials of the presence of the children in the cells. In light of this omission and the denial of the officials that they were informed of the presence of the children a further concern arises; why did the Station Commander not inform them and asked for assistance?
- A lack of suitable facilities is advanced as reason for not fully complying with the provisions of the police Manual;
- The concern is: why are the police still facing a lack of suitable facilities, while Cabinet in October 2009 decided that the Ministry of Safety and Security should *"start budgeting for Remand Prisons, starting with Windhoek"*
- Ms Mateus appeared in court on 28/11/13 and the case was postponed to 6/02/2013. The prosecutor requested the investigating officer to obtain the outstanding witness statement. On 6/2/2013 the case was postponed to 25/3/13 because the outstanding statement was not obtained, because the investigating officer was attending a course at the police college. On 25/3/14 the case was postponed to 26/6/14 for plea and trial.
- The concern here is, why was the charge annexure not completed and the accused required to plead on 25/3/14 if the further investigation was completed. For what we know, she may have pleaded guilty.
- If the police do not have facilities to detain mothers with children and the social workers do not have places of safety to care for children, while their mothers are detained, then the concern is, why was this case and similar cases not fast-tracked?
- A greater concern is why do we not have courts which could fast-tracked cases involving the simplest of crimes?

FINDINGS

I find that the following officials are in the employment of the state:

- the Station Commander at the Wanaheda police station and all police officers stationed there;

- the arresting and investigating officers stationed at Windhoek police station;
- all social workers, in particular those who visited the Wanaheda police cells;
- the presiding magistrates and prosecutors who dealt with the case in question;
- the complaint investigators of the Ombudsman Office, particularly those who visit the cells.

I further find that:

- The right to apply for bail and to be released on bail, is not a separate right, but is an aspect of the right to a fair trial.
- Article 7 read with Article 12 of the Constitution and Section 60 of the Criminal Procedure Act place a duty on the magistrate to explain to the undefended accused her right to apply for bail and how to substantiate it. This explanation needs to be recorded on the record of proceedings.
- The prosecutor simply asked for a postponement for further investigation, without explaining to the court to what extent the investigation is still incomplete, especial where the matter was postpone from 28/11/2013 to 6/2/2014 for further investigation and again from 6/2/2014 to 25/3/2014 for further investigation.
- The magistrate failed to treat the request from the prosecutor to postpone the matter for further investigation as an application, in which case the prosecutor was required to submit convincing reasoning for why the matter has to be postponed for further investigation and the accused be given the opportunity to oppose it.
- The duty to detain mothers with children and female juveniles separate from female adults is a minimum requirement and the police did not do everything possible to prevent the deceased and other female juveniles from being detained with adults.
- On their version the police failed to record the requests for assistance from social workers of the Ministries in the past and the present matter, in their recording books.
- On their version the police failed to report the continuous disregard of their requests for assistance by social works to a higher authority.
- The best interest of the deceased did not enjoy the primary consideration in this matter because of a lack of cooperation and collaboration between the different roll players.

- The institutions created to protect the rights of all children individually and collectively failed to act in the best interest of the deceased to prevent his continuous detention in the police cell.

RECOMMENDATIONS

I recommend that:

- the construction of remand prisons in Windhoek and other towns be prioritized as Cabinet already decided during October 2009 that the Ministry of Safety and Security should budget for the construction of these prisons;
- the police should immediately stop the practice of detaining female juveniles with adults;
- pre-trial detention should be used as a means of last resort, with due regard for the investigation of the alleged offence and for the protection of society and the victim;³⁴
- alternatives to pre-trial detention should be employed at as early a stage as possible;³⁵
- the Ministry of Justice should establish a special court in which cases involving the simplest of crime can be dealt with without undue delay. The advantages of such an approach are obvious;
- in all criminal proceedings the magistrate should explain to the undefended accused his/her right to apply for bail and how to substantiate it. The explanation needs to be recorded on the record of proceedings;
- magistrates should play a more active role in the postponement of cases and treat it for what it is, namely an application during which the *audi alteram partem* rule applies, i.e. the applicant needs to submit convincing reasons to the court why the matter has to be postponed for further investigation or any other reason and the accused be given the opportunity to oppose the application. The court's findings need to be recorded on the record of proceedings;³⁶
- only in exceptional cases should a matter be postponed for longer than 14 days – which would require from an investigating officer to apply his/her mind to the docket and finalize the investigation as soon as possible;³⁷

³⁴&³⁵ Rule 6 of the UN Standard Minimum Rules for Non-custodial Measure (The Tokyo Rules)

³⁶&³⁷ Justice P T Damaseb; Remarks at a workshop on overcrowding of police cells and delays in finalization of court cases (29/5/200) with which I associated myself.

- the magistrate must insist that the accused has to plead on the first occasion after the investigation had been completed and if that is truly impossible, then the reasons have to be given and recorded so that the facts are clear to the (next) magistrate on the accused's next appearance;³⁸
- judicial officers should undergo compulsory human rights education training, particularly on the Convention on the Rights of the Child and all other relevant international and regional human rights instruments;
- the role players in the administration of justice should forge closer working relationships and concretized these relationships in memoranda of understanding.
- the Child Care and Protection Bill and Child Justice Bill should be passed as a matter of priority;
- government ensures that the principle of the best interest of the child is appropriately and consistently applied in all legislative, administrative and judicial proceedings as well as in all policies, programmes and projects relevant to and with an impact on children.³⁹
- government protects the rights of children deprived of their liberty and improve their conditions of detention and imprisonment, in particular by establishing special prisons for children suited to their age and needs and ensuring the provision of social service in all detention centres in the country.⁴⁰

CONCLUSION

I am now informed that the Station Commanders and Social Workers of the Ministry of Gender Equality and Child Welfare reached consensus on how to deal with children detained with their mothers. This arrangement must apply country wide and not be limited to Windhoek. The Children's Advocate and social worker in the Ombudsman office, who will be appointed in the near future, will join this arrangement to ensure that the best interest of the child in detention will enjoy primary consideration. This tragic event is preventable and should not be allowed to happen again.

ADV J R WALTERS
OMBUDSMAN: NAMIBIA

DATED: 15 MAY 2014

³⁸ Justice P T Damaseb; Remarks at a workshop on overcrowding of police cells and delays in finalization of court cases (29/5/200) with which I associated myself.

^{39&40}: Recommendations by the UN Committee on the Rights of the Child adopted on 5/10/2012 after considering Namibia's state report, with which I associated myself.