CASE NO.: CC 15/2011

IN THE HIGH COURT OF NAMIBIA

HELD AT OSHAKATI

In the matter between:

THE STATE

versus

MPASI JOHANNES HAUSIKU	**FIRST ACCUSED**
HAINDERE JOHANNES NDOKO	**SECOND ACCUSED**
HAUTA KONSTANTIUS	**THIRD ACCUSED**
FRANS MUNANGO MBAMBA	**FORTH ACCUSED**
ANDREAS KARUPU NZARO	**FIFTH ACCUSED**

CORAM:	**TOMMASI J**
Heard on:	26/05/2011 – 30/05/2011 -
Delivered on:	31/05/2011

REASONS: TRIAL WITHIN A TRIAL

TOMMASI J: [1] This court gave its ruling on 30 May 2011 that the statement of accused 5 would be declared admissible as evidence against him in the main trial and undertook to provide reasons for the ruling. What follows are the reasons for the afore-mentioned ruling.

[2] The Defense indicated during pre-trial proceedings that they object to the handing in of *extra curial* statements made by all the accused, on the basis that the accused were not advised of their right to legal representation; the contents thereof were never read back to them; and they were merely requested to sign the statement.

[3] The State decided to tender only the statement made by accused 5 into evidence. The defense, in addition to the objections raised during the pre-trial conference held, also indicated that accused 5 further objected on the basis that he was offered an improper inducement i.e that he would be granted bail, to make the statement; and the that he was not explained that he had right to remain silent. Given these objections to the admissibility of the statement, the Court proceeded with a trial-within-a-trial.

[4] The State called the investigating officer who, at the time, was attached to the Women and Child Protection Unit. She testified that she was assigned the docket on 9 June 2008. By then the accused was already arrested and in custody. She confirmed that she interviewed accused 5 on the same day. They were communicating in Rukuangali and they were alone in the office. She testified that she introduced herself as a police officer and proceeded to inform the accused of his rights in accordance with the Judges Rules. She testified that these rights are contained in what is commonly referred to as a J17 or a warning statement. She followed the format and read it to the accused in Rukuangali and she wrote down his response in English.

[5] She testified that although Rukuangal was not her mother language, that: she had been living in the Kavango area since 1995; she had informally acquired the language; she spoke Rukuangali fluently and understood it well; she fully understood the accused; and did not gain the impression that he did not understand her. She testified in English

[6] She further testified that she explained the right to legal representation to accused 5 and over and above those explanations contained in the J17, she also explained that he may apply for Legal Aid if he cannot afford to pay for a legal representative by completing a form which he

could obtaining from the clerk of the court. According to her accused 5 indicated that he understood what was explained to him and indicated that he did not want a legal representative.

[7] She further testified that she did explain his right to remain silent and informed him that everything he said will be written down and that it will be used in court. Accused 5 opted to give a statement in the presence of the police officer. She read into the record those parts which she read to the accused and his responses to the questions posed. She testified that when she was done she gave the statement to accused 5 to read and she also read it to him. He indicated that he understood and signed the statement. According to her, the accused appeared to be sober and normal. She denied making any promises to the accused and she averred that he gave the statement voluntarily.

[8] Counsel for the defense took issue in cross examination with the fact that no interpreter was used. The main thrust thereof was that accused 5 did not understand the investigating officer's Rukuangali and that he did not read and understand English well. The witness maintained that the accused understood her and that there was no need for an interpreter. The investigating officer stated that she determined that the accused was in grade 10 and furthermore did not indicate to her that he could not

understand her. Counsel also raised the issue of the youthfulness of the accused. The investigating officer responded that she determined that the accused was 19 years old at the time; that she considered him to be a major and therefore old enough to give a statement without the assistance of a guardian.

[9] The Defense called accused 5 to testify under oath. He testified that he was taken out of the cell and the investigating officer just told him to tell her what happened. She did not introduce herself. He told her what happened. She did not explain that he had a right to have a legal representative present and she did not tell him that he did not have to say anything. When he was asked if she informed him whether he has a right to remain silent he confirmed that she informed him of his right to remain silent. He opted to remain silent. When asked why he made a statement he answered that the investigating officer must have written the statement out of her own head. He later stated that he did make the statement but that he did so only because the investigating officer informed him that the matter would be prolonged and that he would not be granted bail if he does not make a statement. Accused 5 also later admitted that he knew that she was a police officer as she introduced herself to him.

[10] He testified that his English was poor because most of his subjects are tutored in Rukuangali. He was not given the statement to read nor was it read to him. He testified that he did not even see in which language it was written as he was just given a document to sign without knowing what the contents thereof was. He denied that he was asked the questions contained in the J17. Under cross examination accused 5 admitted that he had English as a subject from grade 1 to grade 9 and that he passed English each year. He confirmed under cross-examination that he understood the investigating officer and that there was no need for an interpreter. He also confirmed that she was writing down when he told her what happened.

[11] It is trite law that the onus rests on the State, to prove beyond reasonable doubt that the statement complies with the provisions of section 219(A) i.e that it was made freely and voluntarily. In *S v MALUMO AND OTHERS (2) 2007 (1) NR 198 (HC)* it was held that the Judges' Rules, though they are administrative directives to be observed by the police, are not completely without effect; and that a breach of a rule may influence eg the determination whether an incriminating statement had been made voluntarily or not.

[12] *S v KAPIKA AND OTHERS (1) 1997 NR 285 (HC)* Mtambanengwe J at p288 – 289 H – J and A – C stated the following:

“We live under a constitutional regime like in South Africa, the relevant provisions of whose constitution ie the bill of rights, are similar to ours. In this connection many recent cases in South Africa have emphasised the need for an accused person to be informed of his constitutional rights and to be afforded the opportunity of exercising the same at pre-trial proceedings. See for example S v Mathebula and Another 1997 (1) SACR 10 (W) at 18-19; S v Agnew and Another 1996 (2) SACR 535 (C); S v Melani and Others 1996 (1) SACR 335 (E) at 347e-h where Froneman J said:

> *'The right to consult with a legal practitioner during the pre-trial procedure and especially the right to be informed of this right, is closely connected to the presumption of innocence, the right of silence and the proscription of compelled confessions (and admissions for that matter) which ''have for 150 years or more been recognized as basic principles of our law, although all of them have to a greater or lesser degree been eroded by statute and in some cases by judicial decision'' (in the words of Kentridge AJ in Zuma's case). In a very real sense these are necessary procedural provisions to give effect and protection to the right to remain silent and the right to be protected against self-incrimination. The failure to recognize the importance of informing an accused of his right to consult with a legal adviser during the pre-trial stage has the effect of depriving persons, especially the uneducated, the unsophisticated and the poor, of the protection of their right to remain silent and not to incriminate themselves. This offends not only the concept of substantive fairness which now informs the right to a fair trial in this country but also the right to equality before the law. Lack of education, ignorance and poverty will probably result in the underprivileged section of the community having to bear the brunt of not recognising the right to be informed of the right to consultation with a lawyer.*'

[13] The first question for this Court to determine, is whether the accused was warned in terms of the Judges Rules and informed of his constitutional right to legal representation.

[14] Counsel for the State submitted that they succeeded proving beyond reasonable doubt that the accused made his statement freely and voluntary and that he was advised of his right to legal representation. Support for this contention, he submitted, is the fact that accused 5 admitted that he was informed that he has the right to remain silent; and it would be improbable that the investigating officer would only explain this right and not the others contained in the J17. He further pointed out to this Court the contradictions in the evidence of accused and argued that he was not a credible witness.

[15] Counsel for the defense submitted that the fact that the procedure exist does not *per se* mean that it was followed. She contended that the accused from the outset raised the issue that his right to legal representation was not explained to him and the statement was not read back to him. She submitted that the accused, given his youthfulness, was easily influenced to make a statement and to believe the investigating officer when she promised him bail.

[16] She raised the issue that the inconsistencies could have been the result of a misunderstanding between the interpreter and the accused. The Court at that point deemed it necessary to adjourn the proceedings for the

services of an official interpreter and for him to evaluate whether the the translation of the casual interpreter from Rukuangwali into English and *vice versa* was accurate. The Court called the official interpreter as a witness to testify under oath and he confirmed that the translation was done correctly.

[17] Counsel for defense also conceded that there was no legal requirement for a legal guardian to be present but maintained that, because of his youthfulness, the accused was easily influenced by the investigating officer conduct.

[18] The accused admitted that he was advised of his right to remain silent. His testimony was that he opted to remain silent and only decided to make the statement when he was informed that his case would be prolonged and the promise was made by the investigating officer that he would be granted bail. Whether or not the right to legal representation was explained and whether or not there was an improper inducement requires of this Court to evaluate the evidence placed before it .

[19] With regard to the allegation of an improper inducement offered by the investigating officer, I would firstly deal with the undesirable practice that the investigating officers take down the statements of an accused and to act

as an interpreter at the same time. This practice has to be strongly discouraged. *S v NZAMA AND ANOTHER 2009 (2) SACR 326 (KZP), WALLIS* J at p338 G-H stated the following in respect of confessions:

> *"Our courts have over many years repeatedly drawn attention to the undesirability of having a confession taken by a police officer in the same unit as the investigating officer. They have equally deprecated the use, as interpreters, of officers in the same unit as the investigating officer, and the person taking the confession. The undesirability of taking a statement in the presence of the investigating officer, however remote, and other policemen, is manifest. The reason is, as Jansen JA pointed out, that these factors provide fertile soil in which the accused can plant a seed of suspicion against the conduct of the police, and the propriety of their behaviour in obtaining the confession. Such an environment can also, as the learned judge pointed out, plant suspicion in the mind of the accused that he or she is not free to speak their mind and tell the person recording the confession of misconduct or inducements brought to bear upon them in order to compel the confession*."

[20] Although the above relate to confessions, the same, to my mind would apply to statements. It was held in that case that the above- mentioned practice was not *per se* to be irregular. In this instance, the fact that the investigating officer took down the statement and was also the interpreter, made it possible for the accused to plant a seed of suspicion against the conduct of the police. It however remains this Court's duty to evaluate the evidence to determine whether there is any truth in the allegation of an improper prior inducement.

[21] The disputed facts in respect of the admissibility of the statement are whether or not the right to legal representation was explained and whether or not the investigating officer offered an improper inducement to the accused to make the statement. In essence there are two mutually destructive versions of what transpired in the office between the investigating officer and accused 5. In *S v Janse van Rensburg and Another* 2009 (2) SACR 216 (C), Moosa J at p202, C – D, states the following:

> *"Logic dictates that, where there are two conflicting versions or two mutually destructive stories, both cannot be true. Only one can be true. Consequently the other must be false. However, the dictates of logic do not displace the standard of proof required either in a civil or criminal matter. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measured against the probabilities. In the final analysis the court must determine whether the State has mustered the requisite threshold - in this case proof beyond reasonable doubt."*

[22] The accused appeared, despite the fact that he achieved an educational level of at least up to grade 9, to be unsophisticated. Despite this fact the Court was unable to ignore the obvious discrepancies in his testimony. What became apparent is that the accused understood the investigating officer when she spoke Rukwangali. He furthermore first denied that she introduced herself and afterwards admitted that she indeed introduced herself. He first denied that she explained that he did not need to

make a statement and later upon being prompted about why he eventually made a statement admitted that the investigating officer did explain this right to him. It appears that he was not prepared to, of his own volition, concede that some of the procedure during the interview was followed. I would have to agree with counsel for the State that it could not reasonably possibly be true, that the investigating officer would explain some of his rights and not the other.

[23] When he first narrated what transpired on his own he testified that the investigating officer asked him to tell her what happened and he did so. No mention was made of any promises. It was only after being prompted by his counsel that he indicated that he opted to make a statement due to the promise made by the investigating officer. This creates the impression that it was not part of what actually transpired but an afterthought.

[24] The admissions made by the accused in terms of the fact that the investigating officer introduced herself and that she warned him of his right to remain silent, lends credence to the testimony of the investigating officer that she indeed explain his right to legal representation.

[25] Accused 5's evidence was unconvincing and improbable and is rejected as being wholly untruthful and incapable of credence. I am satisfied that the investigating officer warned the accused in accordance with the Judge's Rules and informed him not only of his right to legal representation but also informed him that he could apply for legal aid. The accused version of the promises made by the investigating officer that he would be granted bail is nothing more than an afterthought.

[26] The issue whether or not she properly recorded what was said has no bearing on the admissibility of the statement. It is therefore not necessary for me at this point, to determine whether the accused understood the statement that was written in English. The weight to be attached to the contents of the statement will be determined in the main trial and I shall therefore not deal with this issue in the trial-within-a-trial.

[27] I was satisfied that the State had proven beyond reasonable doubt that accused 5 made the statement freely and voluntary and that his right to remain silent and the right to have a legal practitioner present were explained to him. I therefore ruled that the statement of accused 5 be declared admissible as evidence against him in the main trial.

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Tommasi J