



CASE NO.: CC 32/2001

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

HELD AT WINDHOEK

In the matter between:

THE STATE

and

CALVIN LISELI MALUMO & 111 OTHERS

CORAM: HOFF, J

Heard on: 08 – 09 November 2011

Delivered on : 10 November 2011

JUDGMENT

HOFF, J: [1] Detective Chief Inspector Simasiku testified in relation to a video recording which the State wished to present to Court as real evidence, namely that he was informed by an informant of the existence of this video recording, which apparently contains footage where Mr Mishake Muyongo had an interview with the SABC and in which Mr Mishake Muyongo allegedly justified the secession or the purported secession of Caprivi from Namibia.

[2] Police Officer Simasiku then, according to his testimony requested the informer to retrieve this video recording cassette from an unidentified house. This was subsequently done and these were the circumstances under which this video cassette eventually came into the possession of the investigating team.

[3] When Mr January tried to have this video recording identified and viewed by the Court, or by the witness in order to identify the video recording, there was an objection of counsel appearing on behalf of the accused persons, in the person of Mr Kauta.

[4] The objection in short firstly relates to the fact that since it is common cause that the video recording had not been seized during a normal seizure proceedings on the strength of a warrant, that the privacy rights of the unknown owner of that house had been violated in the process of retrieving this video cassette.

[5] Secondly, that the Police by not following the normal procedure to seize the video recording on the strength of a search warrant in fact committed the crime of theft; that they came to Court with dirty hands and that because the conduct of the Police violated the provisions of the Namibian Constitution and also the provisions of the Criminal Procedure Act, this video recording should not be received as evidence by the Court.

[6] Mr January disagreed and submitted that the Officer never mentioned in his evidence-in-chief that the crime of theft had been committed but even if it is accepted that the video recording had been obtained in violation of

constitutional rights, this Court still has a discretion to allow the evidence if it is in the public interest or the interest of the administration of justice to do so.

[7] This Court raised the issue that due to the scant evidence presented, that this Court is placed in a position where it cannot, on a basis of the evidence before Court exercise its discretion whether or not to allow the evidence.

[8] This has in fact the result that the Court must at this stage speculate under which circumstances the video recording had been obtained by the Police. Mr Kauta charged that the Police were accomplices to the crime of theft. Now that may be a reasonable inference under the circumstances based on the evidence of Inspector Simasiku. But if one has to speculate, one could go even further than theft.

[9] It could well be that the informant in his endeavours to retrieve the video recording committed the crime of housebreaking with intent to steal and theft, or even worse, housebreaking with intent to rob and robbery. An equally and compelling reasonable inference is that the informant obtained the video recording under innocent circumstances, for example it could be that he obtained it from an acquaintance.

[10] The Court is in a position as I indicated earlier, that it is now forced to speculate under which circumstances, and as I have indicated there are two equally compelling inferences which one may draw under which circumstances the video recording could have landed in the hands of the Police Officers.

[11] It is trite law that where an admission or a confession, or even an object which had been used in the commission of crime had been obtained under dubious circumstances or where it had been obtained in violation of constitutional rights of an accused person, that the Court may under those circumstances refuse to accept it as evidence in the court.

[12] Mr January yesterday asked during his submissions what would be the way forward, should the Court provide the State the opportunity to clarify the circumstances under which the video recording had been obtained?

[13] Now the dilemma in allowing this is the following. Since the Chief Inspector Simasiku is not in a position to testify regarding the circumstances under which the video recording had been retrieved, the State cannot rely or cannot present his evidence to Court because that evidence that the State would tender would amount to hearsay evidence, since what Inspector Simasiku will come and testify is what he had heard from the informant, under which the circumstances the informant had obtained the video recording, and that would be hearsay. Since hearsay evidence is inadmissible, the Court would still remain in the position that it is unable to say under what circumstances this video recording had been retrieved.

[14] It is unlikely that the State will call the informant to testify under which circumstances he retrieved the video recording. Since the State has an onus to establish the admissibility requirements for the reception of any evidence in Court, I am of the view that where you are faced with a situation like this, where you have two equally compelling inferences that may be drawn under which

circumstances the video recording had been retrieved, the State in such scenario has not discharged that onus in a situation where the scales are evenly balanced.

15] It is for that reason that the Court cannot at this stage accede to the request by the State to receive the video recording as evidence.

HOFF, J:

ON BEHALF OF THE STATE:

MR JANUARY

*(Request by Mr January to have the video recording viewed
by Court, objected by Mr Kauta - video recording, not seized
but stolen, should not be received as evidence by Court)*

Instructed by:

OFFICE OF THE PROSECUTOR-

GENERAL

ON BEHALF OF THE DEFENCE:

MR

KAUTA

Instructed by;

DIRECTORATE OF LEGAL

AID