

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: CC 03/2004

In the matter between:

THE STATE

APPLICANT

v

PROGRESS KENYOKA MUNUMA

1ST RESPONDENT

SHINE SAMULANDELA SAMULANDELA

2ND RESPONDENT

MANUEL MANEPELO MAKENDANO

3RD RESPONDENT

ALEX SINJABATA MUSHAKWA

4TH RESPONDENT

DIAMOND SAMUNZALA SALUFU

5TH RESPONDENT

FREDERICK ISAKA NTAMBILWA

6TH RESPONDENT

HOSTER SIMASIKU NTOMBO

7TH RESPONDENT

JOHN MAZILA TEMBWE

8TH RESPONDENT

Neutral citation: *S v Munuma* (CC 03/2004) [2020] NAHCMD 11 (21 January 2020)

Coram: UNENGU AJ

Heard: 17 October 2019 – 18 November 2019

Delivered: 21 January 2020

Flynote: Criminal Procedure – Warning Statements – Admissibility thereof – The right not to incriminate themselves and to apply for a legal aid funded lawyer not recorded on the statements to prove that the rights have been explained to the accused – The mere say so by warrant officer Kombungu not sufficient proof that rights were explained – Warning statements disallowed for not passing the test of a fair trial envisaged in Article 12.

Summary: The accused in the matter are charged with crimes of high treason, murder, sedition and possession of arms and ammunition. The crimes were perpetrated in the former Caprivi now Zambezi Region during 1999. Various witnesses testified on behalf of the state already but when the investigating officer warrant officer Kombungu gave his evidence, the defence objected to the admissibility of warning statements of certain accused. In view thereof, a trial within a trial was conducted to establish whether to admit or not to admit the warning statements objected to by the defence. During the trial within a trial proceedings, the state led evidence of officer Kombungu and fellow police officers. They were all cross examined by the two defence's counsel. However, none of the accused persons whose warning statements are involved testified.

Held: that the warning statements are disallowed no proof that rights not to incriminate themselves and to apply for legal aid explained to the accused.

Held further that the mere say so by Kombungu that he explained the rights without recording it, is not sufficient proof that the right to apply for legal aid lawyer was explained.

ORDER

The warning statements taken from accused 1, 2, 6 and 7 are disallowed and not to be admitted as evidence in the main trial.

RULING

(Trial-within-a trial)

UNENGU, AJ

INTRODUCTION

[1] These proceedings concern a trial-within-a trial in the trial of the State vs Progress Munuma and Others. The accused are arraigned in this court with charges of high treason, sedition, murder and possession of arms and ammunition.

THE BACKGROUND FACTS

[2] Various witnesses testified on behalf of the prosecution and were cross - examined by the defence. However, during the testimony of detective warrant officer Kombungu, both Ms Agenbach and Mr Neves, the legal practitioners for the accused objected to the admission into record as evidence of warning statements taken from Mr Progress Kenyoka Munuma, accused 1, Mr Samulndela Shine Samulandela, accused 2, Isaka Frederick Ntambilwa, accused 6 and Hoster Simasiku Ntombo, accused 7 on the ground that warrant officer Kombungu did not properly explain the right to legal representation, the right against self-incrimination and the right to apply for legal aid at the directorate of legal aid in the Ministry of Justice to the accused. As a consequence therefore, a trial within a trial was ordered to afford the prosecution an opportunity to refute the objections raised by counsel for the accused against the admissibility of the warning statements and to prove that the right against self-incrimination and to apply for legal aid were properly explained.

[3] The warning statements objected to were handed in as exhibits (FFF1, FFF2, FFF3 and FFF4) during the evidence of officer Kombungu. Officers Kombungu, Popyeinawa and Chindo were called by Mr Campher for the state to testify. The essence of their testimony was to prove that Kombungu did explain the right alleged by the accused not to have been properly explained to them. As expected, Kombungu testified that he did explain to them the right to obtain legal representation from legal practitioners of their own choice for whom they have to pay with own money and the right to apply for a legal aid lawyer from the Ministry of Justice at the directorate of legal aid from whom they would get legal representation for free.

[4] All these witnesses are still Police Officers in the Namibian Police Force and experienced officers except for Nchindo who was a constable then now works for the Ministry of Environment and Tourism. They confirmed in their testimony that the right

to apply for a legal aid lawyer was explained to all four accused although not indicated on their warning statements. The failure by Kombungu to put it in writing on the warning statements that the right to apply for legal aid was explained, what was told them to do and what legal aid entails, sparked intensive and robust cross-examination from both Ms Agenbach and Mr Neves, legal practitioners for the accused.

[5] Officer Kombungu could not give a plausible explanation why he did not write in pen and in own handwriting on the warning statements as he has done with questions and answers, how he explained these right to the accused. He conceded to a question put to him by Mr Neves that he had papers in abundance to write on. After cross-examination, the defence elected not to call the accused to testify in defence of their case but decided to close their cases without leading evidence.

ARGUMENTS

[6] All three counsel prepared and submitted written heads of argument which were amplified with oral submissions. During oral submissions, the state through Mr Campher, submitted that the state through the evidence presented before court proved that the right to legal representation and to apply for legal aid were properly explained to the accused. Mr Campher stressed that the fact that it was not written down does not necessarily mean that the right to legal aid lawyer was not explained. To proof his point, Mr Campher quoted from a dialogue between Detective Warrant Officer Kombungu (then Detective Sergeant) and the accused when he read to them the questions on the proforma warning statements. The testimony of Detective Warrant Officer Kombungu was corroborated by Chief Inspector Popyeinawa in whose presence Kombungu ostensibly warned and explained the right to the accused.

[7] Mr Campher further argued that the answers given by accused 2 in the warning statement did not amount to a confession but admissions under s 219 A of the Criminal Procedure Act¹. Similarly, Mr Campher argued that the warning statement of accused 1 should be admitted as evidence in the main trial.

[8] Further, counsel submitted that the warning statement of accused 6 was taken by Kombungu after he had explained to him his right not to incriminate himself, the

¹ Act 51 of 1977.

right to engage a lawyer of his own choice and to apply for a legal aid legal practitioner.

[9] On her part, Ms Agenbach though, started off by referring to Article 12(1) of the Constitution which provides for a presumption of innocence until proven guilty and a right not to incriminate themselves, amongst others. Article 12(1) mainly deals with a fair trial, in a civil or in a criminal trial. She pointed out with reference to case law² that it is an obligation of the State to discharge its duty without any assistance from an accused or by making use of potential incriminating evidence from an accused person against constitutional and common law admissibility requirements. As a result, Ms Agenbach objected to the admission of the warning statements of accused 1 and 2 into record as evidence in the main trial.

[10] Counsel was adamant that Kombungu never explained to her clients their right to apply for a legal aid lawyer because the explanation does not appear on their warning statements. She contended that for the court to accept that the right to apply for a legal aid lawyer for whom they would not pay anything but would be provided and paid for by state, such an explanation has to be in writing on the warning statement of each accused person.

[11] Sentiments expressed by Ms Agenbach in her written heads as well as in her oral submissions, were echoed by Mr Neves counsel for accused 6. He also argued in his written heads of argument and oral submissions that his client Isaka Frederick Ntambilwa was not informed of his right to apply for legal aid in the event he was unable to afford a lawyer of his own choice. Such failure to inform his client his right, he argued, is a violation of Article 12 of the Constitution which provides for a fair trial and requested the court to consider POL 17 inadmissible. Mr Neves further attacked POL 17 forms on the grounds that the forms were not commissioned by a commissioner of oaths and that neither of the witnesses made a statement under oath in support of POL 17.

CONCLUSION

[12] Article 12 of the Constitution provides for a fair trial. A fair trial referred to in the Article is in respect of all parties involved. Both the state and the accused before court

² S v Alex Couriers (Pty) Ltd 1985 SA at 81).

in a criminal trial are entitled to be accorded a fair trial starting from pre-trial proceedings until the end of such trial. In *S vs Malumo and Others*³ the court held that the entire process of bringing an accused person to trial and the trial itself is subject to Article 12 of our Constitution. Such process must pass the test in the Article failing which may result in the whole process be declared null and void on the ground of irregular proceedings.

[13] In the present proceedings, the court will also apply the above test to the whole process of how the accused were brought to trial starting from time of their arrests. If the process found not to have passed the test in Article 12, the court will not allow the warning statements to be part of the court proceedings.

[14] In *S v Kapika and Others*⁴, Mtambanengwe J with reference to *S v Melani* said the following 'We live under a constitutional regime like South Africa, the relevant provisions of whose constitution i.e. 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 347 e –⁵. See also *S v Tobias Nahenda*⁶.

[15] The Supreme Court in the matter of *Deon Engelbrecght v The State*⁷ held amongst others that while the justice of the peace warned the appellant of his right to legal representation, he failed to record the response of the appellant to the warning and that he was a poor witness in his oral evidence on that point, he could not recall whether the appellant wanted a legal representation of his choice or that funded by the State.

[16] The court further, held that the court has a discretion to allow or exclude the unconstitutionally obtained evidence or evidence in conflict with the constitutional right for reasons of public policy and that no exclusionary rule is adopted in exercising the

³ 2007 (1) NR 198).

⁴ 1997(1) NR 285 at 288.

⁵ 1996 SACR 335 (E).

⁶ Case No. CC 56/ 2007 delivered on 6/10/2008.').

⁷ Case No: SA 05/ 2012 delivered on 14 July 2012.

court's inherent power in ensuring a fair trial. Furthermore, the court held that it is now settled law that an accused person under arrest depending on the facts of each case, in particular the personality and the characteristics of the particular *accused should be comprehensively informed of his/ her right to legal representation, which includes the right to apply for legal aid; that failure to inform the accused properly of his right to consult there and then with a legal representative violates a fundamental right of the accused.* (Emphasis added)

[17] There is no doubt in my mind that the case law referred to above and principles applied therein are applicable to the facts of the present matter. Even though witnesses called by the state testified that the right to apply for legal aid was explained to them, Warrant Officer Kombungu failed to record it to serve as proof that indeed he informed the accused the right to apply for legal aid. In fact, the facts in the matter at hand and those in the Deon Engelbreght matter are almost similar, save for the fact that in that matter a confession was involved while in this one, warning statements are involved.

[18] Therefore, and in view of what has been stated above, in particular the law principles applied in cases cited as well as those provided in Article 12 of the Constitution, I come to the conclusion that the state failed to prove beyond reasonable doubt that the right not to incriminate themselves and to apply for a legal aid funded lawyer was explained to the accused whose warning statements have been objected to, that allowing the warning statements into evidence in the main trial will not deny the accused persons their constitutional right to a fair trial.

[19] The warning statements could also not be allowed for different reasons one such reason being that warrant officer Kombungu proceeded to ask questions eliciting from the accused persons self-incriminating answers despite the proforma forms of the warning statements providing in brackets that questions be asked after consultation with their legal practitioners.

[20] That said, the following order is made:

The warning statements taken from accused 1, 2, 6 and 7 are disallowed and not to be admitted as evidence in the main trial.

E P UNENGU
Acting Judge

APPEARANCES:

APPLICANT: L Campher
Office of the Prosecutor-General, Windhoek

RESPONDENT 1-5 & 7: E Agenbach
Instructed by Directorate of Legal Aid, Windhoek

RESPONDENT 6 & 8: J Neves
Instructed by Directorate of Legal Aid, Windhoek