

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: CC 03/2004

In the matter between:

THE STATE

APPLICANT

and

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 90 (12 March 2020)

Coram: UNENGU AJ

Heard: 13 February 2020

Delivered: 12 March 2020

Flynote: Criminal Procedure – Trial-within-a-trial – Confessions – Admissibility of confession – Accused persons alleging their right against self-incrimination and to

apply for legal aid not satisfactorily explained – thereby infringing their right to a fair trial in terms of Art 12(1)(a) read with Art 12(1)(f) of the Constitution of Namibia.

Summary: The two accused and others are charged with crimes of high treason, murder, sedition and possession of arms and ammunition. A trial-within-a-trial was conducted after counsel for the two accused objected to the admissibility of confessions taken from them by an experienced magistrate on the ground that their right to a fair trial as provided for in terms of Art 12(1)(a) and Art 12(1)(f) had been infringed because the magistrate failed to explain to them their rights against self-incrimination and to apply for legal aid.

Held – that the evidence of the prosecution that the right to legal representation including the right to apply for legal aid was not rebutted by the accused when choosing to remain silent.

Held – that the accused bore the *onus* to prove the violation of the rights but failed to discharge such *onus*.

Held – further that the prosecution has proven beyond a reasonable doubt that the right to legal representation which includes the right to apply for legal aid was explained to the accused.

Held – further that the confessions by the accused are ruled admissible and be admitted into record of the main trial as evidence.

ORDER

The confessions taken from both accused 6 and 8 are hereby ruled admissible and admitted into record as evidence

RULING

(Trial-within-a-trial)

UNENGU, AJ

Introduction

[1] This is another judgment for a trial-within-a-trial. However, this one, concerns confessions taken from accused 6 and 8, by magistrate RMM Sakala at Katima Mulilo in the district of Katima Mulilo.

[2] Both accused 6 and 8 are charged together with accused 1, 2, 3, 4, 5, and 7 with crimes of high treason, sedition, murder and possession of arms and ammunition. Mr Neves, counsel for the two accused, objected to the submission of confessions made by accused 6 and 8 as evidence on the ground that they were not satisfactorily informed of their right to apply for legal aid prior to them making the statements in the event they could not afford a lawyer at their own expense, resulting in the confessions be deemed inadmissible for want of compliance with Article 12 of the Constitution of the Republic of Namibia.

[3] Article 12 of the Constitution deals with a fair trial. Relevant to these proceedings are the provisions of Sub-Article (1)(a) and (f), which state as follows:

‘(1)(a) In the determination of the civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law; provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.’

[4] On its part, sub- article (1)(f) states as follows:

‘No person shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such person’s testimony which has been obtained from such person in violation of Article 8(2)(b) hereof.’

[5] In regard to the right against self-incrimination provided for in sub- article (1)(f), it has not been alleged by accused 6 and 8 that they were compelled or unduly

influenced by magistrate Sakala or any other person to make confessions. The complaint is that the right to apply for a legal aid lawyer was not satisfactorily explained to them. That being the case, sub- article (1)(f) is not applicable to these proceedings. The same will apply to Article 8 (2)(b) referred to in Article 12(1)(f).

[6] Coming back to the confessions of the accused, the State called magistrate RMM Sakala and the interpreter Ms Mubonenwa to testify. It is unnecessary to determine as whether the statement taken down by the magistrate from the two accused are confessions or not. The reason being that the ground for attacking the admissibility of the confessions is not that the confessions did not comply with the requirement of s 217 of the Criminal Procedure Act¹ (herein referred to as the CPA), but rather a failure to explain the right to legal aid.

[7] Magistrate Sakala, after she was sworn in, started off by placing on record her qualifications, where she obtained these qualifications and her experience in the field of law. She testified that she worked as a magistrate in Zambia from 1977 up to 1995; thereafter she took employment at the University of Namibia at the Justice Training Centre. In 1998 she was appointed as a magistrate for the district of Katima Mulilo in the then Eastern Caprivi Region. She testified that she took many confessions as part of her functions as a magistrate for Katima Mulilo.

[8] With regard to the confession of Frederick Isaka Ntambilwa (accused 6), Mrs Sakala testified amongst others, that accused 6 was brought to her office by the police on 24 July 2002. She said that in the office were only herself, the accused and Mr Bernard M Sachibambo the official interpreter in the Silozi language and no one else. Mr Sachibambo has in the meantime, passed away.

[9] Magistrate Sakala testified that during the taking down of the confession, the accused spoke in Silozi language, the language she understands and speaks very well as it is similar to her mother language, and referred to the Silozi speaking people as their joking cousins.

¹ Act 51 of 1977.

[10] The proforma form (exh “GGG1”) handed up provisionally as an exhibit by agreement of the parties, contains information read to the accused and the answers of the accused in handwritten form.

[11] Mrs Sakala testified that she explained the accused’s right to legal representation before taking down the confession. This she did by reading out the content of the proforma form of the confession to the accused which was interpreted to the accused by the interpreter in Silozi and the answers to her in the English language by the same interpreter. The preliminary questions in the proforma used by the magistrate are self-explanatory, no further elaboration is required in that regard. Besides, the defence’s objection to the admissibility of the confession is that the accused was not told to apply for legal aid at the Directorate of Legal Aid in the Ministry of Justice because the explanation in case it was done, it was never recorded in writing on the form for proof that the accused was indeed told to apply for legal aid.

[12] Similarly, Mrs Sakala repeated and reiterated the procedure followed in taking down the confession of accused no 6. With regard to the taking down the confession of accused no. 8, the proforma used for taking down the confessions in respect of both the accused are identical. The only difference in the processes conducted, she said, is that accused no 8 elected to speak English instead of using the interpreter who was present during the whole session. According to her, the right to apply for legal aid was explained to both the accused, albeit not recorded on the proforma. The confession of accused 8 was provisionally handed in and marked as exhibit “HHH1” and “HHH2”.

[13] The witness was cross-examined by Mr Neves on behalf of accused 6 and 8. The cross-examination concentrated on the issue of the right to apply for legal aid which counsel said was not explained to accused which the witness replied it was. Mrs Sakala’s evidence with regard to this accused was corroborated by Ms Portia Mubonenwa, the official interpreter who was present when the confession of accused 8 was taken down. On a question of whether she had sufficient papers to write down the explanation of the right to apply for legal aid, Mrs Sakala responded that she had but could not pin pieces of papers to a proforma of a confession. Mr Neves also wanted her to explain why para 17 of exhibit “GGG1” (prov) reading “was not unduly

influenced thereto” was struck out and why she only signed the last page of provisional exhibit “HHH1” whereas in respect of provisional exhibit “GGG1”, she had signed on every page. Her response why para 17 was delineated is that she could not think of a reason why the para was struck out because of elapse of time.

[14] Ms Portia Mubonenwa, an official interpreter for the Katima Mulilo magistrate court, was next and the last witness called by the prosecutor to testify. She testified that she was present when the confession of accused 8 was taken down by the previous witness. She testified further that she was present to assist accused 8 in case he needed any help from her. She said the accused spoke English when the confession was taken down. She testified furthermore that even though she did not interpret for the accused when he was telling the magistrate his story, she did interpret for him the right to legal representation when explained to him by the magistrate.

[15] It is also Ms Mubonenwa’s testimony that she heard the magistrate explaining the right to apply for legal aid to the accused and that she did not sign the interpreter’s certificate because she was of the view that it was not necessary as she did not interpret the body of the confession. Ms Mubonenwa was also cross-examined by Mr Neves while Ms Agenbach had no questions to ask. The State then closed its case, after which Mr Neves also closed the case for accused 6 and 8 thereby exercising their right to remain silent in the face of evidence the court was entitled to consider.

[16] In *S v Auala*,² the Supreme Court held that the fact the accused is under no obligation to testify, does not mean that there are no consequences for that option during the trial if there is evidence calling for an answer. That the accused who chooses to remain silent in the face of such evidence, the court may be entitled to consider such evidence in the absence of evidence to the contrary.

[17] In this trial, both accused 6 and 8 chose to remain silent in the face of evidence from Mrs Sakala and Ms Mubonenwa to the effect that rights to legal representation, including the right to apply for legal aid where explained to them.

² 2010 (1) NR 175 (SC).

[18] In his written heads of argument, Mr Neves attacks the credibility of both Mrs Sakala and Ms Mubonenwa and argues that Mrs Sakala insisted that she informed both accused their right to apply for legal aid but failed to record that on the proforma while two lengthy confessions on separate papers were recorded. Also that she took it upon herself to sign exhibit "GGG1" (provisional) on every page despite there nothing in the proforma compelling her to do that, if the proforma was a directive and she could not go against such directive.

[19] Mr Neves further argues that Mrs Sakala's initiatives demonstrate that she was not as bound by the supposed directive as she made out in her testimony, because, he goes further, that if it is accepted that she did have a discretion to take her own initiative, then it must also be accepted that she could have, and should have, recorded in writing the explanation of the right to legal aid; that nothing precluded her from doing this. Even though, counsel labelled Ms Mubonenwa purporting to corroborate the version of Mrs Sakala that accused 8 was informed of the right to apply for legal aid, I am satisfied that her evidence and the evidence of Mrs Sakala, as a whole, have not been refuted under oath by accused 8.

[20] Similarly., Mr Campher, on behalf of the State, also filed written heads of argument which he augmented with oral submissions. In his written heads of argument, he reiterated Mrs Sakala's qualifications and her experience as a magistrate and in other fields of law practice. According to him, Mrs Sakala is a very experienced magistrate. I have no doubt that she was an experienced magistrate, well vested with the knowledge of taking confessions and her duty to explain legal rights to an accused person, not only when such an accused person is before her for purpose of making a confession, but also during the entire trial.

[21] As pointed out herein-before, Mr Campher argues and submits that only two grounds for objection against the admissibility of the confessions were raised by Mr Neves on behalf of accused 6 and 8. These are; that the accused's right to legal aid and the right against self-incrimination were not explained. He argued further that no other objections were raised by Mr Neves; like that his clients were threatened, beaten up, coerced, unduly influenced or were not in their sound and sober senses when taking down the confessions. I agree. In my view, it is also the position taken by the defence.

[22] As alluded to above, the ground for objection against the admissibility of the confessions is the failure to record on the proforma or any other paper how the magistrate explained to accused 6 and 8 the right to apply for legal aid, which such failure denied the accused a fair trial as provided for in Article 12 (1)(a) and (1)(f).

[23] Counsel for the two accused further relied heavily on the Supreme Court judgment in the matter of *Deon Engelbrecht v the State*,³ in which judgment the Supreme Court set aside the conviction and sentence of the appellant on the ground that the appellant did not receive a fair trial since there was no other evidence other than the confession to convict him. The facts in the *Deon Engelbrecht* matter differ materially from the facts in the instant matter. Two witnesses testified in this matter and is a trial-within-a-trial. With regard to the main trial, many witnesses testified already and is still continuing.

[24] In the trial-within-a-trial though, two witnesses testified, the magistrate and the interpreter. The testimony of the interpreter supported the evidence of the magistrate on the issue of whether or not the rights to legal representation and to apply for legal aid were explained to accused 8.

[25] Also in this matter, an experienced magistrate took down the confessions from the two accused persons, while in the *Engelbrecht* case, the confession was taken down by a peace officer who was a member of the Police Force whom the Court found to be a poor witness. The appellant in the *Engelbrecht* matter testified under oath and rebutted the evidence of Inspectors Becker and Oelofse.

[26] Therefore, in view of the fact that the two accused persons alleged that their constitutional right to a fair trial as provided for in Article 12 (1)(a) of the Constitution had been infringed upon, they bore the *onus* of proof of such an infringement but failed to discharge that *onus*.

[27] In that regard, this is what the Supreme Court has said in the *Engelbrecht* matter:

³ Case No.: SA 15/2012 Delivered on 14 July 2017.

[26] The accused or the appellant in this case bore the *onus* of proof in regard to the alleged constitutional infringement of his right. See *S v Soci* 1998 (2) SACR 275 (ECD) at 288h and 289d.

[27] There has been a number of decisions in this court and the High Court on the effect of the admissibility of self-incriminatory acts by an accused following upon infringement of the right to legal representation. *S v Kau & others* 1995 NR 1 (SC); *S v Shikunga & another* 1997 NR 156 (SC); *S v Bruwer* 1993 NR 219 (HC); *S v Kukame* 2007 (2) NR 815 (HC); *S v Malumo & others* 2007 (1) NR 72 (HC); *S v Malumo & others* (2) 2007 (1) NR 198 (HC); *S v De Wee* 1999 NR 122 (HC).

[28] The principle gleaned from some of these decisions is that a court has a discretion to allow or exclude unconstitutionally obtained evidence or evidence in conflict with a constitutional right for reasons of public policy. See *S v De Wee*, at 127I; *S v Kukame* at 837I; *S v Malumo & others* at 215 para 88. See also *S v Soci* at 292I; *S v Khan* 1997 (2) SACR 611 (SCA) 619a-g. No strictly exclusionary rule is adopted in exercising the court's inherent power in ensuring a fair trial. (Emphasis added)

[29] The correct approach adopted in considering evidence obtained in conflict with constitutional rights was spelt out, though in a different context, in *S v Shikunga & another*, at 170F-171A-D by Mahomed CJ, after the learned Chief Justice conducted a thorough survey of the approaches in four other jurisdictions, namely, Canada, United States, Jamaica, Australia, as follows:

'There can be no doubt from these authorities that a non-constitutional irregularity committed during a trial does not *per se* constitute sufficient justification to set aside a conviction on appeal. The nature of the irregularity and its effect on the result of the trial has to be examined. Should the approach be different where the error arises from a constitutional breach? That question assumes that the breach of every constitutional right would have the same consequence. In my view that might be a mistaken assumption and much might depend on the nature of the right in question. But even if it is assumed that the breach of every constitutional right has the same effect on a conviction which is attacked on appeal, it does not follow that in all cases that consequence should be to set aside conviction. I am not persuaded that there is justification for setting aside on appeal all convictions following upon a constitutional irregularity committed by a trial court.

It would appear to me that the test proposed by our common law is adequate in relation to both constitutional and non-constitutional errors. Where the irregularity is so fundamental that

it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits. Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has been tainted by such irregularity. Where this question is answered in the negative the verdict should stand. What one is doing is attempting to balance two equally compelling claims – the claim that society has that a guilty person should be convicted, and the claim that the integrity of the judicial process should be upheld. Where the irregularity is of a fundamental nature and where the irregularity, though less fundamental, taints the conviction the latter interest prevails. Where however the irregularity is such that it is not of a fundamental nature and it does not taint the verdict the former interest prevails. This does not detract from the caution which a court of appeal would ordinarily adopt in accepting the submission that a clearly established constitutional irregularity did not prejudice the accused in any way or taint the conviction which followed thereupon.’

See also *S v Kandovazu* 1998 NR 1 (SC).’

[28] Further, in para 30 of the judgment the Supreme Court said the following:

[30] Compare Mahomed CJ’s observations above to that of Kriegler J in *Key v Attorney General, Cape Provincial Division & another* 1996 (4) SA 187 (CC) at 195G-196D paras 13 and 14 where the following was said:

[13] In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavor by international human rights bodies, enlightened legislature and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.

[14] If the evidence to which the applicant objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise objections to its admissibility. It will then be for the trial Judge to decide whether the circumstances are such that fairness requires the evidence to be excluded.'

[29] It is clear from the authorities cited hereinabove that a court has discretion to allow or exclude unconstitutionally obtained evidence or evidence in conflict with a Constitutional right for reasons of public policy, and no strict exclusionary rule is adopted in exercising the court's inherent power in ensuring a fair trial.

[30] As already stated in this matter, both the two witnesses who testified for the State told the court that the right to legal representation, including the right to apply for legal aid was explained. Documentary evidence handed up by both counsel as exhibits, also support the versions of the two witnesses. It is pity though that the accused persons who bore the *onus* to prove the allegations of the violation of their constitutional right to a fair trial chose not to testify in the face of strong evidence to the contrary. This court in absence of evidence from the accused, has no choice other than to consider the only evidence presented before it by the prosecution. There is no doubt in my mind, that the prosecution had proven beyond a reasonable doubt that the right to legal representation, including the right to apply for legal aid was explained to the accused by the magistrate before the confessions were taken down and that the accused were afforded a fair trial as envisaged in Article 12 (1)(a).

[31] It was agreed upon by the parties to disclose and read into record of proceedings the contents of the confessions by the accused due to the fact that Mrs Sakala was a foreign witness who came from Zambia to testify in the matter. Therefore, it is not necessary for the prosecution to recall her to come and read into record the contents of the confessions.

[32] Therefore, for reasons stated above and the submissions made by counsel in the matter, as well as the legal principles in the case law cited herein, I make the following order:

The confessions taken from both accused 6 and 8 are hereby ruled admissible and admitted into record as evidence.

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