



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case No: CC 19/2017

THE STATE

Versus

PANDULENI GOTLIEB	1 ST ACCUSED
DAVID TASHIYA	2 ND ACCUSED
DAVID SHEKUNDJA	3 RD ACCUSED
ELLY NDAPUKA HINAIVALI	4 TH ACCUSED
MALAKIA SHIWEDA	5 TH ACCUSED

Neutral citation: *S v Gotlieb and 4 others* (CC 19/2017) [2022] NAHCMD 92 (7 March 2022)

Coram: D USIKU, J

Heard: 23 and 24 February 2022

Delivered: 7 March 2022

Flynote: Criminal procedure – Trial – within- a trial – Right to legal representation includes the right to apply for legal aid – explanation of rights – Not just a formality – An accused must be made to understand and appreciate the

explanation of his rights – Rights explained must be documented – In the absence of documentation, no rights explained.

ORDER

The evidence relating to the identification parade is ruled inadmissible.

RULING

TRIAL – WITHIN – A – TRIAL

USIKU J:

[1] After the state led the evidence of about 12 state witnesses, Mr Raphael Litota, a Chief Inspector in the Namibian Police, based at the Walvis Bay Police Station Regional Headquarters was called to testify as a thirteenth state witness.

[2] His testimony is that he was requested by the Investigating Officer in this case, Warrant Officer Ashikoto to conduct an identification parade. At the time of the request he had not been involved in any investigation of the case. Neither did he know any of the state witnesses. According to him a police officer who conduct an identification parade need not to have a particular rank. Because the identification parade is often very crucial, there are certain rules that one has to comply with.

[3] Most importantly, the proceedings at the identification parade should be recorded by an officer in charge of the identification parade. This is done in order to ensure that an accurate account of the event can later be furnished to the court. Thus the importance of the Pol 47.

[4] Having been involved in the arrangement of the identification parade arrangements were made for an interpreter who was required to translate from Oshiwambo language and vice versa.

[5] Another important rule at the identification parade is that the suspects should be informed of the purpose of the parade and the allegations against them, they should also be given an opportunity to obtain a legal representative of their own choice to be present at the parade.

[6] Chief Inspector Litota testified further that there were about 13 suspects at the identification parade held on 2 June 2016 at the Volleyball hall, on the first floor at the Walvis Bay Police Station. A photographer was also arranged in order to take photos of suspects once they have been identified by the witness.

[7] Inspector Litota's testimony is further that he explained the right to legal representation of own choice to the participants at the identification parade. He also explained to the suspects that they had a right to call either a family member or a friend to be present at the parade, if he so wished. These rights were documented on the pro-forma, which is designed by the police and is specifically used when identification parades are held. That specific pro-forma does not provide for the right to be represented by a legal aid lawyer. He maintained that he verbally explained the right to obtain legal aid to the suspects, who are now accused 1 and 3 before court. He also explained to them how they were to apply for legal aid through the clerk of court. All these according to Inspector Litota were explained and translated to accused 1 and 3 by the interpreter, a former constable Kambabi.

[8] Having explained the rights including the right to be legally represented by a legal aid lawyer, accused 1 and 3 were further asked if they had understood their rights to which each accused responded in the affirmative. Had any of the accused indicated that he required the services of a legal aid lawyer he would have stopped the process immediately. That did not happen with any of the accused.

[9] In cross examination Chief Inspector Litota explained the setup of the hall where the parade was held. No one was able to see what was going on from the outside, and that the parade was held behind closed doors. He denied the allegations that there were persons who sat at the balcony as there is no such alleged balcony at all. His duty as an officer in charge of the parade was to ensure that no irregularities would occur during the process. With regard to the claim by accused 1 that he had appeared on the same date before court and there were groups of people who attended at his first appearance, Inspector Litota responded that he was not aware about the case and was also not present at the court on that date.

[10] When cross examined by counsel for accused 3 about the purpose of the identification parade, he explained that the parade is meant for the victim of a crime to point out a suspect alleged to have been involved and also further explained that the suspect could be present or not at the parade. He maintained that accused 3's right to apply for legal aid was fully explained to him albeit verbally.

[11] Mr Veikko Kambabi a former constable in the Namibian police confirmed that he was requested to act as an interpreter at the time of the identification parade held on 20 June 2016. He has since resigned from the force. He translated from Oshiwambo language to English and vice versa. He is an Oshiwambo speaking person. During the proceedings and after the accused's rights were explained, none of the accused opted to apply for legal aid, neither to call a family member or a friend to be present at the identification parade. Accused 1 and 3 each appended their signatures on the pro-forma used at the parade by the police. He also signed as an interpreter. Mr. Kambabi confirmed further that the right to apply for legal aid was verbally explained to accused 1 and 3 respectively.

[12] On the other hand, accused 1 and 3 testified, denying to have been informed about the right to apply for legal aid at all and how to go about it. They each maintained that the reasons why they signed the pro-forma was to confirm the rights that appear on the pro-forma, which was the right to acquire the services of a private

lawyer, at their own expense and the right to have a friend or a family member present at the identification parade. Their contention is that had they been informed of their right to apply for legal aid, such right could have been documented in the proforma, like the other rights. It was further contended that they had not been afforded sufficient time in order to exercise such right or entitlement.

[13] The issue before court is to determine whether the accused's right to apply for legal aid were indeed explained and further whether the accused had been afforded sufficient or reasonable time within which to exercise such right. It is now common cause that no documentary record was made with regard to the right to apply for a legal aid adviser. This court is therefore not in a position to assess what explanation if any was made to the accused persons at the time of the identification parade apart from a mere say so.

[14] In terms of s73(1) of the Criminal Procedure Act 51 of 1977 once an accused person has been arrested, he or she is entitled to the assistance of his/her legal representative as from the time of his/her arrest.

[15] In *S v Malumo and others*¹ at para 211, it was stated that Article 12 of the Constitution of Namibia means that the entire process of bringing an accused to trial itself needs to be tested against the standard of fair trial. Most importantly, Article 12(1)(e) of the Constitution provides that all persons shall be afforded adequate time and facilities for preparation and presentation of their defence, before the commencement of and during their trial and shall be entitled to be defended by a legal practitioner of their choice.

[16] Indeed the identification parade is of crucial importance. A member who conducts an identification parade should therefore be careful in order to ensure the fairness of the identification parade because it is an investigative process and the reliability of the resulting identifying evidence, can be guaranteed. This court is not persuaded by the proposition that an accused person has no right to legal representation during the conduct of an identification parade on the basis that an

¹ *S v Malumo and others*² 2007 (1) NR 198 at 211.

accused is not required to make a testimonial communication. The right to be legally represented begins when a person has been arrested and goes on throughout the trial.

[17] As alluded to the right to apply for legal aid was not documented on the pro-forma which is used by the members of the Namibian Police force. This court is obviously therefore not in a position to confirm whether indeed the rights were explained. Mr. Litota the officer in charge of the parade tried to explain the reasons why the rights to legal aid is omitted from the pro-forma used by the police. Thus if an accused is required to participate at an identification parade, he or she be informed of his right to have his legal adviser of his own choice at such proceedings including an adviser from the legal aid department.

[18] It is trite that the right to legal representation includes entitlement to legal aid, which must be explained to an accused who might not know about such a right that would place an accused person in a position to make an informed decision. There is a further requirement that an accused must also be informed how to exercise such right. To have informed the accused person who were not in a position to acquire the services of a private lawyer, could have enable them an opportunity to have a legal aid lawyer present to ensure that a fair parade is conducted.

[19] Contrary to the testimony of Chief Inspector Litota and the interpreter who maintained that the accused's rights to apply for legal aid were explained verbally, there is nothing to convince the court that the right to apply for legal aid was indeed explained in the absence of any written documentation to that effect.

[20] It remains the duty of the state if it intends to rely on the evidence of an identification parade to establish that the parade was conducted fairly. It cannot be said that the parade was conducted fairly if the accused's right to apply for legal aid representation, had not been fully explained to them in order to make an informed decision as to how to proceed during the conduct of the identification parade.

[21] As a result, the evidence relating to the identification parade is ruled inadmissible.

D N USIKU
Judge

APPEARANCES

STATE: Mr. Basson Lilungwe.
Office of the Prosecutor-General

ACCUSED 1: Mr. Kaurivi.
(Kaurivi Legal Practitioners)

ACCUSED 3: Ms Tanya Klazen.
(Legal Aid – Swakopmund)