

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

**TRIAL WITHIN A TRIAL
RULING**

Case no: CC 19/2012

In the matter between:

THE STATE

and

**HERMAN MBANGO
SIMON SHAANIKA
TYLVES SHAANIKA**

1st ACCUSED

2nd ACCUSED

3rd ACCUSED

Neutral citation: *The State v Mbango* (CC 19/2012) [2013] NAHCNLD 46 (13 August 2013)

Coram: LIEBENBERG, J.

Heard: 15 – 19; 22 – 23; 26; 29 July; 05 – 7; 13 August 2013

Delivered: 13 August 2013

Flynote: **Criminal procedure** - Evidence - Confessions and admissions - Admissibility - Duties of magistrate when recording confessions and

admissions - Magistrate not merely a recording agent - Magistrate must be satisfied that statement made freely and voluntarily - Where accused indicates assault or injuries magistrate must make further enquiries.

Criminal procedure - Evidence - Confessions and admissions - Admissibility - Duties of magistrate when recording statements - Explaining right to legal representation - Such explanation should include alerting accused to right to apply for legal aid - Lack of such explanation rendering statements inadmissible.

Summary: The accused persons were arrested and subsequent thereto warning statements were obtained of each. The following day they appeared before a magistrate for purposes of making statements during which only accused no 1 made a statement (confession). The admissibility of these statements were challenged on the basis that the accused were assaulted by the police prior to the making thereof and also that the accused were not informed of their right to legal aid. As regards the warning statements the accused persons prior to the making of a statement said they wanted to be legally represented. The police officers recording the statements, notwithstanding, continued taking down the statements. The court ruled the warning statements inadmissible. Regarding the statement made to the magistrate by accused no 1, the magistrate failed to inform the accused of his entitlement to legal aid and was of the view that this is embodied in the explanation of the right to legal representation. Although the accused informed the magistrate that he was assaulted (beaten) when arrested and the magistrate observed minor injuries on the person of the accused, he failed to investigate the possibility whether there was any connection between these injuries and the accused making a statement. The court ruled the statement made by accused no 1 equally inadmissible.

ORDER

The court rules exhibits 'K', 'L' and 'M' being the warning statements of accused no's 1 – 3, respectively, and exhibit 'G', the confession made by accused no 1, inadmissible.

RULING***Trial within a trial***

LIEBENBERG J:

[1] This is a trial-within-a-trial where the court is called upon to decide the admissibility of alleged statements made by the accused persons ie a confession by accused no 1 made to a magistrate and warning statements made to the police by each accused. The admissibility of these statements is contested on grounds of assault perpetrated against each accused, culminating in the accused making the statements of which the State now seeks its admission into evidence. It was contended that the statements were not made freely and voluntarily; that the accused persons, prior to the making of these statements, were not duly informed of their rights to legal representation, alternatively, that their right to legal representation was not adhered to after they elected to be legally represented when making the statements under consideration.

Warning statements – Accused no's 1 – 3

[2] The State led the evidence of three police officers who obtained warning statements from each accused on the day of their arrest ie Sergeant Amunyela (from accused no 1); Sergeant Shaatika (from accused no 2); and

Constable lithete (from accused no 3). The police officers disputed allegations of assault perpetrated against any of the accused persons prior to, or during, the recording of the statements. It is common cause that the accused, on the day of their arrest, were taken to Okahau police station where they were taken to the conference room, apparently for purposes of having their rights explained to them and for questioning ('interviewing') by Inspector Johannes. According to all the State witnesses who testified in the inner-trial, the warning statements of the accused persons were only obtained thereafter, and not during the interview, as they allege.

[3] In view of allegations made about the accused persons having been assaulted and forced into making certain admissions, and which seem to have been incorporated in the contested statements, the State called, besides the magistrate and official interpreter, a further 11 police officers, all of which being implicated by the accused persons having either assaulted them or exerted undue pressure on them in order to make the statements in question. Each of these witnesses disputed allegations of assault committed on the accused by the police, and from the evidence of Sergeant Irmaly, it would appear that the accused, from the onset, gave their full co-operation; thus there was no need to assault the accused or force them into making any admissions. The accused in turn gave evidence to the contrary and gave detailed accounts of the circumstances under which the assaults took place. It is their evidence that, as far as it concerns the warning statements, the content of each statement did not come from them but rather seems to be a joining together of facts proposed by the police during an interview conducted with the accused persons in the boardroom of Okahau police station. Thus, the statements as reflected in the warning statements are not of their making and were imputed to them.

[4] Because of the conclusion I reach in this matter as regards the admissibility of the respective warning statements as to whether or not these were improperly obtained, it is at this juncture unnecessary to decide the veracity of those witnesses who testified about the alleged assaults on the

accused persons, culminated in their making statements under duress when charged. The reasons for this will become apparent in due course.

[5] The standard form (POL 17) was used in respect of each accused, hence the format of the pre-printed form is the same in respect of questions put to each accused prior to the making of a (warning) statement and there is no need to differentiate between these forms except for what had been added in pen by the officer who filled in the form. The form is divided into different sections starting with the recording of the particulars of the recording officer, the accused person, and the charges preferred against the suspect or accused. The next section deals with the rights of the suspect 'before making a statement or [the suspect] answer(s) any questions'(emphasis added). The rights explained to the accused are stated in the following terms:

- '1. He/she is warned that he is not obliged to answer any question put to him/her and/or make any statement but what he/she choose to say will be taken down in writing and may be used against him/her at a later date as evidence in the court of law.
2. He/she is also informed that he/she have a right to consult a legal practitioner of his/her own choice and at his/her own expense, prior to deciding to remain silent or answer questions or give an explanation and to assist him/her when answering or giving an explanation or pointing out objec[t], point(s) at the scene.
3. (This paragraph relates to minors and is not relevant to the present proceedings). (emphasis added)

The suspect/accused is then required to respond to three questions as to whether he understood his or her rights and what the person elects to do. These questions, and the accused persons' response thereto, are:

- 'Question: Do you understand your rights?
 Question: Do you want a legal representative?
 Question: What is your choice, do you wish to make a statement or do you wish to answer questions, (after consultation with your legal practitioner) or do you remain silent?'

(Emphasis added)

On the first question all three accused answered in the affirmative.

On the second question all three elected to be legally represented with accused no's 2 and 3 opting for legal aid.

On the third question the response of each accused was: Accused no 1 – 'I wish to give [a] statement to the police officer with me'; Accused no 2 – 'I wish to make my statement right now before crt [court].'; and Accused no 3 – 'I wish to give my statement right now'. (Emphasis added)

In the light of each accused's reply on the last question, statements were obtained from them.

[6] The fact that these questions and answers were correctly recorded by the respective police officers was never in issue; neither that the accused persons exercised their right thereto to be legally represented. This they did after having been informed that they may consult a legal practitioner prior to deciding whether they want to remain silent, answer questions put to them, or give an explanation. Despite each accused informing the officer responsible for recording the statement that he wants to consult a legal practitioner before taking a decision whether or not to make a statement, the officers simply proceeded to the third question and obtained statements from them without affording the accused persons the opportunity to exercise their right to first consult a legal practitioner. In *S v Kukame*¹ the court as *per* Van Niekerk J said:

'Once the accused was asked whether he wanted legal representation before making a statement and he answered in the affirmative, no further questions should have been put to him which may have led him to make any statement. The interview should have been stopped immediately, except perhaps to determine who the accused's lawyer is in order for arrangements to be made for the lawyer to be contacted (Compare *S v Agnew* 1996 (2) SACR 535 (C) at 542c). The right to have access to a lawyer is inextricably linked with the right not to be compelled to make a confession, which is one of the requirements for admissibility. By continuing with the

¹2007 (2) NR 815 (HC) at 836I-836A.

interview and posing further questions which ultimately led thereto that the accused made a statement, a violation of the accused's constitutional rights occurred.'

I respectfully endorse these sentiments.

[7] To simply continue against the wishes of the accused was irregular, thereby infringing the accused persons' fundamental right to a fair trial to be legally represented at the stage of making a report to the police; which right is protected by the Constitution in Article 12 (1)(e). The right to a fair trial includes the entire process of bringing an accused person to trial and the trial itself.² The courts are under a duty to enforce the fundamental rights and freedoms guaranteed by the Constitution (*S v Scholtz*³), and has a discretion to allow or exclude evidence obtained in conflict with the fundamental rights of an accused person (*S v Shikunga and Another*⁴).

[8] Failure by the police to afford the accused persons in the present case the right to be legally represented when obtaining warning statements from them, nullifies the statements so obtained from each accused, rendering it inadmissible evidence.

Confession – Accused no 1

[9] It is common cause that the accused persons the following day appeared before magistrate Musakana at Outapi for purposes of making a statement or confession in terms of s 217 of the Criminal Procedure Act. The accused were interviewed individually and the only other person present was Ms Kuutondokwa, the official/casual interpreter. It is not in dispute that the magistrate informed each accused of his right to legal representation and that the services of a legal practitioner may be engaged prior to the making of a statement. The pre-printed statement used by the magistrate does not provide for the explanation to a suspect or accused person of his or her entitlement to legal aid, provided for by the Directorate: Legal Aid. In the learned

²*S v Malumo and Others* (2) 2007 (1) NR 198 (HC) at 211E-F.

³1998 NR 207 (SC) at 217B.

⁴1997 NR 156 (SC).

magistrate's opinion the right to legal representation already includes the right to legal aid, and he therefore did not deem it necessary to distinguish between a privately instructed legal practitioner and legal aid provided for by the State.

[10] That the magistrate explained to the accused persons their right to be legally represented, but not their right to legal aid, is clear, and his perception that the right to legal representation embraces the accused persons' right to legal aid, is inconsistent with the view taken by this court where it was held that an unrepresented lay person would not be in a position to exercise his or her right to legal representation and legal aid if not informed of such entitlement and, depending on the circumstances of the case, would be fatal.⁵ It is a well-established principle that the court is under a duty to adequately inform the unrepresented accused of his or her right to legal representation; which right includes the entitlement to legal aid and that these rights equally apply to pre-trial proceedings. Failure to explain these rights to the unrepresented accused would amount to an irregularity and a failure of justice.

[11] The evidence of several police officers was led, who repeatedly since their arrest, had informed the accused persons of their rights, including the right to legal representation and their entitlement to legal aid. These refer to the time of the arrest; prior to any pointing out allegedly made by the accused persons; before they were interrogated; and when warning statements were obtained from each. It seems to me in the light of the contradicting evidence of those police officers involved in the arrest of accused no's 1 and 2, and the events which took place thereafter, that their evidence about the accused having been duly informed on diverse occasions of their right to legal representation and legal aid, has the making of being simulated and exaggerated. Even if the accused persons at that stage were indeed informed of their rights, can it be assumed that accused no 1, when brought before the magistrate, must have known that he was not only entitled to legal representation, but also legal aid before making a statement to the magistrate? It seems important to note that when his warning statement was

⁵S v *Malumo and Others*, 2010 (1) NR 35 (HC).

earlier obtained, he, unlike accused no's 2 and 3, did not say he wanted legal aid, but legal representation.

[12] Accused no's 2 and 3, after being informed of their right to legal representation, elected to give their statements in the presence of a legal representative. This brought an end to their respective interviews with the magistrate. As for accused no 1, he said he was 'prepared to make a statement without legal representation' and that he will 'hire a lawyer after the statement'. (Emphasis added) It would appear from the accused's answer that he was unaware of the option of legal aid otherwise he would not have mentioned that he would hire a lawyer. The court in *Malumo (supra)* endorsed the following remarks made in *S v Kasanga*⁶ at 53E-F:

'In my view, the starting point in determining the fairness of a trial, as envisaged in art 12, should always be whether or not the accused is informed. Without an accused being properly informed, one cannot even begin to speculate whether or not rights have been exercised or indeed waived.'

[13] In the matter of *The State v Orina*⁷ I occasioned to say the following at 26:

'[60] ...It has been stated that it was desirable that an accused should be advised of his rights to legal representation and to remain silent at every stage of pre-trial proceedings where he might incriminate himself; however, failure to do so could never have the result that "*evidence about such a step was inadmissible, merely because there was no such advice*". See: *S v Shaba en 'n Ander*, 1998 (1) SACR 16 (TPA).

[61] The principle of fairness in this context clearly does not lie in the number of times an accused's rights are explained to him or her, but whether the accused, before exercising his or her right, was properly informed and understood that right and the consequences thereof. In other words, whether the accused was in a position to make an informed decision (*S v Bruwer*⁸).

⁶2006 (1) NR 348 (HC) at 360D-E.

⁷Unreported Case No CC 12/2010 delivered on 18.01.2011.

⁸ 1993 NR 219 (HC) at 223C-F.

[14] I have therefore come to the conclusion that even if it were to be accepted that accused no 1 had been informed of his entitlement to legal aid at different stages prior to him appearing before the magistrate, that in the circumstances of the case, the possibility cannot be excluded that he was unaware of such right at the time when he made a statement to the magistrate. One can but only speculate as to whether he would have exercised his right differently when making a statement. The State must prove beyond reasonable doubt that the accused, when exercising his rights, was properly informed. The magistrate's decision to inform accused no 1 of his right to legal representation only, and not his entitlement to legal aid, is fatal. To admit the confession into evidence, in my view, would infringe on the accused's right to a fair trial.

[15] It seems to me that besides the aforementioned reasons there is another reason why the magistrate should not have proceeded in taking down a statement from accused no 1.

[16] In response to the magistrate's questioning prior to the making of the statement, the accused said he wished to make a statement and that he had not been assaulted, threatened or persuaded to do so. On a follow-up question as to whether he had any injuries he replied: 'Yes, on my hand due to handcuffs, upper-lip, on chest, knee and back, head'. When further asked as to how he sustained these injuries he said: 'I was beaten by the police officers during my confrontation with them, during the arrest'. The statement then reflects that the magistrate made the following observations on the body of the accused: 'Small wound on hand, small scratch inside upper-lip and mouth, nothing on head, no injury on knee, no visible injury on the back, no visible injury on chest'.

[17] During the magistrate's testimony in cross-examination on a question as to whether he established that there was no connection between the injuries the accused carried and the making of a statement, he replied that he did not because, in his view, this had been dispelled by the accused's earlier answer

in the negative on question 6. This question however relates to any threats of assault made against the accused if he were to inform the magistrate about any earlier assaults or threats, and not the connection between the accused's injuries and the making of a statement. The cause of the injuries are set out in question 8 (ii) (above) and it seems to me that the form does not specifically provide for a situation where the magistrate is required to determine whether there is any connection between injuries the accused or suspect may have at the time, and the making of the statement. Although this may to a certain extent be inferred from the answer as to how the accused sustained the injuries (question 8 (ii)), Hoff J in *S v Malumo and Others* (*supra*) at 51G-I said:

'[81] I have indicated *supra* that where there is an allegation of assault by the police, the magistrate must put further relevant questions to the accused person in order to establish eventually whether or not the statement the accused is about to give would be given freely and voluntarily, and [whether or] not the accused has been brought to a confessing state of mind.

[82] Maritz J (as he then was), in *S v Swartz and Others* (High Court, case No CC 108/99, 29 October 1999), referred to the duty of the magistrate and, at 22 of the judgment, said the following:

"Of course, had the accused said anything which should have caused the magistrate to suspect that the accused's appearance before her was not freely and voluntarily, or that he had been unduly influenced, she would have had the duty to further enquire into the matter, and such a duty would have extended beyond the scope of the pre-printed form." (Emphasis added)

[18] In the present case accused no 1 – despite having told the magistrate that he was not assaulted, threatened or coerced into making a statement – informed the magistrate, prior to the making of a statement, that he sustained injuries when beaten by police officers during his arrest. In view of the accused having been arrested the previous day and him being willing to give a statement relatively soon after he was 'beaten', seems to me to be an instance where the magistrate had the duty to further enquire into the circumstances which preceded the making of a statement by the accused.

Firstly, to satisfy himself that the statement the accused was about to give would be given freely and voluntarily and secondly, to establish whether there was any connection between the alleged assault and the making of a statement. The injuries observed by the magistrate – albeit not of serious nature – should have alerted him against the possibility of the accused being coerced into making a statement as it was *prima facie* proof of the assault mentioned by the accused. And more so when regard is had to the accused's answer on the question why he wanted to repeat the statement and he replied: 'I was told to come and give a statement to the court.' (Emphasis added) According to the accused, they had not requested the police to take them to a magistrate in order to make statements; neither was that the evidence of any of the police officers who testified. In the absence of such evidence the evidence of accused no 1 on this point stands unchallenged.

[19] Again the magistrate did not deem it necessary to clarify who had told the accused to make a statement and whether that is what he wanted to do. On the contrary, it appeared to the magistrate that the accused freely and voluntarily desired to make a statement and he continued to record the impugned statement.

[20] In the *Malumo*-case the court at 47 referred with approval to a passage in *S v Maasdorp*⁹ where Bosielo AJP said:

'Although, strictly speaking, a magistrate who takes a confession is not expected to act as an inquisitor or investigator, one does not expect him to act like a passive umpire who is simply there to ensure that formal rules are observed. Given the historical evolution of confessions in this country and the countless reported cases of abuse of their power and authority by the police, one expects that where there is some indication of improper conduct which could have had an undue influence on the accused to make a confession, that the magistrate who takes such a confession should investigate further the circumstances surrounding the alleged confession.' (Emphasis added)

⁹2008 (2) SACR 296 (NC) at 305H-J.

[21] It appears to me that in the present circumstances there had been some indication of improper conduct on the part of the police the previous day which was likely to have brought the accused to a confessing state of mind and which, without having been clarified, might have persisted when the accused was brought before the magistrate to make a statement against his will. This possibility in itself ought to have casted doubt in the magistrate's mind as to whether the accused would be making the statement freely and voluntarily. Failure by the magistrate to further investigate the circumstances leading up to the accused making a statement is fatal; and for this additional reason, the confession should not be admitted.

[22] In the result, the court rules exhibits 'K', 'L' and 'M', being the warning statements of accused no's 1 – 3 respectively, and exhibit 'G', the confession made by accused no 1, inadmissible.

JC LIEBENBERG
JUDGE

APPEARANCES

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SECOND ACCUSED	G Mugaviri Instructed by Mugaviri Attorneys, Oshakati.
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