

**REPUBLIC OF NAMIBIA**

NOT REPORTABLE



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**RULING  
TRIAL WITHIN A TRIAL**

Case no: CC 19/2012

In the matter between:

**THE STATE**

and

**HERMAN SHEEPO MBANGO**

**ACCUSED NO 1**

**SIMON SHEEKENI SHAANIKA**

**ACCUSED NO 2**

**TYLVES AMUNYELA SHAANIKA**

**ACCUSED NO 3**

**Neutral citation:** *S v Mbango* (CC 19/2012) [2014] NAHCNLD 5 (31 January 2014)

**Coram:** LIEBENBERG, J.

**Heard:** 22 January 2014

**Delivered:** 31 January 2014

**Flynote:** **Criminal procedure** – Evidence – Admissibility of extra-judicial admissions – Section 219A of Act 51 of 1977 – Admissibility decided in a trial within a trial – Undue influence found – Fairness of procedure followed by police questionable and suspect.

**Summary:** The State seeks to have oral admissions made by the accused persons to a senior police officer during an interview admitted into evidence. The accused challenged the admissibility of such evidence claiming that it was not made freely and voluntarily. After evidence was heard in a trial within a trial it was concluded that the State failed to prove beyond reasonable doubt that the accused made admissions voluntarily and ruled same inadmissible as evidence. The court also expressed its dissatisfaction with the procedure followed by police officers during an interview conducted with accused persons prior to the making of any admissions.

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**ORDER**

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Any admission made by the accused persons to Inspector Johannes on 30 March 2011 is ruled inadmissible.

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**RULING**

***Trial within a trial***

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LIEBENBERG J:

[1] The court during earlier stages of the trial was called upon to decide the admissibility of a confession allegedly made by accused no1 to a magistrate

and warning statements allegedly made by all three accused to police officers at Okahau, shortly after their arrest.

[2] After evidence was heard in a trial within a trial the court, at the conclusion of the inner-trial, ruled the confession and the warning statements inadmissible as evidence. It was found that the accused persons' fundamental right to a fair trial had been infringed in that they were not afforded legal representation at the stage when their warning statements were recorded by the police. In respect of accused no 1 a confession made to a magistrate was equally ruled inadmissible, albeit for different reasons. Whereas the court's ruling was based on the State's non-compliance with a constitutional imperative<sup>1</sup> in respect of the warning statements and the non-compliance with admissibility requirements as regards the confession, the court, at that stage, deemed it superfluous to decide the veracity of the witnesses who testified in the inner-trial.

[3] During subsequent proceedings in the main trial Mr *Lisulo*, appearing for the State, informed the court that the State intends leading evidence about admissions made by the accused persons to Inspector Johannes during an interview conducted with them in the conference room at Okahau police station. This was on the day of their arrest and before witness statements were taken. Counsel for the defence once again objected to the admissibility of any admission made by the accused persons on the basis that the accused, prior thereto, were continuously assaulted from the time of their arrest up to where they were taken to Inspector Johannes. Whilst being questioned they were again assaulted and forced to admit their involvement in the commission of the crimes charged.

[4] The admissibility of the admissions made by the accused persons to Inspector Johannes must now be decided.

[5] In view of the evidence adduced in the inner-trial pertaining to alleged assaults perpetrated by the police on the accused persons during and after

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<sup>1</sup>The right to legal representation during pre-trial proceedings.

their arrest, and what transpired in the conference room at Okahau police station when Inspector Johannes interviewed them, I enquired from counsel whether they intend leading any new evidence. Counsel were in agreement that it would not be necessary and that they, for purposes of the present ruling, will rely only on the evidence presented in the inner-trial.

[6] I informed counsel that I was however of the view that there are certain aspects of Inspector Johannes' evidence which, for purposes of this ruling, required further scrutiny and clarification by him; also that such evidence appeared to be essential to the just decision of the case. This obviously meant that the trial within a trial had to be re-opened to receive further evidence. The court exercised its discretionary powers given to it under s 167 of the Criminal Procedure Act, 51 of 1977 and re-called Inspector Johannes. I shall revert to his (further) evidence in due course.

[7] It is common ground that information received from an informer led the police to the three accused and nothing else. Subsequent thereto nothing was found in their possession which could possibly link them to the crimes committed. The testimony of the accused persons is that, when confronted by the police in connection with the crimes committed, they denied any involvement. This much was confirmed by Inspector Lungameni who questioned the accused persons after their arrest.

[8] However, Sergeant Irmaly who claims to have been present at the time, said that when Inspector Lungameni came to Ms Kashele's house where accused no's 1 and 2 were apprehended, all three accused were present and they immediately admitted being guilty; also that they were willing to point out certain items. He continued saying that from the house the accused took them to various scenes where each made a pointing out where money and other items buried were found. These items would not only link the accused persons to Six Mabone bar, but also implicate them in the commission of the crimes charged.

[9] The evidence of Sergeant Irmaly in respect of the circumstances which brought about the pointing out by each accused differs substantially from what Inspector Lungameni testified. As far as it concerns accused no 3 there are irreconcilable differences between the evidence of Inspector Lungameni and that of Sergeant Nanyala, the investigating officer. According to the latter he did not see Inspector Lungameni speak to accused no 3 (sitting in the back of the vehicle where he remained at all times during the arrest of accused no's 1 and 2) and according to him, had this happened, he would have seen it as he was also at the vehicle. Contrary thereto, Inspector Lungameni testified that in fact, it was Sergeant Nanyala who informed him about accused no 3 wanting to speak to him in private. When accused said he wanted to 'speak the truth' Inspector Lungameni called Nanyala, Sergeant Irmaly and Sergeant Shatika to where he was and 'introduced' them to the accused. This then led to the first pointing out made by accused no 3.

[10] I pause here to remark that Inspector Lungameni in his testimony in the main trial contradicted himself on this point when he said that he called Warrant Officer Shivute and Sergeant Haufiku to him before explaining accused no 3's rights (and not Irmaly and Shatika).

[11] There are furthermore material differences between the evidence given by those police officers present during the arrest of accused no's 1 and 2 and the events leading up to them also pointing out different scenes to Inspector Lungameni. The evidence of Warrant Officer Haufiku and Sergeant Mwitelefufu is clear that, after they effected the arrest of accused no's 1 and 2 at Ms Kashele's house, they took both accused *directly* to Six Mabone bar where they were handed over to Inspector Johannes. From there they were taken to Okahau police station where they were interviewed. Neither Haufiku nor Mwitelefufu made any mention about the presence of Inspector Lungameni at the time of their arrest or that any pointing out was made by the accused on their way between the house of Ms Kashele and Six Mabone bar. In the absence of evidence explaining the contradictions in the respective versions, I find the evidence in this regard suspect.

[12] Although the accused themselves say they were indeed taken to the alleged scenes of pointing out, it still does not explain the contradictions between the evidence given by the respective police officers, or remedy the shortcomings in the State's case on this point.

[13] In my view it would be important for purposes of the court's ruling not to restrict oneself to the evidence adduced in the inner-trial, but also to have regard to evidence adduced in the main trial about the circumstances leading up to the accused persons being brought before Inspector Johannes, and the interview itself. This seems necessary in view of the evidence of the accused persons about the continued assaults on them after their arrest. It would particularly be of assistance to the court to evaluate the admissibility of the admissions made to Inspector Johannes by the accused persons in the light of their demeanour during the arrest and, to some extent, the alleged pointing out thereafter.

[14] I earlier alluded to the accused having disputed their involvement in the crimes committed from the beginning and that they were arrested solely on information obtained from a police informer. The source and nature of the report made to the police remains unknown. It therefore must have come as a complete surprise to Inspector Lungameni when, shortly thereafter and without being unduly influenced (on the State's version), all three the accused unexpectedly informed him that they wanted to make a pointing out which would link them to the crimes committed. There can be no doubt that the purpose of the accused being interviewed by Inspector Johannes was because of the alleged pointing out made by the accused persons. But, in the light of Inspector Lungameni's evidence that all three the accused by then had confessed (to him) their involvement in the commission of the crimes, why would it have been necessary for Inspector Johannes to question them any further if that was the case?

[15] On this point Inspector Johannes testified that it was his decision to interview the accused persons to see whether they could be linked to the crimes committed. He further said that at this stage the only information he

had about the accused is that they were suspects and prior to the interview he was not briefed by Inspector Lungameni; neither did any of the police officers in attendance tender any information about the accused persons' involvement. When asked what the purpose was of interviewing the accused persons with four more police officers present, Inspector Johannes said this was procedure and a person should not be interviewed by only one officer. He was not certain whether any of these police officers actively took part in the questioning of the accused but cannot rule out the possibility. In response as to why the accused were not questioned individually but together, he said that he wanted them to hear what the others say.

[16] I find the reasons advanced by Inspector Johannes for interviewing the accused persons implausible. Both he and Inspector Lungameni are senior officers and, although Lungameni is the Station Commander whilst Johannes is attached to the Crime Investigating Unit, it appears to me highly unlikely in view of Inspector Lungameni's breakthrough in the investigation, that he would not have briefed Inspector Johannes about it. At least two police officers (Sergeants Amunyela and Shatika) were present during the interview as well as the pointing out and it seems equally unlikely that they would not have informed Inspector Johannes about any pointing out earlier made by the accused persons and their confessed involvement in the commission of the crimes. Even more so in the light of Sergeant Amunyela's evidence in cross-examination that he was not interested in interviewing the accused persons as he had already recovered the (stolen) items during a pointing out made by them.

[17] During his testimony Sergeant Amunyela was evasive when testifying about the interview and according to him the only reason why the accused were taken to Inspector Johannes was merely to inform them of their rights. This was said against the background where Inspector Lungameni had earlier informed the accused of their rights *ad nauseam* and while Sergeant Amunyela was present at all times!

[18] Inspector Johannes, when asked about the demeanour of the accused persons during the interview, said it was 'fine and free' and that they were co-operative by responding 'in a peaceful manner' to the questions put to them. His evidence in this regard stands in sharp contrast with that of the accused who testified about several assaults committed on them by police officers present, including Inspector Johannes. I shall revert to the alleged assaults later herein.

[19] The accused persons since their arrest and on diverse occasions thereafter were informed by different police officers (but mainly Inspector Lungameni) of their right to remain silent and not to incriminate themselves. Also that whatever they say would be recorded and could be used as evidence against them in a court of law. The right to be legally represented during these stages were also explained. It is the State's case that the accused persons thereafter waived these rights and made statements, admissions and pointing out to the police, thereby incriminating themselves. It remained as such when brought before Inspector Johannes. It is common cause that none of the alleged statements or admissions made by the accused was reduced to writing.

[20] When asked, in the light of the explanation given to the accused, why nothing the accused had said was reduced to writing, Inspector Johannes explained that they (the police officers present) would remember what had been said by the accused and this would be reflected in the individual witness statements of those officers present. He is however unable to say whether this indeed happened except for himself. Thus, the only occasion when statements and admissions made by the accused persons were actually recorded, was when Inspector Johannes afterwards gave his statement. The accused persons also did not have the opportunity to familiarise themselves with the content of the statement to verify it as correct. This would only have happened with the disclosure of witness statements during pre-trial proceedings.



[21] Although the accused persons at different stages of the investigation were informed that everything they say would be recorded and could be used against them in a court of law, nothing was recorded. This despite all three the accused allegedly having admitted their involvement in the crimes committed! The warning against the making of self-incriminating statements in itself, in my view, embodies the opportunity afforded to a suspect or an accused person to acquaint him or herself afterwards with what had been recorded and to endorse same by appending his or her signature to the statement. This is a well-established practice applicable to other statements such as the warning statement, a confession and witness statements, and I am unable to see why an earlier incriminating statement made by a suspect or accused should be treated any differently. Had the alleged admissions in the present instance been recorded and endorsed by the accused, then the State could have proved its existence by simply producing it into evidence and which in itself, would have refuted allegations of recently fabricated evidence.

[22] However, the State is not relying on any written statements in which the accused made certain admissions but seeks leave to lead evidence about oral admissions made to Inspector Johannes during an interview conducted with them.

[23] I now turn to consider the circumstances under which the alleged admissions were made to Inspector Johannes.

[24] Inspector Johannes testified that no valuable information was forthcoming from the accused persons during the interview because they were accusing one another. This, he said, is also reflected in his witness statement. If that were to be the case, what weight could be given to the accusations made by the accused, apparently trying to shift the blame? This aspect of his evidence furthermore flies in the face of his testimony earlier about the accused persons being 'fine, free and co-operative' when questioned. In my view there are indeed signs of the accused persons not merely accepting or acknowledging their guilt during the interview and which becomes more apparent when regard is had to them individually opting

shortly thereafter to be legally represented prior to making any further statement.

[25] Regarding the presence of other police officers during the interview and the reason for this as explained by Inspector Johannes, I am unable to comprehend what the purpose of this exercise was. It is the State's case that the accused persons by then had already admitted their guilt and there would have been no need for Inspector Johannes to interview them – let alone interviewing them together and in the company of those police officers who earlier witnessed the alleged pointing out made by the accused persons during which they incriminated themselves. These are also the same officers (Sergeants Amunyela and Shatika) who thereafter recorded warning statements of accused no's 1 and 3 respectively, whilst Constable lithete was also present during the interview and thereafter recorded the statement of accused no 2. The mere presence of these officers during the interview created the opportunity of divulging information to those present about earlier statements or admissions made by the accused after their arrest and during the alleged pointing out. Although these officers might not have actively participated in the questioning of the accused, they were in the position to gather information disclosed by others present during the interview. The same obviously applies to Inspector Johannes.

[26] It is against this background that the court must consider the evidence of the accused persons who said they were assaulted shortly after their arrest up to the stage where they were interviewed by Inspector Johannes. Furthermore, that during the interview information about the crimes committed was divulged by the police officers who, in turn, imputed this to the accused persons who simply accepted it in fear of further assaults. It was also said that some officers were making notes during the interview and which were later used to record their warning statements from. Although the latter was disputed by those police officers present, I am, in the light of what Inspector Johannes testified, inclined to believe that the contention is not completely without merit.

[27] Inspector Johannes said nothing was recorded at the time and each officer, when later recording his own statement, had to remember what was earlier said by the accused. He was however unable to say to what extent did these statements reflect what had been said by the accused during the interview and whether it was a true reflection of what transpired. He could only speak for himself and in the absence of any record of the proceedings conducted during the interview, it is impossible at this stage to determine whether or not Inspector Johannes' statement is a true account of what transpired during the interview.

[28] I remain unconvinced that the presence of other police officers during the interview was justified. In my view, based on the evidence adduced, the possibility cannot be ruled out that these officers were present either to brief Inspector Johannes about the investigation conducted thus far, or to confront the accused jointly with facts and information gathered by them up to that stage. According to the accused they were assaulted during the interview when they disputed what was put to them as to what had happened. They were, amongst others, assaulted in different ways by Sergeants Irmaly and lithete, and Inspectors Lungameni and Johannes.

[29] There is no clear evidence that Inspector Lungameni remained in the conference room after he brought accused no 3 and the fourth suspect Iyambo up to the door, or that he took part in the assault on the accused. On the contrary, it was contended that he ordered those officers busy assaulting the accused, to stop. The presence of Sergeant Irmaly however, was vehemently denied. But, both Sergeant Amunyela and Constable lithete testified that he was indeed present whilst Sergeant Shatika was not sure of his presence. This, in my view, and despite Sergeant Irmaly's evidence to the contrary, corroborates the evidence of the accused that he was indeed present. His mere presence would have placed him in the position to assault the accused as testified. In view of the accused persons' evidence that quite a number of police officers were present and Sergeant Irmaly having actively taken part in the assault in the conference room, I find the contradicting evidence regarding Sergeant Irmaly's presence suspect.

[30] The accused persons testified about several incidents during which they were assaulted. It must be said that their evidence differ from one another in some respects relating to the incidents during which they were assaulted. However, these were partly explained and according to them came as a result of incorrect instructions given to their counsel. In my view regard must also be had to the circumstances the accused persons found themselves in and it seems unlikely that they would have been in the position to observe everything that happened – even an assault on their co-accused. In some instances it was a mere slap in the face but there were also instances of more serious nature. Accused no 1 was kicked on the ribs and legs after his arrest, rendering him unconscious. He was also hit with a 'stick' (baton) several times in the conference room by different officers. On one occasion in the conference room he was slapped by Constable lithete during which he sustained an injury to his mouth. Accused no's 2 and 3 received the same treatment and were also kicked and hit with the stick on their backs several times. I am satisfied that the accused in material respects corroborate one another as regards assaults perpetrated against them.

[31] The assaults described by the accused persons appear to have been of serious nature and undoubtedly would have caused visible bruises, marks or wounds on their bodies. It is therefore surprising that medical reports (J88) completed by Dr Mmasi on the 1<sup>st</sup> of April 2011 (two days after their arrest) and handed into evidence, reflect that no injuries were observed on accused no 1 whilst accused no 2 had fresh marks on the back and bruising on the neck only. Accused no 3 had a recent scar on the back. In view of their evidence one would have expected to find more serious injuries than what was noted in the report. Although the report in respect of accused no 1 is silent as to possible injuries he might have had at the time, the magistrate before whom he appeared the previous day (the 31<sup>st</sup> of March) recorded that he observed a small wound on the one hand and a small scratch on the inside of the upper lip and mouth. It would appear that his attention was also drawn to other aspects of the accused's body but according to the magistrate there were no visible injuries on the head, knee, back and chest of the accused.

Accused no 1 also informed the magistrate that he sustained these injuries 'when beaten by the police officers during my confrontation with them, during the arrest'. The accused in no uncertain terms informed the magistrate that he was assaulted by the police and the allegation, to some extent, is supported by injuries to the mouth and hand. This clearly contradicts the evidence of State witnesses about the accused persons having co-operated from the beginning.

[32] From the above it seems inevitable to conclude that the accused persons exaggerated the extent of any assault on them. However, each of them did have injuries to show – albeit minor – and when considered together with their evidence, the possibility of them having been assaulted by the police after their arrest cannot be ruled out completely. The onus is on the State to prove beyond reasonable doubt that any admission made extrajudicially by the accused persons in relation to the commission of an offence was made voluntarily.<sup>2</sup> Proof of any undue influence exerted on the accused would render the admission inadmissible.

[33] In view of the above I have come to the conclusion that the State failed to prove that any admission made by the accused persons during an interview conducted by Inspector Johannes, was made voluntarily and must therefore be excluded as evidence.

[34] In the result, any admission made by the accused persons to Inspector Johannes on 30 March 2011 is ruled inadmissible.

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JC LIEBENBERG  
JUDGE

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<sup>2</sup>Section 219A of Act 51 of 1977.

APPEARANCES

STATE	D Lisulo Of the Office of the Prosecutor-General, Oshakati.
For ACCUSED NO 1	S Aingura Aingura Attorneys, Oshakati.
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