



CASE NO.: CC 32/2001

REPORTABLE

SUMMARY

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

CALVIN LISELI MALUMO & 112 OTHERS

HOFF, J

7 April 2011

Trial-within-a-trial - pointings-out.

Admissibility requirements - voluntariness and fair pre-trial procedures.

Right to legal representation includes entitlement to legal aid must be explained to unrepresented accused person especially uneducated and unsophisticated accused persons in such a manner that an accused person is placed in a position to make an informed decision.

Accused person must also be informed how to exercise such right or entitlement.

Explanation of rights never a mere formality - explanation must be supplemented to do justice to accused person - accused must understand and appreciate the explanation and his rights.

Should not pay mere lipservice to duty to explain rights.

After an accused has been so placed in a position to make an informed decision accused person must be given a reasonable time within which to exercise such right.

Failure to properly explain rights - irregularity which may vitiate the proceedings.

Onus on State to prove beyond reasonable doubt that a statement or pointing-out satisfies the admissibility requirements of voluntariness and fair pre-trial procedures.

Request for interpreter - an accused person must be allowed to use the language in which he or she is able best to express himself or herself.

Police officers not to decide there was no need for an interpreter because he could communicate directly to the accused person.



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CORAM: HOFF, J

Heard on: 07 – 10 March 2011; 22 – 24 March 2011; 31 March 2011

Delivered on: 07 April 2011

JUDGMENT

Trial-within-a-trial – Accused No. 55

HOFF, J: [1] This is a trial-within-a-trial. Chief Inspector van Zyl, a member of the Namibian Police and stationed in Windhoek testified that he received an instruction to assist with pointings-out in Katima Mulilo. He met the accused, Albert Mangilazi, for the first time on 21 August 2002. The pointings-out took place over a period of two days. On each day he completed a pro-forma which reflects certain information and questions. The answers by the accused to these questions were recorded in writing. An audio recording as well as a video recording of what was said and what happened between Chief Inspector van Zyl and the accused person were received as exhibits in Court. A transcript of the audio recording was also handed in as an exhibit.

[2] The objection raised against the reception of the pointings-out was formulated as follows:

firstly, that the pointings-out took place and the accused was involved in it, but it was not made freely and voluntarily;

secondly, that he had not been warned of his constitutional rights, and in particular his right to silence, his right to legal representation, and his right not to incriminate himself;

thirdly, his entitlement to legal aid was not explained; and

fourthly, he was assaulted by the police whilst begin interrogated by sergeant Simasiku, sergeant Popyeinawa, the late sergeant Robert Chizabulyo and other police officers in the presence of Chief Inspector van Zyl; that he was thoroughly intimidated and in fear of the consequences of not complying to the pointings-out, he co-operated.

[3] Since what was said and explained prior to the pointings-out was transcribed it is necessary to refer to those exchanges between Chief Inspector van Zyl and the accused person from p. 9 – 11 of the transcription:

“CHIEF INSPECTOR VAN ZYL: So, you must please, you must not hesitate to ask me or to say if you have a problem there. Okay. In the first place there, you are in the presence of a Justice of the Peace. That is a Commissioned Officer in the Namibian Police. As you already know my rank. I’m a Chief Inspector, né?

ALBERT MANGILAZI: Ja.

CHIEF INSPECTOR VAN ZYL: I inform you that you are not compelled to point anything or to say anything about such scene. The said person is further warned okay, I also warn you that what you might point out or what you may said will be noted down and photos of the scene and points pointed out will be taken and may be used as evidence during a trial. So, do you understand? So you are not compelled or you’re informed whether you want to say anything or point out anything, it is your will.

ALBERT MANGILAZI: Okay.

CHIEF INSPECTOR VAN ZYL: Your own free will. So, but if you are going to out anything, any scene then I will take photos thereof and that will be used as evidence in court. So, do you understand this part?

ALBERT MANGILAZI: I understand.

CHIEF INSPECTOR VAN ZYL: Okay. Do you understand the warning that I gave you? He said, I understand. I also inform you that you have the right to adopt the presence

of a lawyer or you can also make contact with Legal Aid to appoint a lawyer for you. So, do you understand this right of yours that you have a right to this?

ALBERT MANGILAZI: I've got a question there.

CHIEF INSPECTOR VAN ZYL: Okay. What is your question.

ALBERT MANGILAZI: How does it come that you say there I can look for a lawyer if I'm not having money or anything?

CHIEF INSPECTOR VAN ZYL: Okay. If you got this warning then you have also the opportunity to contact Legal Aid.

ALBERT MANGILAZI: If I contact the Legal Aid and if they don't want to come they don't want to help me, so what can I do then if I remain a suspect and I want my case to be solved?

CHIEF INSPECTOR VAN ZYL: Ja. I understand what you are meaning. But I explain your rights to you that you have the right to a lawyer. So, if you've got one if you have money. As I said, you can also contact Legal Aid if you want to. Maybe you have contacted them but at this point in time if you need a lawyer now. Do you need one with the trial or what is your problem?

ALBERT MANGILAZI: I don't have something to tell you.

CHIEF INSPECTOR VAN ZYL: Okay. So, you are telling me that you don't need a lawyer now?

ALBERT MANGILAZI: I don't need a lawyer."

[4] In the transcription the accused was informed that he has "the right to adopt the presence of a lawyer ...", but in the "Notes on the Pointing-out of Scene(s)" from which Chief Inspector van Zyl read appears: "he has the right to opt for the presence of his lawyer".

[5] It is clear from afore-mentioned passage, contrary to the objection that his constitutional rights had not been explained to him, that those rights had indeed been explained to him and he was also informed that he may apply for Legal Aid.

[6] The matter however does not end there. I shall with reference to the relevant authorities demonstrate why what was explained fell short of the standard of fair pre-trial procedures.

This Court has in its unreported judgment delivered on 1 March 2010 extensively dealt with the constitutional requirements, case law and the duties of magistrates in taking down confessions from undefended accused persons, especially uneducated and unsophisticated accused persons.

What was said then, equally apply to commissioned officers employed by the Namibian Police Force irrespective whether such commissioned officer is tasked with the taking down of a confession, an admission or to assist in a pointing-out.

[7] In this regard it is necessary for the purpose of this judgment to refer to some of the authorities mentioned in afore-mentioned judgment.

[8] Section 218 (2) of Act 51 of 1977 relates to pointings-out and reads as follows:

“Evidence may be admitted at criminal proceedings that anything was pointed out by an accused person appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing-out or information forms part of a confession or statement which by law is not admissible in evidence against such person at such proceedings.”

[9] This subsection itself does not deal with the admissibility requirement of a pointing-out. The admissibility requirement appears from the interpretation by Courts of the provisions of sections 218 (2) and 219 A of Act 51 of 1977.

A pointing-out was held to be in essence a communication by conduct and such a statement by the person pointing-out (*S v Sheehama 1991 (2) SA 86 (A) at 879 B*) and it is nothing other than an extra-judicial admission by conduct, admissible if made freely.

In terms of section 219 A of Act 51 of 1977 any admission made extra-judicially by any person if such admission does not constitute a confession and is proved to have

been made voluntarily by such person, admissible in evidence against him at criminal proceedings. Therefor the admissibility requirement in respect of a pointing-out is one of voluntariness, which must be proved beyond reasonable doubt by the State.

(See *S v Mokautsa* 1993 (1) SACR 408 (O) at 412 f - j; *S v January*; *Prokureur-Generaal Natal v Khumalo* 1994 (2) SACR 810 (A) at 806 h - 807 g; *S v Abbott* 1999 (1) SACR 489 (SCA) at 493 C - E).

[10] Voluntariness in turn is influenced by constitutional imperatives such as the right to legal representation, the right not to incriminate oneself, the presumption of innocence, and the right to a fair trial. (Article 12 of the Constitution of Namibia).

[11] The compliance or non-compliance of the Judges Rules is also a factor to consider in determining the voluntariness of a statement and the fairness of a trial.

[12] This Court has in the past held (See *S v Malumo and Others* (2) 2007 (1) NR 198 at 211) that Article 12 of the Constitution of Namibia means that the entire process of bringing an accused to trial and the trial itself needs to be tested against the standard of fair trial.

[13] Article 12 (1) (e) of the Namibian 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 practitioners of their choice.

[14] In *S v Kasanga* 2006 (1) NR 348 Heathcote AJ remarked at 360 D - E as follows:

“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.”

[15] The right to legal representation which includes the entitlement to legal aid must in my view not only be explained in such a way that an accused person may make an informed decision, but he must also be informed, especially if he or she is a layperson, how to exercise such right or entitlement.

[16] In *S v Hlongwane 1982 (4) SA 321 NPD Didcott J* in dealing with the duty of a magistrate during court proceedings said the following at p. 323:

“A judicial officer trying an accused person who has no legal representation must explain to him his procedural rights, and assist him to put his case before the court whenever his need for help becomes apparent. Such duty has been proclaimed time and time again. Informing the accused of his right to call witnesses is one of its most important aspects. To let him know of that right, yet not how to exercise it when he has no idea and starts running into trouble, is not of much use. Mere lip service to the duty is then paid.”

(Underlining mine).

[17] In *S v Nyanga and Others 1990 (2) SACR 547 (CK) Heath J* stated the same duty as follows:

“The explanation to the accused of his rights is never a mere formality. The explanation should always be supplemented to cover the particular circumstances to do justice to the particular accused. The presiding officer is not merely a recording machine and he must satisfy himself that the accused understands and appreciates the explanation and his rights.”

(Underlining mine).

[18] In *Kasanga (supra)* the court, in dealing with the explanation of rights to accused persons, expressed itself as follows at 368 A - C:

“What would the appellant have understand under the phrase ‘constitutional right to be defended by a lawyer of his choice and means’ ? The case was a serious one. It concerned a charge of murder. Inevitably, the magistrate must have known that if the accused was found guilty, he would face a sentence of long-term imprisonment. The explanation to him about his right to obtain legal representation was totally insufficient. It was also misleading. No indication whatsoever was recorded in the district court that the appellant was entitled to apply for legal representation with the Legal Aid Board. He was not informed how to go about exercising his rights. In my view the irregularity vitiated the proceedings.”

(Underlining mine).

[19] In *James Gadu v The State 2004 (1) NCLP 48 at 56 Manyarara AJ* (with whom Gibson J agreed) suggested a simple format to inform an accused person of his right to legal representation

- “(a) that he has the right to be defended by a lawyer (deliberately omitting at this initial stage the rather confusing phrase “of one’s choice”);
- (b) that he has the right either to hire and pay a lawyer “of his choice” or, alternatively to apply to the legal aid office for a lawyer to be provided by the State;
- (c) that, if he chooses to apply for a legal aid lawyer, the clerk of court will assist him in completing the necessary forms;
- (d) that the legal aid office will consider his financial circumstances and, based on its finding, will decide and inform him whether he will be required to make any contribution towards the cost of the legal aid lawyer to be provided to represent him.”

[20] A commissioned officer, like Chief Inspector van Zyl, steps into the shoes of a magistrate in those instances where he is required to take down an admission, a confession or is involved in a pointing-out. He is in those instances under the same duty to inform the accused person of his rights in such a way that the accused person is put in a position to make an informed decision.

[21] The question is whether Chief Inspector van Zyl fully complied with aforementioned duty.

[22] Chief Inspector van Zyl as it appears from the extract (*supra*) informed the accused Albert Mangilazi that he had the right to a lawyer if he had money, and that he may also contact Legal Aid to appoint a lawyer for him.

It appears from the extract that Albert Mangilazi had a concern about money. The evidence on record is further that Mangilazi attended school until he reached Grade 7 and he is in my view a relatively unsophisticated and uneducated person, especially in connection with legal matters. It is furthermore common cause that the accused person is charged with serious offences *inter alia* high treason, several counts of murder, attempted murder, sedition and public violence.

[23] It appears from the extract that Chief Inspector van Zyl never informed the accused person how he may exercise his entitlement to legal aid. As was stated in *Hlongwane (supra)* it is not of much use and mere lip service is paid when an accused person is not informed how to exercise a right. There are obviously exceptions e.g. where a legal representative or other educated and knowledgeable persons appear before a judicial officer. The accused was not such a person.

[24] When Mangilazi raised concerns about money Chief Inspector van Zyl should have gone further and explained to him that in essence money was no impediment to obtain a lawyer at the expense of the State and provided by the Directorate of Legal Aid.

He should also have informed the accused that if he chooses to apply for legal aid the clerk of the court would assist him in completing the necessary application forms. In my view the accused should also have been informed that it would take some time before a decision would be reached and if successful depending on his financial circumstances a small financial contribution may be required from him.

[25] One can only at this stage speculate what the accused would have decided if he had been provided with this information at that stage. At least he would have been placed in a position to make an informed decision.

[26] In my view, the next step after an accused has been so placed in a position to make an informed decision, is to give such accused person the opportunity to decide what to do.

[27] The duty upon a judicial officer is that an unrepresented accused person must not only be informed of his right to legal representation (which includes the entitlement to legal aid) but should be given "a reasonable time" within which to exercise such right. This is apparent from case law reported even prior to the acceptance of the South African Interim Constitution as well as the Constitution of the Republic of Namibia.

{See *S v Radebe, S v Mbonani 1988 (1) SA 191 (TPD)* at 196 H as per Goldstone J (as he then was) }. This opportunity was not given to the accused Albert Mangilazi.

[28] Chief Inspector van Zyl suggested something which the witness never said as it appears from the following extract:

“Maybe you have contacted them (legal aid) but at this point in time if you need a lawyer now. Do you need one with the trial or what is your problem ?”

Mangilazi replied: “I don’t have something to tell you.”

Chief Inspector van Zyl: “Okay. So you are telling me that you don’t need a lawyer now ?”

To which the accused replied: “I don’t need a lawyer.”

[29] One should be careful not to lay words in the mouth of an accused person when one explains the rights of such accused person. Chief Inspector van Zyl heard “don’t need a lawyer” when Mangilazi said that he did not have something to tell the officer.

[30] Another issue raised which further complicates the exchange between Chief Inspector van Zyl and the accused person and which in my view may seriously effect the fairness of pre-trial procedures and by implication the fairness of the trial itself, is the question of intelligent communication.

[31] The following extracts will serve as illustration:

On p. 4 of the transcript, lines 12 – 23:

“CHIEF INSPECTOR VAN ZYL:Okay. Are you fluent in English? Do you want a interpreter? To tell you the truth I don’t want to work with an interpreter because there’s maybe something we talk and we don’t understand each other currently. So, if we can speak in English there is no problem for me.

ALBERT MANGILAZI: I think I need an interpreter.

CHIEF INSPECTOR VAN ZYL: Are you sure?

ALBERT MANGILAZI: I'm sure. Because otherwise if you go deeper maybe (intervention)

CHIEF INSPECTOR VAN ZYL: No. I will not go deeper. You must understand me correctly now."

On p. 6, lines 9 - 18:

"CHIEF INSPECTOR VAN ZYL: Okay. Like I said I don't like interpreters because there is always in the court there's always a problem with the interpreter and things that they don't understand.

ALBERT MANGILAZI: Okay.

CHIEF INSPECTOR VAN ZYL: So, it's better for me to communicate directly.

ALBERT MANGILAZI: Okay. You can (intervention)

CHIEF INSPECTOR VAN ZYL: Are you satisfied?

ALBERT MANGILAZI: I am satisfied,"

On p. 16 lines 7 - 19:

"ALBERT MANGILAZI: Alright. I want to have an interpreter because some of the English words (intervention)

CHIEF INSPECTOR VAN ZYL: Ja. Okay.

ALBERT MANGILAZI: Ja.

CHIEF INSPECTOR VAN ZYL: Let me explain this to you.

ALBERT MANGILAZI: Ja.

CHIEF INSPECTOR VAN ZYL: I just want to know from you because you are still willing to point out the things. I want to know from you where do you get the knowledge of these things. If I can put an example for you?"

[32] Mr Kachaka submitted with that reference to passages from the transcription, that confusion reigned in the mind of the accused person because he was forced to proceed without an interpreter. This may be an obvious consequence where as a result of misunderstandings minds do not meet.

A more fundamental concern however is that a presiding officer or a police officer should not second guess what an accused person is conveying since this may lead to grave injustices.

[33] It is common cause that an official interpreter was available most of the time during the questioning of the accused person by Chief Inspector van Zyl. What is of concern though is the convenient approach of Chief Inspector van Zyl, namely, that he preferred to communicate directly with an accused person and did not “like” to make use of an interpreter.

[34] It is common cause that English is not the mother tongue of the accused person. Even if it is accepted, as suggested by Mr January, that the accused downplayed his knowledge of and his ability to communicate in English the principle remains, namely that an accused person must be allowed to use the language in which he or she is able best to express himself or herself.

[35] It was not for a police officer in the position of Chief Inspector van Zyl to decide, in spite of a request for an interpreter, that there was no need for an interpreter.

[36] Regarding the objection that the accused had been assaulted and threatened by police officers prior to the pointing-out, I need to state the transcription (Exhibit ENX₅) and the video recordings (Exhibits 47 and 48) viewed in court, in addition to denials by Chief Inspector van Zyl and other police officers that the accused had been assaulted and threatened, do not support this objection.

Furthermore, Chief Inspector van Zyl as reflected in the transcription and the video recordings had on numerous occasions asked the accused whether he had been at

any time and at any stage been assaulted by any one, including the police officers, to which the accused person on each occasion answered that he had not been assaulted and had not been threatened by any one.

[37] I am accordingly of the view that this objection is nothing but a fabrication and should be rejected as false.

[38] The onus is on the State to prove beyond reasonable doubt that a statement or a pointing-out satisfies the admissibility requirements of voluntariness and fair pre-trial procedures.

[39] I must mention that much effort was made by the State in this trial-within-a-trial to discharge this onus.

[40] In *S v Mofokeng and Another 1968 (4) SA 852 at 854 H - 855 A* the following was said in relation to this onus:

“The fact that the accused are unreliable witnesses does not of itself mean that the State’s burden of proof has necessarily been discharged. In saying that I am not unmindful of the remarks by Williamson JA, in *S v Mkwanazi 1966 (1) SA (AD) at p. 747*. Those remarks embody an injunction against the rejection of a confession on the basis of mere conjecture unsupported by any evidence. But considered in their context they do not mean that a trial court which has found the accused to be an unsatisfactory witness, is thereby relieved of the duty to weigh up the evidence as a whole in order to decide whether the prerequisites to admissibility have been proved beyond reasonable doubt.”

[41] The fact that I did not in this judgment refer to every submission made by counsel is no indication that those submissions have not been considered. It is for

the reasons expressed afore-mentioned that I am of the view that those submissions will not affect the conclusion reached by myself.

[42] The finding of this Court is that, due to an unfair pre-trial procedure (referred to *supra*) the State has failed to prove that the pointings-out may be received as admissible evidence in the main trial.

[43] In the result the pointings-out are declared to be inadmissible.

HOFF, J

ON BEHALF OF THE STATE:

ADV.

JANUARY

(TRIAL-WITHIN-A-TRIAL - POINTINGS-OUT TO C/INSP. VAN ZYL

BY ALBERT MANGILAZI - ACCD NO. 55)

Instructed by:
GENERAL

OFFICE OF THE PROSECUTOR-

ON BEHALF OF THE DEFENCE:
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ACCD NO. 55

MR

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