



CASE NO.: CC 17/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

ROMEO MANELITTO SCHIEFER

ACCUSED

CORAM: SHIVUTE, J

Heard on: 2011 March 30 – 2011 April 06,

2011 June 14 – 2011 June 16 and 2011 June 21.

Delivered on: 2011 August 10

RULING ON A TRIAL-WITHIN-A-TRIAL

SHIVUTE, J:[1] This is a ruling on a trial-within-a-trial. The defence objected to a confession and admissions allegedly made by the accused being produced as part of the evidence on the following grounds:

- (i) That the accused was pressurized into making a confession or admissions by the police through questioning over a long period of time from 01h00 to 03h00 on 19 January 2008 and again on the same day from 09h00 to 16h00;
- (ii) That the accused was unduly influenced by the police to make a confession. The police advised him in the presence of his brother Desmond Schiefer that it was not necessary to obtain the services of a lawyer;
- (iii) That when the accused's brother had obtained a lawyer for him, the lawyer came to the offices of the Serious Crime Unit but the lawyer had been denied access to the accused, and
- (iv) That before and during the making of the alleged confession the accused was not properly informed of his right to remain silent and to have a lawyer present during the taking of the alleged confession.

[2] Apart from the above grounds, it was also raised as an issue that because the accused was 18 years old at the time, he should have been assisted by a guardian during the interrogation by the police and during the taking of the confession.

[3] The State called two witnesses during the trial within a trial. The first witness was Detective Sergeant Simeon Nghilalulwa who is based at Serious Crime Unit, Windhoek. He testified that on 19 January 2008 he came to know the accused whilst he was on standby duty. He was called by Chief Inspector Michael Unandapo who informed him about the double murder which took

place in Khomasdal the previous night. Sergeant Nghilalulwa's first encounter with the accused was when he found the accused and his brother Desmond smoking in the corridor outside Chief Inspector Unandapo's office. Immediately he entered Chief Inspector Unandapo's office the accused and his brother Desmond entered after him.

[4] Chief Inspector Unandapo (Unandapo) told him that they were busy interrogating the accused and the accused indicated to Unandapo that he was willing to give a confession. Unandapo instructed Sergeant Nghilalulwa (Nghilalulwa) to take the accused to the Motor Vehicle Theft Unit, Southern Industrial Area, to Chief Inspector Gerrit Johannes Viljoen (Viljoen). However before Nghilalulwa was instructed to take the accused to Viljoen at about 14h00 Unandapo had instructed him and Inspector Amakali to go and fetch the shoes which were allegedly worn by the accused previously.

[5] Nghilalulwa took the accused to Viljoen by car. There were only two persons in the motor vehicle, namely Nghilalulwa and the accused. It took Nghilalulwa about ten minutes drive to take the accused to Viljoen. According to Nghilalulwa's estimation, they left Unandapo's office to the Motor Vehicle Theft Unit at about 16h05. He went on to say that there was no conversation between him and the accused on their way to and from the Motor Vehicle Theft Unit. At the Motor Vehicle Theft Unit, they found Viljoen waiting for them at the gate. The witness then handed over the accused to Viljoen. After Viljoen had finished taking a confession from the accused, he called Nghilalulwa and Viljoen came out of the premises and handed the accused

and the confession over to Nghilalulwa. Nghilalulwa then drove back to the Serious Crime Unit and handed the accused person and the confession over to Unandapo. The witness was asked by the Court whether whilst the accused was in his custody the witness was approached by anyone who wanted to talk to the accused and he responded that he was not approached by any person.

[6] The second witness who testified during the trial within a trial was Viljoen who testified that on 19 January 2008 at about 16h50 at the Motor Vehicle Theft Unit, he took a confession from the accused who was brought to him by Nghilalulwa. Viljoen stated further that when he took the confession from the accused he used a *pro forma* title "Confession in terms of Section 217 of the Criminal Procedure Act 1977, Act 51 of 1977. The *pro forma* reads as follows:

On the 19th day of January 2008, 16h15 at the Motor Vehicle Theft Unit in room 1 before me Gerrit Johannes Viljoen, a Detective Chief Inspector in the Namibian Police, appear in the presence of Romeo Schiefer, male, 19 years, thereafter called the deponent, apparently in his sound and sober senses. The deponent was brought by Constable Simeon Nghilalulwa of the Namibian Police in my private office and in the office those present are the deponent, myself nobody else. Deponent was informed that he is in the presence of a justice of the peace who is also a peace officer. That he had nothing to fear, that he should therefore speak, the truth. He was cautioned that he is not

obliged to make any statement and that should he wish to make a statement it would be taken down and it can be used in evidence, that he has the right to consult a legal practitioner of his own choice, and if a legal practitioner cannot be afforded, the State will appoint on application by him a legal practitioner to represent him. That the application can be directed to the Directorate Legal Aid, Private Bag 13370, Windhoek. He can make a statement on his own. He must keep in mind that the statement can be used as evidence either in his favour or against him.

The deponent thereupon replied as follows to the following questions:

Question: What do you elect to do now?

Answer: I prefer to make a statement on my own as it will be the truth and do not require any legal assistance at this stage.

Question: Do you understand the warning I gave you?

Answer: Yes

Question: Do you nevertheless still wish to make a statement?

Answer: Yes

Question: Were you assaulted or threatened by any person in order to influence you to make a statement?

Answer: No

Question: Were you in any way influenced or urged by anyone to make a statement?

Answer: No

Question: Did any person promise you anything if you should make a statement?

Answer: No

Question: Did you make a statement before, either verbal or written in regard to the incident to any person?

Answer: No. I only talked about it.

Question: If so to whom, when and in what circumstances?

Answer: With the Chief at his office. [The witness then indicated Unandapo's name]

Question: Do you wish to repeat the statement?

Answer: [The witness then wrote "Not Applicable"].

Question: Were you arrested?

Answer: Yes

Question: When were you arrested?

Answer: 2008 January 19

Question: Do you have any injuries?

Answer: No

(Observation by justice of the peace) No visible injuries were observed on the body of the deponent.

Question: Are you currently under the influence of alcohol or drugs?

Answer: No

(Observation by the justice of peace) The deponent is sober.

Question: Do you still wish to make a statement?

Answer: Yes

If you are still prepared to make a statement I would like to know from you where you obtained the knowledge about which you wish to make the statement.

[Incriminating statement made].

(Duly describe the exact circumstances that led to the deponent's appearing before you)... I was approached by Deputy Commissioner Visser at 15h43 who informed me that the deponent wants to make a statement of which the content was that of a confession and he needs me to take it down.

[7] According to Viljoen he spoke to the accused in English after he inquired from him whether he was conversant with the English Language. At no stage

did it appear to him that the accused did not understand the whole procedure. After the statement had been read back to the deponent and confirmed that the content was correct, the deponent affixed his signature on each page. The witness also put his signature on the last page. In addition to the deponent's signature, his thumbprint was also imprinted on the form. Thereafter the witness handed over the accused and the confession to the officer who had brought him.

[8] The witness was asked whether the *pro forma* used informed the deponent that he had a right to have a legal practitioner present, during the taking of the statement, to consult a legal practitioner prior to deciding to remain silent, to answer questions, to give an explanation or to be just present to assist him when answering questions or giving explanations? The witness replied that according to his understanding the *pro forma* which he used meant that the accused had a right to have a legal representative at that stage where they were. He was further asked whether the words "present now" appeared on the *pro forma* he used and he replied that "now" does not appear but the fact that he had informed the accused that he had a right to get a legal representative meant that he could have a legal representative at that stage or at any time.

[9] It was further put to the witness that the accused did not understand the word "consult", to which the witness responded that the accused understood the word, otherwise he could have told him so and/or could have asked him what the word had meant. It was further put to the witness that

the accused did not know the difference between legal aid and legal assistance to which the witness replied that he wrote "legal assistance" because the accused answered that he did not need legal assistance. However, he further explained that it could also be possible that he, the witness, used the word during their discussion and the accused could have picked it up. A further question was put to the witness that the accused never said he did not need legal assistance. The witness insisted that the accused told him that he did not require legal assistance "at this stage".

[10] After the State had closed its case of the trial within a trial, the accused testified under oath and called two witnesses.

The accused testified that he was born on 20 March 1989. When this incident happened on 18 January 2008, he was 18 years old. On the above mentioned date at about 00h00 he received a phone call from one of his brothers who informed him that there was a problem at home. He went home and the police informed him that his parents had been murdered. Between 01h00 and 02h00 in the morning, the police took him and his brothers to the police station. At the police station they were interrogated as the police were suspecting that one of them had murdered the parents. They were questioned until about 03h00. Thereafter the accused and his brothers went to their aunt's house. Between 09h00 and 10h00 the police officers collected the accused and his brothers for further questioning. At that stage the accused was not informed that he was under arrest and nobody had explained his rights. At the Serious Crime Unit they were put in different

offices. The accused was taken to Unandapo's office where he was asked the same questions repeatedly. They asked him where he had been the previous night, they accused him of killing his father and they showed him a pillow and a pair of shorts. They forced him to answer the questions. According to the accused, he was questioned for about five to six hours. The accused was asked by four police officers, two of those officers were Unandapo and Louw. When they started questioning him his brother was not present; he came at Unandapo's office at a later stage.

[11] In the presence of his brother, Desmond, the police officers asked the accused again the same questions. It was at that stage that the accused's brother decided to go and call for a lawyer. His brother told the police that he was going to call a lawyer and Unandapo chased him out of the office. Whilst the police were interrogating the accused, they did not inform him of his rights. After the accused's brother was chased out of the office that was also the time the police took the accused to Viljoen's office. Viljoen communicated to the accused in English. When Viljoen spoke to the accused he could understand him but there were certain words which he did not understand namely words like "legal aid" and "legal assistance". He also did not understand phrases like he "has the right to consult a legal practitioner"; "the state will appoint on application a legal practitioner to represent you." Those words were used and they were not translated to the accused. The accused stated that he did not understand those words and he never used phrases such as legal assistance. The accused was told that "the application can be

directed to the Directorate Legal Aid, Private Bag 13370, Windhoek.” He also stated that he did not understand that part as his home language is Afrikaans and those phrases were not translated to him. He also testified that he failed Grade 10 which he was repeating at Namibia Education College. The accused further testified that he never stated in his statement that “I prefer to make a statement on my own as it will be the truth and do not require any legal assistance.” The accused testified that he was not told that he had a right to have a lawyer present before he decided to make a statement or to say anything to the police, or to advise him about what to say and advise the accused of what he was about to do. The word confession was not explained to him either.

[12] The accused further stated that had it been explained to him that he had a right to have a lawyer at that stage, he could have asked the lawyer to come and help him. He again stated that he only came to hear from Mr Dos Santos, the lawyer who represented him when he first appeared in court, that he had a right to get a lawyer and the right to remain silent. After the accused learned that he had been misled by the police by not being informed of his rights, he wrote a letter to the police to explain to them that his rights were not explained to him. He wrote the letter about a month later after he gave the statement to the police. The letter bore a date stamp of the police dated 2008 February 28. The accused’s legal representative who represented him earlier gave the original letter to the police and the accused remained with a copy. In the letter, the accused indicated his unhappiness about how

the investigators handled the matter. His brother Desmond allegedly told Unandapo that he thought they needed a lawyer. Unandapo allegedly became angry and asked why he needed to make use of a lawyer. Unandapo further told them that may be they had something to hide. He allegedly further stated that it was not necessary for them to have a lawyer because they were only questioned as a routine. He went on to say that Unandapo misled them. He again stated that the accused's brother Desmond informed him, the accused, that he had called a lawyer and that lawyer Ruben Philander was on his way. Before Philander had arrived, the police took the accused to a different venue. If he knew that he had a right to a lawyer, he could have talked to a lawyer to help him. At the time he was questioned by the police, the accused felt bad because his parents had been murdered the previous day and Unandapo allegedly forced the accused to say things and the accused just did what he was told to say.

[13] Through cross-examination, the accused was questioned as to what he was allegedly told to say by the police and he replied that the police told him to admit that it was him "who did it". The police told him to accept or admit that it was him "who did it". He further stated that the police told him what he should tell Viljoen. In other words, the accused maintained that he was not the source of the content of the confession. The accused was further asked who was interrogating him the first day he went to the police station. He replied that there were about two or three officers who were interrogating him and he could not tell whether Unandapo was there or not.

[14] It was put to the accused that the accused's brother called him at about 01h00 and that at about 02h00 he also made another call registered at the Khomasdal Tower. The accused's response was that it was correct that his brother had called him at about 00h11 and that was the reason he said they went to the police station between 01h00 and 02h00. It was further put to the accused that if he had gone to the police station between 01h00 and 02h00 and had left the police station past 03h00, then it meant that he was only questioned for about more than one hour. The accused responded that he knew that they had arrived at his aunt's house at about 04h00. It was further put to the accused that he was not at the police station for more than three hours as he had stated in his testimony because his brother, Mario, made a call at about 02h00 and the MTC print out shows that the call was made from "Augustineum 2" tower which covers the area of Khomasdal. That means that the accused's brother was at Khomasdal and since the accused was together with his brother, he must have been also at Khomasdal and not at the police station. His reply was that he did not know but he was together with his brother.

[15] It was put to the accused that he was not arrested at night he was only arrested later during the day. The accused replied that according to the police, he was not arrested at night but they never informed him formally when he was arrested. Nobody told him that he was arrested for the two murders. The accused was again asked through cross-examination if he had not been arrested, why did he tell Viljoen, according to the document

containing the alleged confession, that he was arrested. His response was that he was tired and Unandapo had already questioned him. When Viljoen asked him he just replied "Yes" to all the questions put to him. The accused was further questioned that if he had answered in the affirmative to all the questions which were put to him, why the answer was not recorded as "Yes" when the accused was asked when he was arrested. The accused replied that he did not know. As to the question whether he had injuries the accused was asked whether he had also answered in the affirmative. He replied that he never told Viljoen that he had no injuries. He explained that Viljoen had asked him to stand up and he had examined him to see if he had injuries and he then wrote "No" on the relevant part of the form. The accused was further asked why when he was questioned whether he had made a statement before, either verbal or written with regard to the incident to any person, the answer was recorded as being "No". The accused replied that he only talked about it to Unandapo and his answer was "Yes". Unandapo told the accused what he must tell Viljoen.

[16] The accused was further asked whether he used the word "consult" he replied that he never used the word since he did not know its meaning. Upon a follow up question whether he was coached by Unandapo to use the word "consult" when telling Viljoen, he said Viljoen also used his own words. The accused was asked what time he was collected from Eros on 19 January 2008 to go to the Serious Crime Unit and he replied that it must have been between 09h00 to 10h00 since they were there for more than three to four

hours. When it was put to the accused that the instructions from him through his legal representative that were put to the witnesses is that he was at the police station for about five to six hours he replied that he did not know, but it could be five to six hours. The accused was further asked how the police allegedly pressurised him. He responded that the police showed him a pair of shorts that was bloodstained which they said was his. Apart from that, the police forced him and they were saying that Mario said the accused was the last person to leave the house. The accused was questioned whether whilst he was in Unandapo's office there was a time he had left the office to go and smoke with Louw and he responded in the affirmative.

[17] It was put to the accused through cross-examination that it was never put to Viljoen that all the questions where he recorded a "No" answer the accused gave him a "Yes" answer. The accused responded that although Viljoen did record "No" the accused responded "Yes" to all the questions which were put to him. He did not know why this version was not put to Viljoen. The accused was asked whether he had failed Grade 10 and whether the medium of instructions at the school where he had failed Grade 10 and the private school where he was repeating the grade was English to which the accused replied in the affirmative. It was further put the accused that during his bail application it was never denied that the content of the confession was not the truth or the police coached him to tell Viljoen. The accused replied that he was forced by Unandapo and that Unandapo told him what to tell Viljoen. The accused was again asked that if it was Unandapo who had told

him the content of the statement, how would Unandapo or Viljoen know that the accused had failed Grade 10 in 2006 and that he had failed to hand in the last projects of his four subjects. The accused decided not to comment on these questions.

[18] The accused was questioned whether when police officer Amakali went through the warning statement the admissibility of which was not disputed before this Court, he had understood the warning he was given by Amakali and the accused replied that he did understand. However, when the accused was asked whether his rights were explained by Amakali the accused stated that he did not understand Amakali. The accused further disputed that he ever told Amakali that he had spoken to his lawyer already. He stated that his lawyer came in Amakali's office whilst Amakali was about to finish the statement. Another question put to the accused was that the accused was asked the following: "What is your choice; do you wish to make a statement or do you only wish to answer questions after consultation with your legal practitioner or do you wish to remain silent" and the accused answered that he had already given his statement to Viljoen. The accused responded that although he had given his statement to Viljoen, he never told Amakali that he had already given his statement to Viljoen. He said he never used those words. When he was asked to state the words he used he said he could not remember them.

[19] The next witness called by the defence was Desmond Quinton Schiefer, the accused's brother, who testified that on the night of the incident they

arrived at the police station plus minus 01h00. At the police station they were questioned by the police. They were first put in one office where Unandapo questioned them. The manner in which he was questioning them made them to feel that they were responsible for the death of their parents. At that stage the witness asked Unandapo whether it was possible for him to contact a lawyer. He then took him out of the office and asked him whether he had something to hide and what was the reason for him to get a lawyer. At the time the witness was at the police station with his brothers, the police looked at their hands and their shoes. The witness was not very sure as to the time they had spent at the police station that evening but he could remember that they proceeded to his aunt's residence and arrived there at about 03h45 or 04h00. At about 07h15, the witness went to meet with the police at the deceased persons' house. They spent about two hours at the house. The witness and the police went to pick up his wife from his house and thereafter they proceeded to Eros to his aunt's house to pick up his two brothers for further questioning. The witness estimated the time to be around past 10 hours when they went to Eros.

[20] When they arrived at the aunt's house the small gate was half open. The witness entered the house and Unandapo entered the yard but he did not go inside the house. At that stage the accused was outside the house at the verandah. The witness could not tell whether any person was arrested at that stage. From the aunt's house the witness; his two brothers and the police drove to the Serious Crime Unit. At the Serious Crime Unit, the police started

to interrogate the accused and his two brothers. At first they were put together in one office thereafter they were separated. The witness was put in the same office with the accused. After the police interrogated the accused for some time they requested the witness to go outside the office, and later on they asked him to come back to the office. They did that for about three of four times.

[21] Whilst the police were interrogating the witness and the accused the police told them what they thought had happened during the incident. The police questioned the accused repeatedly and before few minutes to 15h00 the police again asked the witness to go outside. The witness was called again to return to the office. When he came back to the office Unandapo had a piece of paper in front of him and he read from it. The content of the piece of paper appeared as if it was a statement made by the accused. Unandapo told the witness that it was a statement made by the accused. After Unandapo had read the statement, he told Romeo to tell the truth. The accused denied any knowledge of the incident. Thereafter the witness told Unandapo that he would telephone a lawyer. Unandapo went to another office leaving behind the accused, the witness and Mr Louw, a police reservist. The witness telephoned his wife to in turn telephone his nephew, Philander, who as stated, is a lawyer. Thereafter Unandapo came and took the witness out of the office and left him outside the burglar door.

[22] At the time the witness went outside the burglar door, his wife had already telephoned Philander and they were waiting for Philander. When

Philander came, the police told them that the accused was no more at the Serious Crime Unit. The police let Philander inside the premises. The witness and Philander stood at the gate for some time. After some time the accused came with police officers. The witness learned that the accused was taken to Viljoen. Philander went inside the office. He did not stay there for a long time and when he came out he told the witness that the police had obtained a confession from the accused. It was the witness's opinion that by taking him outside the office after he had mentioned that he would call a lawyer it meant that Unandapo did not want a lawyer to be present to disturb him or to make things complicated.

[23] Through cross-examination the witness was asked whether they were being interviewed one by one when they were in the office with the accused to which he replied that the accused was asked in his presence where he was and he told the police that he was with his friend Lee-Roy. It was put to the witness that he must have arrived at the police station for questioning for the second time after 11h23 because the cell phone print out indicated that he had made a call from his cell phone at that time but that "Bahnhoff 2" which is the cone for the police station did not register as the place from where the call was made. The witness replied that it could be possible that they arrived at the police station past 11 hours but before 12 hours. The witness was asked whether there was a stage when he was with the accused in Unandapo's office and the accused asked him to leave the office so that the

accused could speak to Unandapo. The witness testified that it was not correct.

[24] The witness was further asked whether there was a time when they were in Unandapo's office the accused had left with Louw to smoke. The witness confirmed that Louw and the accused had left the office to go and smoke. The witness had also gone to the toilet and when they had returned to the office, the police continued to interrogate the accused and the witness was told to go outside the office again. When he returned, that was the stage when Unandapo read from the piece of paper. The witness was asked why the accused never testified about Unandapo reading from the piece of paper if this was true. The witness replied that he did not know why the accused did not testify about it. The witness was furthermore asked whether the accused had heard him when the witness said he would telephone a lawyer. He replied that the accused had heard him. When the witness went out, he telephoned one Jaco, who is also a lawyer, but his phone was off. He did not think about Philander the first time he wanted a lawyer. When he went back to the office the police did not ask many questions again and they let them go. This was the first time when they visited the police station.

[25] The witness was asked whether the first time they went to the police station he had asked Unandapo whether he should get a lawyer and on Saturday he told him that he was going to phone a lawyer and to which the witness replied in the affirmative. He was further asked whether he had spoken to the accused on Friday or Saturday about obtaining the services of

the lawyer and he said he did not discuss this with him. The accused also did not tell him that he had wanted a lawyer. The witness was again asked what Chief Inspector Unandapo's response was when the witness indicated that he wanted a lawyer and he responded that Unandapo had said nothing. Unandapo went outside the office and when he returned to the office he took the witness outside. The witness was questioned as to how long Philander had stayed in the office where the accused was and what Philander had told the witness. The witness's response was that he could not tell the exact time Philander was in the office but he estimated the time to be 15 minutes to 20 minutes. It was put to the witness that it seemed as if it was the witness who wanted a lawyer and not the accused to which the witness replied that this was correct. The witness was asked to state what else Philander had told him apart from stating that the accused had already given a confession. He then replied that Philander had told him that the accused was booked in and that he was busy giving finger prints.

[26] The last witness called by the defence was Ruben Philander. His testimony was that he is a legal practitioner who is related to the accused. On 19 January 2008 he was contacted to go to the office of the Serious Crime Unit. He was informed that the police had detained the accused and his two brothers; therefore he should go to attend to them. The person who contacted him telephoned in the afternoon, past 14h00. When he went to the office of the Serious Crime Unit, he met Desmond outside the building. The witness went to Unandapo's office and introduced himself and stated the

purpose for his visit. He also told Unandapo that he was related to the accused's mother (the deceased) Unandapo said that if he was related to the deceased then he was not supposed to be involved in the matter. They deliberated on that and the witness asked to see the accused. Unandapo told him that the accused was not on their premises and that he would return later, therefore the witness should wait for the accused. Philander left the office and went to wait outside. About half an hour the accused arrived in the company of the police. After five or ten minutes Philander was allowed to see the accused. Philander was given the confession. He could not do anything much because the confession was already signed. He then discussed the issue of bail with the accused. However, he never intended to apply bail on behalf of the accused but to instruct another counsel as he does not practice criminal law on daily basis.

[27] The witness was questioned in cross-examination whether he had discussed the confession with the accused and he replied that he never discussed the confession with the accused and the accused did not tell him or complain to him about anything. The witness was further asked whether he was present when the warning statement was taken he answered that he was not present at all and that when he was left with the accused to consult, he only discussed the application for bail. The witness was further asked whether he was refused access to see the accused and he responded that when the accused arrived at the police station with two police officers the accused was taken to the office and he followed shortly thereafter that. He

was again asked whether he was denied access to the accused and he replied that he had to wait outside and when he spoke to Unandapo he never told him where the accused was he just said that the accused was not there, if one had regard to Unandapo's conduct by not telling him where the accused was one would interpret it as amounting to a denial to access, however he added that this is subject to legal argument. He was further asked whether the accused knew that he was a lawyer and he said that the accused knew it since they grew up in the same area.

[28] In re-examination the witness was asked whether he had discussed the confession with the accused. He replied that there was nothing to discuss, the confession was in such detail because it described how the incident had happened what happened next and what the witness specifically recalled stood out to him was a tear dropping on the face of the accused's father. The defence then closed its case on a trial within a trial.

[29] Counsel for the State submitted that in appropriate cases lengthy interrogation may be a decisive factor to exclude statements made by the accused to determine that it is not made freely and voluntarily and without undue influence thereto. She referred the court to the case of *S v Zulu and Another* 1998 (1) SACR 7 (SCA) where the Court quoted with approval in *Zulu supra* the observation made by Williamson JA in *S v Mkwanazi* 1966 (1) SA 736 at 746G - 747 A.

"Lengthy interrogation by the police, even if there is no suggestion of what is termed a "third degree method" attached to it, may of itself

undoubtedly have an effect or influence upon the mind or attitude of some persons so interrogated. The manner and personality of the interrogator and the methods adopted by him can each have a bearing or any possible influence flowing from the interrogation. Obviously a Court called upon to decide whether or not a statement made consequent upon such an interrogation was unduly influenced thereby would consider all such aspects if it appears possible that some undue influence or persuasion might have been present. But, whereas here, the person interrogated himself at no time raises the suggestion that he was overawed and browbeaten by his interrogator into making a statement or a confession, there is really no basis for saying that the interrogation, however, protracted might have unduly influenced him."

I fully agree with this proposition. Counsel for the State argued that at no stage did the accused inform the Court what effect the so called lengthy interrogation had on him; because the time that he had spent with the police was not that long and not continuous. The accused was allowed to use the bathroom when he went with Louw; he was seen with his brother in the corridor smoking before he was taken to Viljoen.

[30] She further argued that the accused claimed at first in his bail application (Exhibit "C") that he had been interrogated from the previous night until the next morning and the police had kept on forcing him by saying it must be him or his brothers who had committed the offences and did what the police said. However, he later admitted that when he was told by the prosecution during bail application that the evidence will be led that there was a clear break in interview. The accused also admitted in Exhibit "C" that he did not tell Viljoen that he was forced to make a statement. It was the State's submission that the first interrogation had no impact on the accused

as there was a clear break and the accused and his brothers went home to rest. As to the second time of the interrogation, the State argued that the accused was not taken to the police station for interrogation before 11h23 as the accused was picked up by his brother at Eros and this was the time that Mario, the accused's brother's cell phone registered a call at Cone 1, being in the vicinity of Brits Street and the next radio tower that his phone picked up was at 11h52 at Bahnhof 2 which is the cone in the vicinity of the police station in question. They could not have been at the police station because by then Mario was at the shopping mall near MultiChoice. The State based its argument on Exhibit "R", the MTC print out.

[31] Counsel for the State submitted that there was no evidence suggesting that the method used or the manner in which the police officers who interviewed the accused was oppressive and neither the accused nor his brother testified to the effect that any of the interrogation methods had on him. Counsel for the State referred this Court to the matter of *R v Ananias* 1963 (3) SA 486 (SR) where Beadle CJ said the following at 487:

"A statement extracted by repeated questioning after arrest may often be ruled to be inadmissible on the application of this test; and it might be useful to examine the type of cases when this is likely to be so. Each individual case must, however, depend on its own particular circumstances; and it would be quite impossible to give any exhaustive list of such cases. But many of the cases where the statements may be held to be inadmissible will fall into one of four broad classes:

- (1) *Cases where the form of questions put, or the manner of the interrogation, itself indicates that the accused's freedom of volition was negative;*
- (2) *Cases where an illiterate accused may feel that he is subject to the police officer's authority, and thus feel that if he refuses to answer questions it would be regarded as disobedience on his part which might result in unfortunate consequences to himself;*
- (3) *Cases where persistent and aggressive questioning may so frighten or overawe an accused as to overcome or negative his freedom of volition;*
- (4) *Cases where fatigue induced by persistent questioning may break down the accused's power of resistance and induce him to speak where he would not otherwise have done so. The so-called 'third degree' method of interrogation is an example of this type of case.*

...the accused himself is the best judge of whether or not 'any external impulse negative his freedom of volition', and if he does not say any particular impulse did so the hypothetical argument that it may have done so as CLADEN, F.C.J., says 'has little force when that person does not say that that was so.'

[32] Counsel for the State argued furthermore that although the accused contended that he was unduly influenced at no stage during the trial within a trial did the accused testify to that effect. It was also never put to any of the State witnesses. The only time when the accused mentioned some sort of promise made by the police was at the time when the state fished out those promises from the accused through cross-examination. Counsel continued to

say that the failure to testify about the alleged undue influence or even put the allegation to witnesses casts doubt whether there was such influence.

[33] Concerning the allegation that the accused was denied access to a lawyer counsel for the State argued that it was the accused's brother Desmond who wanted a lawyer and not the accused. At no stage did the accused indicate to the police that he needed a lawyer. When Mr Philander arrived he was not denied access to see the accused. After they consulted the accused never even complained to Mr Philander that he was not happy with the way the police had treated him. She further argued that the accused was aware of his rights and made an informed decision.

[34] Counsel for the State argued in connection with the allegation that the accused was not properly informed of his rights to remain silent and to have access to a lawyer before and generally during the confession, that the accused's rights were explained to him by Unandapo at Eros at the time of his arrest and at the police station when the accused told Unandapo that he wanted to talk to him in private. At that stage the accused told Unandapo that he did not need a lawyer. The accused was further warned by Viljoen of his rights. At no stage did the accused mention during his bail application that his rights were not explained to him and that he never understood them.

[35] In connection with the accused's denial of the content of the confession, counsel for the State argued that it was never put to Unandapo that he coached the accused what to say to Viljoen. The accused testified

during cross-examination that Unandapo told him verbatim what to tell Viljoen in English and he did exactly what Unandapo told him in English. Counsel asked by way of a submission: If the accused did not understand English and speak it properly how would he have remembered each and every English word if Unandapo had coached him? The State pointed out certain information in the accused's statement to establish that such information could only have been known to the accused and not the police. Such information concerns the fact that the accused failed Grade 10 and that that he had failed to hand in his projects of his last four subjects. Counsel for the state urged the Court not to believe the accused that he only came to learn about his rights from Mr Dos Santos because he testified that he understood the warning statement given to him by police officer Amakali.

[36] Concerning the evidence of Desmond Schiefer, counsel for the State argued that it was highly unlikely that Unandapo had read a piece of paper purported to be a statement given by the accused because the accused himself never testified to that effect and counsel for the defence never put such an allegation to the witnesses during cross-examination. She argued that this was an attempt by the accused's brother to persuade the Court that this could be the reason why the accused told Viljoen in so much detail during the time he gave his confession.

[37] Concerning the evidence of Mr Philander, Counsel for the State argued that Philander was never denied access to see the accused because at the time he had arrived at the police station the accused was not there. When

the accused came to the police station he had consulted with the accused and this was before a warning statement was obtained from the accused and the accused told Amakali that he had already spoken to his lawyer and would stick to his confession.

[38] Turning now to submissions made by counsel for the defence, in his written submissions counsel restated the grounds of objection to the admissibility of the evidence of the confession identified in paragraph [1] of this ruling. He next cited passages from the case law relevant to the enquiry and referred to some of the information given and the questions put to the accused in the pro forma as well as to the accused's answers to those questions.

[39] Counsel for the accused argued correctly that the purpose of a trial within a trial is to determine the admissibility of evidence. It is a question of law and the State in *casu* must prove beyond reasonable doubt that admission or pointing out had been made freely and voluntarily by the accused person. He referred this court to paragraph [41] of the judgment in *S v Calvin Liseli Malumo & 118 Others*, unreported and delivered on 14 February 2007.

[40] He further *inter alia* cited a passage in *S v Shikunga and Another* 1997 NR 156 (SC) at 164 where it was stated as follows:

"At common law a confession made by an accused person is not admissible against him or her unless it is established that it was freely and voluntarily made, and that he or she was in a sound and sober

sense and not unduly influenced thereto. This is a crucial requirement in a fair system of justice. It goes to the heart of the rights expressly protected by Art 12 of the constitution. A statute which invades that right subverts the very essence of the right to a fair trial and incidents of that right articulated in Art 12 (1) (a) (d) and (f)..."

It was further counsel for the defence's argument that in deciding whether a confession or admission was obtained as a result of undue influence the test is not whether there was in reality no act of free will at all. The criterion is the improper bending, influencing or swaying of the will not its total elimination as a freely operating entity. The whole object of the enquiry is to evaluate the freedom of volition of an accused and this of its very nature is an essentially subjective enquiry. It is his will as it actually operated and affected by outside influence that is the concern. Counsel for the defence further referred to authorities regarding the admissibility of a confession.

[41] Concerning the fact that the accused did not complain of a particular treatment or influence brought to bear upon him does not necessarily always mean that such factors do not exist. A layman, particularly an ignorant person in police and court matters, might not complain of something for a variety of reasons. Counsel relied for this submission on the case of *R v Hackwell and Another* 1965 (2) SA 388 (SRA) at 390D-E where that Court said:

"The appellant's failure to raise the fact of confrontation as a ground of objection should not be minimized; on the other hand it should not be overstressed. I think that, when it is sought to exclude a confession, accused persons often regard an allegation of assault as possessing a magical quality. And for that reason, other matters no less sufficient may not be mentioned either because they are not considered to be

much weight or because it is felt that to mention them would weaken the effect of the objection as formulated.”

[42] He also relied on the following views expressed by Goldstone J in a passage taken from the case of *S v Radebe* 1988 (1) SA at 196F-I:

“If there is a duty upon judicial officers to inform unrepresented accused of their rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the Legal Rules thereto, and the seriousness thereof, an accused should not only be told of his rights but he should be encouraged to exercise it. He should be given a reasonable time within which to do so. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case may result in unfair trial in which there may well be a complete failure of justice. I should make it clear that I am not suggesting that the absence of a legal representation per se or the absence of the suggested advice to an accused person per se will necessarily result in such an irregular or unfair trial and the failure of justice. Each case will depend upon its own facts and peculiar circumstances.”

[43] It was further counsel for the defence’s argument that nowhere during the questioning was it indicated to the accused that the charges are very serious with a possibility of severe sentences; the advantage and disadvantage of making a confession and the consequences thereof; the meaning and effect of the words “to consult a legal practitioner”; the

advantage of having a lawyer present to advise the accused about what to do and how to go about in obtaining the service of a lawyer at his own expenses or should he not be able to afford one how to obtain a lawyer at state expenses; and that the accused was encouraged to have a lawyer present during the interview. This Court was further referred to the matter of *S v Nyanga and Others* 1990 (2) SACR 547 (CK), where Heath J explained the duties of the presiding officer when explaining the accused's rights. The court was also referred to the matters of *S v Theofilus Sisande* - CC 1/2009 unreported judgment by Van Niekerk J, delivered on 16 November 2009 and *S v Kasanga* 2006 (1) NR 348 at 365I-366A in this regard and other authorities.

[44] Counsel for the defence further argued that it was never established by Viljoen what the circumstances were under which the accused "talked about" the statement and how it came about that he agreed to give a confession hence the accused was misled in making a confession with serious consequences for him. Counsel then concluded by stating, amongst other things, that the accused had failed Grade 8 (which is incorrect) and that given that his home language was Afrikaans and the confession was taken down in English during which process allegedly complicated terms to a layman were used which terms were not explained to the accused, it cannot be said that the State had proved beyond reasonable doubt that the accused had clearly understood the explanation of his rights.

[45] The Court having summarized the evidence and the issues that must be decided as well as the arguments presented by counsel from both sides, I must now consider and decide the issues raised.

45.1 I start with the issue that although initially raised as one of the grounds of objection, it was not raised in counsel for the defence's written heads of argument. I do not, however, understand that it has been abandoned. The issue is that the accused was not allowed to be assisted by a guardian.

Section 73 (3) of the Criminal Procedure Act, 1977 (Act No.51 of 1977) states that an accused person who is under the age of eighteen years may be assisted by his parents or guardian at criminal proceedings and any accused who in the opinion of the Court requires the assistance of another person at a criminal proceeding may, with the permission of the Court be so assisted at such proceedings. The accused in this matter was above the age of eighteen, therefore there was no obligation on the part of the police to have the accused assisted by a guardian. This ground cannot be of assistance to the defence.

45.2 Pressure put on the accused by the police through long hours of interrogations.

I fully agree with counsel for the State's submission that lengthy interrogation may be a decisive factor to exclude statements made by the accused to determine that it was not made freely and voluntarily and without undue influence. However, I wish to scrutinize the time the accused was

interrogated by the police. According to the accused he was interrogated for about five to six hours by the police. He was taken to the police station between 01h00 and 02h00 where he was questioned until about 03h00. Thereafter the accused and his two brothers left the police station. They were again collected from their aunt's house between 09h00 and 10h00 and they were taken to the police station for further interrogation. There is no specific evidence indicating the exact time when the accused and his brothers arrived at the police station on both occasions and when they left the police station. However, there is evidence that the accused received a call from his brother Mario at 00h11 and the call showed that his brother was at Khomasdal when he called the accused. There is further evidence that the accused's brother again made another call and the Augustineum 2 tower registered the call at about 02h00 which means that his brother was still at Khomasdal. Since the accused went together with his two brothers it means that they only went to the police station at about 02h00. The accused and his brothers left the police station at about 03h00 it means that they were interrogated for one hour and some minutes. The accused person and his brother testified that they went back to the police station at between 09h00 to 10h00 the same morning. However, there is evidence that one of the accused's brothers made a cell phone call at about 11h23 and the cell phone printout did not indicate Bahnhof 2 the tower for the police station, which means that the accused person with his two brothers only went to the police station for the second time after 11h23. This suggests that they were interrogated from

about that time to past 15h00, a period of some four hours. Four hours plus one hour and gives a total of four and half hours being the total period that they were interrogated. However, as counsel for the state rightly submitted, this was not continuous interrogation. The accused and his siblings first went to the aunt's place after they were interrogated for about an hour and half. When they came back they were first put in one office where they were interrogated and thereafter they were separated. At the time they were being interrogated the accused had a chance to go to the bathroom and to go on a smoking break. I would not regard five hours and half spaced by breaks to be a lengthy time of interrogation given the complexity of the matter under investigation. I am therefore of the opinion that the accused was not pressurized to make a confession on this ground.

45.3 Undue influenced to make the confession by being promised bail and a lenient sentence.

When the accused was called upon to testify he never indicated that he was promised bail and lenient sentence if he had made a confession. If these promises were really made, he should have testified about them during these proceedings so that they could be tested through cross-examination. He only mentioned about the promises when he was cross-examined by counsel for the State. I find there is no evidence that the accused was unduly influenced to make a confession through promises of bail and lenient sentence.

45.4 That although a lawyer was present, he was denied access to the accused.

It will be recalled that the evidence in respect of this ground was that the accused's brother, Desmond, informed his wife to telephone legal practitioner Philander who is related to the accused and his brothers. When the lawyer arrived at the police station in all likelihood the accused had already been taken to Viljoen at a premise different from where Unandapo was for the purposes of making a confession. Mr Philander was told to wait for the return of the accused and he Philander duly did. Within five to ten minutes of the accused's return to the Serious Crime Unit, Mr Philander was allowed to see the accused. There can be no suggestion that in those circumstances Mr Philander was denied access to the accused. With due respect to Mr Philander, there is no legal argument about this.

45.5 The question whether the accused was advised through his brother Desmond that a lawyer was not necessary.

Desmond Schiefer testified that he had asked Unandapo the following: "Is it not possible for me to contact a lawyer?" At that stage Unandapo allegedly took him out of the office and he allegedly asked him why they needed a lawyer and whether they had something to hide. He allegedly added that they did not need a lawyer since he was just asking routine questions. That was the first occasion when the accused and his brothers went to the police station. Whilst they were at the police station at around 15h00, Unandapo

was busy interrogating the accused and told Desmond to go out of the office. He later called him in. At that stage Unandapo read a document and the content of the document appeared as if it was given by the accused. When Desmond saw where the situation was leading to, he told Unandapo that he would telephone a lawyer. Unandapo did not say anything. Instead, he left the office. It was at that stage that Desmond phoned his wife to call Mr Philander. When Unandapo came, he took Desmond out of the office. Regarding the document allegedly read by Unandapo, this was not put to Unandapo and the accused never mentioned about it when he testified. On Desmond's own admission, it was Desmond who needed the services of a lawyer at that time. My conclusion on this point is therefore that there is no evidence that the accused was advised through his brother that it was not necessary for him to get a lawyer.

45.6 The accused was not properly informed of the seriousness of the charges, his rights to remain silent and his right to have a lawyer present at the confession.

In the main trial Unandapo testified that he had warned the accused according to the Judges' Rules, which he explained in Court what these Rules were about. He stated that he explained to the accused amongst other things his right to remain silent, the right to a legal representative of his own choice or a lawyer appointed by legal aid if he could not afford a lawyer of his choice. Unandapo said that he explained the rights to the accused on three occasions, namely at the house of the accused's aunt, at the police station before the

accused was questioned and after the accused indicated that he wanted to speak to Unandapo privately. That the accused had asked to speak to Unandapo in private was corroborated by the evidence of Police Reservist Louw. Accused allegedly told him that he did not need the services of a lawyer. It was also Unandapo's evidence that he had informed the accused that he was investigating a serious charge against him. The defence disputed Unandapo's evidence in this respect. With respect to the issue of legal representation, the accused had written a letter without a date but bearing a police date stamp of 18 February 2008 complaining that he was misled into believing that he did not need a lawyer. Although the accused stated in the letter that he was misled, as already pointed out, there is no evidence that the accused indicated that he wanted the services of a lawyer or that Desmond wanted to secure a lawyer on behalf of the accused.

Apart from Unandapo's evidence that he had explained the accused's rights, there is also evidence from Viljoen who took the alleged confession from the accused. As mentioned before, he used a pro forma where the rights to be explained to a deponent are recorded in detail and these have already been referred to in this ruling. It will be remembered that when he was asked what he elected to do "now" after his rights were explained, he is recorded as having replied among other things that he did not require any legal assistance "at this stage". The evidence was that both the accused and Viljoen are Afrikaans speaking but that they spoke in English. The accused contended that he did not understand certain phrases properly and that he

did not mention words such as “legal practitioner”, “legal assistance” and to “to consult”. Although the accused stated that he did not understand some of the phrases, it was Viljoen’s evidence that the accused did not bring this to his attention. Apart from the above, the accused also disputed the contents of the alleged confession as far as to say that Unandapo dictated to him what to say. This version was, however, not put to Unandapo to give him a chance to react to it. In any case, certain of the information contained in the alleged confession was within the accused’s knowledge and could only have come from him. Looking at the evidence as a whole, including that Unandapo is a senior police officer with vast experience, it is highly unlikely that he did not explain the accused’s rights. If the accused is disputing even the information which is in writing, what about the oral explanation that Unandapo says he had given to him?

[46] In my opinion the accused’ rights were explained to him by both Unandapo and Viljoen and the accused had understood his rights as explained. He elected to give a statement in his own words “as it will be the truth and do not require any legal assistance at this stage”.

[47] Although counsel presented other interesting arguments including constitutional issues, because of the conclusion I have arrived at in this matter, I do not find it necessary to decide those issues. My prima facie view is therefore that the alleged confession was made by the accused freely and voluntarily in his sound and sober senses and without him having been unduly influenced to make it.

[48] In the result, the alleged confession is ruled admissible evidence in the main trial.

SHIVUTE, J

ON BEHALF OF THE STATE

Ms Wantenaar

Instructed by:

Office of the Prosecutor-General

ON BEHALF OF DEFENCE

Mr Christiaans

Instructed by:

Directorate: Legal Aid