



CASE NO.: CC 32/2001

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

CALVIN LISELI MALUMO & 111 OTHERS

CORAM: HOFF, J

Heard on: 12 October 2011; 17 October 2011; 19 October 2011

Delivered on: 24 October 2011

JUDGMENT

(Trial-within-a-trial - Pointings-out-Mr Isaya Shaft Kamwanga)

HOFF, J: [1] This is a trial-within-a-trial. In the course the testimony of Jacobus Hendrik Karstens during November 2010 it became apparent that he had conducted a number of pointings-out in the aftermath of the attack on Katima Mulilo on 2 August 1999. His testimony was that six accused persons, including the accused Isaya Shaft Kamwanga, were involved in these pointings-out which were conducted during the period August 1999 until December 1999.

[2] This Court dealt with five of the six pointings-out in a consolidated trial-within-a-trial and made a ruling on 31 January 2011. Reasons were provided on 17 February 2011. During afore-mentioned consolidated trial-within-a-trial this Court did not deal with the pointings-out by Isaya Shaft Kamwanga because Mr

Samukange, who represents this accused person, at that stage informed this Court that he was unable to take meaningful instructions from the accused person since there were indications that the accused suffers from a mental illness.

This Court subsequently referred the accused Isaya Shaft Kamwanga for psychiatric observation in terms of the provisions of sections 77, 78 and 79 of the Criminal Procedure Act, 51 of 1977. Reports by a psychiatrist and a clinical psychologist were received, evidence were presented during an enquiry which concluded in a finding by this Court on 3 October 2011 firstly, that at the time of the commission of the alleged offences the accused person was criminally responsible for his actions, was able to appreciate the wrongfulness of the alleged offences and to act in accordance with such appreciation, and secondly, that the accused is capable of understanding the proceedings and is fit to stand trial.

[3] Mr Samukange who did not cross-examine State witnesses during the consolidated trial-within-a-trial (for the reason mention *supra*) applied to Court to recall Mr Karstens and another police officer Evans Simasiku who had been conducting the pointing-out involving the accused Isaya Shaft Kamwanga.

[4] This application was allowed (despite an objection by the State) since the consolidated trial-within-a-trial would have been incomplete in the absence of a ruling on the admissibility of the pointing-out by the accused, Isaya Shaft Kamwanga.

[5] Mr Samukange, on instructions from the accused person, objected to the reception of evidence obtained during this pointing-out on the basis that it was not made freely and voluntarily (it was alleged that the accused had been subjected to

assaults and torture prior to the pointing-out) and on the basis that the accused had not been informed of his constitutional rights.

[6] The testimony of Mr Karstens who was a member of the Namibian Police Force and who at that stage held the rank of detective inspector testified that on 12 December 1999 he was approached by Sgt. Evans Simasiku in his (Karsten's office) who informed him that the accused was willing to make a pointing-out.

[7] The accused was thereafter brought into his office and he was informed of his right to remain silent and his right to legal representation. Inspector Karstens did not inform the accused of his entitlement to legal aid.

[8] They then drove in a police vehicle to Mafuta settlement in the Caprivi region where the pointing-out was to take place. There the accused person took them into the bush and pointed-out a certain place. Inspector Karstens could see that at that spot the ground had not been disturbed. The accused then volunteered to take them to a second place in the bush where he again pointed to a specific place. Here again he could see that the soil had not been disturbed at all. He became suspicious, thinking that the accused wanted to use that opportunity to escape, and decided to take the accused back to the police cells at Katima Mulilo.

[9] Detective Chief Inspector Evans Simasiku testified that he accompanied Inspector Karstens (who was in charge of the pointing-out) on that particular day. The testimony of Detective Chief Inspector Simasiku contradicted that of then Inspector Karstens on various issues including whether or not the hut of the accused

person had been searched. The evidence of Detective Chief Inspector Simasiku however supports that of Inspector Karstens on one important aspect, namely, that nothing was discovered as a result of pointings-out by the accused person.

[10] Mr Samukange decided not to call the accused to testify and this Court then heard argument whether or not the State had succeeded in proving the admissibility requirements in respect of the pointing-out.

[11] I wish at this stage to regress and point out that after the cross-examination of Mr Karstens but before Detective Chief Inspector Simasiku was called to the witness box to be cross-examined, I expressed my reservations regarding the necessity to continue with the trial-within-a-trial in the light of the testimony of Mr Karstens that nothing was found during the pointings-out, the reason provided namely that it was obvious that the soil had not been disturbed, and the suspicion harboured by Inspector Karstens that the accused had an ulterior motive for taking them into the bush.

[12] I shall later deal with the respective responses by counsel in respect of my reservations.

[13] Regarding the question whether or not the State has discharged its onus in respect of the admissibility requirements for a pointing-out, Mr January on behalf of the State submitted that even though Inspector Karstens had conceded that he did not inform the accused person of his entitlement to legal aid prior to the pointing-out Sergeant Simasiku testified that when he confronted the accused person with his alleged involvement in the attack on Katima Mulilo before he took down his

warning statement he (i.e. Sgt. Simasiku) had *inter alia* not only informed the accused of his right to legal representation but also his entitlement to legal aid and that the stage the accused was so informed of his entitlement to legal aid and the time the accused was brought to Inspector Karstens was so closely related in time that for all practical purposes this Court should accept that the accused had been informed of his entitlement to legal aid prior to the pointing-out.

In respect of the question of assaults or torture Mr January submitted that the State witnesses denied any such assault or torture and this evidence is uncontroverted since the accused elected not to testify.

[14] Mr Samukange highlighted various aspects in the testimony of Detective Chief Inspector Simasiku where he had contradicted himself as well as the various contradictions between the evidence of Detective Chief Inspector Simasiku and Inspector Karstens and Detective Chief Inspector Simasiku's response when confronted with these contradictions that in the circumstances the evidence of Inspector Karstens is to be preferred, and Mr Samukange submitted that this Court should find that the State has failed to discharge the onus in respect of the admissibility requirements for a pointing-out.

[15] It was during the address by Mr Samukange that this Court again raised the same reservation referred to afore-mentioned.

Mr Samukange in essence submitted that since nothing had been pointed-out that the trial-within-a-trial was an exercise in futility.

[16] Mr January disagreed. In response to a question by this Court, Mr January agreed that should one for the sake of argument accept that the State had succeeded in proving the admissibility requirements for a pointing-out, that Inspector Karstens would have to be recalled in order to testify as to what article was pointed-out. Since we all already at this stage know that nothing was pointed-out what purpose would it serve for Inspector Karstens to come and confirm that nothing was pointed-out.

Mr January's reply was that it would serve a purpose in the sense that it would indicate the accused person's guilty state of mind since he had apparently indicated to sergeant Simasiku that he was willing to point-out something. It appears further from the evidence that the accused indicated to sergeant Simasiku that he was willing to point-out a fire-arm (AK 47).

[17] I must confess that despite approaching this contention with an open mind and with the best of intentions, I failed to find any substance in this contention. It is trite law that a mere *suspicion* that someone had committed a crime or that he or she may have knowledge of the commission of a crime is no basis to conclude that such a person had indeed committed such an offence. The first duty of a Court in criminal proceedings is to determine what *facts* have been established. When this has been established a Court may draw certain inferences or conclusions and then apply the legal principles to the established facts in order to determine the guilt or otherwise of an accused person.

[18] I have indicated in my reasons provided on 17 February 2011 that a pointing-out is essentially communication by conduct which may amount to an extra-curial admission.

[19] The aim of the State in any trial-within-a-trial is to have incriminating evidence (e.g. an admission, a confession or a pointing-out) introduced as evidence against an accused person. For example where an accused had been charged with the crime of murder, evidence that the accused pointed-out the murder weapon to the investigating officer may greatly bolster the State's case against such an accused person depending on the explanation given by such accused person in respect of his knowledge of the whereabouts of the murder weapon.

[20] The question (which I also posed to counsel) was, what incriminating evidence is there against an accused person if nothing at all is pointed-out.

I am of the view and is in agreement with Mr Samukange that it serves no purpose at all and is an exercise in futility.

[21] Returning to the contention that it is an indication of the guilty state of mind of the accused person, the mere fact that the accused had pointed-out places under circumstances where the police officers did not even attempt to discover any object, cannot in my view lead to the conclusive inference that the accused had a guilty state of mind when he so pointed-out specific places in the bush.

The likelihood that the accused had an ulterior motive when he indicated his willingness to point-out a weapon is equally compelling. This likelihood was clearly

manifested during the testimony of Inspector Karstens. The accused literally and figuratively speaking took the police officers for a ride.

[22] It is not necessary in my view to come to any finding on whether or not the State has discharged its onus in respect of the admissibility requirements for a pointing-out because it will serve no purpose at all to do so.

[23] I must accept that the contents of the witness statements of the police officers, Inspector Karstens and Sergeant Simasiku correspond with their *viva voce* evidence in Court (on the fact that no pointing-out had been made by the accused person) since they have not been discredited as witnesses neither had the State applied to have anyone of them declared a hostile witness.

If this is accepted, then on the basis of their witness statements and mindful of the purpose of a pointing-out one would have hoped that this trial-within-a-trial (involving Isaya Shaft Kamwanga) had been stillborn.

[24] In view of the afore-mentioned reasons it is not necessary to come to any finding whether or not the State had succeeded in proving the admissibility requirements of the pointing-out referred to in evidence and this Court accordingly makes no such finding.

HOFF, J

ON BEHALF OF THE STATE:

MR JANUARY

(Trial-within-a-trial - Pointings-out i.r.o. - Accd No. 43 -

Mr Isaya Shaft Kamwanga)

Instructed by:

OFFICE OF THE PROSECUTOR-

GENERAL

ON BEHALF OF THE RESPONDENT:

MR

SAMUKANGE

Instructed by:

DIRECTORATE OF LEGAL AID