SUMMARY ***REPORTABLE***

CASE NO.: A 22/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PAULUS TUHAFENI SHEEHAMA v MINISTER OF SAFETY AND SECURITY AND OTHERS

PARKER J

2011 March 17

Constitutional Law - Human rights - Right under Article 11 (3) of the Namibian Constitution - Applicant alleging violation of his Article 11 (3) basic human right - Court finding sufficient and incontrovertible evidence exist on the papers showing that the applicant was not brought before a magistrate or other judicial officer within 48 hours of his arrest and no evidence was placed before the magistrate to show why that was not reasonably possible - Court finding further that when applicant was eventually brought before the magistrate the applicant had been detained in custody beyond 48 hours without the authority of a magistrate or other judicial officer -Consequently, Court finding that the order of the magistrate purporting to authorize the further unlawful detention of applicant was in violation of Article 11 (3) of the Constitution and therefore unconstitutional -

Accordingly, in pursuance of Article 25 (3) Court ordering the immediate release of applicant from further unlawful detention as necessary and appropriate to secure for applicant the enjoyment of his Article 11 (3) basic human right.

Practice - Notice of motion - Application in terms of Article 25 (3)

of the Constitution to secure enjoyment of Article 11 (3) basic human right - Application brought as urgent application - Court finding that on the facts and in the circumstances of this case and because the matter concerned the personal liberty of the applicant the application merited to be determined on urgent basis.

Held,, that where an applicant is arrested and detained in custody beyond 48 hours of his arrest without the authority of a Magistrate or other judicial officer and after the expiration of the 48 hours the applicant is brought before a magistrate or other judicial officer and no evidence is placed before the magistrate or other judicial officer explaining to the satisfaction of the magistrate or other judicial officer the reason why that was not reasonably possible, any order purporting to authorize the continued detention of the applicant is in violation of Article 11 (3) of the Namibian Constitution and therefore unconstitutional.

Held, further, that the forty-eight-hour rule under Article 11 (3) of the Namibian Constitution is one of the most important reassuring avenues for the practical realization of the protection and promotion of basic human right to freedom of movement guaranteed to individuals by the Namibian Constitution.

Held further, that on the facts and in the circumstances of the present case and because the matter concerns the personal liberty of an individual, the application to secure the enjoyment of the right that has been violated deserves to be determined on urgent basis.

CASE NO.: A22/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PAULUS TUHAFENI SHEEHAMA	**Applicant**
and	
MINISTER OF SAFETY AND SECURITY	**1st Respondent**
THE STATION COMMANDER WINDHOEK POLICE STATION	**2nd Respondent**
PROSECUTOR-GENERAL Respondent	**3rd**
MRS V STANLEY, MAGISTRATE, WINDHOEK MAGISTRATES' COURT	**4th Respondent**
CORAM:	**PARKER J**
Heard on:	2011 February 23
Delivered *(ex tempore)* on:	2011 February 23
Delivered (reasons) on:	2011 March 17

JUDGMENT

PARKER J: [1] In this application the applicant, represented by Mr. Swarts, has prayed for the relief set out in the notice of motion. The respondents, represented by Ms Koita, have moved to reject the application.

[2] The application was brought to enforce the applicant's basic human right guaranteed to him by Article 11 (3) of the Namibian Constitution which provides:

> 'All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, *and no such persons shall be detained in*

> *custody beyond such period without the authority of a Magistrate or other judicial officer.*' (Italicized for emphasis)

[3] *In casu* it is established beyond a shadow of doubt that the applicant, who was arrested on 14 February 2011 by a police official of the Namibia Police (NAMPOL), was brought before a magistrate on 17 February 2011, that is, not within 48 hours of his arrest; and there was not one iota of evidence before the learned magistrate why it was not 'reasonably possible' to bring the applicant before the magistrate within 48 hours of his arrest. Indeed, on 17 February 2011 the public prosecutor in question informed the learned magistrate that he did not know why the applicant was not brought before the magistrate within 48 hours after his arrest. These are the words of the public prosecutor *verbatim et literatim:*

> '.....although the accused was arrested on 14 February 2011 and was brought to court only today (i.e. 17 February 2011) we do not know why that is so.'

[4] The gravamen of Ms Koita's argument goes briefly as follows. The applicant was brought before the learned magistrate on 17 February 2011, that is, after the expiration of the forty-eight-hours constitutional time limit, and so the applicant should not feel aggrieved. After all, Ms Koita's argument proceeded, the learned magistrate ordered the applicant's further detention when the applicant was brought before that learned magistrate on 17 February 2011, that is, as I say, after the expiration of the absolutely peremptory forty-eight-hours time limit.

[5] With the greatest deference to Ms Koita, such argument is not only sad, it is

also unfortunate, apart from being puerile in the extreme, particularly when it is made in a country whose very life and soul are nourished by 'the triadic ideals of democracy, human rights and the rule of law.' (See *Rally for Democracy and Progress v Electoral Commission* 2009 (2) NR 793 at 798H.) One must not lose sight of the fact that the object of Article 11 (3) of the Namibian Constitution is to ensure the prompt exhibition of the person of an arrested and detained individual before a magistrate or other judicial officer so as to prevent the detention of a person incommunicado which is itself an affront to our constitutionalism, democracy and respect for basic human rights. It is also an assurance to the magistrate or other judicial officer that the arrested and detained person is, for instance, alive and has not been subjected to any form of torture or to cruel, inhuman or degrading treatment while in the hands of those who have detained him or her -treatment that is outlawed by Article 9 (2) of the Namibian Constitution. The forty-eight-hour rule is therefore one of the most important reassuring avenues for the practical realization of the protection and promotion of the basic human right to freedom of movement guaranteed to individuals by the Namibian Constitution.

[6] Furthermore, in order to find a peg on which to hang her argument that the continued detention of the applicant is not unlawful, Ms Koita submitted that the learned magistrate 'ordered the further detention of the applicant' when the applicant was at last brought before the said learned magistrate. This submission, with the greatest deference to Ms Koita, is self-serving, dangerous and fallacious. The width of the wording of Article 11 (3) debunks counsel's submission.

[7] What Article 11 (3) says - in material part - is that 'no such persons shall be detained in custody *beyond such period (i.e. 48 hours) without the authority of*

a Magistrate or other judicial officer.' (Italicized for emphasis) The simple, irrefragable fact that seems to escape Ms Koita's comprehension is that when the applicant was at last brought before the magistrate on 17 February 2011 the applicant had already been 'detained in custody beyond such period (i.e. 48 hours) without the authority of a Magistrate or other judicial officer' - in blatant violation of the applicant's Article 11 (3) basic human right. The words of the learned magistrate say it all: they are telling and instructive. The learned magistrate said:

> 'Although it is indeed unlawful for an accused person to be detained for more than 48 hours after his arrest and before being brought to court, this does not necessarily empower this court to summarily release the accused person.'

Thus, without a doubt, the learned magistrate saw the unlawfulness of not bringing the applicant before her within 48 hours of his arrest; even if she wringed her hands, not sure what to do in the circumstances. The public prosecutor also saw the unlawfulness of not bringing the applicant before the magistrate within 48 hours of his arrest; even if he also only moaned helplessly about it. Unfortunately, it is only Ms Koita who does not see the unlawfulness of the failure to bring the applicant before the magistrate within 48 hours of the applicant's arrest. And what is more, any order purporting to authorize the further detention of the applicant by the learned magistrate, as argued by Ms Koita, had the unacceptable effect of the learned magistrate authorizing the continued unlawful detention. Any such order was in clear violation of Article 11 (3) of the Constitution and therefore unlawful. In any case, the public prosecutor in question, as we have seen previously, did not know 'why that is so', that is, why the applicant was not brought before the magistrate within 48 hours of his arrest. The effect of the public prosecutor's statement is significant: it goes to

establish that no evidence was placed before the learned magistrate to enable her to consider whether she was satisfied as to why it was 'not reasonably possible' for NAMPOL to have brought the applicant before the learned magistrate within 48 hours of the applicant's arrest. All this goes to bury Ms Koita's argument - which I find to be without a modicum of merit - that the learned magistrate 'ordered the further detention of the applicant' when the applicant was at last brought before the said learned magistrate on 17 February 2011.

[8] For all the aforegoing, I conclude that the applicant's basic human right guaranteed to him by Article 11 (3) has been violated; and so, doubtless, the applicant is an aggrieved person within the meaning of Article 25 (2) of the Namibian Constitution, and he has approached the

Court for protection by enforcing that right on urgent basis. In my opinion, on the facts and in the circumstances of this case and because the matter concerns the personal liberty of an individual, an application to secure the enjoyment of the right that has been violated must be determined on urgent basis. This conclusion is so logical, reasonable and fundamental that I do need to cite any authority in support thereof. Thus, in pursuance of Article 25 (3) the only order that is 'necessary and appropriate' to secure the applicant's enjoyment of his Article 11 (3) right is to order his immediate release from further unlawful detention.

[9] In peroration and for the avoidance of doubt, I must deal with Ms Koita's submission that the offence, with which the applicant has been charged with, sc. rape, is a serious offence. With respect, I fail to see what purpose such

submission is meant to achieve in furtherance of the respondents' case. It is labour lost. It is not the applicant's case that rape is not a serious offence. Indeed, as Mr. Swart, counsel for the applicant, submitted, the Namibian Constitution does not say that Article 11 (3) does not apply to a person who is charged with a serious offence, e.g. rape, murder or treason. *A fortiori,* the applicant has not applied to the Court to order his permanent release from prosecution for the offence he has been charged with, to wit, rape. This conclusion puts paid to Ms Koita's submission which, with respect, I consider to be otiose.

[10] All the above constitutes my written reasons for the order I made on 23 February 2011 after hearing the application. I hasten to add that in the nature of the case and on account of the fact that there is no factual dispute on the only relevant issue at play in this matter, that is, that the applicant was not brought before the learned magistrate within 48 hours of his arrest, in blatant violation of the applicant's Article 11 (3) basic human right, as I have said previously, the order I made is a final order. On the facts and in the circumstances of the present case and in virtue of the aforegoing reasoning and conclusions, it would serve no useful purpose to grant a rule *nisi.*

PARKER J

COUNSEL ON BEHALF OF THE APPLICANT:

Mr N Swarts

Instructed by: Swart & Bock Legal Practitioners

COUNSEL ON BEHALF OF THE 2ND AND 3RD RESPONDENTS:

Ms Koita

Instructed by: The Government Attorney