HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: CA 70/2012

In the matter between:

LAZARUS LISWANISO SANKWASA **APPELLANT**

vs

THE STATE **RESPONDENT**

Neutral citation: *Sankwasa v State* (CA 70/2012) [2013] NAHCMD 249 (23 August 2013)

CORAM: UEITELE,J et UNENGU AJ

Heard on: **22 February 2013**
Delivered on: **23 August 2013**

Flynote:

Fundamental rights - Right of accused to a fair trial in terms of Article 12 of the Namibia Constitution - Admission of evidence – evidence allegedly obtained in breach of the Constitutional rights guaranteed under Article 12 of the Namibia Constitution - Fairness an issue having to be decided upon facts of each case by trial Judge - At times fairness might require that evidence unconstitutionally obtained be excluded - But there

will also be times when fairness will require that evidence, although obtained unconstitutionally, should nevertheless be admitted

Criminal procedure - Evidence - Failure by accused to give evidence - Accused not obliged to give evidence in his defence - However, guilt of accused could still be proved if weight of evidence against him was sufficient.

Criminal procedure - Trial - Irregularity in - Effect thereof - Constitutional irregularities - Test proposed by common law is adequate in relation to both constitutional and non-constitutional errors - Where irregularity so fundamental that it could be said that in effect there had been no trial, conviction to be set aside - Where irregularity less severe then, depending on its impact on the verdict, conviction should either stand or be set aside on the merits.

Summary:

The court *a quo* had convicted the appellant, an employee of Namdeb in Oranjemund, of theft of diamonds from Namdeb, in contravention of the Diamonds Act 13 of 1999. It was common cause that when the appellant commenced employment with Namdeb, he underwent an induction program in regard to the security system at Namdeb and he had signed a declaration that he was familiar with the security measures. The appellant had pleaded not guilty and had not given evidence in his defence. On appeal the questions that the court had to decide are whether the evidence in the court *a quo* was obtained in breach of the Appellant's Constitutional Rights as enshrined in Chapter 3 of the Namibia Constitution and the consequences that follow if it was so obtained; and whether the court *a quo* erred when it found that the unpolished diamonds that were eventually valuated were the same unpolished diamonds removed by the appellant from under his trouser.

Held further that when the appellant passed through the Scanex x-ray facility he was not a suspect and it is at that time that the foreign objects were detected in the pelvic area

of his body. So at that time he was a non-suspect and there was, therefore, no duty on the Namdeb security officers to advise him of his Constitutional rights.

Held further that there was no duty on Detective Inspector Husselman in the circumstances of this case to inform the Appellant of his Constitutional rights under Article 12. Consequently the police officer did not infringe any of the Appellant's constitutional rights guaranteed in Article 12 of the Namibian Constitution.

Held further that the appellant has failed to discharge the onus resting on him to demonstrate a violation of any of his Constitutional rights. That the admission of the 12 unpolished diamonds in evidence, in all of the circumstances of this case, would not render the trial unfair and bring the administration of justice into disrepute.

Held further that the appellant had the duty to rebut the evidence led by the State witnesses and his failure to do so only leads to the conclusion that the prosecutor's case was sufficient to prove the elements of the offence.

ORDER

The appeal against conviction is dismissed.

JUDGMENT

UEITELE J (UNENGU J concurring):

[1] The appellant was arraigned on a charge of contravening section 74 of the Diamond Act, 1999[1] (theft of 14 unpolished diamonds with a total mass of 120.51 carats

[1] Act 13 of 1999.

and valued at N$1,449,007-93) in the Regional Court held at Keetmanshoop. The appellant also faced an alternative charge of being in unlawful possession of 14 unpolished diamonds with a total mass of 120.51 carats, valued at N$1,449,007-93), in contravention of Section 30 (1) of the Diamond Act, 1999.

[2] The appellant pleaded not guilty to both the main charge and the alternative charge. The appellant provided no plea explanation as contemplated in section 115 of the Criminal Procedure Act, 1977[2] and he challenged the State *'to prove each and every element of the offence as if specifically traversed.'*

[3] In support of its case, the State called five witnesses. The appellant on the other hand closed his case without giving evidence. He was subsequently found guilty and convicted of theft of 12 unpolished diamonds valued at N$1,428,720-97. On 19 March 2012 the appellant was sentenced to pay a fine of Two Hundred and Seventy Five Thousand Namibia Dollars (N$ 275 000) or five years imprisonment plus six years' imprisonment which are wholly suspended for a period of five years on condition that the appellant is not convicted of the offence of theft or found in possession or to be dealing unlawfully in unpolished diamonds during the period of suspension.

[4] It is against this conviction that the appellant now appeals. Before I deal with the grounds and merits of the appeal I will briefly set the background that led to the appellant's arrest, charge and conviction.

The background facts

[5] The appellant was employed at Oranjemund by Namdeb Diamond Corporation (Pty) Ltd (Namdeb) as a safety officer. He worked inside the Namdeb Mining Licence Area No 1. This area is fenced off and employees entering or returning from the mining area can only enter or exit through the mines' access control system. On 28 May 2007 the appellant proceeded through the access control system and there he was arrested. In order to appreciate how the appellant was arrested I find it necessary to briefly

[2] Act 51 of 1977.

explain the procedure and the 'route' an employee would be following upon leaving the mining area.

[6] Any person considered for employment with Namdeb at Oranjemund must, before signing a contract of employment with the mine, attend an induction course which, *inter alia*, includes a 'pep talk' on the security policy of the mine, and which is explained to each potential employee. Once he or she understands its content, then a declaration to that effect must be signed. Non-compliance with the security policy is regarded to be a contravention of the Diamond Act, 1999.

[7] Once a person is offered employment, he or she is handed an 'employee card', reflecting the personal particulars of the employee. If that person is expected to enter the mining area, he or she will be issued with a key card, which grants him or her access to that area. When exiting the mine, the person, must exit through the Scanex x-ray facility which is equipped with three or four x-ray machines. When the person goes through the x-ray machines he or she is scanned or x- rayed or they sometimes get a dummy x-ray. A dummy x-ray is when a person goes through the x-ray machine but he or she is not actually x-rayed or scanned.

[8] Once a person is scanned or x-rayed the scanned image of that person appears on a video monitor of a security officer. After the person is x-rayed he or she proceeds to what is called a holding cubicle. The person is then escorted by a security officer from the holding cubicle to a search room. In the search room a physical search is conducted on the body of the person. Having briefly set out these procedures I will now turn to the evidence as presented in the court *a quo.*

[9] The State witnesses who testified on the events of 28 May 2007 are Karel Lesley du Toit, Epafras Jambeinge Simon, Johannes Husselman, Filipus Alugodhi and Maria Elizabeth Louw.

[10] Mr Du Toit testified that he is the investigations security superintendent and in charge of the investigation section at Namdeb's security department. He related the events of 28 May 2007 to the court *a quo* as follows:

(a) On that day the employees of Namdeb who were exiting mining area no. 1 passed through the Scanex x-ray facility. He testified that he instructed the investigation officers to stop them all after they had passed through the Scanex x-ray facility and to search them and reintroduce them through the Scanex x-ray facility. The reintroduction process entailed the taking back of the persons to the x-ray machine and the person is then actually scanned or x-rayed.

(b) He was then contacted by senior security officer Epafras Jambeinge Simon who informed him that a person (the appellant) searched by them indicated that he had a running stomach and wanted to use the toilet. He instructed senior security officer Simon not to allow the appellant to go to the toilet until after he had been reintroduced through the Scanex x-ray facility. The appellant was escorted through the Scanex x-ray facility and an image was detected in his pelvic area.

(c) When the security officers noticed the foreign objects on the body of the appellant they took him to the search room. The witness (Mr Du Toit) then went to the search room where the appellant was and he (witness) called a certain Detective Inspector Husselman. He instructed the security officer in the search cubicle not to search the appellant until Inspector Husselman had arrived.

(d) When Inspector Husselman arrived in the search room, he was shown the footage on the monitor, he introduced himself and detective constable Alugodhi to the appellant, he spoke to the appellant and enquired from the appellant whether he had anything in his possession that he would like to remove and also whether he wanted to say anything before they conducted the search. The appellant indicated in the affirmative that he would like to remove an object from his body. He (appellant) also asked whether the video that was displaying in the

search room was being recorded and whether anybody (apart from the persons present in the search room) else was watching the image. When he received answers to those questions, the appellant thereafter reached with his hands under his trouser in the area of his private parts and from there removed a wrapped parcel and put the parcel in a bowel that was on the table.

(e) Inspector Husselman in the presence of the appellant then placed the parcel in a brown envelope and sealed the envelope. The envelope was signed by Inspector Husselman and the appellant also countersigned it. The appellant was thereafter escorted to the investigations office where the police officer and the investigation officer opened the parcel in the presence of the appellant. Thereafter the parcel was again sealed and locked away in the Protection Resources Unit's (PRU) safe, which was in a security strong room equipped with an alarm and a double lock system on the door. For security reasons, two different persons hold different keys giving access to the strong room. The PRU officer can also only get access to their safe in the presence of Namdeb's security officers. After the parcel was locked away in the safe the investigation team then went to the appellant's office where they also conducted a search of the Appellant's office.

A video recording was also made covering the events that transpired in the search room. The video recording formed part of the record and I had the opportunity to view it.

[11] Epafras Simon's account of the events of 28 May 2007, is materially identical to that of Du Toit regarding the observations made on the appellant as he proceeded through the Scanex facility, the reintroduction to the Scanex facility, the removal of the objects by the appellant from under his trouser and up to the stage where appellant was escorted to the investigation office. This witness also testified how they conducted a search of the appellant's office and the object they found under a cupboard in the appellant's office.

[12] Former Detective Inspector Johannes Husselman testified that during May 2007 he was attached to the Namibian Police's Protected Resources Unit at Oranjemund. He testified that on the morning of 28 May 2007 he and a certain detective constable Alugodhi were at the offices of the Namdeb investigation security offices. While at that office he received a call from Coordinating Security Officer Karel Du Toit who summoned him to the search room (search cubicle no.4). When he arrived at the search cubicle, Coordinating Security Officer Karel Du Toit conveyed to him what had led to the holding of the appellant in the search cubicle. Video footage of the said incident was shown to him, whereafter he introduced himself and detective constable Alugodhi to the appellant. His evidence from that point corroborated that of Du Toit regarding the removal of the objects by the appellant from under his trouser and up to the stage where appellant was escorted to the investigation office.

[13] Detective Inspector Husselman further testified that in the investigation office he removed the sealed envelope from his briefcase enquired from the appellant whether the envelope was the same envelope that was put in the briefcase during the search in the search cubicle and whether one of the two signatures on the envelope was his. After he confirmed that the envelope was the same envelope and that one of the signatures was his, he (Husselman) proceeded to open the envelope and removed the wrapped parcel from the envelope. He unwrapped the parcel and inside the bigger parcel there were three smaller wrapped parcels he also unwrapped the three smaller parcels and from those three parcels he removed a total of twelve objects. He then put the objects in three different smaller envelopes marked the three smaller envelopes as (1, 2 and 3), sealed the envelopes with a red police seal. He then placed these three sealed envelopes in one bigger enveloped and also sealed that envelope with a red police seal. He further testified that the process took place in the presence of the appellant. He thereafter placed the sealed envelope in the PRU safe and it is only after that, that he arrested the appellant for theft of and possession of unpolished diamonds. After he was arrested appellant was accompanied by detective constable Alugodhi and the Namdeb security officers to his office inside the mine. He (Husselman) remained at the offices of the crime investigations unit.

[14] Detective Inspector Husselman continued and testified that while he was still at the office of the crime investigation Unit, he was contacted by Senior Security Officer Simon Epafras who informed him that the search at the office yielded positive results. The objects found at the appellant's office were in a sealed envelope and that envelope was handed to Detective Inspector Husselman by detective constable Alugodhi. The appellant was then taken to the police cells where he was detained. The following day the sealed envelope was opened and two objects were found. The objects were then sealed in a smaller envelope and marked as parcel number 4.3.0558. He then removed the big envelope containing the three small envelopes opened it and added the envelope marked as parcel number 4.3.0558. He thereafter wrote on the envelopes 1, 2, 3 and 4 and put the envelopes back into the PRU safe. The envelope was later taken from the safe after the necessary paper work was done and flown to Windhoek for the evaluators to evaluate the objects. Detective inspector Husselman furthermore testified that he personally handed the envelope containing the smaller envelopes to Chief Inspector Elizabeth Maria Louw and she is the person who flew with envelope to Windhoek.

[15] The evidence of detective inspector Husselman were in material respects corroborated by detective constable Alugodhi.

The grounds of appeal and the question to be decided

[16] On 30 March 2012 the appellant filed a notice of Appeal against his conviction. He sets out grounds upon which he bases his appeal in the notice of Appeal as follows:

> '1. That the learned Magistrate erred in law or on the facts in finding that the State has proved *(sic)* beyond reasonable doubt that the appellant contravened section 74 of the Diamond Act 1999 (Act 13 of 1999). In doing so, the Learned Magistrate erred in that he, *inter alia*, gave no, alternatively, insufficient weight and/or consideration to:

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1.1 the distinct separate elements (requirements) that the State have to prove to secure a conviction of a contravention of section 74 of the Diamond Act 1999 (Act 13 of 1999);

1.2 the version of the appellant as put to the relevant state witnesses during cross-examination.

1.3 the material contradictory versions originating from different state witnesses during testimony.

1.4 the nature, effect and purpose of the chain of custody ad those material short comings and discrepancies pointed out by the accused in cross examination and argument.

1.5 the uncontested evidence that the police obtained incriminating evidence which originated from the accused in a process of willful and flagrant disregard of the accused constitutional rights to remain silent, being legally represented, not to incriminate himself, and being properly informed of the existence of such rights and afforded an opportunity to waive such rights.

1.6 the admission and consideration of evidence obtained in violation of those Article 12 Constitutional rights referred in 1.5 hereinabove and convicting the accused on such inadmissible evidence.'

[17] Mr Nyambe who appeared for the respondent raised a point *in limine* namely that the grounds of appeal set out in sub-paragraphs 1.1 to 1.4 of the Notice of Appeal do not meet the requirements of Rule 67(1) of the Magistrates' Court Rules and should therefore be disregarded. I do not find it necessary to decide that point because the thrust of Mr Krüger's (who appeared for the appellant) arguments was on the alleged unconstitutionally obtained evidence and the chain of possession of the objects (which turned out to be unpolished diamonds) found on the Appellant.

[18] As I have indicated in the preceding paragraph, Mr Krüger pinned his thrust of argument on two grounds only namely; that the court *a quo* should not have admitted the evidence of the objects (which turned out to be unpolished diamonds) that the appellant removed from under his trouser because, so the submission goes, the police obtained incriminating evidence which originated from the accused in a process of willful and flagrant disregard of the accused's constitutional rights to remain silent, being legally represented, not to incriminate himself, and being properly informed of the existence of such rights and afforded an opportunity to waive such rights; and that the State failed to prove that the unpolished diamonds that were eventually valuated were the same diamonds that were removed by the appellant from under his trouser.

[19] The questions that we have to decide in this appeal are therefore:

(a) whether the evidence in the court *a quo* was obtained in breach of the Appellant's Constitutional Rights as enshrined in Chapter 3 of the Namibia Constitution and the consequences that follow if it was so obtained; and

(b) whether the court *a quo* erred when it found that the unpolished diamonds that were eventually valuated were the same unpolished diamonds removed by the appellant from under his trouser.

[20] In order for us to resolve the first question will require of us to outline some principles of constitutional law as regards the admissibility or non-admissibility of evidence obtained in breach a person's constitutional rights.

Were the Constitutional Rights of the Appellant infringed?

[21] Mr Krüger's who appeared for the appellant amongst others submitted that:

'(15) The appellant was a suspect under investigation in a serious matter when the security personnel of Namdeb apprehended him. The appellant was considered by Namdeb personnel to be a suspect in respect of whom criminal misconduct

was suspected. They obviously foreseen *(sic)* that criminal prosecution was reasonably expected and for that purpose they decided to summon experts on the particular subject, to wit, Protected Resources members of the Namibian Police to proceed with investigating the matter.

[16] Chief Inspector Husselman was not only very experienced in rank and years, but he was attached to a specialized unit of the Namibian Police. The Public expects due compliance with the law from individuals appointed in these capacities. At all times relevant to the apprehension of the appellant he knew and foresaw that it was a serious matter which may lead to arrest and detention. He further knew and appreciated at the time that he was about to obtain (potentially) incriminatory evidence from a suspect who in all probability will be standing trial on a serious matter which may suggest a heavy penalty.

[17] The incriminating evidence, which originated from the appellant, was not obtained freely and voluntarily and without undue influence. Appellant had not been warned or informed of his constitutional rights, or warned according to the Judges rules and neither was he afforded any opportunity to engage the services of a legal practitioner. It is thus as a consequence evident that the appellant could not appreciate and understand his rights, or the consequences of his conduct, which renders a waiver thereof (if any) a nullity.

[18] The State's own evidence proves a complete lack and willful disregard for compliance with all the admissibility requirements required by law to lawfully admit incriminating evidence. The fact that these processes were executed by senior police officials, attached to a special branch, makes the misconduct very serious and inexcusable.'

[22] I find it appropriate to in detail quote the Constitutional provisions which have a bearing on the matter at hand for me to decide whether the appellant's Constitutional rights were infringed or not. I will below quote the relevant provisions:

(a) The first Constitutional provision I regard to be relevant to this appeal is the article dealing with human dignity. Article 8 reads as follows:

> **'Article 8: Respect for Human Dignity**
>
> (1) The dignity of all persons shall be inviolable.
>
> (2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
>
> (b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.'

(b) The second Constitutional provision I regard to be relevant to this appeal is the article dealing with arrest and detention. Article 11(1) reads as follows:

> '**Article 11: Arrest and Detention**
>
> (1) No persons shall be subject to arbitrary arrest or detention.'

(c) The third Constitutional provision I regard to be relevant to this appeal is the article dealing with fair trial. Article 12 (1) reads as follows:

> **'Article 12: Fair Trial**
>
> (1) (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals,

the public order or national security, as is necessary in a democratic society.

(b) A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.

(c) Judgments in criminal cases shall be given in public, except where the interests of juvenile persons or morals otherwise require.

(d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.

(e) All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.

(f) No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof.'

(d) The fourth Constitutional provision I regard to be relevant to this appeal is the article dealing with privacy. Article 13 reads as follows:

'Article 13: Privacy

(1) No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or

morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.

(2) Searches of *the person* or the homes of individuals *shall only be justified*:

(a) where these are authorised by a competent judicial officer;

(b) in cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by Act of Parliament to preclude abuse are properly satisfied'. {My Emphasis}

[23] It is not Mr Krüger's case that the Appellant's right to human dignity or not to be arbitrary arrested or detained was infringed. His argument was that the rights conferred in Article 12 (1) of the Namibian Constitution were infringed. The first issue in this case therefore is whether the evidence of the unpolished diamonds was obtained in a manner that breached the appellant's rights under the Article 12(1) of the Namibian Constitution. Mr Krüger's arguments quoted above are that the police breached Appellant's *Constitutional* rights by failing to advise him of his right to speak to a legal practitioner of his choice contrary to Article 12(1)(*e*), before the search that led to the production of the unpolished diamonds that are the subject of the charges. He also submitted that the court *a quo* erred by admitting in evidence of the unpolished diamonds contrary to Article 12 (1)(*f*).

[24] The threshold question is at what point and under which circumstances a person must be informed of his right to have a legal practitioner present, the right to remain silent and the right not to incriminate himself.

[25] In the course of his submission Mr Krüger analyzed and referred us to no less than two dozens of decisions of the various courts in South Africa and Canada. I do not intend to embark on the same exercise as Mr Krüger. It will suffice for the purpose of this judgment that the decisions which I regard as the best exposition of our law on the issues that are confronting me and with which decisions I fully agree are; the decision of

Hoff, J in *S v Malumo and Others (2)*[3] and the ruling of Satchwell, J in *S v Sebejan and Others,*[4] and the decision of Mahommed CJ in *S v Shikunga and Another*[5]*.*

[26] The brief facts in the *S v Sebejan and Others,* matter are as follows: The accused were charged with murder in the High Court of South Africa. During the course of the trial an issue arose regarding the admissibility, for purposes of cross-examination of accused No 1, of a statement made by that accused to a police officer. It appeared that the accused, the wife of the deceased, had been approached by a policeman, at her home. He asked her to make a statement. She made the statement freely and voluntarily and had read the statement herself. During the trial, accused No 1 stated that she had lied in that statement. When counsel for accused No 3 attempted to cross-examine accused No 1 on the statement, counsel objected to the admissibility thereof, arguing that at the time of making the statement the accused was a suspect, in that a prior statement (statement B) had been taken by the same policeman from another person in which certain allegations were made against accused No 1. It appeared that this statement was commissioned within minutes of the other statement. As accused No 1 had not been warned of her rights to legal representation it was contended that this failure violated her constitutional rights and rendered the statement inadmissible. It was later determined that the statement made by accused No 1 was taken in the morning but commissioned later that evening in her absence and after statement B was taken. The issues that confronted the Court were amongst others the question whether accused No 1 was a suspect at the time she made the statement and thus enjoyed the constitutional rights to not incriminate herself and to her right to consult her legal practitioner prior to making the Statement. The court held that a suspect was one about whom there was some apprehension that he or she may be implicated in the offence under investigation and, it could further be, whose version of events was mistrusted or disbelieved.

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[3] 2007 (1) NR 198 (HC).
[4] 1997 (1) SACR 626 (W) (1997 (8) BCLR 1086).
[5] *Infra* footnote 16

[27] Satchwell, J[6] after setting out some Constitutional rights of 'detained, arrested and accused persons' said the following as regards a suspect.

> 'Accused No 1 was neither an arrested person nor an accused person at the time that she made the statement to Sergeant Kasipersad on 25 July 1995. She did not understand herself to be so. She says that she was visited at her home, went into a bedroom for privacy and was asked to make a statement about 'what happened over the past few days with Dan (her husband)'. She informed the Court she was arrested some four to five days after the death of her husband, which is some two to three days after making the statement. This is confirmed by Kasipersad.
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> At first reading it would therefore appear that the provisions of the relevant section in the Bill of Rights are not applicable to accused No 1 insofar as she was not an 'arrested or detained person'.

[28] The learned judge continued and said[7]:

> The basis of the objection to the statement being used in cross-examination is that it should not be inadmissible in this Court since it is argued that the accused was a suspect and was not warned of her constitutional rights. The questions for decisions are therefore:
>
> (a) What is a suspect?
>
> (b) What rights accrue to a suspect?
>
> (c) Was the accused a suspect at the relevant time?
>
> **What is a suspect?**
>
> The Concise Oxford Dictionary defines 'suspect' as 'subject to or deserving suspicion or distrust; not sound or trustworthy'.

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6 *Supra* at 631.

7 At 631-632.

' "Suspect" and "suspicion" are words which are vague and difficult to define. Dictionary meanings and decided cases were quoted to the Court as to the meaning of these words. Save for saying that these suggest that suspicion is apprehension without clear proof, I do not intend to deal with the meaning of "suspect". *'R v Van Heerden* 1958 (3) SA 150 (T) at 152D. In this case it was argued suspicion is an imperfect state of mind falling short of proof. The Oxford Thesaurus offers synonyms for the verb 'suspect' of 'disbelieve, doubt, mistrust, harbour or have suspicions about' as also 'questionable, dubious'. 'Suspicion' is synonymous with 'doubt, misgiving, mistrust, qualm, apprehension' as also 'notion, inkling, glimmer, tinge, hint'…

It would appear that a suspect is one about whom there is some apprehension that she may be implicated in the offence under investigation and, it may further be, whose version of events is mistrusted or disbelieved.' {My Emphasis}

Rights of suspect

Clearly statements must be freely and voluntarily made when made by a suspect. The suspect therefore has the right not to be maltreated, unduly influenced or coerced in any way.

The 1931 Judges' Rules were issued by the executive authorities as administrative directions to be observed by the police. Failure to obey them does not itself render a confession inadmissible, yet these rules (although they are regarded as merely administrative rules of fairness) are not completely without effect: breaches of the rules may be of weight in determining whether a confession had been voluntarily made without undue influence.

Judges' Rule 1 provides: 'questions may be put by policemen to persons whom they do not suspect of being concerned in the commission of the crime under investigation, without any caution being first administered (my emphasis). Judges' Rule 2 provides that 'questions may be put to a person who is under suspicion where it is possible that the

person by his answers may afford information which may tend to establish his innocence. In such a case cautions should first be administered.'

In short, non-suspects may be questioned without any cautions or warnings whereas suspects, even in circumstances where answers to questions may establish innocence, should receive the benefit of a caution or warning. The suspect is treated differently and entitled to certain protective cautions not afforded to a mere witness.' {My emphasis}

[29] The above reasoning was endorsed and followed by this Court (per Hoff) in the case of *S v Malumo*[8]. Is the argument of Mr Kruger that 'The appellant was a suspect under investigation in a serious matter when the security personnel of Namdeb apprehended him' then correct? I do not think so. I say so for the following reason. When the appellant passed through the Scanex x-ray facility he was not a suspect, but an employee following the normal route and process as agreed to between him and his employer and it is at that time that the foreign objects were detected in the pelvic area of his body. So at that time he was a non-suspect and therefore there was no duty on the Namdeb security officers to advise him of his constitutional rights.

[30] It will be recalled that after the Namdeb security officer observed that the Appellant had hidden some objects in his pelvic area they did not question him, asked him to make any statement or searched him they instead summoned a member of the Namibian Police's Protected Resources Unit. Did the detection of the foreign objects turn the Appellant into a suspect at that point? Applying the definition of Satchwell, J, that '*a suspect is one about whom there is some apprehension that she may be implicated in the offence under investigation and, it may further be, whose version of events is mistrusted or disbelieved*', I am inclined to hold that although there was no offence under investigation at that point the Appellant's conduct was surely distrusted and he thus became a suspect at that point.

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8 Supra footnote 3 at 213.

[31] When Detective Inspector Husselman arrived in the search room and he was shown the video image which indicated a foreign object in the appellant's pelvic area the appellant was in my view a suspect. This is confirmed by the testimony of Detective Inspector Husselman. He testified that he formed the suspicion that the appellant may have committed an offence when he saw the image (of the foreign objects in the appellants pelvic are) on the monitor.[9] Once it is established that the appellant was a suspect his position is different from that of a non-suspect Satchwell, J[10] said the following:

> 'I have already referred to the position of a suspect from the perspective of the investigating police person. The distinction between a suspect and an arrested person from the viewpoint of a suspect deserves examination: firstly the suspect has not been taken into custody (either by being touched by the arresting officer or by being forcibly confined); secondly there has not been a formal notification of the cause of the arrest.
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> The crux of the distinction between the arrested person and the suspect is that the latter does not know without equivocation or ambiguity or at all that she is at risk of being charged. The suspect may herself have an inkling that she is mistrusted by the investigating officer; she may even have been told that she is at some risk of being arrested; but the suspect has not been placed on terms. Indeed the suspect may have no qualms or concerns whatsoever and may therefore continue to operate in a state of ignorance - ignorance that she is mistrusted, may be under surveillance, that the investigator is enquiring into her actions and behaviour, that there may be an attempt to develop sufficient evidence against her. In this situation there is no bliss in ignorance. The suspect is in jeopardy of committing some careless or unwise act or uttering some incautious and potentially incriminating words which would subsequently be used against her in a trial. For an investigating officer to take a statement from a suspect in these circumstances would, in my view, be fraudulent of the constitutional imperative. There is a deception in treating a suspect as no more than a witness and obtaining information from her under false pretences in the hope and belief that this can be used to further an investigation of and against that person. To then rely on that individual's

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9 See page106 of the Record of proceedings lines 3-10.

10 Supra footnote 4 at 633-634.

ignorance and use whatever has been extracted during this time of deceptive safety in order to initiate or found or develop a prosecution of such person is inimical to a fair pre-trial procedure.'

An arrested person has not necessarily been deprived of all access to civilian help; may not even be in custody. An arrested person is certainly aware that she is in the firing line of litigation and the reasons therefor. The arrested person knows that she and the investigating officer do not enjoy parity of positions and community of interests. The lines have been drawn - their interests are inimical to one another. The arrested person knows the basis for such antagonistic status and is now in a position to attempt to formulate a response thereto.

The suspect enjoys no such enlightenment. She may still believe that the investigating officer and she are confidantes, that the investigator seeks help rather than ammunition.'

[32] The learned Judge continued to demonstrate the rationale for the entitlement to legal representation at the pre-trial stage by quoting from the judgment of Claasen, J in *S v Mathebula and Another*[11], as follows:

'An accused is presumed innocent until proven guilty. The onus is on the State to prove that guilt. There is no duty on the accused to assist the State in its task. An accused has the right to remain silent and need not contribute in any way to the process of supplying or obtaining evidence which tends to prove his guilt in the form of self-incriminatory oral or written communication …[W]henever the State wishes to embark upon any pre-trial procedure wherein it seeks the co-operation of the accused and which would result in an erosion of or encroachment into the accused's constitutional rights, such procedure will have to be preceded by a repetition of a due warning regarding all of his relevant s 25 constitutional rights.' {My emphasis}

The learned judge continued and said:

[11]1997 (1) SACR 10 (W) at 19.

> 'If the suspect is deprived of the rights which have been afforded to an arrested person then a fair trial is denied the person who was operating within a quicksand of deception while making a statement. That pre-trial procedure is a determinant of trial fairness and is implicit in the Constitution and in our common law. How can a suspect have a fair trial where pre-trial unfairness has been visited upon her by way of deception?

[33] After reviewing some authorities including the case of *S v Sebejan and Others* Hoff, J concluded that a suspect is entitled to the constitutional rights during pre-trial proceedings. I therefore echo the words of Satchwell, J when he said 'The constitutional right of an accused person does not only relate to fundamental justice and fairness in the procedure and the proceedings at his trial. It also includes the right to be treated fairly, constitutionally and lawfully by policing authorities and state organs prior to the trial.' Also see the case of *S v Kapika and Others* (1)[12] where Mtabanengwe, J (as he then was) referred with approval to the case of *S v Melani and Others*[13] where Froneman, J said the following:[14]

> 'The right to consult with a legal practitioner during the pre-trial procedures and especially the right to be informed of his right, is closely connected to the presumption of innocence, the right of silence and the proscription of compelled confessions (and admissions for that matter) which "have for 150 years or more been recognised as basic principles of our law, although all of them have to a greater or lesser degree been eroded by statute and in some cases by judicial decision" (in the words of Kentridge, AJ in the *Zuma* case.)
>
> In a very real sense these are necessary procedural provisions to give effect and protection to the right to remain silent and the right to be protected against self-incrimination. The failure to recognise the importance of informing an accused of his right to consult with a legal advisor during the pre-trial stage has the effect of depriving persons, especially the uneducated, the unsophisticated and the poor of the protection of their right to remain silent and not to incriminate themselves. This offends not only the

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12 1997 NR 285 (HC) at 288F – G.
13 1996 (1) SACR 335 (E).
14 I propose to quote the quotation relied upon by Mtabanengwe J in full at 347E – H.

> concept of substantive fairness which now informs the right to a fair trial in this country, but also the right to equality before the law. Lack of education, ignorance and poverty will probably result in the underprivileged sections of the community having to bear the brunt of not recognizing the right to be informed of the right to consultation with a lawyer.'

[34] The evidence presented on behalf of the State was that the accused was viewed as a 'suspect' after Detective Inspector Husselman saw the image (of the foreign object in the Appellant's pelvic area) on the monitor. It thus follows as a general rule that he must be informed of his constitutional rights before he is questioned by a police officer and before he makes any statement to such officer.

[35] I alluded to the term *general rule* in the preceding paragraph for the simple reason that, the principle that a suspect must be informed of his constitutional rights is law, but the point at which point the duty to do so (i.e. to inform a suspect of his rights) is a factual question. I am of the view that if there is no questioning or request for a suspect to make any statement or pointing out then there is no duty on the police officer to inform the suspect of his right to remain silent, the right to consult a legal practitioner or his or the right not incriminate himself. It will be noted that the Judges rules I referred to above (in para 28), state that *'questions may be put by policemen'.*

[36] In the present matter the evidence is that Detective Inspector Husselman was summoned to the search room after it was discovered that the appellant had a 'foreign' object in his pelvic area. When he arrived at the search room Inspector Husselman viewed the image and proceeded to identify himself to the appellant, he then asked the appellant whether he wanted to remove anything from him or say anything before they conducted a search. The appellant enquired whether there was anybody else who was viewing the procedures and whether the procedures were being recorded. When he received the answer that no one except the people in the search room were viewing the recordings and that the procedures were being recorded the appellant of his own volition reached under his trouser in the area of his private parts and removed a wrapped parcel. It is clear that in this matter the discovery about the presence of the

foreign object was made at the time when the appellant was not a suspect and when there was no duty on the security officers to inform the appellant of his Constitutional rights, the appellant was not asked to make any statement nor was any statement which is inculpatory of him taken from him, he was also not asked to make any pointing out. I am therefore of the view that there was no duty on Detective Inspector Husselman in those circumstances to inform the appellant of his Constitutional rights under Article 12. I am consequently of the view that the police officer did not infringe any of the appellant's Constitutional rights guaranteed in Article 12 of the Namibian Constitution.

[37] I am of the view that the Constitutional right of the appellant which was in danger or under threat of infringement was the right conferred by Article 13 of the Namibian Constitution which I quoted in full above (in paragraph 22). It is not Mr Kruger's argument and I think correctly so that the search on the appellant was conducted in violation of his right guaranteed under Article 13 of the Namibian Constitution. That Article clearly authorizes the search of a *person* without judicial authority in cases where delay in obtaining judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by Act of Parliament to preclude abuse are properly satisfied. The procedures to search a person or the homes of individuals are governed by chapter 2 (i.e. sections 19-36) of the Criminal procedure Act, 1977. Section 22 of the Criminal Procedure Act, 1977[15] clearly authorizes the search. It reads as follows:

> **'22 Circumstances in which article may be seized without search warrant**
>
> A police official may without a search warrant *search any person* or container or premises for the purpose of seizing any article referred to in section 20-
>
> (a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
>
> (b) if he on reasonable grounds believes-

[15] Act 51 of 1977.

(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search.

[38] In the present matter there is evidence that when the appellant realized that he was about to be searched, he intimated that he was having stomach problems and wanted to visit the toilet. That request was turned down and there is no further evidence of the appellant's alleged stomach problems. In the absence of an explanation by the appellant the only reasonable inference I draw from this evidence is that the appellant wanted to dispose of the foreign object hidden under his trouser.

[39] I am therefore of the view that the appellant has failed to discharge the onus resting on him to demonstrate a violation of any of his Constitutional rights. Even if I am wrong in my conclusion it must be remembered that Satchwell, J said: 'It is now well-established that constitutional enquiries require a 'double barreled' approach: firstly, one establishes whether or not a fundamental right contained in chap 3 of the Constitution has been infringed. If not, *cadit quaestio*. Secondly, if there has been a contravention of such a fundamental right, one has to establish whether such infringement is justified in terms of s 33(1) of the Constitution.' The second leg of the 'double barrel' approach was stated as follows by Hoff, J in the *Malumo* matter 'on the authority of inter *alia* Namibian case law, where evidence was obtained in conflict with the constitutional rights of an accused person the courts have a discretion to allow it or to exclude it.'[16]

[40] In the matter of *S v Shikunga and Another*[17] Mahomed, CJ, after a thorough survey of the approaches of several jurisdictions with regard to this vexed question which included Canada, United States, Jamaica, Australia and South Africa, concluded that:

> 'What one is doing is attempting to balance two equally compelling claims - the claim that society has that a guilty person should be convicted and the claim that the integrity

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16 Supra footnote 3.

17 1997 NR 156 (SC); or 1997 (2) SACR 470 (NmS) at 171B - D (NR).

> of the judicial process should be upheld. Where the irregularity is of a fundamental nature and where the irregularity, though less fundamental, taints the conviction the latter interest prevails. Where however the irregularity is such that it is not of a fundamental nature and it does not taint the verdict, the former interest prevails. This does not detract from the caution which a court of appeal would ordinarily adopt in accepting the submission that a clearly established constitutional irregularity did not prejudice the accused in any way or taint the conviction which followed thereupon.'[18]

[41] This general approach is also in accordance with that adopted in South Africa in respect of the exclusion of evidence obtained in conflict with constitutional rights as said by Kriegler, J in *the Key v B Attorney-General, Cape Provincial Division and Another*[19] namely that:

> 'In any democratic criminal justice system there is a tension between, on the one hand the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted. '

[42] In this matter I am satisfied that the admission of the 12 unpolished diamonds in evidence, in all of the circumstances of this case, would not render the trial unfair and bring the administration of justice into disrepute for the following reasons: It is clear that

[18] Also see the case of S v Kandovazu 1998 NR 1 (SC).where the Supreme Court reaffirmed that approach.

[19] 1996 (4) SA 187 (CC) at 195G - 196D.

the information which Detective Inspector Husselman received as to the location of the 'foreign object' on the appellant was obtained while the appellant was a non-suspect and when there was no duty on the Namdeb security officers to inform him of his Constitutional rights, he was not questioned or asked to make any statement or give any self-incriminating information, the search of his person is sanctioned by Article 13 of the Constitution and section 22 of the Criminal Procedure Act, 1977. I am therefore not persuaded that the court *a quo* erred in admitting the evidence of the 12 unpolished diamonds.

The chain of custody of the unpolished diamonds.

[43] In this Court Mr Krüger who appeared for the appellant argued that 'the most important shortcoming in the State's case is the chain of custody of the diamonds presented by the State and claimed to be originating from the appellant'. He argued that the State failed to secure the chain of evidence to prove that what was found on the appellant was handled, send for testing and proved to be diamonds. He continued and argued that 'There is significant doubt created in the States own case that proves what was discovered from the appellant and what was depicted on the photos are materially different objects contained in different wrappings'. Mr Kruger submissions were based on the alleged contradictions in the evidence of Mr Du Toit and Detective Inspector Husselman, the contradiction as regards the type of 'tape' in which the parcel removed by the appellant from his body was wrapped in, how the wrapped parcel found its way in to the bowel when the video recording shows that the appellant placed the parcel on the table and not in the bowel when he removed it from under his trouser and the ease with which the envelope in which the parcels were sealed could be opened.

[44] The court *a quo* dealt with the question of chain of possession of the diamonds at pages 239 to 249 of the Record. The court *a quo* in detail and accurately in my view dealt with all the submissions by Mr Kruger: The court after the detailed analysis of the evidence and arguments pertinently remarked, that:

> 'In the present case the evidence against accused was neither circumstantial nor tenuous it was direct and cogent evidence of him having been found in possession of the parcel which later turned out to be a parcel of diamonds. The video footage the undisputed x-ray image and the photo plan all support the State's case in respect of the parcel or consignment of diamonds found on the accused person as he exited the mining area, I am satisfied that the State has managed to prove this case beyond reasonable doubt.'

[45] The court *a quo* rightly referred to the rule that the appellant's decision not to testify has consequences. I find the remarks of Mtambanengwe, AJA in the matter of *S v Auala* [20] apposite where he quoted what Lang DP said[21] namely that:

> 'The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence…
>
> Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecutor's case may be sufficient to prove the elements of the offence. The fact that an accused had to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.'

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[20] S v Auala 2010 (1) NR 175 (SC) at 182.

[21] S v Boesak 2001 (1) SA 912 (CC) (2001 (1) SACR 1; 2001 (1) BCLR 36).

[46] The learned judge continued and referred to the matter of *S v Katoo*[22] where Jafta, AJA criticized the weight attached by the trial judge 'to the defence version which was put to State witnesses under cross-examination' and remarked further:

> 'It was treated as if it were evidence when the trial Court considered its verdict on the merits. As respondent failed to place any version before the Court by means of evidence, the Court's verdict should have been based on the evidence led by the prosecution only.'

[47] In the present matter the Appellant's version was not even put to any of the State witnesses, the cross examination of Mr Kruger of the State witnesses was based on hypothesis and conjectures and the court *a quo* was correct when it remarked that:

> '…It is being argued that they [i.e. the envelopes in which the parcels were sealed] were not temper prove as they could easily be reopened and resealed after having been initially sealed. It was also argued that the police seal used was no guarantee against tempering, *where the argument falters is that there is absolutely no evidence that the envelopes were tempered with. This is a mere hypothetical argument with no factual begging from the available facts. At no point did the Accused suggest that indeed the larger envelop or the smaller individual envelops were actually opened and resealed in his absence.* To the contrary there is ample evidence from Husselman that each time that he opened the larger envelop the Accused was present and he expressed satisfaction that it had not been tempered with. It is one thing to suggest in the abstract the possibility of reopening and resealing of envelopes and it is completely different thing to suggest that was indeed tempered with.' {My Emphasis}

[48] The appellant had the duty to rebut the evidence led by the State witnesses and his failure to do so only leads to the conclusion that the prosecutor's case was sufficient to prove the elements of the offence.

[48] In the result I make the following order.

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[22] 2005 (1) SACR 522 (SCA) ([2006] 4 All SA 348) in para 19.

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The appeal against conviction is dismissed.

SFI Ueitele

Judge

EP Unengu

Judge

APPEARANCES

APPELLANT:	H Krüger
	of Krüger van Vuuren & Co
RESPONDENT:	S R Nyambe
	Instructed by the Prosecutor-General