REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

(*TRIAL-WITHIN-A-TRIAL*)

Case No: CC 10/2018

In the matter between:

THE STATE

and

UNAARO MBEMUKENGA **ACCUSED**

Neutral citation: *S v Mbemukenga* (CC 10/2018) [2020] NAHCMD 3 (16 January 2020)

Coram: SIBEYA AJ
Heard: 25-28 November and 11 December 2019
Delivered: 09 January 2020
Reasons: 16 January 2020

Flynote: Criminal procedure – Evidence – Admissions – Admissibility – Duty on police and court to inform accused of fundamental rights – Accused duly informed of rights when charged – Accused well aware of his rights during court appearance and meaning thereof – Accused understanding his rights and able to make a decision.

Evidence – Duty on the cross-examiner to put his defence on every material aspect in dispute to the opposing witness failing which such evidence can be accepted as true.

Summary: The state applied to court to have the statement made by the accused during pre-trial proceedings in terms of section 119 of the Criminal Procedure Act declared admissible. The accused objected thereto on two intertwined grounds: firstly, that the investigator informed him of the nature and content of the statement made to the magistrate and threatened him to tell the magistrate exactly what he was informed, failing which, he would not be granted bail; secondly, that he was promised bail in the event that he tells the magistrate as per information from the investigator.

Held, that the evidence led established that by the time the accused appeared in court for the section 119 proceedings he was well knowledgeable of his rights as an accused person, as such rights were explained to him prior to his court appearance by the investigator when he was charged.

Held further, that subsequent to his guilty plea and while fully comprehending his rights the magistrate questioned him as to whether he was forced, threatened or influenced to plead guilty to which he responded in the negative.

Held further, that from the evidence it is apparent that the accused was not threatened, promised bail nor told what to inform the magistrate, resultantly the section 119 plea proceedings are ruled admissible.

RULING

Trial-within-a-trial

SIBEYA AJ:

[1] The accused is on trial before this court on charges of murder and robbery with aggravating circumstances. In the midst of the state's case, the prosecution sought to introduce a statement orally made by the accused during pre-trial court proceedings in accordance with section 119 of the Criminal Procedure Act[1] (the CPA) and forming part of the transcribed record. The accused enthusiastically objected to the admission of the statement based on two related grounds: *firstly,* that the investigator informed him of the content of the statement which he was threatened to convey to the magistrate failing which he would not be amenable to be granted bail; and *secondly*, that the investigator promised to ensure that he is granted bail if he narrated to the magistrate exactly what he was told by the investigator. A trial-within-a-trial ensued in order to determine the admissibility of the statement made in terms of section 119.

[2] It is trite law that courts retain a duty to inform accused persons of their constitutional rights and where accused persons make admissions, courts should ascertain the admissibility of such statements by inquiring, *inter alia*, whether the accused makes such statement or admission freely and voluntarily or whether such accused was forced, threatened or influenced to make such statement or admission. Failure to ascertain whether a statement or admission was freely and voluntarily made may result in a material irregularity which could constitute a failure of justice, with the capacity to vitiate the proceedings.[2]

[3] *Mr Lutibezi* appeared for the state while *Mr Siyomunji* appeared for the accused.

[4] In its pursuit to prove the admissibility of the section 119 statement the state led the evidence of five witnesses.

[1] Act 51 of 1977.
[2] S v Shikunga and Another 1997 NR 156 (SC).

[5] Detective Warrant Officer *Samuel Auxab* testified that he is the investigator in this matter. He came in contact with the accused in Swakopmund on Sunday, 24 September 2017 when he charged the accused for murder and robbery with aggravating circumstances in order for him to make his first court appearance the following day. The accused informed him that he had something to tell the officer but he nevertheless proceeded to first warn the accused of his rights and completed a warning statement.

[6] Amongst the rights explained in the Otjiherero language to the accused which he understood, were that: he was not obliged to answer any questions put to him or make any statement but whatever he says would be written down and may be used as evidence against him in court. The accused opted to remain silent but further stated that he will tell the magistrate what happened. He signed each page of the warning statement as an acknowledgment of understanding the content of the signed pages thereof. It was his evidence that did not make any threats or promises to the accused. During cross examination it was put to him by *Mr Siyomunji* that he is the officer who took the accused from the police station to court, which assertion was vehemently denied. It was further put to him that he informed the accused that when he goes to court, he should plead guilty and promised the accused bail if abides by what he informed him, this was denied. He further testified that he then forwarded the case docket to his unit commander Detective Inspector *Tjihavero* and that was his only encounter with the accused prior to the accused's court appearance.

[7] Detective Inspector *Roosa Tjihavero* testified that she is the unit commander of the Criminal Investigation Unit at Swakopmund police station. She received the case docket in this matter from the investigator who informed her that the accused intended to tell the truth. On Monday, 25 September 2017 she requested Sergeant *Nuxab* to take the accused to court which he did and she did not see the investigator that Monday.

[8] Sergeant *Gerson Nuxab* corroborated the testimony of Detective Inspector *Tjihavero* that in the morning of 25 September 2017 she requested him to take the accused from the police station to court which he did. He was together with Sergeant *Mbango* who has since left the police force. Whilst in his company no one threatened, influenced or promised the accused anything. He did not see the investigator on that day.

[9] Magistrate *Coincita Olivier* testified that the accused appeared before her on 25 September 2017 on a charge of murder where proceedings in terms of section 119 of the CPA were conducted. His rights to legal representation were explained to him and he opted to apply for legal aid but for purposes of the section 119 proceedings he decided to plead and make a statement without legal representation. When the charge was put to him, he pleaded guilty, after which the following exchange appears on record:

'Court: …Plea in terms of section 119 proceedings are as follows, the state is required to put the charges to you or he will put the charge to you thereafter you are required to plea. Either guilty or not guilty as it is your choice but please take note this is a preliminary plea, this is not the stage of the trial. … Did you understand the explanation by the court sir?

Accused: I do your worship.

Court: Is it still correct that you will proceed for today to conduct your own defence in light of the explanation?

Accused: I do.

Court: If you understood the charge against you sir what do you plea?

Accused: Pleads guilty.

Court: … In order for the court to establish whether you do admit all the allegations made against you. Please take note should the court not be satisfied with the answers that you give the court will record a not guilty plea on your behalf… Do you understand?

Accused: I do your worship.

Court: Were you forced or threatened or influenced at any stage to plead guilty to this offence sir?

Accused: No your worship.'

[10] The accused was cooperative and understood the proceedings. The magistrate further testified that that if she was alerted to the allegation that the accused was threatened or influenced to make a statement then she would not have taken down the statement. The accused then proceeded to make a statement where he made admissions. On the request from the prosecutor, the court repeatedly inquired from the accused whether he had any objection to the admissions made being recorded in terms of the section 220 of the CPA after explaining the purpose of the said section. The accused had no objection.

[11] During cross examination the witness, *Ms Olivier,* was not questioned on the alleged threat but the line of questioning focused on the allegation that the investigator informed the accused what to narrate to the court in exchange for a promise of being granted bail. The magistrate conceded that she did not specifically question the accused whether he was promised anything but inquired from him whether he was forced, threatened or influenced in any manner to which the accused responded in the negative. She further stated that promise in her view is an ingredient of influence and therefore the question on influence covered the concern regarding promise.

[12] *Ms Anneliza Bunga* testified that she was the court interpreter during the section 119 proceedings. She did not talk to the accused before his matter was called in court as she only interpreted for him formally during court proceedings. It was put to her that the accused in one of his replies to the state's pre-trial memorandum disputed the admissibility of the section 119 proceedings on the basis that he was not properly and adequately informed of his rights and was misled by the interpreter to plead guilty as an incentive to be granted bail, which assertion she denied.

[13] The accused testified, *inter alia*, that on Sunday, 24 September 2017 during the process of being charged, the investigator informed him of the statement of admitting to the charge which he had to tell the court in order for him to be granted bail. The investigator and Sgt *Nuxab* took him to court on Monday, 25 September 2017 and at court the investigator reminded him not

to forget to tell the court what he said to him prior. At court he narrated the statement told to him by the investigator without revealing the origin of such statement. He stated that he understood his rights when they were explained to him by the magistrate as such rights were explained to him by the investigator the previous day. He conceded that the magistrate asked him as to whether he was forced or influenced in any manner to which he responded in the negative as he was already coached by the investigator on what to say. He testified that he chose to lie to court in that he was not threatened or influenced in any manner in order for the promise to be fulfilled and for him to be granted bail.

[14] On the promise from the interpreter to get bail as per his reply to the state's pre-trial memorandum, the accused testified that the interpreter conveyed this to him from the investigator. The said reply to the state's pre-trial memorandum was therefore not correct where it referred to the accused being misled by the interpreter as this was done by the investigator using the interpreter as a conduit. When Mr *Lutibezi* pursued this version and put it to him that the interpreter was not present when the investigator communicated with the accused and she only saw him for the first time in court, he agreed but later changed and said that the interpreter saw him in a small office just before his court appearance.

[15] The investigator had earlier testified that he spoke Otjiherero to the accused and they understood each other. When the court inquired from the accused as to what the interpreter was then translating when the investigator and himself understood each other, the accused changed his version and testified that the interpreter actually did not say anything as she was just listening.

[16] During argument, Mr *Siyomunji* submitted that the accused was threatened to narrate the statement told to him by the investigator failing which he would not be granted bail. This court then alerted him to the specific question posed by the magistrate where she unambiguously asked him if he was forced, threatened or influenced to plead guilty and he denied. Mr.

Siyomunji then correctly abandoned this argument as the accused has clearly stated that he was not threatened.

[17] The only objection that remains for determination is whether the accused was informed by the investigator what to narrate to the court under the promise that should he comply then he will be granted bail.

[18] It is mandatory that an accused person should be advised of his right to legal representation, the right not to be compelled to give testimony against himself (inclusive of the right to remain silent where there is a possibility of self-incrimination). Where the accused opts to make a statement, it should be ascertained whether such statement is made freely and voluntarily without being forced, threatened, influenced or promised anything to do so. Failure to inform the accused of the said legal rights may result in an unfair trial which could vitiate the proceedings. In the event of a statement made, failure to inquire whether such statement was made freely and voluntarily could render such statement inadmissible.

[19] The magistrate inquired from the accused if he was influenced in any manner but did not ask him if he was promised anything. Mr *Siyomunji* vehemently argued that the failure by the magistrate to inquire from the accused if he was promised anything cements the proposition that the accused was not properly advised of his rights and was not properly questioned to determine if his statement was made freely and voluntarily to the extent that there was failure of justice. Had the court inquired if the accused was promised anything then the rights of the accused would have been fully explained to him, so the argument went.

[20] The magistrate stated that when she asked the accused if he was influenced in any manner that included promise. The ordinary dictionary

meaning of influence on a person is the capacity to have an effect on the behaviour of someone, while promise to another is the assurance that one will do something to the other. Our courts have accepted that generally, in interpretation, the ordinary meaning of the words should be resorted to unless such interpretation leads to absurdity. It follows therefore that an assurance for one to do something for the other provided such person acts in a particular manner can influence the action of such other person in order for him to have the promise realised.

[21] It can be accepted that where there is a promise to be granted bail if the accused informs the court of a particular statement then such promise influences the nature and content of the statement made to court. There could be merit in the submission that influence therefore has a component of promise contained in it. This court however discourages the use of collective words which would usually require interpretation to determine whether certain other words are included therein or not. Considering that several allegations of various promises made to accused in different matters have surfaced in our courts, it has become elementary to inquire from an accused whether he has been promised anything by anybody in order to make such statement. The accused should not be left to speculate whether the court included promise when it inquired about influence.

[22] *In casu*, the accused was aware of his rights even before he appeared in court for the section 119 proceedings. It is further apparent from the evidence that he was determined to inform the court exactly what he alleges was told to him by the investigator to inform the court. While discussing the right to legal representation where the accused is aware of his rights Strydom JP (as then was) in *S v Bruwer*[3] stated that:

> 'I am also mindful of the fact that reference in our Constitution to a fair trial forms part of the Bill of Rights and must therefore be given a wide and liberal

[3] 1993 NR 219 (HC) 223C-D.

interpretation. However, I fail to see how it can be said, even against this background, that a trial will be less fair if a person who knows that it is his right to be legally represented is not informed of that fact. Whether the fact that an accused was not informed of his right to be legally represented, resulted in a failure of justice is, as in most other instances where a failure of justice is alleged, a question of fact.'

[23] Although the above words were expressed in respect of the right to legal representation this court finds the principle therein applicable to this matter in as far as it concerns the explanation of rights to accused persons who already have knowledge of such rights. In fact, during cross examination the accused stated that he responded in the negative to all questions regarding any force, threat or influence as he was promised bail if he restated what the investigator informed him. This court is of the view that the failure of the magistrate to inquire whether he was promised anything by anyone is not material enough to render the statement inadmissible.

[24] It became apparent during the proceedings that the accused was informed of his rights by the investigator on Sunday, 24 September 2017 which he understood and when such rights were again explained to him by the magistrate on Monday, 25 September 2017 such rights were already well within his knowledge and any diminished explanation thereof is immaterial.

[25] The warning statement which was received into evidence by consent of the accused reveals that after the accused was informed of his rights and he understood, he opted to remain silent but stated further that he will tell the magistrate what happened. He then signed the page on which the said information is recorded as a demonstration of his approval of the content of such page. Nowhere in the warning statement does it state that what he had to tell the magistrate emanated from the investigator, based on a promise to be granted bail.

[26] Sgt *Nuxab* testified in a forthright manner and stated that he is the one who booked out the accused from the police cells and took him to court on 25 September 2017 and he did not see the investigator on that day. No one threatened or promised anything to the accused in his presence. It was not disputed that the Sgt *Nuxab* was together with another police officer who took the accused to court. It was put to him that he was in the company of the investigator which he disputed and stated that he was in the company of Sgt *Mbango.* It was never put to him that at court the investigator reminded the accused about the version that he was informed to tell the court.

[27] Ms. *Bunga*'s testimony that she only spoke to the accused for the first-time when she interpreted for him during court proceedings was not disputed as well.

[28] *Claassen*, J. in *Small v Smith*[4] stated as follows:

> 'It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and opportunity of explaining the contradiction of defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross examination and afterwards argue that he must be disbelieved. Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in absence of notice to the contrary that the witness's testimony is accepted as correct.'

[29] The often-quoted paragraph from *S v Boesak,*[5] is further authority on this point where *Smallberger* JA stated that:

> '[50] It is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the

[4] (105/99) [2000] ZASCA 24 (12 May 2000) at page 33 and 34.
[5] 2000 (1) SACR 633 (SCA) 647c-i.

witness implicating his client. A criminal trial is not a game of catch-as-catch-can, nor should it be turned into a forensic ambush.

[51] In this respect, we are in full agreement with the comments made by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at 36J-37E:

"[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn (1893) 6 R 67 (HL) and has been adopted and consistently followed by our Courts.'"

[30] This court cannot fathom any reason why the aforesaid undisputed evidence of Sgt *Nuxab* and Ms *Bunga* should not be found to be credible. This court is further not furnished with any reason why the said witnesses should be disbelieved on unchallenged crucial evidence.

[31] In the premises, this court finds that the fundamental rights of the accused were not infringed so as to render the statement made during the section 119 proceedings inadmissible. To the contrary the evidence demonstrates that the accused was not threatened, promised bail neither was he told by the investigator as to what to inform the court.

[32] The statement made in terms of section 119 proceedings is therefore ruled admissible.

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O S SIBEYA

ACTING JUDGE

APPEARANCES:

STATE: C K Lutibezi

Of the Office of the Prosecutor-General, Windhoek.

ACCUSED: M Siyomunji
Siyomunji Law Chambers (instructed by Directorate: Legal Aid), Windhoek.