



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**REASONS – TRIAL-WITHIN-A-TRIAL**

Case no: CC 16 /2012

In the matter between:

**THE STATE**

and

**SEM SHAFOSHUNA HAUFIKU**

**ACCUSED**

**Neutral citation:** *The State v Haufiku* (CC 16/2012) [2013] NAHCNLD 49 (24 September 2013)

**Coram:** TOMMASI J

**Heard:** 3 -4 June 2013

**Delivered:** 5 June 2013

**Reasons released:** 24 September 2013

**Flynote:** **Criminal procedure** – Evidence - Admissibility of evidence – not proven that police officer explained constitutional rights not to incriminate himself and right to legal representation– admission of verbal statements would render the trial unfair. Evidence – warning statement and confessions – Admissibility of evidence - police officers and magistrates to “go a step further in assisting the court which may later be called upon to adjudicate on the admissibility of the statement and would work against an injustice to an accused” – it is the duty of court to determine the admissibility of the statement or confession

**Summary:** The accused objected to the admissibility of verbal admissions he allegedly made on the ground that his constitutional right to a fair trial has been violated. The police officer's evidence in respect of the circumstances was not corroborated by entries in the occurrence book and the court accepted the account of the accused testimony which was probable and corroborated by entries in the occurrence book. The admitted failure to explain the accused's right to legal aid led to the exclusion of the warning statement. The accused objected to the admission of the confession on the ground that he was assaulted by three police officers. The pro forma warning statement as well as the pro forma confession recorded an injury to the ear of the accused. The magistrate merely recorded that the accused informed him that he was assaulted by a police officer and he did not further enquire into the circumstances of the assault or the circumstances which led to the accused wanting to make a confession. The court held that the State failed to prove the requirements for the admission of the confession.

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### ORDER

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1. The oral admissions made by the accused to former Constable Hafeni Endjala are declared inadmissible as evidence in the main trial;
2. The written warning statement of the accused to Warrant Officer Andowa is declared inadmissible as evidence in the main trial; and
3. the confession of the accused to the magistrate, Mr Musakana, is declared inadmissible as evidence in the main trial.

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### JUDGMENT

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TOMMASI J

[1] The accused objected to the admissibility of oral admissions made to a former police officer, Constable Hafeni Endjala (Cst Endjala); his warning statement which was taken down in writing by Warrant Officer Andowa and a confession which was reduced to writing by the magistrate. Evidence was adduced by the State and the accused in a trial-within-a trial. The court gave the following ruling:

1. The oral admissions made by the accused to former Constable Hafeni Endjala are declared inadmissible as evidence in the main trial;
2. The written warning statement of the accused to Warrant Officer Andowa is declared inadmissible as evidence in the main trial; and
3. the confession of the accused to the magistrate, Mr Musakana, is declared inadmissible as evidence in the main trial.

What follows are my reasons for above ruling.

#### Oral admission to former Constable Hafeni Endjala

[2] Cst. Endjala arrested the accused on 19 July 2010 at a *cuca* shop in the district of Okahao. The accused gave his full cooperation when approached. He informed the accused that there were serious allegations made against him and asked him if the allegations were true. The accused, apart from making certain admissions to him at the time of his arrest, undertook to explain everything at the police station. At the police station he informed the accused that he will write down what he says and it may be used against him in a court of law. He recorded the admissions of the accused as part of his own statement. He did not sign the statement that same evening as the police officers on duty were illiterate. He had his statement commissioned a few days thereafter.

[3] According to the accused Cst Endjala was not alone when he made the arrest but was accompanied by two armed police officers. The police officers simply loaded him into the police vehicle without saying or explaining anything. At the police station he was locked up in the cells without being interviewed by Cst. Endjala.

[4] Extracts from the occurrence book of Okahao Police Station were handed into evidence by agreement. An entry recorded in the occurrence book reflects that, on

19 July 2010, Cst. Endjala, the driver of the vehicle, together with three other police officers each armed an AK-m departed to arrest the accused.

[5] The central dispute was whether or not there was a violation of the accused constitutional rights and if so whether this court should exclude the admissions on this ground.

[6] In *S v Kasanga* 2006 (1) NR 348 (HC), Heathcote AJ remarked at 360D - E as follows:

'In my view, the starting point in determining the fairness of a trial, as envisaged in art 12, should always be whether or not the accused is informed. Without an accused being properly informed, one cannot even begin to speculate whether or not rights have been exercised or indeed waived.'

[7] It is trite that the failure to inform an accused does not in all cases constitute an irregularity; and that this court has a discretion to exclude evidence obtained in violation of an accused's constitutional rights where its admission would render the trial unfair or otherwise detrimental to the administration of justice<sup>1</sup>.

[8] Cst. Endjala's was a senior police officer who appeared to be familiar with what was required of him during an arrest. His sole purpose when he approached the accused was to arrest him. Despite these factors he was unclear whether he cautioned the accused before he asked questions or thereafter. He furthermore emphatically denied that he arrested the accused in the presence of armed police officers yet the entry in the occurrence book clearly indicates otherwise.

[9] Mr Wamambo, counsel for the State, argued that Cst. Endjala made an honest mistake and that the discrepancy in respect of the number of police officers present at the time of the arrest, was not material. I respectfully differ with this submission. It was the State's case that the accused rights were explained at the time of his arrest and the circumstances which prevailed at the time was thus

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<sup>1</sup>See *S v Kapika and Others* (1) 1997 NR 285 (HC); *S v De Wee* 1999 NR 122 (HC); *S v Malumo and Others* (2) 2007 (1) NR 198 (HC)

material. I am furthermore not entirely persuaded that it was an honest mistake. It was not the only discrepancy between his testimony and the entries which appears in the occurrence book. He was adamant that he had not taken the accused to the village where the offence was committed the day after his arrest yet the occurrence book carries an entry reflecting this fact. His explanation for not commissioning the statement that same evening is improbable. I entertain strong doubts whether he recorded the statement that same evening.

[10] Cst. Endjala was a single witness whose testimony in respect of material and peripheral aspects was not satisfactory. The accused's version of his arrest, corroborated by the entries in the occurrence book, is probable and no good reason exists for the court not to accept same.

[11] I am thus not persuaded that the State proved beyond reasonable doubt that Cst Endjala informed the accused of his right to legal representation and that he is not compelled to give testimony against himself. This however does not mean that the evidence should be excluded.

[12] The accused faced serious charges and if convicted, lengthy custodial sentences. He was 18 years old and had completed grade 9. This evidence does not entitle this court to assume that he was aware of his rights. It has not been proven that the accused had been informed of the most fundamental rights required to ensure a fair trial. I am of the view that the admission of the verbal admissions would render the trial against the accused unfair and consequently ruled that same would be inadmissible in the main trial.

#### Warning Statement

[13] It was common cause that W/O Andowa took a warning statement from the accused on 21 July 201 and that she failed to inform the accused of his right to apply for legal aid. She was of the view that this was the court's duty and that she had no such obligation to inform the accused.

[14] Ms Mainga argued that this omission was fatal. Mr Wamambo relied on the fact that the accused's right to legal representation was explained by Cst.Endjala the previous day which the court found was not proven. This court has to determine whether the failure by W/O Andowa to explain to the accused that he may apply for legal aid should result in the evidence being excluded.

[15] As already indicated a failure to properly explain the rights to legal representation is not *per se* fatal. The court has a discretion which it should exercise on the facts of each case. In *S v Mulumo and Others*<sup>2</sup> Hof J at paragraph 93 endorsed the above quoted passage in *S v Kasanga, supra* and reasoned in paragraph 94 that an unrepresented lay person would not be in a position to exercise his right to legal representation if his entitlement to legal aid is withheld from him. The importance of affording an indigent person the opportunity to apply for legal aid and to be legally represented in trials has been stressed in cases such as *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial 2002 NR 235 (SC)* and *S v Luboya and Another 2007 (1) NR 96 (SC)*. It is trite that a fair trial includes fair pre-trial procedure and it is important that the right to apply for legal aid should be explained to an unrepresented accused.

[16] The evidence does not support a conclusion that the accused was aware of such a right and it was evident from the answers recorded by W/O Andowa that the accused was unemployed. W/O Andowa should have considered the possibility that the accused may not have been in a position to afford the services of a private legal practitioner and should have explained to the accused that he may apply for legal aid. There is no point to speculate at this juncture whether the accused would have waived his right not give an incriminating statement if he was made aware of his right to apply for legal aid.

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<sup>2</sup>2010 (1) NR 35 (HC)

[17] Under these circumstances I am of the view that the admission would render the trial of the accused unfair and for this reason it was ruled inadmissible as evidence in the main trial.

#### The confession

[18] The accused informed the magistrate that he was assaulted by Cst. Namundjebo. In his reply to the State's pre-trial memorandum the allegation was repeated and it was stated that: "these police officers include one Namundjebo and Teacher Otto" (Sgt lithete). He objected to the admission of the confession on the ground that he was assaulted and threatened.

[19] The State in order to discharge the onus to prove beyond reasonable doubt that the accused made the statement to W/O Andowa and the confession to the magistrate freely and voluntarily,<sup>3</sup> called both these witnesses. Pro forma forms of the confession and warning statement, without the details of the actual statement, were handed into evidence. Both documents made reference to an injury observed on the ear of the accused. The warning statement simply reflects an injury to the right ear of the accused. I deem it necessary to refer extensively to the material questions and answers recorded and confirmed by the magistrate as it appears on the pro-forma confession:

- "8. (i) Have you any injuries and if so of what nature?  
Answer: I was injured on my ear and blood was coming out and  
I have a swollen wound behind the ear.
- (ii) How did you sustain these injuries  
Answer: I was kicked by a police officer called Namundjebo.
9. Were you influence or encouraged by any person in any other way to make a statement?  
Answer: No
12. (i) Have you previously made a statement to any person in respect of this incident?  
Answer: Yes I made a statement to the investigating officer,
- (ii) If so, to whom, when and under what circumstances

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<sup>3</sup>S v MALUMO AND 116 OTHERS (No 5) 2008 (2) NR 520 (HC)

Answer: To the investigating officer on 20 July 2011, at Okahao police station in the office.

(iii) Why do you want wish to repeat this statement?

(Ascertain and describe the circumstances which led to declarant's appearance)

Appeared calm and relaxed

Answer I just want to give a statement to the magistrate”

[20] It was common cause that W/O Andowa, on 21 July 2011 observed a fresh injury on the ear of the accused and that she did not record the fact that the accused informed her that he was assaulted by a cellmate earlier that morning at breakfast. Although it was not disputed during cross-examination that she was alone with the accused during the interview the accused thereafter testified that the three police officers who assaulted him were present during the interview.

[21] The magistrate took down the confession on 29 July 2011. The only material dispute was the magistrate's failure to inquire into the circumstances of the assault by Cst Namundjebo. The magistrate simply recorded the information in respect of the injury and the assault without going into the circumstances surrounding the assault as he did not want to interfere too much. He did not deem it necessary to revisit the issue of voluntariness after being informed of the assault by a police officer. He maintained that he was satisfied that the accused gave his confession freely and voluntarily. He expressed the following view: "...The bottom line is, he may have been assaulted but he still wants to make a statement to the magistrate". The magistrate confirmed that he returned the confession to the police officer who brought the accused.

[22] During cross-examination of Cst Endjala it became evident that he was also implicated in the assault. He denied that he had any contact with the accused after his arrest. Cst Namundjebo denied having assaulted the accused on that day as he was off duty. It was evident from the occurrence book that he was not on duty on this date. Sgt Ithete denied being present in Okahoa on that date and produced a certificate indicating that he successfully completed a course in Advanced Criminal



Investigation from 18 July 2011 to 9 September 2011. He only returned to Okahoa the evening of 26 July 2011 in order to attend court proceedings the next day. He commissioned the statement by Cst Endjala on 27 July 2011. The occurrence book reflects that he departed on 17 July 2011 but no corresponding entry for his return to Okahao was made.

[23] According to the accused he was taken out of his cell on 21 July 2011 by Cst Endjala and taken to the office where a female police officer, Teacher (Sgt Ithete) and Cst Namundjebo were present. Cst Endjala handcuffed him, Sgt Ithete hit him with a fist on his side, Cst Namundjebo kicked him on his chest and Cst Endjala hit him with a baton behind his left ear. The police officers threatened that they will assault him again should he refuse to make a statement. The female police officer left the office when the assault started and returned some time thereafter to take a statement from him. He gave his statement to the female officer as he was forced. He did not want to inform the female officer that he was threatened to make a statement as the police officer who assaulted him were present during the interview. He denied that the injury was on the right ear and that he informed W/O Andowa that the injury was caused by assault by a cellmate. He informed her that he sustained the injury as a result of an assault by the police.

[24] He agreed to give a statement to the magistrate as he feared that he would be assaulted again should he refuse. He informed the magistrate that he was beaten by three police officers whose names he also provided. He however informed the magistrate to leave out the names of Cst Endjala and Sgt Ithete. He indicated that he was unable to freely speak about the assault as he remained in custody in Okahao. At the time he testified he felt free to testify as he was no longer detained at Okahoa.

[25] The purpose of a trial-within-a-trial is to determine the voluntariness, or otherwise, of an incriminating statement (confession or admission). Both counsel were *ad idem* that the State bears the onus to prove beyond reasonable doubt that the accused made the statements freely and voluntarily. Mr Wamambo submitted

that the State had proven beyond reasonable doubt that the allegation of assault by the accused is false and that he made the confession freely and voluntarily. Ms Mainga submitted that State failed to discharge the onus in that: the magistrate failed to enquire into the details of the assault; the circumstances surrounding the making of the prior statement; and failed to record his explanation in respect the accused's right to legal aid on the pro-forma confession.

[26] This court has to determine whether or not the State proved beyond reasonable doubt that the allegation of the assault by the accused was false, the impact of W/O failure to record the information provided by the accused and the magistrate's failure to enquire into the details of the assault and his appearance before him and the failure to record his explanation in respect of legal aid. I am of the view that the objection on the ground that the magistrate failed to record his right to legal aid is without merit given the accused's admission that he was informed of this right when he appeared in court on 22 July 2011.

[27] It is trite that "beyond reasonable doubt" is not "beyond a shadow of a doubt" and that there is "no onus on an accused to convince the court of any of the propositions advanced by him and it is for the State to prove the propositions as false beyond reasonable doubt."<sup>4</sup> In terms of the provision of section 217 of the Criminal Procedure Act, 51 of 1977, the court shall admit into evidence a confession, if it proved that the accused: made it freely and voluntarily, that he was in his sound and sober senses; and without having been unduly influenced thereto.

[28] Article 12 1(f) of the Constitution provides that and no Court shall admit in evidence testimony which has been obtained in violation of Article 8(2)(b). This court would thus be mandated to exclude evidence which had been obtained as a result of any assault or threat perpetrated in order to persuade the accused to give a statement.

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<sup>4</sup>S v Mtsweni 1985 (1) SA 590 (A)

[29] Ms Mainga referred this court to a number of cases which was cited with approval in *S v Malumo and Others*<sup>5</sup> namely *R v Gumede and Another*<sup>6</sup> *S v Jika and Others*<sup>7</sup>; and *S v Maasdorp*<sup>8</sup>. Hoff J in *S v Malumo* also referred to other judgments of this court namely *S v Tjihorero and Another*<sup>9</sup> and *S v Swartz and Others*<sup>10</sup>. Hof J, having referred to these authorities held that a magistrate did not act as a mere recording agent when writing down a statement; and where an accused indicated that he had been assaulted, injured or threatened in any way, the magistrate had a duty to make further inquiries. From the cases cited it is clear that the guidelines are equally applicable to police officers.

[30] My understanding of Ms Mainga's submission is that the failure by the magistrate *per se* should render the confession inadmissible. The magistrate, when an accused is brought to him/her to make a confession has a duty to record the confession. The magistrate is not called upon to determine the admissibility of the confession but he has to be satisfied that the accused is making the confession freely and voluntarily. Where however an accused mentions an assault, threat, injury or a promise made, the magistrate has a duty to "go a step further in assisting the court which may later be called upon to adjudicate on the admissibility of the statement and would work against an injustice to an accused"<sup>11</sup>. In *S v Abbott*<sup>12</sup> the court held that: "as a result of recommendations made by the Bench over the years, with reference to questions which ought to be asked particularly by magistrates before an accused's confession is recorded, standard departmental forms had come into being which were used by magistrates and police officers for confessions and pointings out (i e, to establish that an accused was indeed acting freely and voluntarily). An official who used such a form had to be meticulous in making the various preliminary enquiries, and in recording the accused's replies thereto. However, it was the trial Court which ultimately had to decide whether the accused had acted freely and voluntarily, and a failure to comply with the relevant departmental

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<sup>5</sup>2010 (1) NR 35 (HC)

<sup>6</sup>1942 AD 398,

<sup>7</sup>1991 (2) SACR 489 (E)

<sup>8</sup>2008 (2) SACR 296 (NC):

<sup>9</sup>1993 NR 398 (HC)

<sup>10</sup>High Court, case No CC 108/99, 29 October 1999

<sup>11</sup> *S v COLT AND OTHERS* 1992 (2) SACR 120 (E)

<sup>12</sup>1999 (1) SACR 489 (SCA)

prescriptions did not necessarily result in the accused's statement being inadmissible".[my emphasis]

[31] The magistrate herein incorrectly held the view that he should do nothing more than record what the accused was saying despite the decided cases of this court. His failure to perform his duty is detrimental to the administration of justice. The court cannot lose sight of the fact that a proper enquiry at that stage would have made it clear whether not there was a causal connection between the assault complained of by the accused and his decision to confess. In these circumstances the protection afforded by statute to the accused becomes an illusion.

[32] The accused was free from injury when he was detained. The occurrence book reflects that there were no complaints on 20 July 2011 when the accused returned from the scene of the crime with Cst Endjala. W/O Andowa noted that the accused had a fresh injury behind his right ear. It is reasonable to infer under these circumstances that he accused sustained the injury whilst he was in police custody.

[33] The State relied on the evidence of W/O Andowa to prove that the accused should not be believed as he offered a different explanation as to the cause of the injury to her. In *S v TJIHORERO AND ANOTHER* 1993 NR 398 (HC), Strydom JP, as he then was, stated that officers and magistrate's using the prescribed roneoed forms:" are, when the answers given to them by a particular deponent are not clear or need further elucidation, entitled and must ask further questions in order to clear up such uncertainties, as long as the questions and answers thereto are also written down" [my emphasis]

[34] If W/O Andowa had recorded the answer it would have gone a long way to dispel any doubts this court may have had in respect of the accuracy of the response. She reasoned that it was a minor injury and therefore there was no need to record the cause thereof. The questions on the pro-forma warning statement are designed to determine whether the deponent is giving his statement voluntarily. A fresh injury should have alerted her to the possibility that the accused may not be giving his statement freely and voluntarily. It was therefore important for her to note

his response to reflect that the injury had no bearing on his willingness to give a statement.

[35] W/O Andowa was not able to independently recall the details of the explanations she gave the accused and only recalled it during cross-examination. Although this is not necessarily an indication that she was not a credible witness, it serves to demonstrate the fallibility of her memory. The accused however failed to dispute her testimony that they were alone and I consider his testimony in respect hereof as an afterthought. It is furthermore not plausible that he would have informed her in the presence of the police officers that they had assaulted him. While I am unable to rely on W/O Andowa testimony, I equally reject the accused testimony that he informed her of the assault by the police. The court is thus left with what was recorded on the warning statement i.e that the accused had fresh injury to his ear.

[36] An obvious discrepancy which appears *ex facie* the documents is the fact that the warning statement reflects an injury on the right ear and the confession refers to an injury on the right ear. In the absence of any evidence to the contrary I am satisfied that it was the same injury which was noted by the magistrate.

[37] Although the magistrate recorded that the accused was assaulted by a police officer, it was not evident from the document or his testimony that the assault was in any way linked to the making of the confession. It is however significant that the accused raised the assault by a police officer and that the magistrate failed to enquire into the circumstances surrounding the assault. It is further significant that the State led no evidence in respect of the circumstances which led to the accused being brought before the magistrate. It does not appear that the accused voluntarily agreed to make a confession but did so at the behest of the persons involved in the investigation of the offence.

[38] In addition to the above there were unsatisfactory aspects in respect of the State witnesses. Cst.Endjala told a blatant lie when he denied that he had no further

contact with the accused after his arrest. He was not a credible witness and no weight can be given to his denial of the assault.

[39] Sgt lithete provided corroboration for his denial in the form of a certificate. This however falls short of providing conclusive proof that he was present at the course on the date in question. Although the occurrence book reflects that he left on 17 July 2011, no corresponding entry was made for his return on the aforementioned date. He was furthermore somewhat vague in respect of the court case which he had to attend to on 27 July 2011. Save for the fact that it was a housebreaking case, he was unable to recall any other details of the case despite the fact that court cases are recorded. Although he confidently denied the allegation, the court gained the distinct impression that he was not completely frank.

[40] Although Cst Namundjebo denied the allegation and the occurrence book reflect that he was not on duty that date, this court finds it disconcerting that there was no evidence adduced that the allegation of assault was investigated. The lack of interest by police officers to investigate a complaint of assault by by a police officer compromises the integrity of the investigation.

[41] The accused's evidence is not without shortcomings. He informed the magistrate that the injury was caused by Cst Namundjebo whereas he testified that Cst Endjala hit him behind the ear with a baton. During his testimony he mentioned three officers whilst he only mentioned Namundjebo to the magistrate. The accused mentioned Sgt lthete for the first time in his reply to the State's pre-trial memorandum and no mention was made therein of Cst Endjala participation in the assault. The reply however does not exclude the possibility that other officers may have been involved, The failure of the accused to give a consistent account of the identity of the persons and what they did in the extra curial statements, should not be viewed in isolation. Caution should be applied not to attach too much weight to these inconsistencies given the fact that he was detained at all material times at Okahao police station. This court cannot ignore the fact that he sustained an unexplained

injury whilst in police custody and that he reported an assault by a police officer to the magistrate.

[42] This court is not persuaded, on the totality of the evidence adduced that the State proved beyond reasonable doubt that the allegation of assault by the accused was false. The State has, in my view, not proven the admissibility requirements as required by s 219A(1) of Act 51 of 1977 beyond reasonable doubt and I therefore ruled the confession to be inadmissible as evidence in the main trial.

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MA Tommasi  
Judge

## APPEARANCES

THE STATE :

Mr Wamambo

Office of the Prosecutor-General, Oshakati.

ACCUSED:

Ms Amupolo

Directorate Legal Aid

Ms Mugaviri

Mugaviri Attorneys instructed by Legal Aid

Ms Inonge Mainga

Inonge Mainga Attorneys instructed by Legal Aid