REPORTABLE

CASE NO.: CC 32/2001

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

CALVIN LISELI MALUMO + 116 OTHERS

CORAM: HOFF, J

Heard on: 2009.04-06 – 08; 2009.04-20 – 24; 2009-04-27 – 29; 2009-05-18 – 20; 2009-05-26 – 28; 2009-06-01 – 04; 2009.06.08 – 11; 2009.0615 – 18; 2009.06.22; 2009.06.25; 2009.06.29 – 30; 2009.07.01; 2009.07.06 – 09; 2009.07.14 – 16; 2009.07.20 – 21; 2009.07; 2009.09.14 – 17; 2009.09.21 – 24; 2009.09.28 – 30; 2009.10.01; 2009.10.05 – 08; 2009.10.26; 2009.11.03; 2009.11.23; 2009.11.30

Delivered on: 2010.03.01

JUDGMENT
TRIAL-WITHIN-A-TRIAL

HOFF, J: [1] This Court has heard evidence in respect of a number of contested admissions and confessions. Defence counsel objected to the admissibility of these documents on the basis that these admissions and confessions had not been deposed to by the accused persons

freely and voluntarily and that what was related in those documents were as a result of what members of the security forces forced or told the accused persons to narrate.

[2] Sections 217 and 219 A of the Criminal Procedure Act, 51 of 1977 deal with confessions and admissions respectively and read as follows:

"Section 217. Admissibility of confession by accused -

(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided -

(a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; and

(b) that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question –

(i) be admissible in evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to that of such person and, in

the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such documents to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate; and

(ii) be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto.

(words inserted by S 13 Act 56 of 1979).

(2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under proviso (b) to subsection (1).

(3) Any confession which is under subsection (1) inadmissible in evidence against the person who made it, shall become admissible against him -

(a) if he adduces in the relevant proceedings any evidence, either directly or in cross-examining any witness, of any oral or written statement made by him either as part of or in connection with such confession; and

(b) if such evidence is, in the opinion of the judge or the judicial officer presiding at such proceedings, favourable to such person."

"Section 219 A. Admissibility of admission by accused –

(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by

that person, be admissible in evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained –

(a) be admission in evidence against such person if it appears from such document that the admission was made by a person whose name corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the admission and any question put to such person by the magistrate; and

(b) be presumed, unless the contrary is proved, to have been voluntarily made by such person if it appears from the document in which the admission is contained that the admission was made voluntarily by such person.

(2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1)."

General Principles

[3] The admissibility of a statement, whether classified as an admission or as a confession is determined by a separate enquiry during the trial, referred to as a trial within a trial.
In such an instance as a general rule the court decides the issue of admissibility without having regard to the actual contents of such a statement. The admissibility of an admission or a confession is usually contested by alleging *inter alia* that such statement had not been made freely and voluntarily in circumstances where the deponent had been physically assaulted, or threatened to make such an admission or confession or where the statement given had been induced by a promise to the deponent which threat or promise had been induced by a person in authority.

[4] The onus is on the State to prove beyond reasonable doubt that an admission had been made freely and voluntarily. In addition to the factor of voluntariness, the State must prove that the accused person was in his or her sound and sober senses and had not been unduly influenced where it is alleged that the accused person had confessed to the commission of an offence.

[5] The question of admissibility is determined separately from the question of guilt. A trial within a trial has been described as *"insulating the inquiry into voluntariness in a compartment separate from the main trial,"* (*S v de Vries 1989 (1) SA 228 (A) at 233 H*), as a *"watertight compartment, with no spill-over into the main trial"* (*S v Sithebe 1992 (1) SACR 347 (A) at 351 (a – b)*, and as *a "one way glass"* where one is prevented from *"peering into the trial within a trial from the main trial"* (*S v Muchindu 2000 (2) SACR 313 (WLD) at 315 (g)*).

[6] The need for the aforementioned description is that an accused person must be at liberty to challenge the admissibility of an incriminating document in a trial within a trial without fear of inhibiting his election whether or not to testify on the issue of his alleged guilt.
(See *S v Sithebe (supra) at 351 (a)).*

[7] The ruling on admissibility in a trial within a trial is interlocutory and may be reviewed at the end of the trial in the light of later evidence. (*See S v Muchindu (supra) at 316 (f – g); S v Mkwanazi 1966 (1) SA 736 (A) at 742 H – 743 A).*

[8] In *Muchindu Schultz J* said in this regard at *316 g* the following:

> *"This principle in itself shows that subsequent evidence in the main trial may decisively affect the determination of the issues in the trial-within-the-trial. If subsequent evidence may, why not also earlier evidence ? What if before anyone even asked for a trial-within-a-trial the investigating officer in cross-examination rejected a suggestion of the accused's innocence by proudly pointing out that after he had been beaten he confessed ? "*

and at 317 g – h

> *"Accordingly I rule that during the course of this trial-within-a-trial reference may be made to evidence already led in the main trial, and that the Court is entitled to rely on such of that evidence as may be appropriate."*

[9] The general principle, of not allowing the contents of a disputed statement to be disclosed before the question of admissibility has been resolved by the court, is subject to exceptions.

[10] The first exception finds application in the instance where it is alleged by a deponent that the contents of the statement is false and had been provided to him by the police. In such an instance the State is allowed to cross-examine an accused person on the contents of the statement in order to show that the accused person was indeed himself or herself the source of that information and not the police as alleged by the accused. The object of allowing cross-

examination on the contents of the statement is not to show that the contents are true but to attack the credibility of the accused person.

(See *S v Lebone 1965 (2) SA 837 (A); S v Mafuya 1992 92) SACR 381 (W)).*

[11] The second exception is manifested in the instance where the accused person admitted having given the statement himself or herself, however alleging that the contents of such a statement has been invented and that it was done in order to avoid being assaulted further by the police.

(See *S v Gxokwe and Others 1992 (2) SACR 355 (C).*

[12] In *Gxokwe (supra)* dealing with those instances described in the first exception the Court expressed itself as follows on *358 (a – c)*.

> *"As I understand the rationale of those decisions, it is that such an allegation by the accused is so much part and parcel of his attack upon the admissibility of his statement, and so, plainly relevant to the question of whether or not he was coerced or unduly influenced to make the statement, that in the interest of fairness the State must be permitted to explore by appropriate cross-examination the truth or untruth of that particular allegation. The outcome of such cross-examination is obviously highly relevant to both the accused's credibility as a witness in a trial within a trial, and the control issue which is being considered in such a trial, namely the voluntariness of the tendered statement. I emphasise that here has to be a close logical correlation between the accused's allegation and the issues which are being considered in the trial within a trial before it becomes legitimate to cross-examine him upon the contents of his statement."*

(See also *S v Latha 1994 (1) SACR 447 (A)).*

[13] The jurisdictional requirements for admissibility of admissions and confessions (section 219 A and 217 of Act 51 of 1977 as amended) have been provided with added impetus by the

inclusion in the Namibian Constitution of the provisions of Article 12 and in particular Article 12 (1)(a) the right to a fair trial, Article 12 (1)(d) presumption of innocence, Article 12 (1)(f) the right against self-incrimination and the right to have evidence obtained in violation of Article 8 (2)(b) excluded.

[14] Article 8 (2)(b) of the Namibian Constitution reads as follows:

> *"No persons shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*

Article 12 (1)(f) provides *inter alia* that no Court shall admit in evidence testimony which has been obtained in violation of Article 8 (2)(b).

[15] This Court as well as the Supreme Court has in the past given a broad interpretation of the provisions of Article 12 by giving meaning to those provisions beyond the mere wording contained in the Article in order to give effect to the principles of a fair trial and the values inherent in that concept.

(See *S v Malumo and Others (2) 2007 (1) NR 198 at 211 A – E).*

[16] It has been held in relation to the requirement of a fair trial that an accused person has the right not only to consult with a legal practitioner during the pre-trial procedure but to be informed of such a right.

(See *S v Kapita (1) 1997 NR 285 (HC); S v De Wee 1999 NR 122; S v Calvin Liseli Malumo and Others (unreported) Case CC 32/2001 delivered on 14 February 2007).*

This Court has a discretion to allow or to exclude evidence obtained in conflict with the constitutional rights of an accused person, (*S v Shikunga and Another 1997 NR 156 SC)* and has a

duty to enforce the fundamental rights or freedoms guaranteed by the Namibian Constitution (*S v Scholtz 1998 NR 207 at 217 B)*.

[17] The non-compliance of the Judges Rules is one of the factors to consider in determining the issue of voluntariness of a statement or the fairness of a trial.

[18] *In casu* all deponents to the disputed statements alleged that they had been assaulted, threatened with assault and had been told by members of the security forces (i.e. Namibian Police Force and Namibian Defence Force) what to narrate to the magistrates who recorded the respective statements. The State was on the basis of the first exception *(supra)* allowed to cross-examine the deponents on the contents of those statements.

[19] The presumption in section 217 (1)(b)(ii) of Act 51 of 1977 has been declared unconstitutional on the basis that it subverts the very essence of the right to a fair trial and the incidents of that right articulated in art. 12 (1)(a), (d) and (f) of the Constitution of Namibia. (See *S v Shikunga (supra*)).

Section 219 A of Act 51 of 1977 contains a similarly worded presumption (the constitutionality of which has not yet been tested). It has been accepted by the State that the presumption contained in section 219 A (1)(b) would not withstand the test of constitutionality and would follow the same route as the presumption contained in section 217 (1)(b)(ii) of Act 51 of 1977. The State thus started to lead evidence in order to prove the admissibility of statements without relying on the presumption contained in section 219 (A) (1)(b).

[20] The admissibility of these statements (admissions and confessions) must be proved beyond reasonable doubt.

[21] I shall now turn to the individual statements of the respective accused persons and shall briefly summarise the objections against admissibility, the evidence presented and the submissions by counsel.

1. <u>Calvin Liseli Malumo</u>

[22] The objection was that the statement was not obtained freely and voluntarily since the accused had been assaulted by members of the police force, was threatened with further assaults should he fail to repeat to the magistrate the statement provided to him, that he has not been informed of his constitutional rights neither had he been warned in accordance with Judges Rules. It is common cause that the accused was arrested on 10 August 1999 by members of the Namibian Police namely Warrant Officer Gideon Kashawa, Inspector Shebby Lukopani and Inspector Mokena at Kalumba village in the Caprivi region. The circumstances under which he had been arrested are in dispute. He was taken to Katima Mulilo police station and thereafter transported to Mpacha military base. He was subsequently flown to Grootfontein military base where a warning statement was obtained from him on 19 August 1999. On 23 August 1999 he was taken for his first court appearance. On 15 September 1999 he was taken to a magistrate who took down his statement (Exhibit EJW).

[23] The state witness Inspector Mukena in his evidence-in-chief testified that the accused had at the time of his arrest not been assaulted or threatened nor provided with a certain version of events presented to him by the police officers. At some stage during cross-examination he relented and corroborated the version of the accused under which circumstances the arrest had been effected. He admitted that the accused on different occasions that day had been assaulted by members of the Namibian Police, that the accused had been questioned about his involvement in

the attack on Katima Mulilo on 2 August 1999, that the accused had denied any involvement in the attack, that on his denials he had further been assaulted, and that he was forced to admit to a certain version of the events which emanated from the police. The other two state witnesses namely Inspector Lukopani and warrant officer Kashawa denied this version and testified that the accused had never been assaulted on that day.

[24] Mr January who appeared on behalf of the state submitted that the witness (Mr Mukena) discredited himself if one has regard of his contradicting evidence and the fact that subsequent state witness refuted his concessions.

[25] The witness made the concessions referred to *(supra)* during cross-examination. There was no re-examination. These concessions therefore stand as evidence presented by the State since the State has not discredited this witness neither was there an application to have the witness declared a hostile witness. In the result the State presented two mutually destructive versions to this Court which was fatal.

It is not necessary to relate the version of the accused person. It is however necessary to relate what happened on 15 September 1999 when the accused person was brought to the magistrate in Grootfontein in order for him to depose to his statement. Exhibit EJW is document labeled *"Confession in terms of section 217 of the Criminal Procedure Act, 1977 (Act 51 of 1977)"*. Certain preliminary questions appear on this pro-forma document. Question 4(i) is whether the deponent had been threatened with assault should the deponent decline to make a statement to the magistrate, to which the accused answered in the negative.

Question 6(i) is whether the deponent had been threatened with assault or any other prejudice should the deponent inform the magistrate of assaults or threats against the deponent prior to having been brought to the magistrate, to which the accused answered in the negative.

[26] Question 8(i) was whether the deponent had any injuries, and if so, of what nature to which the accused answered as follows:

"No – but I was assaulted, I was kicked, beaten with fists and slapped."

[27] The observation by the magistrate was that the accused could show no injuries.

[28] Question 12 on the pro-forma reads as follows:

"(i) Have you previously made a statement to any person in respect of this incident ?

Answer: Yes.

(ii) If so, to whom, when and under what circumstances ?

Answer: To the C.I.D on 10/8/1999 at Katima Mulilo.

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

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

Answer: I would like to repeat it because I was forced what to tell. They said they would shoot me."

[29] Question 13 reads as follows:

"(i) Did anyone tell you what to say in this statement ?

Answer: No. "

[30] Other questions followed and the magistrate eventually took down an incriminating statement from the accused.

[31] It is in my view necessary to quote question 17 which reads as follows:

> *"17. Whereas it appears that declarant:*
>
> *(a) is in his or her sound and sober senses;*
>
> *(b) was not unduly influenced thereto; and*
>
> *(c) freely and voluntarily desires to make a statement, he or she is told that he or she can now make such a statement."*

[32] If one has regards to the answers given to questions 8(i) and 12(ii) then it is difficult to fathom how it could have appeared to the magistrate that the accused *"freely and voluntarily desires to make a statement"*.
The answers to these questions amount to a categorical denial of voluntariness.

[33] Even if one has regard to the answer given to question 13 in comparison with the answer to question 12(iii) there is an obvious tension or contradiction between these two answers. In my view not even the answer to question 13 could have convinced the magistrate that the statement that the accused was about to give would have been given freely and voluntarily.

[34] It is a clear to me that having regard to the evidence (presented by the State, the accused person, and some of the answers given to the magistrate by the accused) that the State has not proved beyond reasonable doubt that the accused gave the statement freely and voluntary.

[35] In the result I rule the statement to be inadmissible.

[36] The accused objected to the admissibility statement in the sense that it was not given freely and voluntarily but was given when he had been unduly influenced to give such a statement. In particular that he had been assaulted when he was arrested at his village by police officers, that he was kept in solitary confinement at Grootfontein military base and assaulted, was never informed of Judges Rules or his constitutional rights, and that he was told to repeat a confession to the magistrate previously dictated to him by the police.

[37] It is common cause that the accused was arrested on 10 August 1999 at Ngukwe village in the Caprivi region by a group of approximately twenty police officers. On the same occasion one Chika Adour Mutalife was also arrested. The arrests were effected before dawn. All the police officers were armed. They were taken to Katima Mulilo police station and handed over to Chief Inspector Munaliza. They were not booked into the occurrence book as was normal practice. The accused was taken to Mpacha military base and later flown to Grootfontein military base where he appeared in court on 23 August 1999 for a bail application. On 14 September 1999 he appeared before a magistrate who recorded his *"confession"*. The three senior police officers who were involved in his arrest on 10 August 1999 were warrant officer Gideon Kashawa, Inspector Shebby Lukopani and Inspector Richard Mukena.

[38] Warrant officer Kashawa and Inspector Lukopani during their testimonies denied that the accused had ever been assaulted on the day of his arrest. Warrant officer Kashawa testified that he informed the accused of his right to remain silent and warned him of his other legal rights. Inspector Lukopani confirmed in his testimony that the accused had been informed of his right to legal representation at the time of the arrest at the village. Inspector Mukena in material respects

contradicted (during cross-examination) the evidence of Warrant officer Kashawa and Inspector Lukopani. He, Inspector Mukena, denied that the accused had been given any warning prior to his interrogation. He confirmed that once the accused had stepped out of the hut in which he had been sleeping he was beaten and kicked whilst questions were asked about his involvement in the attack. Inspector Mukena confirmed that the accused had then been taken from the village into the bush where the assaults and kicking continued because the police wanted an admission from the accused person that he had been involved in the attack on 2 August 1999, which admission the police eventually extracted from him on that day. He conceded that since he had witnessed himself these kickings, beatings and the accused being hit with the butt of a fire-arm, that he would have entered the injuries sustained by the accused in the occurrence book at the police station.

[39] It is common cause that when the accused had been brought to Katima Mulilo police station that these injuries had not been recorded neither the fact that the accused had been arrested.

[40] Inspector Mukena further confirmed what a state witness, Dascan Simasiku Nyoka, had testified in the main trial, in respect of what Nyoka had observed during this very same incident , namely that the accused, Sihela, was blindfolded and kicked to the point where the blindfold fell from his face, and that the accused had been hit with the butts of fire-arms.

[41] Mr January has in respect of this mini trial also argued that Inspector Mukena's evidence should be disregarded since he has discredited himself by giving two conflicting versions, one during his evidence-in-chief and a different version during cross-examination. The State has not during re-examination discredited Inspector Mukena, neither was there an application to declare

him a hostile witness. This Court cannot ignore the evidence of Inspector Mukena that the accused person had been assaulted at the time of his arrest. It must be accepted that the state witness (Inspector Mukena) has corroborated the evidence of Rodwell Sihela as well as the evidence of another state witness, Nyoka, to the effect that the accused had been assaulted by the members of the police force. Even if the State were to call another ten witnesses to testify that the accused had not been assaulted it would not have assisted the State since the State had by default (i.e. by not discrediting or by not applying the witness to be declared hostile) accepted the evidence of Inspector Mukena that the accused had been assaulted as alleged. Two mutually destructive versions had been presented by the State which undermined the proof that the statement given by the accused had been given freely and voluntarily.

[42] In addition when the accused appeared before the magistrate on 14 September 1999, one of the preliminary questions in the pro forma (referred to *supra*) was whether he had previously made a statement in respect of this incident, and if so, to whom and under what circumstances. The accused answered that he gave the statement to a police officer at the police station on 10 August 1999.
The following question was why he wanted to repeat the question, to which the accused answered as follows:

> *"The previous statement was not the real one. I was forced while they were armed with a fire-arm."*

[43] This accused also informed the magistrate on a previous question, that he had been hit with a fire-arm on his head and on his back. The magistrate observed a healed scar on the left side of his forehead.

[44] In addition when asked what is the date of the commission of the alleged offence in connection with which he wished to make a statement the accused person stated that he did not commit any offence.

[45] The magistrate did not explore the averment that he had been forced but continued to take down the statement since the magistrate was of the view that the declarant freely and voluntarily desired to make the statement without being unduly influenced thereto.

[46] I need at this stage not even consider the testimony of the accused person to conclude that the State has failed to discharge its onus to prove that the statement had been given freely and voluntarily.

This statement is accordingly declared to be inadmissible.

Chika Adour Mutalife

[47] The objection to the admission of the statement (admission) was that it was not made freely and voluntarily in the sense that the accused had been subjected to assaults, threats and promises. He was constantly interrogated and told what to tell the magistrate. The accused was also never warned of his constitutional rights nor warned in terms of the Judges Rules. This accused had been arrested together with Rodwell Sihela on 10 August 1999 at Ngukwe village. He was taken to Katima Mulilo police station and thereafter taken to Mpacha military base. He was flown to Grootfontein military base where he was kept. On 19 August 1999 his warning statement was taken and on 14 September 1999 he was taken to a magistrate who recorded his statement.

[48] The State called amongst others Warrant Officer Kashawa, Inspector Mukena and Inspector Lukopani. The police officers denied assaulting the accused person. I have indicated previously that Inspector Mukena had conceded that Rodwell Sihela who was together with the accused, Mutalife, had been assaulted, interrogated in the bush, and a confession extracted from him.

[49] Chika Mutalife testified about the same method followed by the police when they dealt with him namely, the assaults at the village. He was further assaulted in the bush and a confession was extracted from him. The accused person like Rodwell Sihela was not booked in at the charge office at Katima Mulilo police station but taken directly to Chief Inspector Monaliza who at that stage was in charge of operations. Inspector Mukena conceded during cross-examination that the normal procedure of booking-in suspects was not followed most probably because the injuries sustained by the suspects would have been recorded in the occurrence book in the charge office.

[50] It is clear from the questions which preceded the taking down of the statement by the magistrate that the accused person had made a prior statement to the police. It is also clear when asked why he wanted to repeat the statement the accused replied as follows:

> *"I want to make a correction. Some of the things I told the police were not correct. I was forced, a fire-arm was pointed at me."*

[51] The magistrate did not clarify or investigate this allegation but continued to take down the statement of the accused since it appeared to him that the accused freely and voluntarily desired to make a statement.

[52] Bosielo AJP *in S v Maasdorp 2008 (2) SACR 296 NCD at 305 h – 306 a* said the following regarding the duty of a magistrate when taking down a statement:

> *"Although, strictly speaking, a magistrate who takes a confession is not expected to act as an inquisitor or investigator, one does not expect him to act like a passive umpire who is simply there to ensure that formal rules are observed. Given the historical evolution of confessions in this country and the countless reported cases of abuse of their power and authority by the police, one expects that where there is some indication of improper conduct which could have had an undue influence on the accused to make a confession, that the magistrate who takes such a confession should investigate further the circumstances surrounding the alleged confession. Self-evidently, such conduct is congruent with the basic tenets of fairness to an accused person, which underpins the right of every accused person to be presumed innocent, the right to remain silent and the right not to be compelled to make any confession or admission that can be used in evidence against such person."*

[53] That such a duty rests upon any magistrate who is required to take down an admission or a confession has been recognized as far back as 1942. The Appeal Court in South-Africa expressed itself as follows in *Rex v Gumede and Another 1942 AD 398 at 433:*

> *"I think it is right to add a comment on the working of the rule laid down in the second proviso to sec. 273 (1) as illustrated by what took place in this case. That proviso, as already mentioned, renders a confession "made to a peace officer other than a magistrate or justice" inadmissible in evidence unless "confirmed and reduced to writing in the presence of a magistrate or justice". In this case admissions were obtained from both accused by the police, and the accused were then produced before a magistrate to make statements. Nothing was said to the magistrate as to what had taken place to the accused and the police prior to the appearance of the accused before him. The magistrate took down what they said as new statements previously made. And this seems to be a practice commonly followed, namely, that an accused or suspected person is interrogated by the police, and that, when, as a result of such interrogations, he has been brought to a confessing state of mind, he is taken to a magistrate and then makes his statement before him, as if he were making it for the first time. The result is that the proceedings before the magistrate, as faithfully recorded by him, may convey a very misleading impression of*

spontaneity on the part of the person making the statement, when, as a matter of fact, the statement is not really made spontaneously, but as a result of a series of interrogations, in the course of which illegitimate methods may have been applied for the purpose of inducing the person concerned to make his statement, including possibly admissions of guilt. Thus this proviso though devised, in part at least, for the protection of accused or suspected persons, may actually work very much against them, and tend to facilitate the obtaining of statements by improper means, which may not come to light owing to the dropping of a veil between the previous interrogations by the police and the subsequent appearance of the interrogated person before the magistrate.

If this second proviso is to be retained in law in its present form, some rule of procedure should be laid down as to questions to be asked by the magistrate, so that the person making the statement before a magistrate may be encouraged to disclose what has led up to his appearance before the magistrate for the purpose of making his statement."

[54] This comment was quoted with approval in *S v Jika and Others 1991 (2) SACR 489* where the Court expressed itself as follows at *500 e – g:*

"As subsequent authorities have correctly laid down, it is in such circumstances necessary that the questioning by the magistrate be such as, firstly to pierce the veil adverted to in Gumede's case and, secondly, to ensure that the result of such a piercing is that one is satisfied beyond reasonable doubt that whatever possible untoward circumstances may have prevailed at the time the accused made the statement to the police were no longer operative at the time when the accused appeared before the magistrate. As indicated in Gumede's case, the reason herefor is that there is a danger that by reason of untoward conduct on the part of the police the accused might have been brought to a confessing state of mind which might persist at the time of his appearance before the magistrate and which might give rise to an apparent but deceptive voluntariness on his part to make a statement to the magistrate."

[55] The accused informed the magistrate that he was forced to give a statement to the police. This should have alerted the magistrate to investigate the circumstances under which the accused had been brought to him in order to establish whether the accused had been brought to a

confessing state of mind which persisted at the time of the appearance of the accused person before him.

[56] There is no proof that the accused's volition was not affected by the force mentioned by him in the sense that he freely and voluntarily gave the statement to the magistrate.

[57] I am not satisfied that the State has discharged its onus to prove beyond reasonable doubt that exhibit EJU has been made freely and voluntarily and rule that the statement recorded by the magistrate to be inadmissible.

Joseph Omo Mufuhi

[58] The objection against the admission of an admission made by the accused to the magistrate was that it had not been made freely and voluntarily since the accused had been subjected to insults, accusations, assaults and torture. He was furthermore upon his arrest on 1 September 1999 not informed of his constitutional rights neither was he warned according to Judges Rules. He was taken to the Katima Mulilo police station where he was interrogated and assaulted. He was transferred to Grootfontein on 4 September 1999. He was told what to inform the magistrate and on 14 September 1999 he was taken to a magistrate who recorded his statement.

[59] Mr January submitted that the testimony of those members of the Namibian Police who effected the arrest of the accused person (i.e. officers Mbinge, Karstens, Chizabulyo, Aupa, Simasiku and other Special Field Force members) corroborated with each other to the effect that after the accused had been arrested he was taken to Katima Mulilo police station and that he had not been assaulted.

[60] I do not deem it necessary to give a summary of the evidence presented by each state witness neither do I deem it necessary to repeat in detail the testimony of the accused how, when and by whom he had been assaulted, threatened and told what to tell the magistrate.

[61] It is clear from the preliminary part of Exhibit EJS (i.e. the *"confession"* document), that the accused had when he appeared before the magistrate provided certain information to the magistrate.

Question 8(i) was whether he had any injuries and if so of what nature. The accused answered in the affirmative and added that he was slapped and hit with a fist for almost two days.

Question 8(ii) was how he obtained these injuries to which he replied as follows:

> *"I have a problem with my hearing as a result of the assault."*

[62] The observation by the magistrate was as follows:

> *"Shows a small black mark on the left side of the ribs – said he was kicked."*

[63] Question 12(i) was whether he had previously made a statement to which the accused answered in the affirmative.

Question 12(ii) was to whom, when and under what circumstances the statement was given, the accused replied that it was given to a policeman on 3 September 1999 at the police station.

Question 12(iii) was why he wished to repeat his statement to which the deponent replied as follows:

> *"They did not take my statement as I told them. They also did not re-read the statement to me."*

[64] Question 12(i) was whether anyone told him what to say in the statement to which the accused answered in the negative.

[65] One should not lose sight of the fact that the State bears the onus to prove the admissibility requirements of the statement beyond reasonable doubt. The magistrate called to testify on behalf of the State is a witness like any other police officer called to testify.

I have indicated that a magistrate who takes down an admission or a confession does not act like a recording machine but has a specific *duty* before a statement is taken down and that is to be satisfied (as far as the circumstances may allow it) that a deponent gives his or her statement freely and voluntarily.

[66] The magistrate in this instance failed to do this. The answers given to questions e.g. that no promises were made to the accused person, that what he was about to say in the statement would be the truth, that he has not been threatened with assault should he decline to make a statement to a magistrate or that he has not been threatened with assault or any other prejudice should he inform the magistrate of assaults or threats against him prior to him being brought to the magistrate, collectively do not negate the fact that the magistrate had been alerted by the accused person that he had been assaulted to the extent that he was half deaf at the stage he appeared in front of the magistrate.

[67] In this instance the magistrate was obliged to do more than merely recording what was said by the accused person but was obliged to pose further questions to the accused person in order to pierce the veil adverted to in *Gumede's* case *(supra),* in order to exclude any possibility

that the accused person was still in a confessing state of mind when the accused appeared before him.

The failure of the magistrate to do this results in a failure to comply with the admissibility requirement (voluntariness) contained in section 219 (A)(1) of Act 51 of 1977.

[68] It would in addition be inimical to the basic notions of fairness, justice and a fair trial to receive Exhibit EJS as admissible evidence in this trial.

[69] In the result my ruling is that Exhibit EJS for the reasons mentioned is inadmissible.

Kingsley Mwiya Musheba

[70] The accused objected to the statement (admission) on the basis that it was not made freely and voluntarily since the accused was subjected to assaults, undue influence, and torture. The accused was also not informed of his constitutional rights neither warned in terms of the Judges Rules at the time of his arrest on 2 August 1999. The accused had allegedly been assaulted from the time of his arrest until the next day when he was removed to Grootfontein military base and kept in solitary confinement for 20 days during which time he had been periodically interrogated, threatened and assaulted by members of the Namibian Defence Force. He was encouraged by Chizabulyo, a member of the Namibian Police to repeat a version of the events to the magistrate which had been provided to him by the police. He did it in order to save his life.

[71] It is common cause that the accused had been arrested on 2 August 1999 shortly after the attack on Katima Mulilo on 2 August 1999 and detained by members of the Namibian Defence Force, first at Mpacha military base and later at Grootfontein military base. His warning statement was obtained on 19 August 1999, and on 24 August 1999 he appeared in court in connection with a bail application. It was testified by Popyeinawa, a police officer, that he spoke

to him in Grootfontein prison and the accused indicated his willingness to make a statement to the magistrate. This was denied by the accused. On 17 September 1999 he was taken to a magistrate who recorded his statement.

[72] The State presented evidence with the aim of proving that the accused person had voluntarily given his statement to the magistrate. The accused testified in an attempt to prove contrary.

[73] When the accused appeared before the magistrate preliminary question were asked by the magistrate and it is necessary to refer to those questions and answers.

[74] Question 8(i) was to the effect whether the accused had any injuries to which the accused replied in the affirmative.
Question 8(ii) wanted to know how he had sustained those injuries.

[75] The accused replied to this question as follows:

> *"Answer: With a sjambok – several times and also kicked.*
> *(Observation by magistrate – described injuries – if any):*
> *Showed a bandage around the ribs – wound at left side of back and also other scars on the back and right arm and on the head and also on the nose."*

[76] Question 12(i) was whether he had made a previous statement to which the accused replied that it was given to the police at Grootfontein in the army base.
On the question 12(iii) why he wished to repeat that statement he replied as follows:

> *"I want to repeat it. At that stage I was confused as a result of the assault."*

[77] Question 13(i) was whether anyone told him what to say in that statement he answered in the negative.

[78] Mr January on behalf of the State critised the evidence of the accused person as contradictory regarding where he had been arrested and that the claim of the accused that what he informed the magistrate in his statement came from the police is fanciful and improbable in view of the detailed content thereof and his evidence that what is contained in his statement came from the police is so fanciful and improbable that this court should reject it as false.

[79] This argument *prima facie* appears to me (without making a ruling on those submissions) not without merit but since that State has accepted that it bears the burden of proving the admissibility requirement of voluntariness this Court must have regard in the first instance to the evidence presented by the State in order to determine whether the State has discharged its onus.

[80] I have referred *(supra)* to the duty of a magistrate when an accused person appears before a magistrate to have his or her statement recorded. When the accused person appeared before the magistrate on 17 September 1999 he not only informed the magistrate that he had been assaulted but the magistrate himself observed the injuries sustained by the accused person.

[81] I have indicated *(supra)* that where there is an allegation of assault by the police the magistrate must put further relevant questions to the accused person in order to establish eventually whether or not the statement the accused is about to give would be given freely and voluntarily and not when the accused has been brought to a confessing state of mind.

[82] Maritz J (as he then was) in *S v William Swartz and Others (unreported) Case CC 108/99 delivered on 29 October 1999* referred to the duty of the magistrate and said (at p. 22 of the judgment) the following:

> *"Of course, had the accused said anything which should have caused the magistrate to suspect that the accused's appearance before her was not freely and voluntarily, or that he had been unduly influenced, she would have had the duty to further enquire into the matter, and such a duty would have extended beyond the scope of the pre-printed form."*

[83] In *S v Tjihorero and another 1993 NR 398 at 404 G-H* Strydom JP (as he then was) said:

> *"Lastly, I wish to refer to the prescribed roneoed form which was used by Chief Inspector Terblanche when he took the statement of accused 1. Officers and magistrates using this form are, when the answer 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". (Underlining mine))*

[84] In this instance the magistrate did not only hear allegations of assault but he himself observed the effects of those alleged assaults. It is in my view highly unlikely that the magistrate could have been under the impression that the accused person freely and voluntarily desired to make a statement.

[85] If one has regard to all the questions and answers given by the accused at the preliminary stage, specifically the replies to questions 8(i), 8(ii), 12(ii) and 12(iii) *(supra)* one would be very hard pressed to conclude that the tenor of the answers given, beyond reasonable doubt, tend to

support the requirement of voluntariness. On the contrary in this particular instance the answers (specifically to questions 8(i), 8(ii), 12(ii) and 12(iii) point towards coercion.

[86] The State has in my view not proven the admissibility requirements as required by section 219 A (1) of Act 51 of 1977, accordingly the admission (Exhibit EJV) is ruled to be inadmissible evidence.

O'Brien Sinkolela Mwananyambe

[87] The objection to the admission of the statement (confession) was that he had been assaulted by two police officers, namely Evans Simasiku and one Sergeant Kombungu on 2 February 2000. He was taken to Katima Mulilo police station where the assaults and threats continued. A warning statement was taken on 3 February 2000. He was subsequently on 26 April 2000 transferred to Grootfotnein prison where he was at some stage informed that he should make a confession in line with a statement prepared by the police and should he fail to comply with these instructions further assaults would follow. On 3 May 2000 he was taken to a magistrate where his statement was recorded.

[88] Officers Simasiku and Kombungu denied that the accused had been assaulted at the time of his arrest at the village of Masikotwani and denied that he had subsequently been threatened or assaulted at the Katima Mulilo police station. It was put to Simasiku during cross-examination that on 28 April 2000 he (i.e. the accused person) was visited in Grootfontein Prison by police officers i.e. himself (Simasiku), Mbinge, Kombungu and a certain Bernard Sachibambo where the accused was informed that he should make a confession, the contents of which should be in line with his warning statement. This was denied by Simasiku, who testified that when the accused

person was transferred to Grootfontein Prison, Kombungu was not part of the escorting party. He further denied that the accused had been threatened that should he not do as he was told, further assaults would follow. Mbinge also denied that he was present at the Grootfontein Prison when the accused had allegedly been informed to give a confession.

[89] The magistrate who recorded the statement (confession) testified that she asked him preliminary questions before taking down his statement.

[90] The accused was informed of his right to legal representation but never informed of his entitlement to legal aid.

[91] This Court has in the past held (See *S v Malumo and Others (2) 2007 (1) NR 198 at 211* that Article 12 of the Namibian Constitution means that the entire process of bringing an accused person to trial and the trial itself needs to be tested against the standard of a fair trial.

[92] Article 12 (1)(e) of the Namibian Constitution provides that all persons shall be afforded adequate time and facilities for 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.

[93] In *S v Kasanga 2006 (10 NR 348* Heathcote AJ remarked *at 360 D – 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."*

I endorse this passage.

[94] Even though the entitlement to legal aid is not a fundamental right in terms of the provisions of the Namibian Constitution, how else would an unrepresented lay person be in a position to exercise his right to legal representation if this entitlement is (inadvertently ?) withheld for him or her ?

[95] In *James Gadu v The State 2004 (1) NCLP 48 at 56* Manyarara AJ suggested a simple format to inform an accused person of his right to legal representation:

> *"(a) that he has a right to be defended by a lawyer ...;*
>
> *(b) that he has the right either to hire and pay a lawyer 'of his choice' or, alternatively apply to the legal aid officer for a lawyer to be provided by the State;*
>
> *(c) that if he chooses to apply for a legal aid lawyer, the clerk of court will assist him in completing the necessary forms; and*
>
> *(d) that the legal aid office will consider his financial circumstances and, based on its finding, it will decide and inform him whether he will be required to make any contribution towards the cost of the legal aid lawyer to be provided to represent him."*

[96] In this instance, as in the other matters, the failure by the magistrate to inform the accused of his entitlement to legal aid is fatal.

[97] In the result this Court rules exhibit EKL inadmissible.

Richwell Makungu Matengu

[98] This accused person did not testify. The statement (Exhibit EJX) was handed up by the State because the magistrate who took down the statement was in Court. This statement was not in issue. It is not an admission neither is it a confession. It is a total denial of the commission of any offence.

Brighton Simisho Lieleso

[99] The accused deposed to a statement (Exhibit EHR) before a magistrate on 6 September 1999 in Grootfontein where to the question whether he needed legal representation the accused replied:

> *"I need a lawyer, but I have no money. You can just continue without a lawyer."*

[100] In reply to the question whether he had any injuries he replied:

> *"No, but I was beaten on the buttocks with a sort of stick – black one."*

[101] The observation by the magistrate was as follows:

> *"Observe no injuries, but he states that he was beaten three (3) times on buttocks and once on face."*

[102] The accused person informed the magistrate that he elected to be legally represented but was not in a financial position to do so. This was an ideal opportunity for the magistrate to have informed the accused of his entitlement to legal aid. This the magistrate failed to do.

[103] The accused in addition informed the magistrate that he had been assaulted by police officers. The magistrate failed to put any question to the accused person in this regard. One would have expected the magistrate to ask the accused at least when these assaults took place and whether those assaults had anything to do with the appearance of the accused person before him.

[104] It is further clear from (Exhibit EJY) that the accused on 14 September 1999, eight days later, appeared before a different magistrate with the aim of making a statement when the accused person this time more categorically informed the magistrate that he needed to consult with a legal representative before he would say anything.

[105] I do not know why it was necessary to have the accused person before a magistrate for a second time when a statement had already been obtained at the first occasion.

[106] The magistrate at the first occasion could not have been satisfied that the accused person, in the absence of any clarification by him, was about to give his statement freely and voluntarily.

[107] Exhibit EHR is accordingly ruled to be inadmissible. Exhibit EJY was not in dispute. The magistrate stopped recording when the accused indicated that he wanted legal representation.

Albert Sekeni Mangilazi

[108] The objection to the admission of the statement was that it was not given freely and voluntarily and that the accused had been unduly influenced to give the statement. It was alleged that the accused had been brutally assaulted by three police officers (Armas Manya, Litoli Petrus Shanyegange and Haikali Immanuel) when he was arrested. At the police station officer Popyeinawa and another officer known as Robert Chizabulyo interrogated him and further assaulted him. Robert Chizabulyo and officer Evans Simasiku forced him to say things they wanted to hear. Police officer Bonaventure Liswaniso threatened the accused and made it clear that he should follow what the other officers were demanding.

[109] The State called a number of witnesses. Armas Manya testified that he was one of the arresting officers on 18 July 2002. The accused and Frederick Tembilwa were arrested early one morning whilst on routine patrol duties. These two male persons were searched and two AK 47 magazines were found in their possession. He denied that these two male persons had been assaulted by himself or any one of his colleagues (Sergeant Iitula, Constable Mashina and Constable Haikali) at the time of his arrest.

[110] The State did not call the other officers present at the time the accused was arrested.

[111] It is not clear from the evidence presented by the State under what circumstances the accused felt compelled to make a statement, exhibit EJK, to the magistrate.
Police officer Kombungu testified that after he had recorded the warning statement of the accused on 21 July 2002 the accused himself offered to go to the magistrate for a confession, whilst officer

Evans Simasiku testified that the accused person indicated his willingness to give a confession to the magistrate after he himself (i.e. Simasiku) had *asked* the accused whether he would be willing to give a confession to the magistrate.

[112] The magistrate during the preliminary questions explained to the accused his right to legal representation but failed to alert the accused to his entitlement to legal aid.

[113] The authorities referred to *(supra*) relating to the duty of a magistrate to adequately inform an undefended accused person of his right to legal representation are applicable in this instance.

[114] The magistrate's failure to inform the accused person of his entitlement to legal aid is an irregularity which vitiated the subsequent proceedings.

[115] Exhibit EJK is accordingly ruled inadmissible.

Michael Mubiana Mundia

[116] The objection to this Court receiving the statement (admission) was that the admissibility requirements referred to in section 217 of Act 51 of 1977 had not been complied with *inter alia* because the statement had been obtained by force.

[117] The accused was arrested on 27 January 2000 by members of the Namibian Police Force. On 31 January 2000 his warning statement was obtained. On 6 April 2000 he was transferred to Grootfontein and on 17 July 2000 he gave a statement to the magistrate.

[118] Mr McNally who appeared on behalf of the accused in his heads of argument raised two issues. Firstly that the right to legal representation had inadequately been explained to the accused person, and secondly that the magistrate failed to make further enquiries when the accused person replied that he was forced.

[119] It was submitted by Mr January who appeared on behalf of the State that the issue of his right to legal representation was never raised as one of the objections against admissibility and the accused during his evidence did not testify that he did not know or did not understand his right to legal representation. It was also submitted that the question of legal representation was never put in issue during cross-examination. It must however be added that the magistrate was during cross-examination questioned about her failure to inform the accused that he has a right to apply for legal aid.

[120] In reply of the first issue the following appears on Exhibit EKK:

> *"The declarant is informed that he or she has a right to legal representation of his or her choice. If he or she wants to make use of legal representation he or she will be afforded such an opportunity before making a statement."*
> *Q. Do you want legal representation ?*
> *A. No. "*

[121] The magistrate during cross-examination gave an ambivalent reply to the question whether she had informed the accused person of his right to legal aid. She first stated that the issue of legal aid does not appear on the pro forma but later stated that she must have informed him about legal aid and immediately conceded that there is no proof that she informed him of such a right.

[122] In *S v Tobias Kau and Others 1995 NR 1 at p. 11* on the topic of cross-examination the Supreme Court held that all that the magistrate had told the accused persons about cross-examination should have been written down.

[123] On p. 12 the court expressed itself as follows:

> *"Without a precise record giving particulars of the nature of the explanations made to the appellants it is difficult to come to the conclusion that the magistrate fully explained to the appellants their rights."*

[124] It is thus difficult for this Court to accept that the accused's right to legal aid had been explained in the absence of such explanation in writing.
(See also *S v Wellington 1990 NR 20 on 25).*

[125] It is trite law that an accused has a right to legal representation and to be informed of such a right.

[126] In *S v Hlongwane 1982 (4) SA 321 NPD at 323 Didcott J* said the following:

> *"A judicial officer trying an accused person who has no legal representation must explain to him his procedural rights, and assist him to put his case before the court whenever his need for help becomes apparent. Such duty has been proclaimed time and again. Informing the accused person of his right to call witnesses is one of its most important aspects. To let him know of that right, yet not how to exercise it when he has no idea and starts running into trouble, is not of much use. Mere lip service to the duty is then paid."*

[127] An accused person must be informed that he is entitled to apply to the Legal Aid Board for assistance.

(See *S v Radebe 1988 (1) SA 191 TPD at 196; S v Gadu 2004 (1) NCLP 48).*

[128] In *S v Nyanga and Others 1990 (2) SACR 547 (CK) Heath J* stated as follows:

> *"The explanation to the accused of his rights is never a mere formality. The explanation should always be supplemented to cover the particular circumstances and to do justice to the particular accused. The presiding officer is not merely a recording machine and he must satisfy himself that the accused understands and appreciates the explanation and his rights."*

(See *also S v Visser 2001 (1) SACR 401 CPD at 405 d – 3).*

[129] In *Radebe (supra)* Godstone J referred to *Powel v Alabama 287 US 45 (1932 at 68-9* where Justice Sutherland said the following:

> *"Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue, or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."*

and remarked at 195 G: *"How much more is this the case with the unlettered and unsophisticated person who so often appears in our courts ? "*

(See also *S v Sibiya 2004 (2) SACR 82 WLD at 89 (f) – (g)).*

[130] In *S v Kasanga 2006 (1) NR 348* the court dealt with the question whether or not the appellant had been properly informed of his right to legal representation. At 365 I – 366 A the following appears:

> *"... what was stated to the appellant in the district court was the following: 'Accused informed that they have a constitutional right to be defended by a lawyer of his own choice and means.'*
> *I am not so sure what it means if someone is informed that he has a constitutional right to be defended by a lawyer 'of his own choice and means'. What I do know is that it is highly unlikely that the appellant would have known what was conveyed to him. Does this comply with the provisions of art. 12 of the Namibian Constitution ? In my view, it does not."*

and at 368 A – C

> *"The case was a serious one. It concerned a charge of murder. Inevitably, the magistrate must have known that if the accused was found guilty, he would face a sentence of long-term imprisonment. The explanation to him about his rights to obtain legal representation was totally insufficient. It was also misleading. No indication whatsoever was recorded in the district court that the appellant was entitled to apply for legal representation with the Legal Aid Board. He was not informed how to go about exercising his rights. In my view, the irregularity vitiated the proceedings."*

[131] There is in my view no merit in the submission that an accused person must first raise the issue of lack of legal representation or that his or her right to legal representation has not properly been explained to such accused person before this Court may decide the issue.

[132] An accused person is entitled to a fair trial including fair pre-trial proceedings.

[133] It is the *duty* of judicial officers to adequately inform an accused person of his or her constitutional right to legal representation.

(See *S v Kau and Others 1995 NR 1 SC at 7 C, S v Kapika and Others (1) 1997 NR 285 at 288. See S v Melani and Others 1996 (1) SACR 335 at 348 I – 349 a).*

There are exceptions e.g. where a lawyer appears before a judicial officer or where other *"educated and knowledgeable"* persons appears before a judicial officer. (See S v Kau *(supra)* at 7D)

[134] Froneman J in *Melanie and Others (supra)* explained that the *"purpose of the right to counsel and its corollary to be informed of that right ... is ... to protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty"* and that these rights exists from the inception of the criminal process.

[135] I endorse what Dumbutshena AJA (as he then was) said in *Kau (supra)* at *9 B – C*:

> *"However the response from those who want to see equality and fairness in criminal trials should not be that legal aid for all accused in impossible. They should strive to work for entitlement to legal representation for all perhaps not now but in future. More often than not indigent accused are rushed to courts because the police have obtained confessions before going to court. It may be there that the unfair trial started. When these people are in custody of the police more often than not determines whether an unrepresented accused pleads guilty or not guilty."*

[136] This Court has held in *S v Tobias Nahenda (unreported case no. CC 56/2007 delivered on 6 October 2008*) that the right to be informed of legal representation includes the entitlement to legal aid.

On p. 7 par. 12 Silungwe AJ stated as follows:

> *"However, an accused person (a person charged with an offence) is entitled to apply for legal aid. Hence, the provisions of section 10(2) do not encompass a person who is merely*

suspected of having committed an offence. This means that an arrested person ought to be informed, not only of his right to legal representation of his choice, but also of his entitlement to approach the Director of Legal Aid for statutory legal aid."

and at paragraph 13

"In so far as Const. Kapembe is concerned, it is common cause that when she explained the rights of the accused (who were already under arrest) just before they could make formal statements to her (which she took down in writing), she also explained to them their right to legal representation but, in so doing, omitted to inform them of their entitlement to apply to the Director of Legal Aid for statutory (State-funded) legal aid. This omission, which constituted a failure to properly explain the accused's right to legal representation was, in my view, fatal."

[137] It must be stated that *in casu,* it appears from the warning statement (Exhibit ELR) that his *"right to consult a legal practitioner of his/her own choice and at his/her own expense"* was explained to the accused person. The warning statement is silent regarding his entitlement to legal aid.

[138] There is merit in the submission by Mr McNally that where an caused person who appears in *court* has the right to be informed of legal representation and that if he cannot afford a legal practitioner of his choice he may apply for legal aid is juxtaposed to the position of an accused person who appears before a magistrate (in office) to have a confession or admission taken down is merely informed of the right to legal representation (without informing such person of the entitlement to legal aid) such accused person before the magistrate (in office) is at a disadvantage vis-a vis the person who appears in *court.*

[139] The second issue raised *(supra)* was the result of the reply by the accused when the magistrate took down his statement that he was forced to give a statement on 27 January 2000 to the police officers.

[140] It appears from an answer to the question whether he has injuries and the nature thereof the accused replied as follows:

> *"I don't have injuries now. I was injured during January 2000."*

His reply to the question how he sustained those injuries was as follows:

> *"I was syamboked."*

[141] Sjamboked was spelt wrongly.

[142] The magistrate did not investigate those allegations but proceeded to take down a statement from the accused person.
I have already *(supra)* discussed case law and the rationale why an magistrate must in appropriate instances investigate why a person is willing to repeat a prior statement given to the police in order to establish whether the statement to the magistrate is made freely and voluntarily.

[143] Where the magistrate did not question the accused about those allegations how could such a magistrate be satisfied that the statement that the accused person was about to give would be given freely and voluntarily ?

[144] Similarly there can be no basis upon which a magistrate can say that he or she was of the view that the assaults mentioned by the accused person has not influenced the accused to make a confession or admission if there is no evidence that such a magistrate had investigated those allegations.

[145] The State must prove beyond reasonable doubt that a statement to the magistrate was made freely and voluntarily. In *S v Mofokeng and Another 1968 (4) SA 852 at 854 H – 855 A* the following was said in relation to this onus:

> "I may not receive in evidence a confession, even if I believe its contents to be true, unless I am satisfied beyond reasonable doubt that it was freely and voluntarily made and that the accused person who made it was not unduly influenced within the meaning of S. 244 (1) of the Criminal Procedure Act to make it. The fact that the accused are unreliable witnesses does not of itself mean that the state's burden of proof has
>
> necessarily been discharged. In saying that I am not unmindful of the remarks of Williamson J A in *S v Mkwanazi 1966 (1) SA 736 A at 747.* Those remarks embody an injunction against the rejection of a confession on the basis of mere conjecture unsupported by any evidence. But considered in their context they not mean that a trial Court which has found the accused to be an unsatisfactory witness, is thereby relieved of the duty to weigh up the evidence as a whole in order to decide whether the prerequisites to admissibility have been proved beyond reasonable doubt."

[146] The accused person is relatively a unsophisticated person. He attended school up to grade 7 which he failed and worked at a school hostel as a *"cooker"*. I take if that this has something to do with the preparation of meals.

[147] In respect of the first issue raised (supra) my view is that the explanation by the magistrate of the right of the accused to legal representation was inadequate and the accused person could not have made an informed decision that he needed no legal representation.

[148] The State's failure to adequately or fully explain the rights of the accused to legal representation has as a consequence the inadmissibility of the statement for the reasons mentioned (supra).

[149] Regarding the second issue, the failure of the magistrate to question the accused regarding allegations of coercion has a similar result in the sense that the State failed to prove that the statement was made freely and voluntarily.

[150] In the result exhibit EKK is ruled inadmissible.

Tobias Mushwabe Kananga

[151] The objection against the admissibility of the admission was on the ground that the statement had not been obtained freely and voluntarily in the sense that he had been assaulted by members of the police, that he had not been warned of his constitutional rights neither had he been warned according to Judges Rules. He was threatened by the police to tell the magistrate a certain version provided to him by the police.

[152] The accused was arrested on 25 March 2000 by members of the Namibian Police. His warning statement was obtained by detective warrant officer Mbinge on 28 March 2000 at Katima

Mulilo. He was transported to Grootfontein on 26 April 2000. He gave a statement to the magistrate at Grootfontein on 4 May 2000. The state witnesses denied that the accused had been assaulted, forced or threatened to make a statement.

[153] In terms of Exhibit EKM (the admission) the accused informed the magistrate that he had given a statement to Warrant Officer Simasiku on 25 March 2000, that he gave it in a friendly way and that he was not forced.
His reply why he wished to repeat the statement was that he would like to repeat it in order to apologise *"before the magistrate"*.

[154] In terms of his warning statement he was informed that he had a right to consult a legal practitioner of his choice and at his own expense, prior to deciding to remain silent or answer questions or give an explanation. He indicated that he did not wish to consult a legal representative.

[155] In terms of the admission statement the accused was informed that he has a right to legal representation of his choice and that if he wants to make use of a legal representative he would be afforded such an opportunity before making a statement.
The accused replied as follows:

> *"I would like to confess now. I will later engage an attorney for purpose of trial."*

[156] In neither the warning statement nor the admission statement was the accused informed of his entitlement to legal aid.

[157] In his evidence-in-chief the accused stated that he informed the magistrate that he wanted to confess since he was in fear and that he was afraid of the interpreter and the police officers who had been waiting outside the office of the magistrate who had allegedly informed him that he would be killed should he make a mistake.

[158] I have already *(supra)* referred to relevant case law regarding the fundamental right of an accused person to legal representation which includes his or her entitlement to legal aid and the consequences of not informing an accused person, in particular a layperson, of such entitlement even during pre-trial procedures.

[159] In this regard the court in *S v Owies 2009 (2) SACR 107 CPD* on regard the issue of legal representation, said the following at 111 i – 112 a:

> *"It must be borne in mind that it is not uncommon to come across cases where accused persons have been advised of their constitutional rights to legal representation, but decide to decline and represent themselves even where they face serious charges. In most cases such decisions are based on misunderstanding the free legal representation system. Judicial officers are encouraged to go an 'extra mile' where accused are facing serious charges, to encourage them to opt for legal representation rather to defend themselves."*

[160] In my view a magistrate is obliged even during pre-trial proceedings to adequately inform an accused person of his entitlement to *"the free legal representation system"* in order to eliminate any misunderstanding.

[161] The accused's highest academic qualification at the time of his arrest was that he reached Grade 10. It is not clear from the record what his occupation was at that stage but that the accused faced very serious charges *inter alia* of high treason and murder is common cause.

[162] It is recognized that the entitlement to legal aid in Namibia is not founded in the provisions of the Constitution, like in South Africa. It is founded in the provisions of the Legal Aid Act 29 of 1990 and in particular section 10(2) which reads follows:

> *"Any person charged with an offence may apply to the Director for Legal Aid and if the Director is of the opinion that*
>
> *(a) having regard to all the circumstances of the case, it is in the interest of justice that such person should be legally represented; and*
>
> *(b) such person has insufficient means to enable him or her to engage a practitioner to represent him or her, the Director may grant legal aid to such person."*

[163] In *S v Sikhipha 2006 (2) SACR 439 SCA at 443 f – g Lewis JA* said the following regarding the court's duty when explaining the rights of an accused person:

> *"It is not desirable for the trial court of such cases merely to apprise an accused of his rights and to record this in notes; the court should at the outset of the trial, ensure that the accused is fully informed of his rights and that he understands them, and should encourage the accused to appoint a legal representative, explaining that legal aid is available to an indigent accused."*

[164] The consequences of failure by a judicial officer in informing an unrepresented accused person that he is entitled to legal aid is a fatal irregularity incapable of being condoned or cured in subsequent proceedings.

(See *S v Tobias Nahenda (supra); S v Owies (supra).*

[165] In the result my ruling is that exhibit EKM is inadmissible.

Chris Sitale Mushe

[166] The objection against the admissibility of his statement (admission) was that prior to the making of the statement the accused was threatened to give a statement which had been provided to him by the police. He was threatened that he would be shot and killed should he fail to give a statement. In addition his constitutional rights had not been explained to him neither was he warned according to Judges Rules.

[167] The evidence on behalf of the State was that the accused had been arrested on a charge of theft of stock on 10 December 1999 at his village. He was locked up in the police cells in Katima Mulilo where he was on 12 December 1999 confronted by officer Simasiku about his involvement in the attack on Katima Mulilo on 2 August 1999. His warning statement (exhibit EKS) was obtained on 14 December 1999 and he appeared in court on 16 December 1999. He was transferred to Grootfontein on 6 April 2000. He gave a statement (Exhibit EKN) to the magistrate in Grootfontein on 17 July 2000. The police officers denied assaulting, threatening or intimidating him to give a statement. The accused testified that at the time of his arrest he had never attended any school.

[168] The accused had in both his warning statement and in the statement to the magistrate been informed of his right to legal representation. He had not been informed of his entitlement to legal aid. The accused claimed to have been assaulted by various police officers, including officer Simasiku, which assaults resulted in him giving statements to Simasiku and the magistrate.

[169] During the preliminary questions by the magistrate the accused person stated that he had not been assaulted or threatened with assault to persuade him to give a statement.

[170] When asked by the magistrate whether he had any injuries he stated that he had none but added that he was injured at the time of his arrest when he was hit with a fire-arm by the police. The magistrate observed an old scar on his chest.

[171] It was submitted by the State that the pro-forma used by the magistrate should be looked at as a whole with all the warnings, questions and answers and that one should not selectively pick on certain questions and answers and conclude that requirements have not been complied with. This may be partially correct, however only one answer indicative of coercion may raise the suspicion that the statement is not made freely and voluntarily and such an allegation of assault, threats or promises must be investigated by the magistrate before taking down the statement of such accused person. Why was the magistrate not interested to know how he was injured at the time of his arrest or why he had been assaulted with a fire-arm by the police ? Further questioning along these lines could have revealed that the accused was brought to a confessing state of mind or it could have revealed that the injuries referred to by the accused person in no way influenced the accused to make a statement to the magistrate.

[172] As indicated (supra) the magistrate is not required to cross-examine a declarant. What is required is further questioning to clarify ambivalent answers or to explain certain replies for it is the magistrate who must be satisfied that a statement is given freely and voluntarily.

[173] In my view having regard to the allegation of assault and the allegation that he had been injured during his arrest, the magistrate in the absence of any further enquiry, could not have been satisfied that the statement was being given freely and voluntarily.

[174] Regarding the duty of the magistrate to inform an accused person of the entitlement to legal aid and the failure to do so, I wish to refer to the authorities discussed *(supra)*.

[175] In my view, for the reasons mentioned, Exhibit EKN is inadmissible.

John Tibiso Masake

[176] The objection to the production of the alleged confession was it was not made freely and voluntarily, but that the accused was tortured by members of the Namibian Police which torture and threats resulted in the accused person presenting a story to the magistrate which originated from the police. He stated that he was informed by an officer (the late Chizabulyo) that he did not need a lawyer since he was going to be used as a witness.

[177] The evidence presented by the State was that the accused was arrested during the first week in January 2001 in Katima Mulilo. On the 5th of January 2001 Sergeant Evans Simasiku obtained a warning statement (Exhibit EJH) from the accused person. On 16 January 2001 he was taken to the magistrate in Katima Mulilo who recorded a statement (Exhibit EJJ) of the accused. On 22 January 2001 he pleaded in terms of the provisions of section 119 of Act 51 of 1977 in the Grootfontein magistrate's court (prescribed over by a different magistrate than the one who took down his statement in Katima Mulilo).

[178] The magistrate who took down the confession of the accused informed him of his right to legal representation of his choice but did not inform him that he is entitled to apply for legal aid.

[179] During cross-examination of the magistrate who recorded the confession, she was asked having regard to the fact that the accused person was an uneducated person, and that he faces

serious charges whether she was not obliged to advise the accused person to obtain legal representation before continuing with the confession. The magistrate stated that she is not a *legal advisor* but *assisted* the accused by telling him that he needs legal representation before giving a confession.

[180] It is a matter of semantics whether a magistrate is bound to advise or assist an undefended accused person, what is of importance is that she has a duty particularly where an unrepresented and uneducated person appears before her to inform the accused person to obtain legal representation specially in the light of the very serious charges the accused is facing.

[181] I have *(supra)* referred to relevant authorities concerning the duty to inform an accused person of his right to legal representation and the consequences of such failure to inform an uneducated and unrepresented person of his or her entitlement to legal aid.

[182] In this particular instance the failure of the magistrate to inform the accused person amounts to a fatal irregularity.

[183] The fact that the rights of an accused person had been explained more than once (i.e. in the warning statement and the confession) cannot be of any assistance where both explanations were fatally defective.

[184] It was submitted by the State that the Court should have regard to the section 119 proceedings in the Grootfontein Magistrate's Court on 22 January 2001. In terms of his explanation the accused admitted in court that he committed high treason. During these proceedings the accused at some stage indicated to the court that he needed legal aid. The

magistrate asked the accused whether he would like to plead to the charge and thereafter apply for legal aid to which the accused person agreed. This in my view is an irregularity committed by the magistrate. The accused should first have been given the opportunity to apply for legal aid before any charge was put to him.

[185] I am furthermore unable to see how what was said in court proceedings four days after the recording of the confession may have had any bearing on the issue of voluntariness. It can further not be argued that the accused person had been aware of his entitlement to legal aid where he had been informed of such entitlement *after* he had given a statement to the magistrate.

[186] Where an accused person's right to legal representation has not adequately been explained to him he would not have been in a position to make an informed decision whether or not he would be better off without legal representation.

[187] My ruling regarding exhibit EJJ is that for the reasons mentioned it is inadmissible.

[188] As I have indicated *(supra)* where there are allegations that an accused has been forced to give a statement to the police the important question is to what extent did such force influence his presence before a magistrate.

[189] This was aptly stated in S *Mpetha and Others (2) 1983 (1) 576 CPD at 593 H* with reference to an article by AP Paizes in the *South African Journal of Criminal Law and Criminology vol. 5 No 2 (July 1981) at 133*:

"The proceedings at the 'mansion' (the Court) cannot be divorced from the procedure in the 'gate house' (the police station) and the Judge should take care to ensure that the confession presented in the 'mansion' was not improperly obtained in the 'gate house'."

[190] In my view a magistrate who is requested to take a statement from an accused person, especially where such accused person faces serious charges, has the same obligation.

[191] I agree with Williamson J where in Mpetha *supra* at 585 D he said:

"An improper influence which is trivial must be ignored; so also an improper influence, which through not trivial in itself, is shown in fact not to have had any meaningful influence on the will of the confessor".

[192] The question put differently that should have been determined by the magistrate, in those instances where there were allegations of assaults, threats or other undue influence was, whether those factors had dissipated by the time the statement was made?

[193] The answer to the aforementioned question could only have been obtained if the magistrate had made the required investigations.

[194] It must be borne in mind that the investigating officers have from the arrest of the accused persons at least until they appeared before the respective magistrate's and thereafter, easy access to the accused persons, and that what was said many years ago in *R v Barlin 1926 AD* is still applicable today in the determination of the question of voluntariness. At 465-466 in Barlin the learned Chief Justice said:

> *"A police officer who has charged or arrested an accused person, or who has him in his custody, occupies in regard to that person a very special position of authority – one which may in itself strongly affect a weak or ignorant man"*

and furthermore:

> *"For though a police officer should be unhampered in the prosecution of enquiries while investigating a crime it is not desirable that he should question those whom he had definitely decided to arrest or has arrested. The right of interrogation at that stage is apt to be abused, and questions are likely to be put, not to investigate the offence, but to manufacture evidence against the person whom it has been decided to charge"*.

[195] It is common cause that some accused person had, months after they had been deposed to warning statement, been approached by investigating officers in Grootfontein prison, with the view to get the accused person to make statements before magistrates.

[196] A number of undefended accused persons earlier during the trial refused to attend the court proceedings until such time as the State has closed its case and were absent when the court received statements allegedly made by them to different magistrates.

[197] It was submitted on behalf of the State that no prejudice would follow should the court at this stage come to a decision regarding the admissibility of those statements. It was submitted that since a ruling in a trial-within-a-trial is interlocutory, no prejudice would follow since the accused persons will again attend the court proceedings. It was submitted that since there was no evidence to gainsay the evidence presented by the State that the statements of the undefended accused persons must be accepted as admissible evidence against them.

[198] It would be an incorrect approach to admit the statements automatically merely because the State's case is unopposed. It is necessary, in my view, to look at each statement in order to determine whether the admissibility requirements have been proved by the State beyond reasonable doubt.

[199] In *Mofokeng (supra)* it was stated that a court which has found an accused person to be an unsatisfactory witness is not relieved of the duty of weighing up the evidence as a whole in order to decide whether the prerequisites of admissibility have been proved beyond reasonable doubt. This is equally applicable in cases where the accused persons have not challenged the State's case.

[200] If during a trial, and at the close of State's case, there is found to be no *prima facie* case against the accused, it is not necessary for an accused person to testify at all, and such an accused person may be discharged at the close of State's case. It is in my view necessary to decide whether the State has *prima facie* (complied with) the admissibility requirements in respect of statements to magistrates before considering the consequences of the failure of the accused persons to challenge the evidence presented on behalf of the State.

[201] I shall therefore consider the contents of the various statements in order to decide the question of admissibility.

[202] **Ndala Saviour Tutalife** appeared before the magistrate in Grootfontein on 18 November 1999. His right to legal representation was explained. He replied that he needed no representation but would need such representation during the trial. He was not informed that he may apply for legal aid. He informed the magistrate that he sustained injuries at the stage he was in Katima Mulilo and that the injuries were sustained *"by a sjambok"*. The magistrate observed a

vague line on his back. He further informed the magistrate that he voluntarily gave a statement to the police on 14 November 1999 in the district of Gobabis and that he wished to repeat the statement because *"it is the truth and I feel it will carry more weight done before a magistrate"*. The magistrate during her testimony stated that she observed a vague line, 25 cm in length on his back.

[203] The magistrate did no further investigation in the sense of questioning the accused why he had been assaulted with a sjambok.

[204] **Postrick Mario Mwinga** appeared before a magistrate on 12 November 1999 in Tsumeb. His right to legal representation was explained. He stated that he did not want to obtain legal representation at that stage. He stated that he has not been threatened or assaulted to make a statement and further stated that he was free of injuries.

[205] He informed the magistrate that he had previously given a statement to Sgt. Popyeinawa. When asked when and under what circumstances he stated:

> *"Warrant Officer Bobby from Katima Mulilo police told me that I must make a statement to them. I was taken to Popyeinawa."*

Asked why he wished to repeat the statement he said:

> *"Sgt. Popyeinawa come to my cells before lunch today and said I must give a statement before a magistrate and I said I am willing to do so."*

[206] He was not informed that he may apply for legal aid.

[207] The magistrate did not investigate the circumstances under which he was told to make a statement, why he was told to make a statement and why it was necessary to repeat such a statement to a magistrate.

[208] **Joseph Kamwi Simawhewhe** appeared on 15 September 1999 before a magistrate in Grootfontein. His right to legal representation was explained and he elected *"to make a statement without the assistance of a legal representative"*. He informed the magistrate that he had sustained injuries. To the question how he sustained these injuries the following appears:

> *"Scar/cut – head on the left eyebrow – mark on right side of head below the ear – scars counted ± 20 marks on the back, can see the scar/cut above left eye, marks on the back – about 8 times beaten with sjambok, with branches."*

[209] He informed the magistrate that he had previously given a statement to a soldier on 24 August 1999 in a military camp and his reply to the question why he wanted to repeat the statement was:

> *"Maybe you want to hear it. I want to tell you in short."*

[210] To the question what was the date of the commission of the alleged offence in connection with which he wanted to give a statement he replied:

> *"I did not commit a crime during 1999."*

[211] He was not informed that he may apply for legal aid. The magistrate, in spite of the extensive visible injuries failed to make any further investigation.

[212] **Sylvester Lusiku Ngalaule** appeared on 15 September 1999 before a magistrate in Grootfontein. His right to legal representation was explained. He replied that he wanted to give his own statement and that he understood his rights. He informed the magistrate that he had been arrested on 2 August 1999. He informed the magistrate that he was beaten with a sjambok on his back and that he was hit with the butt of a rifle on his head. The observation by the magistrate was as follows:

> *"Shows many scars and marks on the back and a knob on the back of the head."*

[213] He informed the magistrate that he had previously given a statement in a military base on 24 August 1999 and that he wished to repeat his own statement to the magistrate.

[214] The magistrate again in spite of the extensive visible injuries failed to pose any further questions in order to satisfy him that the accused has not been assaulted in order to give a statement to the magistrate. The magistrate did not explain to the accused that he may apply for legal aid.

[215] **Charles Mukena Samboma** appeared before a magistrate on 31 March 2001 in Katima Mulilo. His right to legal representation had been explained to him. He chose not to make use of the services of a legal representative. He was not informed that he may apply for legal aid. He informed the magistrate that he was free from injuries and that he had not been assaulted or threatened to give a statement to the magistrate. He informed the magistrate that he had previously given a statement to Sergeant Simasiku when he was arrested and had handed himself over *"to the State"*. He further informed the magistrate that he wished to repeat the statement because he wanted to show the Government that he was sorry.

[216] **George Masialeti Liseho** appeared before a magistrate on 3 May 2000 in Grootfontein. He was informed of his right to legal representation to which he replied:

> *"No. I want to give my confession now. However I will later apply for legal aid."*

[217] He informed the magistrate that he had not been assaulted to give a statement. He further informed the magistrate that he had previously given a statement to the police during March and that he had not been harmed at that stage; that he wished to repeat the statement because he wanted to tell the truth instead of lies.

It is not clear whether the magistrate informed the accused that he may apply for legal aid (no provision for such a question was made on the pro forma) or whether the accused himself had known at that stage that he is entitled to apply for legal aid.

It makes in any event no difference. I have perused the content of the statement and in my view the statement amounts to neither a confession nor an admission. It is an exculpatory statement. It is further trite law that an admission or a confession may only be used against the maker of such a statement. The State is therefore precluded from using the statement against any of the persons whose names appear in that statement.

I therefore need not make any finding in respect of this statement (Exhibit EHU).

[218] **Davis Chioma Maziu** appeared before a magistrate on 3 May 2000 in Grootfontein. He was informed of his right to legal representation and replied as follows:

> *"I would like to state my statement before I engage a lawyer."*

[219] He informed the magistrate that he had not been assaulted to give a statement, that he had previously given a statement to the police on 14 April 2000 which statement had been concluded on 16 April 2000, that he was not forced to give a statement, and that he wished to repeat the statement because he wanted to *show "remorse to the Government."*

[220] No question was asked by the magistrate (in respect of something which was quite unusual in my view) as to why the statement to police was given over a period of two days.

The accused person was not informed that he may apply for legal aid.

[221] **Francis Buitiko Pangalo** appeared before the magistrate on 4 May 2000 in Grootfontein. His right to legal representation was explained and he elected not to be assisted by a legal representative. He was not informed that he may apply for legal aid. He stated that he had not been assaulted, that he previously on 16 April 2000 had given a statement to members of the police force, in a good atmosphere, and that he wanted to repeat that statement because he wanted to tell the truth.

[222] **Roster Mushe Lukato** appeared before a magistrate on 5 May 2000 in Grootfontein. His right to legal representation was explained to him and he wished for no legal representation. He informed the magistrate that he was not assaulted to make a statement, that he previously gave a statement on 16 April 2000 to a police officer, in a good atmosphere, and that he wished to repeat that statement because he wanted the *"law officer"* to hear what he was saying.

[223] Why the accused person regarded the magistrate as a *"law officer"* does not appear from the statement. This is a point that the magistrate could have clarified despite the fact that it appears from the statement that the accused has been informed that he was in the presence of a magistrate who has no connection with the police investigation.

He was not informed of his entitlement to legal aid.

[224] **Kisco Twaimango Sakusheka** gave his statement to the magistrate in Grootfontein on 5 May 2000. He was informed of his right to legal representation and elected not to be legally represented. He was not informed of his entitlement to legal aid. He informed the magistrate that he had not been assaulted or threatened to make a statement. In respect of the issue the magistrate observed an old cut on his right ear and recorded as follows:

> *"He told me that he had a sore when he was a baby and the sore caused that cut."*

[225] He further informed the magistrate that he had previously given a statement to the police, freely, on 16 April 2000 and that he wanted to repeat it *"to tell the truth to the magistrate"*.

[226] **Frederick Kabodontwa Luthehezi** appeared before a magistrate on 4 May 2000 in Grootfontein. His right to legal representation was explained and he elected to have no legal representation since he wanted to confess. It was not explained that he may apply for legal aid. He informed the magistrate that he had not been assaulted to make a confession, that he had previously on 15 April 2000 given a statement to a police officer, that he gave the statement to the officer freely and voluntarily and that he wished to repeat the statement in order to give his true testimony.

[227] **Andreas Puo Mulupu** appeared before a magistrate on 19 July 2000 in Grootfontein. He was informed of his right to legal representation and he informed the magistrate that he wanted to give his statement *"without the assistance of a lawyer"*. He informed the magistrate that he was not assaulted to give a statement to the magistrate, that he had been stabbed on his legs with the

bayonet of a rifle, in Zambia by Zambian soldiers, that he had previously given a statement to a police officer (Sgt. Chizabulyo) on 23 December 1999, freely and voluntarily, and he wished to repeat it because he would like to confess before the magistrate what he had done.

He was not informed that he may apply for legal did.

[228] **Ziezo Austin Lemuha** appeared before a magistrate on 15 August 2001 in Windhoek. He was informed of his right to legal representation. He opted not to be represented. He was not informed that he may apply for legal aid. He informed the magistrate that he had not been assaulted to give a statement to the magistrate, that he had previously given a statement to a police officer on 14 August 2001. His reply to the question why he wished to repeat the statement was: *"No"*.

The magistrate proceeded to state that the accused *"freely and voluntarily desires to make a statement"* contrary to the reply recorded by the magistrate.

The magistrate should not have continued with the taking down of a statement in violation of the constitutional right of the accused not to incriminate himself.

[229] For this reason alone the statement should be disallowed. The statement (Exhibit EJB), is ruled to be inadmissible.

[230] If one has regard to the information contained in some of the statements regarding allegations of coercion and the failure of the respective magistrates to make the necessary further enquiries then these statements referred to fall within the compass of the authorities referred to *(supra)* dealing with the consequences of failures by magistrates to investigate allegations of coercion and the failure to clarify ambivalent statements.

[231] Similarly in respect of all the statements of the undefended persons there is no evidence (save the one referred to) that the accused persons had been informed of their entitlement to apply for legal aid. I have (supra) discussed this failure and the consequences of such failure, namely that it is tantamount to a violation of the fundamental right to legal representation.

[232] There is no evidence that any one of the undefended accused persons was a person who ought to have known that he was entitled to assistance in the form of legal representation, at State expense.

[233] These failures referred to in paragraphs 230 and 231 either singularly or in combination (where applicable) violate the right of the accused person to fair pre-trial procedures.

[234] I need to comment on the approach of some of the magistrates which to a large extent explains the failures referred to in paragraph 230 and 231. All four magistrates who testified strictly adhered to the questions raised in the pro forma document.

[235] In respect of those statements in respect of which the accused persons had informed the magistrate that he had been assaulted or forced by the police to give a statement (warning) one approach by a magistrate was that she assumed because of the long time lapse (approximately seven months) between the alleged assault by the police and the appearance of the accused before her for his *"confession"*, that the assaults referred to in no way influenced the voluntariness of his statement.

[236] Another approach was the fact that an accused person indicated that he had previously made a statement to the police and had been assaulted or forced to do so was not considered to be

her *"problem"*. What was important to this magistrate was that the statement recorded by her was given freely and voluntarily. It was not deemed necessary to make an enquiry into the circumstances under which the assault was allegedly perpetrated and why it was necessary to repeat such statement.

[237] A further approach was if an accused person had given, in reply to the question whether he had been assaulted, a negative answer, that would be the determinant indicator of voluntariness, irrespective of the fact that the accused subsequently informed the magistrate that he had been assaulted by the police to give a statement. A reply which flew in the face of a previous reply need also not be clarified according to this magistrate.

[238] One of the magistrates, though, testified that where an accused person informs her that he has been assaulted by the police to give a statement she would not have taken down any statement. Incidentally all four accused persons who appeared before this magistrate informed her that they had not been assaulted, threatened and neither had promises been made to them to make their statements to the police, statements which they intended to repeat before her.

[239] One of the magistrates had during cross-examination on the issue of legal representation, without being prompted in this regard, mentioned that the issue of statutory legal aid did not appear in the pro forma document she was required to complete. This in my view is an indicator that she must have been aware that an accused person is entitled to apply for legal aid.

[240] Three magistrates who took down statements (Exhibits EHP, EHR and EJB) did not testify.

[241] If one has regard to the approaches referred to, it explains why no further enquiries were made in appropriate instances and why accused persons had not been informed of their entitlement to legal aid.

[242] It is needless to state that these approaches are not conducive to fair pre-trial procedures which in turn maybe a catalyst for the violation of the fundamental right of an accused person to a fair trial.

[243] In the result all the statements handed in as exhibits are declared to be inadmissible as evidence against the accused persons in the main trial.

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HOFF, J

ON BEHALF OF THE STATE: **ADV. JANUARY**

(TRIAL(S)-WITHIN-A-TRIAL –

CONFESSIONS) **ADV. JULY**

Instructed by: **OFFICE OF THE PROSECUTOR-GENERAL**

ON BEHALF OF THE DEFENCE: **MR SAMUKANGE**

MR KRUGER

MR NEVES

MR KACHAKA

MR McNALLY

Instructed by: **DIRECTORATE OF LEGAL AID**