



CASE NO.: CC 25/2010

IN THE HIGH COURT OF NAMIBIA

HELD AT OSHAKATI

In the matter between:

THE STATE

versus

RASALUS KAPIYA

ACCUSED

CORAM: TOMMASI J

Heard on: 14 June – 17 June 2011

Delivered on: 20 June 2011

JUDGEMENT: TRIAL WITHIN A TRIAL

TOMMASI J: [1] The Court was called to adjudicate the admissibility of the warning statement made by the accused to Sergeant Sankwasa. The defense objected to the handing into evidence of the warning statement and advanced the following as the basis for the objection: The accused was not

sober at the time that he made statement and his constitutional rights were not explained to him. The State called Sergeant Sankwasa in a trial-within-a-trial and the defense called the accused to testify under oath.

[2] The admissibility of statements is governed by section 219(A)¹. The relevant part thereof provides as follows:

“(1) Evidence of any admission made extrajudicially 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”

It is further trite law that the onus is on the State to prove beyond reasonable doubt that an admission had been made freely and voluntarily. In *S v MALUMO AND OTHERS* ² Hoff J succinctly stated the legal position as follow at page 40, paragraph [13]:

“The jurisdictional requirements for admissibility of admissions and confessions (ss 217 and 219A of Act 51 of 1977 as amended) have been provided with added impetus by the inclusion in the Namibian Constitution of the provisions of art 12 and, in particular, art 12(1)(a): the right to a fair trial; art 12(1)(d): presumption of innocence; and art 12(1)(f): the right against self-incrimination and the right to have evidence obtained in violation of art 8(2)(b) excluded.”

[3] In this matter the accused averred that he was not in his sober senses when he made the statement. After evidence has been led it was clear that the

¹ Criminal Procedure Act, 51 of 1977

² 2010 (1) NR 35 (HC)

accused was not under the influence of alcohol or any drugs at the time and fully comprehended what was communicated to him by Sergeant Sankwasa. Ms Mugaviri, Counsel for the accused, submitted that it was not meant that the accused was under the influence of alcohol or drugs but rather that he was not in a mental state to appreciate what was communicated to him. She however conceded that there was no evidence to support the objection and abandoned this ground. For this reason I do not deem it necessary to dwell on this ground of objection.

[4] Sergeant Sankwasa testified that the accused was in custody at Ohangwena police station. She noted from the cell register that the accused was arrested but not yet charged. She took up the matter with the unit commander who instructed her to charge the accused. Although this was a matter that was to be dealt with by a specialized unit, Women and Child Protection Unit, it was decided that she should charge the accused. This unit is situated at Eenhana, some 70 km from Ohangwena Police Station, and the accused had to be charged before the expiry of 48 hours.

[5] She further testified that she obtained the docket and arranged for the accused to be brought to her office. She introduced herself to the accused and showed him her appointment certificate. The accused acknowledged that he was aware of the fact that she is a police officer. She informed him that she is

an investigating officer and wanted to know if he was aware that he has been charged with rape. The accused confirmed that he was aware of the charge against him. She informed him that he was not forced to answer any questions and that, if he gives a statement, it would be used in a court of law. She also informed him that he has a right to a legal representative of his own choice or, if he cannot afford it, he could apply for a state lawyer to be appointed. The accused indicated that he did not need a lawyer and that he would make a statement. After she took down the statement she read it back to him and he signed it.

[6] She further testified that: she did not deem it necessary to have an interpreter present as she spoke to the accused in Oshiwambo and he understood and replied in Oshiwambo; and she wrote down what the accused said in his warning statement (J17) in English. According to her observations the accused was sober and normal. She testified that the accused was rude because he kept quiet and did not answer her.

[7] During cross-examination the possibility was suggested that the accused kept quiet because he was not giving his statement freely and voluntarily. Sergeant Sankwasa responded that she did not know why the accused kept quiet but was adamant that the accused spoke freely to her. When counsel wanted to know why she considered this to be rude, she responded that it was

not really rudeness but the accused kept quiet when she asked him if he understood. When she was confronted with the accused version that she did not inform him that his statement will be used in court and that she did not explained his right to remain silent, she insisted that she informed him that the statement would be used in court; and that she gave the accused a choice to give his statement to her or the court. She also testified that she did not give the statement to the accused to read but that she read it to him in Oshiwambo (I believe she meant that she translated what she wrote down in English into Oshiwambo).

[8] The accused testified that he was indeed sober at the time when he was taken out of the cell and taken to the office of a police officer. He confirmed that: she had shown him a document and introduced herself; she informed him of the charge; he was aware of the fact that it was a serious offence; and she informed of him of his right to have a lawyer of his own choice or, if he cannot afford a lawyer, that one could be appointed for him by the State. He further testified that he opted to conduct his own defense and that he exercised this choice freely. He testified that he would keep quiet during the interview because he did not quite understand the questions; and he was very angry at the time because of the allegations made against him. He further testified that the police officer kept on saying “*hurry up*” and “*You have to answer the question*”. Although he did not feel she was harassing him but wanted him to

hurry up and answer the question. He denied that he was informed of his right to remain silent and that his statement would be used in court. He confirmed however that Sergeant Sankwasa informed him that he could give his statement to her or in court. He, on a question by the Court, responded that he understood that he did not have to make a statement then and there and that he could make it in court.

[9] Counsel for the State argued that the Court must consider the evidence in its totality and look at the probabilities. He argued that it is not probable that Sergeant Sankwasa would explain some of the rights and not the other. He submitted that the State had succeeded to prove beyond reasonable doubt that Sergeant Sankwasa explained the right to legal representation, the right to apply for a legal practitioner to be appointed by Legal Aid; and the right to remain silent.

[10] Counsel for the accused submitted that it is clear from the evidence that the right to remain silent was not made clear to the accused. She argued that the accused understood that he had a choice to make his statement either to Sergeant Sankwasa or to court and that such an explanation did not include the right not to make a statement at all.

[11] The evidence of both Sergeant Sankwasa and the accused indicated that his rights were indeed explained to him. There is in essence no dispute that he was explained his right to legal representation; that he understood it; and that he exercised this choice freely. What was however in dispute was whether his right to remain silent was clearly or correctly explained to him.

[12] The question is whether the Court, on the evidence presented, is satisfied that the accused was informed of his constitutional right in terms of article 12(1)(f) that he was not compelled to give evidence against himself. From the testimony of Sergeant Sankwasa it is clear that she did not deem it necessary to obtain the assistance of an interpreter. She therefore informed the accused in Oshiwambo what she understood to be his right to remain silent. She testified that she informed the accused that:

- (a) he was not forced to say anything;
- (b) the statement would be used in court
- (d) he has a choice to make a statement to her or the court.

[13] The accused, to his credit, candidly admitted that he understood her explanation in respect of his right to legal representation and exercised his right freely. He furthermore admitted that he understood that he did not have to give a statement to the investigating officer. The question however is

whether it can be said that he understood that he also did not have to give testimony against himself in court.

[14] The above forms the basis of some of the concerns raised by the explanation given by Sergeant Sankwasa. According to her the accused was rude by not indicating that he understood her. This should have alerted her that perhaps the accused did not fully appreciate what she was explaining to him. The explanation which should have been given to the accused was simply that he has a right to remain silent. This would include the right not to say anything or give a written statement to the police, the right not to give an explanation in terms of section 115 and the right not to testify during trial. The explanation should be given in clear language and should not leave room for confusion. Seargent Sankwasa's explanation could be construed in the manner it was understood by the accused i.e that he has to give a statement, if not to her then to the court which clearly was not a correct interpretation of Article 12(1) (f) which provides that:

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

[15] I am not convinced that the accused was informed in clear and unambiguous terms of his right to remain silent. The circumstances present

during the interview was furthermore certainly not ideal given the testimony of Sergeant Sankwasa that the accused hesitated to confirm that he understood what he was informed. I entertain serious doubt whether Sergeant Sankwasa gave the accused a proper explanation of his right to remain silent. An accused needs to be informed in clear terms what his right is so as to make an informed choice before it can be said that it was made freely and voluntarily.

[16] To this extent the State thus failed to prove beyond reasonable doubt that the statement was made freely and voluntarily as is required by section 219(A).

[17] In the premises the statement of the accused is declared to be inadmissible as evidence against him in the main trial.

Tommasi J