



CASE NO.: CC 32/2001

SPECIAL INTEREST

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

CALVIN LISELI MALUMO & 111 OTHERS

CORAM: HOFF, J

Heard on: 21 June 2011; 27 – 29 June 2011; 05 July 2011; 11 July 2011

Delivered on: 19 July 2011

Reasons on: 25 July 2011

JUDGMENT / REASONS

Trial-within-a-trial – Exhibit “EPA”

HOFF, J: [1] This is a trial-within-a-trial. Deputy Commissioner Shimutwikeni testified in the main trial that during December 1999 he held the rank of detective inspector in the Namibian Police Force and was one of the investigating officers in this case. On 22 December 1999 suspects (including the accused person Fred Ziezo) were

brought from Zambia by members of the Zambian Police Force and handed over to the Namibian Police in Katima Mulilo. The next day the accused was brought into his office where he was warned that he was suspected of having committed the crime of high treason. He was warned by Shimutwikeneni according to Judges Rules, he was informed of his right to legal representation and that he was entitled to legal aid.

[2] The accused person informed him that he did not need legal representation at that stage and informed Inspector Shimutwikeneni that he wanted to explain to the officer his involvement in the attack on Katima Mulilo. He did not take down any statement from the accused person since the accused had requested him to give him the opportunity to write the statement himself. Deputy Commissioner Shimutwikeneni testified that he again warned the accused for a second time and indicated that the accused may leave to write his statement.

[3] Mr January who appears on behalf of the State indicated that the State intended to introduce this statement as part of documentary evidence.

It was not disputed during cross-examination by the accused person that he indeed wrote a statement (received as exhibit EPA) in the cells at Katima Mulilo police station and that the statement was taken from him on 26 December 1999 by sergeant Popyeinawa.

[4] Mr Dube who appears on behalf of the accused person objected to the reception of the statement as evidence on the following grounds:

firstly, that the statement amounts to a confession, was taken by a sergeant (Popyeinawa) and was not confirmed and reduced to writing in the presence of a magistrate, justice or commissioned officer contrary to the provisions of section 217 (a) of the Criminal Procedure Act 51 of 1977;

secondly, that the statement was not made by the accused freely and voluntarily as he was influenced to make such a statement;

thirdly, that the statement was obtained by means of assaults and torture perpetrated on the accused by members of the Namibian Police;

fourthly, that the accused had not been warned of his constitutional rights and his right to legal representation;

fifthly, that he was not warned in terms of the Judges Rules;

sixthly, he was induced to co-operate with the police on the promise that he was destined to become a state witness.

[5] During the trial-within-a-trial the State called six witnesses and the accused testified himself.

[6] In respect of the first ground of objection it must be stated at this stage that the accused person was subsequently indeed brought before a magistrate who took down a statement from the accused person. This statement (confession) was the subject of a previous trial-within-a-trial in which that statement was ruled inadmissible.

[7] Mr January with reference to Principles of Evidence by Schwikkard, Van der Merwe 2nd ed. p. 372 submitted that three main rules have to be complied with before

a document may be received as evidence, namely (a) the statements contained in the document must be relevant and admissible (b) its authenticity must be proved and (c) the original document must be produced.

[8] Regarding requirements (b) and (c) it was submitted, and correctly so, that the original handwritten statement is before court (Exhibit EPA) and that the accused had admitted that he was the author of exhibit EPA. What now needs to be proved was requirement (a), so it was submitted.

In this regard it was submitted by Mr January that exhibit EPA amounts to an admission. Mr Dube disagreed and submitted that the statement amounts to a confession.

It was submitted by Mr January that this Court needs to classify the statement (Exhibit EPA) since the admissibility requirements of an admission differ from that of a confession.

Mr January further submitted that on mere perusal of the statement alone it looks like a confession but since the accused had stated to detective inspector Shimutwikeni that he was misled by Mishake Muyongo, the accused raised a defence (mistake). I have perused the statement (Exhibit EPA) and agree with Mr Dube that it amounts to a confession. Exhibit EPA consists of about 24 pages and the language used by the accused is clear. There is in my view no need to look at the surrounding circumstances. There is nothing in the statement itself which avers that the accused had been misled by Muyongo.

[9] Even if the accused had been misled, this cannot be considered as a defence, if he had the requisite intention to commit high treason. In my view it is highly likely that the accused came up with this excuse only after he had been arrested.

[10] In *S v Zwane and Others (3) 1989 (3) SA 253 WLD* Grosskopf J in considering the law on high treason stated that hostile intent should not be confused with motive and quoted with approval the remarks of Schreiner J in *R v Leibbrandt and Others 1944 AD 253* where the following appears at 281:

“Treason may be committed and the hostile intent be entertained with a view to achieving some further purposes. The ultimate goal may be the achievement of some social or economic advantage for a portion or even the whole of the community. It may be the advancement of some political or ideological theory, or it may be the fulfillment of personal ambition or the wreaking of personal hatred. None of these ultimate motives is relevant to the enquiry whether treason has been committed or not. Whatever the factors are that induce a citizen to entertain an intention to help the enemy or to weaken the effort against the enemy, if he acts in order to carry out that intention he commits an act of treason.”

[11] It is common cause that the warnings referred to by Deputy Commissioner Shimutwikeneni do not appear *ex facie* the statement Exhibit EPA neither was such statement signed by the accused person.

[12] It appears to me that the State in order to comply with the requirement of admissibility referred to *supra* (in requirement (a)) presented the evidence of police officers to show that the statement had been made freely and voluntarily and it was

subsequently submitted by Mr January that the State had also succeeded in proving all the jurisdictional facts relating to the admissibility of a confession.

[13] The endeavour to have Exhibit EPA, a confession, be admitted as documentary evidence is in my view quite quaint.

This statement was written by the accused person after he had been arrested for high treason and after he had been warned according to Deputy Commissioner Shimutwikeneni of his constitutional rights and warned in terms of the Judges Rules. Shimutwikeneni was a commissioned officer at that stage. He testified that after the accused had left the office to write his statement he had not seen the product (Exhibit EPA) until the year 2005 when he saw it in the file of the accused person.

It is common cause that the preliminary questions normally asked before taking down a confession or an admission do not appear *ex facie* Exhibit EPA.

[14] Mr Dube submitted that the law relating to documentary evidence has no place in a trial-within-a-trial and that the applicable law *in casu* relates to the admissibility of confessions and admissions.

He further submitted, if I understood him correctly, that since certain rights had been explained to the accused as testified by Deputy Commissioner Shimutwikeneni, Exhibit EPA for that reason cannot be treated as documentary evidence. The statement was written with the aim of returning it to the police. It was not a document which had been found in possession of the accused person before or after he had been arrested.

I agree with these submissions.

[15] Detective Inspector Shimutwikeni in my view expected at the stage when according to his testimony he warned the accused person, that a confession or admissions may appear from the statement but decided that it was not necessary to take down the statement probably because the accused informed him that it would be a long statement.

[16] In my view in the light of the circumstances the State was constrained to present Exhibit EPA as documentary evidence since the statutory prerequisites in respect of a confession had not been complied with.

(See provisions of section 217 of the Criminal Procedure Act 51 of 1977).

[17] The State most probably realised this and now under the banner of “documentary evidence” endeavours to introduce Exhibit EPA as evidence against the accused person.

[18] Exhibit EPA may be a document but the question is whether in terms of our law of evidence this Court may receive it as admissible evidence. This question in my view must be answered in the negative.

[19] I have not been referred to any authority by counsel that where in the present circumstances, i.e. where a statement which is a confession which had been written by an accused person after he had been duly warned by a police officer, the State may present such a statement as of documentary evidence, avoiding the more onerous

burden of proving that such confession meets the prescribed admissibility requirements.

[20] I must at this stage pause to consider one of the objections of the accused namely that he had not been warned of his constitutional rights neither had the Judges Rules been explained to him prior to him writing Exhibit EPA.

[21] The State witnesses on this point i.e. Deputy Commissioner Shimutwikeni and Deputy Commissioner Maasdorp testified that the warnings given had not been reduced to writing in the form of a statement or investigation notes by them and that they relied purely on their respective memories in respect of what had transpired on 23 December 1999.

[22] It was submitted by Mr Dube that it is very strange that no investigation notes or statements had been taken by the relevant police officers who alleged that they interviewed the accused person, since to be charged with high treason is a very serious crime and one would have expected of the officers involved to have had a record of what transpired during their dealings with the accused person.

[23] I agree with the obiter remarks of Macaulay J in *S v Mutasa 1976 (1) PH (H) 24 (R)* when he remarked as follows:

“At the same time, it is high time and it would be a salutary thing if, when interrogations are conducted by the police with the object of ascertaining an accused’s attitude to a particular charge, it were appreciated that what happens

to an accused during interrogation is a matter of utmost importance to which the police should give their closest attention in respect of which there should be some satisfactory record of what takes place; such a record can be the basis of subsequent evidence when police details later come to refresh their memories.”

[24] I fully agree with the submission that failure to produce investigation notes or statements regarding what transpired during interviews with suspects or accused persons by police officers is highly suggestive that undue influence might have been applied during their interrogation and that the police officers might not have been frank with the Court when they testified that the accused had been warned of his constitutional rights and had been warned in terms of the Judges Rules.

[25] Mr Dube referred to a number of contradictions in the testimonies of Deputy Commissioner Shimutwikeni, Deputy Commissioner Maasdrorp and sergeant Popyeinawa submitting that these contradictions support his contention that the police officers did not explain any right to the accused person prior to him writing Exhibit EPA.

[26] In the same vein Mr January referred to a number of contradictions in the testimony of the accused person impacting negatively on his credibility as a witness. Mr Dube in some way recognized this when in his written heads of argument he euphemistically stated that the accused might have a “debit entry in his credibility”.

[27] I am of the view, having regard to the contradictions in his testimony and in particular the testimony relating to the allegation that he had been assaulted and tortured by the Namibian Police, that he was a poor and unreliable witness with a

tendency to exaggerate. I have accordingly no hesitation in rejecting his evidence regarding the allegations of assault and torture perpetrated on him by members of the Namibian Police Force.

[28] This however does not relieve the State in the first instance to make out a case that Exhibit EPA be received as admissible evidence. I have indicated *supra* that having regard to the circumstances under which, the purpose for which exhibit EPA had been produced, and my finding that exhibit EPA is a confession, the State should have proved the admissibility requirements relating to confessions.

It further appears as indicated *supra* that this was the route they should have, but could not have followed.

[29] In my view exhibit EPA under the circumstances cannot be received as admissible documentary evidence.

[30] In the result the following ruling is made:

The application to have the statement marked as Exhibit EPA introduced as documentary evidence is refused.

ON BEHALF OF THE STATE:

ADV. JANUARY

*(TRIAL-WITHIN-A-TRIAL – STATEMENT/ **EX “EPA”** MADE BY
ACCD NO. 25 - FRED ZIEZO)*

Instructed by:

OFFICE OF THE PROSECUTOR-GENERAL

ON BEHALF OF THE DEFENCE:

ACCD NO. 25

MR DUBE

Instructed by:

DIRECTORATE OF LEGAL AID