



CASE NO.: CC 32/2001

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

HELD AT WINDHOEK

In the matter between:

THE STATE

and

CALVIN LISELI MALUMO & 111 OTHERS

CORAM: HOFF, J

Heard on: 21 November 2011

Delivered on: 21 November 2011 (*Ex tempore*)

JUDGMENT

HOFF, J: [1] During the testimony of Mr Popyeinawa, Mr Dube objected to evidence of what a previous State Witness Christopher Mushabati had informed the police officer Popyeinawa regarding people who had escaped from Dukwe in Botswana and came to Namibia.

[2] Mr Dube's submission was that that evidence would be hearsay evidence.

[3] The second ground of objection was that the witness was not a co-conspirator, but was an informer and that this witness was not aware at the time when he spoke to police officer, Popyeinawa that he was speaking to a State agent providing him with the required information. Mr July disagreed and submitted that that evidence may be received by the Court as an exception to the hearsay rule. And in this regard, Mr July submitted that he has laid the foundation for the reception of the evidence in the sense that Sergeant Popyeinawa had testified that the witness Christopher Mushabati was one a group of 92 persons who left Namibia in 1998 with weapons and entered Botswana.

[4] The apparent exodus of this group of people to Botswana was to return to Namibia at a later stage and to engage the security forces of the Republic of Namibia in order to liberate the Caprivi region. I may just at this stage state that Counsel are both *ad idem* regarding the legal position namely that declarations made in the furtherance of a common purpose may be accepted as evidence.

[5] Firstly, as an exception to the rule, admissions are not vicariously admissible, and secondly, declarations in the furtherance of a common purpose stand on the same footing as acts done. These declarations are then received as evidence when they are relevant acts and they are relevant acts when they are executive statements. In contradistinction to narrative statements, narrative statements are not made in the furtherance of a common purpose, but as an account or an admission of past events.

[6] I have earlier indicated that it is necessary for this Court to determine whether this witness, Christopher Mushabati was a co-conspirator or as submitted by Mr Dube an informer in order to come to this decision whether or not the Court should uphold, or dismiss the objections. I have during the adjournment listened to the video recordings but could find no evidence to support the submission that there is direct evidence that the witness Mr Christopher Mushabati was an informer, or that he knew at the time when he spoke to Sergeant Popyeinawa that he was speaking to a State agent.

[7] The only evidence in my view from which one could draw an inference that the witness might have been an informer, was from the evidence, and this is an undisputed fact, that Christopher Mushabati was repatriated from Botswana. The fact that he had been repatriated is in my view a neutral factor because it may, or it may not indicate that he was a co-conspirator.

[8] I may just pause here at this stage and mention that the Court was referred to a case *The State v Sibanda*, 1993 (1) SACR 691 ZS, where it was held that:

“The executive statements may be received as evidence as long as it is shown that conspiracy was still afoot when those statements were made”.

[9] Reference was made in the *Sibanda* matter to the case of *Mirza Aqbar v King Emperor* 1940 (3) All ER 585 (PC) at 591 B-C where Lord Wright said the following:

“Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground

has been shown to believe to be in its existence. It would be a very different matter however to hold that any narrative statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference”.

[10] It is my view also necessary to consider in this matter whether the conspiracy was still afoot when Christopher Mushabati made the statement to the police officer Popyeinawa. This in turn requires of this Court to make a factual finding. In this regard it is trite law that the Court may also look at the statements of other alleged conspirators or co-conspirators.

[11] In the first instance in order to come to a finding regarding whether the conspiracy was still afoot when the Officer Popyeinawa had this informal discussion with Christopher Mushabati, is the evidence of Officer Popyeinawa that during his investigations he established that Christopher Mushabati was one of the group of 92 armed persons who left Namibia for Botswana.

[12] The evidence in my view of another co-conspirator who previously testified in this Court is the testimony of one, Oscar Luwate Simbulu the relevant part of his evidence is to be found from pages 2135 to 2145 of the record. His testimony was that on the morning of the 2nd of August 1999, that is during the attack on the town of Katima Mulilo, he saw Christopher Mushabati coming from the road and they then exchanged a few words. His evidence is to the effect that Christopher Mushabati then indicated to himself the role that he (i.e Christopher Mushabati) played in the events of that morning of the 2nd of August 1999.

[13] His testimony further was that at a previous occasion prior to the attack on the 2nd of August 1999 he found himself in the company of Christopher Mushabati at what he referred to as “Sachona camp”, where there were also, according to his testimony firearms in their camp.

[14] If one has regard to the evidence of police officer Popyeinawa that Christopher Mushabati was one of the group of 92 who left Namibia for Botswana for a specific purpose, that he returned through the process of repatriation to Namibia, and that at some stage prior to the attack on Katima Mulilo on the 2nd of August 1999 he in effect found himself in the company of the alleged rebels where preparations were under foot for the attack on Katima Mulilo, then under these circumstances the inference that I draw is that at the time when Christopher Mushabati had the conversation with police officer Popyeinawa that the conspiracy was still afoot. That is the first inference. And the second inference is that he, the witness Christopher Mushabati, was at that stage one of the conspirators. Sergeant Popyeinawa testified that Christopher Mushabati told him about another group who came from Botswana. It was at that stage that Mr Dube the objected to the evidence.

[15] In view of my finding that the witness Christopher Mushabati was a co-conspirator and the conspiracy was still afoot at the time when he conveyed to Sergeant Popyeinawa whatever he conveyed to him what was conveyed cannot be termed as a narrative statement but was indeed an executive statement.

[16] And it is on this basis that the Court will allow the evidence to be presented by the Police Officer Popyeinawa.

[17] The objection against the leading of that evidence is overruled.

HOFF, J

ON BEHALF OF THE STATE:

MR JULY

Instructed by:

OFFICE OF THE PROSECUTOR-GENERAL

ON BEHALF THE DEFENCE;

MR DUBE

Instructed by:

DIRECTORATE OF LEGAL AID