

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CR 17/2013

In the matter between:

THE STATE

and

1. MARTIN KANDJIMI

2. SAKARIA SHIPETA

(HIGH COURT MAIN DIVISION REVIEW REF NO 1211/2012)

Neutral citation: *S v Kandjimi and another* (CR 17-2013) [2013] NAHCMD 62 (7 March 2013)

Coram: VAN NIEKERK, J and UEITELE, J

Delivered: 7 March 2013

Flynote: **Criminal procedure** – Evidence – Admissibility – Extra-curial admissions and pointing out – Rights of suspect and accused – police should warn

suspect of constitutional rights – Right to legal representation, right to be presumed innocent, right to silence, right against self-incrimination – Admissions and pointing out rules inadmissible due to failure to warn accused as suspect

ORDER

1. The conviction of accused no. 1 is confirmed, but only in respect of one oryx.
 2. The sentence of accused no. 1 is set aside and substituted with the following sentence:

Three (3) months imprisonment.
 3. The sentence is backdated to 9 May 2012.
 4. The conviction and sentence of accused no. 3 is confirmed.
-

REVIEW JUDGMENT

VAN NIEKERK, J (UEITELE, J concurring):

[1] The accused, with another co-accused, was charged with a c/section 30(1)(a) of the Nature Conservation Ordinance, 1975 (Ordinance 4 of 1975), in that he unlawfully hunted huntable game, to wit 5 oryx without a permit. He pleaded not guilty.

[2] The State led evidence that a farm worker, Phillipus Ashipala, found the two accused and two other accomplices while they were skinning an oryx. They ran away. At the scene he found two wire snares used to catch animals. The next day Ashipala pointed out the two accused and another perpetrator. The police were called.

[3] Constable Kabende testified, *inter alia*, that he was first shown accused no 3 and another alleged perpetrator. At a later stage they found accused no. 1. He interrogated accused no. 1, asking him what he knew of the illegal hunting that took place at the farm. Accused no. 1 allegedly mentioned that he slaughtered one oryx with his co-accused and another man. Accused no. 1 also mentioned that he had slaughtered another oryx with another man. The police asked the three men to lead them to the scene where they had slaughtered the oryx. This they did. As I understand it, this was the scene where Ashipala saw them. The police also asked accused no. 1 to lead them to the other scene. The accused did so and there showed them places where he had hung the meat of four oryx, each oryx at a different place. The police found the skins and some horns. The police then took accused no. 1 with them to identify one of the other perpetrators. They could not locate this person. Then they returned to the complainant's farm, where the complainant opened a case against the accused. They were then arrested and their rights were explained. At a very late stage in his evidence the prosecutor asked Const Kabende if any force, threats or undue influence were used on the accused to point out the scenes, to which he replied in the negative.

[4] The complainant and the farm worker confirmed that accused no. 1 had pointed out the other places where he had hung out the meat of the other four oryx to dry. They denied that any force was used.

[5] Accused no. 1's case was that he did not point out or admit anything; that he did not lead the police to any scene; that this was done by other persons; and that he was handcuffed and beaten at the time. Accused no. 3 appears to have denied pointing out anything. When he testified he admitted coming to the first scene in accused no. 1's company, but stated that this occurred after the oryx

was already dead. He denied skinning the animal or setting any snare. Although accused no 1 did not testify, he did not challenge accused no. 3's version, but stated that he agreed with it.

[6] The trial magistrate took into account that accused no. 1 pointed out the scenes freely and voluntarily and convicted him of hunting the five oryx. She convicted accused no. 3 only on the one oryx at the first scene.

[7] On review the following questions were posed to the trial magistrate:

- '1. Is the evidence of the pointing out by accused no. 1 and the admissions he made not inadmissible?
2. If the answer to the question posed is "yes", is there sufficient evidence to sustain a conviction in respect of all 5 oryx?
3. If accused no. 1 should only have been convicted in respect of 1 oryx, what should his sentence be?'

[8] The magistrate replied that, having consulted a recent judgment, she realises that, as the accused's rights were not explained as set out in the Judges' rules, the evidence about the admissions and the pointing out is inadmissible. She suggests that without this evidence there is still sufficient evidence on record in respect of the one oryx killed at the first scene, but concedes that the conviction cannot stand in respect of the other four oryx.

[9] In *S v Malumo and others (2)* 2007 (1) NR 198 HC Hoff, J considered a suspect not to be in a different position to an accused. The Court held that the police had been under a duty to inform the accused of his constitutional rights and to warn him in terms of the Judges' Rules before questioning him. This would include informing the accused about his right to legal representation, the right to be presumed innocent, the right to remain silent and the right against self-incrimination. The police disregarded these rights in the present case by informing the accused of his rights only after his arrest and after he had incriminated himself by pointing out scenes and making admissions implicating him in the hunting of the five oryx.

[10] What is also disturbing in this case is that the witnesses were allowed to testify about the admissions and the pointing out without the prosecutor alerting the magistrate beforehand that he/she intended leading such evidence. Prosecutors should ideally always do so. They should also first lay a basis to show that such evidence is indeed admissible before leading evidence about the contents of the admissions or the details of the pointing out. This should be done because of the fact that disclosing the contents of this evidence might severely prejudice the accused. However, even if the prosecutor does not do this, the magistrate should be alert to direct the prosecutor to do so if he or she wishes such evidence to be admitted. The accused should also be asked whether he has any objection that such evidence is led. If there seems to be an objection against the admissibility of the evidence, a trial-within-a-trial should first be held to determine the admissibility or otherwise of the evidence.

[11] I wish to point out that accused no. 3 was also not afforded fair pre-trial procedures. However, this irregularity does not taint the trial as a whole. When the evidence that he led the police to the first scene is disregarded, there is still sufficient other evidence, as is the case with accused no. 1, to show that he committed the crime with respect to the one oryx.

[12] I now turn to the question of what punishment should be imposed on accused no. 1. The magistrate imposed a sentence of 8 months imprisonment. In response to the third question posed (see paragraph [7], *supra*), the magistrate suggested a sentence of 4 months imprisonment because the accused did not place any mitigating factors before her and because of the prevalence of the offence in her district.

[13] This suggestion by the learned magistrate seems rather startling in view of the fact that she imposed a wholly suspended sentence of four months imprisonment on accused no. 3, who was convicted of hunting one oryx. The only difference between the two accused is that accused no. 1 at 35 was 5 years older than accused no. 3 and that accused no 3 placed some facts before the magistrate about his personal circumstances. These were that he has two

children aged 13 and 16 who are staying with his mother, that he was unemployed at the time and that he had no money for a fine. It is so that accused no. 1 stated that he did not want to say anything in mitigation and had no witnesses to call, because he considered himself to be not guilty. However, the magistrate should have asked him specific questions to obtain details about his personal circumstances. The accused could then have elected whether to answer these questions. The magistrate took into consideration that the accused had been in custody awaiting trial for 7 months. I have considered imposing the same sentence on accused no. 1 as that imposed on accused no. 3. However, it seems doubtful that he will be located to inform him of the conditions of the suspended sentence. Moreover, the accused has already served his sentence. In the circumstances it would be appropriate to impose a short period of imprisonment, which is backdated.

[14] The result is:

1. The conviction of accused no. 1 is confirmed, but only in respect of one oryx.
2. The sentence of accused no. 1 is set aside and substituted with the following sentence:

Three (3) months imprisonment.
3. The sentence is backdated to 9 May 2012.
4. The conviction and sentence of accused no. 3 is confirmed.

K van Niekerk

Judge

I agree.

S F I Ueitele

Judge