CASE NO.: CC 07/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

JOHANNES MUSHISHI

CORAM: LIEBENBERG, J.

Heard on: 08 – 11; 14 – 16; 18 June 2010
Delivered on: 21 June 2010

JUDGMENT

LIEBENBERG, J.: [1] The accused is faced with two charges namely, murder read with the provisions of Act 4 of 2003 (Combating of Domestic Violence Act) and assault with intent to do grievous bodily harm. He pleaded not guilty to both charges and his plea explanation was the following:

> "*2. I plead not guilty to both charges and wish to make the following explanation in respect of the first charge.*
> *2.1 I admit the identity of the deceased being that of Priskilla Shiindi.*

2.2 I further admit the cause of death being a stab wound to the chest.

2.3 I further admit having stabbed the deceased with a knife.
2.4 I however deny having had the necessary intention to kill the deceased.
2.5 I stabbed at the deceased not with the aim to kill her but to let her go of me.
2.6 I therefore did not direct the blows to certain body parts of the deceased.
2.7 I was standing with my back to the deceased and she was grabbing me on my shirt from behind. I therefore could not see where I was stabbing.

2.8 I also wish to state that I had consumed a lot of marula traditional liquor on that

particular day and that has extensively influenced my behaviour."

In respect of count 2 the accused denied having stabbed the complainant Ester Sonia Shikongo with a knife.

[2] It is common cause that on the evening of 13 April 2008 the accused and his wife (the deceased) were socializing at cuca shops at Oindimba village and during the evening the accused stabbed the deceased with his Okapi knife twice on her chest as a result of which she died at the scene.

[3] An autopsy was performed on the deceased's body and in his post mortem report dated 15 April 2008, Dr. Vasin noted the chief post-mortem findings being:

- penetrating stab wound on the right side of the chest 90 mm deep;
- stab wound of the right lung and lobar branch of the right arterior pulmonalis;
- hemathorax on the right side 1400 ml;
- a non-penetrating stab injury on the left side of the chest 85 mm deep. (By "non-penetrating stab injury" is meant that it did not penetrate the chest cavity)

The doctor's finding as to the cause of death is "stabbing to the chest". The medical evidence was not challenged and when asked what amount of force was required to inflict injuries of that nature, Dr. Vasin opined that, whereas a sharp object was used, moderate force was required to inflict penetrating wounds up to 90 mm on the human body. The stab wound on the right side of the chest was fatal and the direction of the knife when penetrating the body was backwards while the wound on the left side was downwards, in other words, the blow came from above and the knife entered the body at an angle. In the doctor's view it was unlikely that the injuries could have been inflicted as the accused described namely, that he unintentionally stabbed the deceased when she stood behind him and pulled him backwards by his shirt.

[4] During the trial the defence informed the Court that the accused wished to make admissions in terms of s.220 of the Criminal Procedure Act of 1977 of which the relevant aspects thereof were set out in the following terms:

> *"4. I admit that on the 13th of April 2008 and at or near Eenhana in the district of Eenhana I have wrongfully and unlawfully caused the death of Priskilla Shiindi who is my legally married wife when I stabbed her with a knife twice on her chest.*
>
> *5. I admit that by stabbing her I did foresee that I could cause her death and admit that I have notwithstanding negligently proceeded to stab the deceased which stabbing resulted in her death.*
>
> *6. I admit that I was negligent in my conduct and could be punished for that."*

Because the admissions appeared to be contradictory, the Court sought clarification from Ms. *Kishi*, appearing for the accused, who explained that par. 6 was inserted after the State had indicated that it would not accept a plea of guilty on the basis that the accused acted with *dolus eventualis.* The contradiction lies in the accused admitting that he *subjectively* foresaw the consequences of his unlawful conduct but notwithstanding acted with *dolus*, but simultaneously stated that he was negligent; for which the test is *objective.* The State then proceeded to lead further evidence.

[5] There were no eye-witnesses who witnessed the stabbing incident and the two witnesses, Josef Nghidengwa and Ester Shikongo, called by the State, merely described the events taking place at the cuca shops *after* the deceased had already been stabbed. The State case on count 1 is therefore based on circumstantial evidence as well as statements made by the accused to the police afterwards.

[6] Josef said he met with the accused and the deceased at a cuca shop whereafter he noticed that the accused did not respond to his wife's (deceased's) greetings. Accused was not drinking and appeared to be in a good mood. The accused then left. Josef said he also left and went to Ester's cuca shop where he later noticed that the deceased had also come there. After some time the deceased left the bar to relieve herself and shortly thereafter Ester called him saying that the deceased was injured by the accused. When he stepped outside he saw the deceased bleeding profusely from wounds on her chest. Upon his questioning she replied that the accused had stabbed her for no reason. She collapsed and died on the spot. He did not see the accused then, but only later when he returned to the scene in the company of a certain

Shitumbapo. After the accused ascertained that his wife had died, he proceeded to the police station.

[7] Ester's version is that she was on her way to relieve herself when she met with the deceased between her cuca shop and a water reservoir saying, that the accused had injured her. The accused then arrived and when she asked him why he had done that to the deceased, the accused wielded a knife and tried to stab her. She stepped out of the way, turned and ran back to the cuca shop. Under cross-examination Ester said the accused was about 1,5 metres from her when he raised his hand holding the knife trying to stab her and had she not retreated, he would have succeeded.

[8] The defence objected to the admissibility of two statements made by the accused to the investigating officer, sergeant Aihuki and Chief Inspector Agas on 14 and 15 April 2008, respectively. At the end of a trial-within-a-trial the Court ruled both statements admissible for the reasons set out later herein. Both witnesses testified in the main trial that after the statements were recorded it was read back to them whereafter the accused signed the statements. This the accused denied. For the reasons set out in this judgement the accused cannot be seen to have been an honest witness; and whereas the Court was impressed by the approach followed by the two police officers when recording the statements, it seems unlikely that, for no reason, they would have omitted or refused to read back the statements to the accused upon its completion.
The gist of these statements correspond with the evidence of the State witnesses on material issues and differ from the accused's evidence as far as it concerns the number of stabbing incidents and the circumstances in which this happened. In both statements it is stated that the deceased took out his knife when the deceased pulled him on his shirt from behind and that he stabbed her twice; that he followed her when she ran from him and when he caught up with her, he stabbed her for a third time, not knowing where on her body; that the deceased moved to the cuca shop where there was light and from where she also called him to come and see how he had injured her; and, that she died on the spot. During the pointing out the accused identified his shoeprints when he "chased" the deceased and stabbed her for a third time. According to the evidence these prints were not clear and impossible to be captured on a photograph. Of note is that to both police officers the accused said that he gave chase and when he caught up with the deceased, he stabbed her for a third time. Contrary thereto stands the medical evidence that the deceased's body bore only two stab wounds. He therefore could not have stabbed her three times. It is common cause that the accused went up to the deceased after the stabbing incident which could explain his shoeprints going in that direction. In the absence of evidence pertaining to the actual stabbing (other than what is recorded in the statements coming from the

accused) it would be impossible to *infer* only from the direction of the shoeprints, that the accused had run or chased after the deceased to stab her for the third time. The only evidence on that point therefore, is the accused's admissions made to the police.

[9] I now come to the accused's version. He said that upon his arrival home from the cattle post he learned that the deceased had gone to the cuca shops and he then followed. Deceased later arrived at Rimesia's cuca shop and they greeted. He then proceeded to Ester's shop where he joined friends in drinking. When he later decided to go home as he was not feeling well, he went looking for the deceased and found her behind another cuca shop where she was talking to one Fransina. After he told her that he was leaving, she insisted that he should return with her to the cuca shop but he refused – also to take a candle from her which he had to take home. He said she then grabbed him from behind on his T-shirt and pulled and pushed him to and fro upon which he took out his knife from his pocket and made stabbing gestures over both his shoulders, trying to stab her on her hand. The reason for this, he explained, was to force the deceased to let go of him. She released her grip and said that he had "cut" her but when he followed her to a lit up spot, he saw her bleeding from her chest and neck. He was shocked to see this and immediately ran to look for transport in order to take her to hospital. When he returned to the scene he realised that the deceased had died and he then proceeded to the police station where he handed over the knife. He denied having followed the deceased to a different point (point "E" on the photo plan (Exh 'M')) where he allegedly again stabbed the deceased. He furthermore denied that he had any intention of killing or *injuring* the deceased. It seems inconceivable that the accused had the intention of *stabbing* the deceased with a knife on her hand without him foreseeing the possibility of *injuring* her in the process if that was the sole purpose of his action. It was his intention to *stab* her on the hand so that she could release her grip on him. That begs the question, how then could he *not have intended injuring* the deceased by so doing? What he probably meant was that he did not intend injuring her seriously. I shall consider the different explanations advanced by the accused for stabbing the deceased later herein.

Regarding count 2 he denied having attempted to stab the complainant; in fact, he denied having seen her at all after the stabbing incident. He said that because he went into shock after stabbing the deceased, he carried the knife in his right hand in

front of him (chest height) and did not attempt to stab anyone.

[10] Contrary to what was said in his evidence in chief, the accused under cross-examination said that once the deceased *saw* him having a knife, she would let go of him. When asked to explain how he ended up stabbing her, he said this was brought about by the deceased pulling and pushing him to and fro during which she *accidentally* got stabbed. He demonstrated in Court how this came about and from this it appeared that he held the knife in his right hand with the blade pointing upwards and when she pulled him back, his arm swung over his shoulder backwards twice, stabbing the deceased behind him in the process. He added that she got stabbed when he leaned back onto her because of her pulling. From this explanation he clearly did not act intentionally. It was put to the accused that, bearing in mind the seriousness of the injuries inflicted the deceased would most probably not have pulled on his shirt any further after sustaining the first injury, to which he replied that thát is what happened. When reminded about his evidence in chief where he said he only intended stabbing the deceased on her hand, he was unable to explain the contradiction in his evidence.

[11] A further discrepancy in his evidence is that under cross-examination he said that he "assisted" the deceased by walking in front of her up to the cuca shop; whereas he said in chief that he immediately left the scene after he saw the deceased was injured. On a question from the Court why it was necessary to produce a knife and why he did not simply *tell* the deceased to let go of him, he replied that he *did tell her several times.* When asked why he only mentioned it at such a late stage, he said that he did not recall it sooner and neither did he inform his counsel about it. In the end he said that he did not foresee the stabbing; neither that it would result in death – the complete opposite from what the accused had earlier formally admitted. Besides the aforementioned discrepancies, several others were revealed during cross-examination and where it involved the evidence of other witnesses, it was left unchallenged i.e. the reason why the accused did not greet the deceased; the reason why he refused to take the candle home; and that he refused to re-enter the cuca shop. The totality of these contradictions leads to the inevitable conclusion that the accused adapted his evidence

under cross-examination thereby attempting to give credibility to his version. As a witness he was unimpressive and unable to give credible explanations for the contradictions in his evidence.

[12] Accused's denial that he had seen Ester after the stabbing incident was aimed at counteracting her evidence that he tried to stab her when she confronted him for stabbing the deceased. Had Ester only come from the cuca shop when the deceased arrived outside as the accused claimed, how then would she have known about the accused having stabbed the deceased and her telling Josef to come and look? During cross-examination Ester's evidence about the accused trying to stab her was challenged, but it was never put to her that she was not even present at the time. The same applies to the accused's denial of what had been recorded by sergeant Aihuki as stated above. It is standard practice for a party to put to an opposing witness its defence or the facts which concerns that witness and which will be relied upon, in order to afford the witness the opportunity to give evidence about those issues in dispute.

This Court has in the past, in several cases, endorsed the sentiments expressed by Smalberger JA in *S v Boesak* 2000 (1) SACR 633 (SCA) at 647c-d where it was said: "*…, it is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the witness implicating his client."* And, in *Small v Smith* 1954 (3) SA 434 (SWA) this Court held the view that: "*It was grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved."* There can be no doubt that the reason why conflicting evidence was left unchallenged is either because the accused did not fully take his counsel into his confidence and came clean with her during consultations or, that he adapted his evidence whilst on the stand – the latter being the more probable. I find it highly unlikely that the accused could have *forgotten* about him having asked the deceased several times to let go of him before he took out his knife from his pocket and then failed to mention this to his counsel.

[13] Having duly considered the merits and demerits of the State case, the accused's version as well as the probabilities, the Court has come to the conclusion that not only did the accused lie to the Court, but that his version is beyond reasonable doubt false and therefore has to be rejected where it is in conflict with the State case.

[14] On his own admissions the accused admitted that he wrongfully and unlawfully caused the death of Priskilla Shiindi in that he foresaw that by stabbing her with a knife, death might ensue but notwithstanding, proceeded stabbing her twice on

her chest. The accused thus admitted that he had the required *mens rea* and as such had acted with intent in the form of *dolus eventualis*. This notwithstanding, Ms. *Kishi* contended that the accused might not have fully understood during consultation the legal concepts of negligence, foreseeability and direct intent and therefore wrongly made the admissions as he did; and, based on what he had testified, he ought to be convicted of culpable homicide, despite the admissions he had made.

[15] Legal practitioners when representing accused persons in criminal trials not only have the duty to test the credibility of the State witnesses but also to present the defence case and to advise the accused what would be in his or her best interest. *Inter alia,* that could require, in the face of overwhelming evidence against the accused, to advise him to plead guilty or, as often happens, to admit one or more facts which are not in dispute. Where an accused intends making an admission against his own interest it seems inconceivable how that can happen without full consultation with his legal practitioner who certainly has the *duty to fully explain the consequences* thereof to the accused and only thereafter formulate the admissions (in legal terms) to give effect to the accused's intention. Lay persons most probably would not be capable of fully understanding legal terms and where necessary, it would then be required of his counsel to give meaning thereto in simple and understandable terms. This is what should have happened in the present case and if Ms. *Kishi* failed to do just that, then in my view, it would amount to a dereliction of her duty as legal practitioner. Both she and the accused are conversant in the Oshiwambo language and I cannot see that there could have been a misunderstanding caused by language barriers between them.

However, when regard is had to the contradictions in the accused's version about the manner in which the injuries were inflicted on the person of the deceased, it does not appear to me that the admissions made by the accused followed as a result of a misunderstanding between him and his counsel, but rather that the accused, after the State decided not to accept a lesser plea, tried to recover "lost ground" and then adapted his version to favour an inference that he might have acted negligently and not intentionally. He dismally failed in achieving that.

[16] Mr. *Shileka* contended that the accused in fact acted with direct intent and as

authority relied on judgments delivered by this Court in similar cases. He pointed out that at no stage did the accused include in his narrative to the police that the deceased had pulled him from behind, but instead, that he *stabbed* the deceased and when she fled from him he gave chase and *stabbed her for a second time.* It was argued that viewing the evidence in its entirety, it shows that the accused calculatedly stabbed the deceased who was unable to defend herself against his attack. Also, that before the deceased succumbed, she asked why the accused had "killed" her, thereby suggesting that it is indicative of the accused's intention to kill.

[17] In *The State v Gerson Uri-Khob* (unreported) Case No. CC 58/2007 delivered on 21.01.2009 Manyarara, A.J. said:

> *"[31] …While the fact that there was no eye witness to the stabbing might be held to render evidence of the offence to be circumstantial, the evidence of the police officers of what the accused told them is direct evidence implicating the accused."*

I respectfully agree and when regard is had to what the accused had said on two different occasions to sergeant Aihuki and Chief Inspector Agas respectively, about him having stabbed the deceased and his following and stabbing her for a second time, then that certainly points to the accused having acted with intent to kill. It is only the accused's evidence that the deceased was stabbed twice the first time and because of that, he disputed allegations of him following the deceased and any further stabbing. This Court in the unreported matter of *The State v Gerald Kashamba*, Case No. CC 05/2009 delivered on 03.04.2009 quoted with approval the sentiments expressed in *S v Nduli and Others* 1993 (2) SACR 501 (A) at 505g where it was said:

> "*A statement made by a man against his own interest generally speaking has the intrinsic ring of truth, but his exculpatory explanations and excuses may well strike a false note and should be treated with a measure of distrust as being unsworn, unconfirmed, untested and self serving."*

The Court has already rejected the accused's version of the circumstances in which the stabbing took place and when regard is had to what he had told the police and his accompanying pointing out; that he *wanted* to stab the deceased (albeit only on the hand); that he used a knife which was a lethal weapon; directed it at the deceased's chest being a vulnerable part of the human body; and inflicting stab wounds of 85 and 90 mm in depth respectively, the only reasonable inference to draw from these facts is that the accused acted with the intent to kill.

[18] It has been said that because the accused gave false evidence which was discarded, the Court may draw the same adverse inferences as if the accused did not give evidence at all, leaving the State case unchallenged; including the inference that there is something about the incident that he wishes to hide. The fact that he lied does not *per se* make him guilty of committing the crime, as everything will depend on the facts of each case. Hoffmann & Zeffertt: The South Africn Law of Evidence (4th Edition) at p603 states the following:

> "*A proper application of the **Mlambo** [1957 (4) SA 727 (A)] dictum merely signifies that an accused cannot complain if, because of his falsehood, the trier of fact does not give him the benefit of the doubt in this context, that he killed the deceased without intending to kill or that he killed him with a lawful purpose."*

[19] I accordingly find that the State proved the commission of the murder on count 1 beyond reasonable doubt and that the accused had acted with direct intent.

[20] In respect of count 2, there are the opposing versions of Ester and that of the accused, who disputed having met with Ester or that he attempted to stab her with a knife. As stated, despite the accused's denial, Ester's testimony is that she was outside the cuca shop at the time and she is the one who reported the stabbing of the deceased to Josef. She corroborated Josef's evidence pertaining to what happened thereafter and the only material aspect of her evidence that was challenged is the accused's alleged attack on her. She was present when the accused came and

touched the deceased and the fact that the accused did not see her then, does not mean that she was not present as the accused claims. She said she met with the deceased outside the cuca shop where the deceased reported that the accused had stabbed her; and upon her enquiring from the approaching accused why he had done that, he wielded a knife in his raised hand and *tried to stab her*. On his own version the accused said he *did* carry the knife in his hand after the stabbing incident up until the police station, which confirms Ester's evidence on that point. Ester was no party to any ruction between the accused and the deceased and certainly would have had no reason to falsely incriminate the accused. She only wanted to know from the accused why he had injured the deceased but was met by the knife wielding accused who obviously tried to stab her. According to her, had she not jumped out of harms way then she also would have been stabbed.

[21] Ester testified in an honest and forthright manner and her evidence was supported where it overlapped with that of the other witnesses. The Court is mindful that Ester gave single evidence as regards the attack on her and should therefore follow a cautious approach when considering the reliability of such evidence. Bearing in mind that the accused had just stabbed his wife, Ester's questioning as to the reason for doing so, might reasonably have sparked the reaction with the accused to lash out at anyone who dared to intervene or question his conduct. Judging from the evidence about the tension between the accused and the deceased it would appear that the accused was not pleased with his wife's attitude and that this could have given rise to the stabbing incident. When considering the probabilities, the unpredicted lashing out at Ester, in my view, would be consistent with the mood the accused displayed earlier.

Accused's defence against these allegations is a bare denial and according to him he became "confused" after the stabbing of the deceased and thereby tried to explain why he kept the knife in hand all the time. On his own evidence there is nothing showing that he was acting like a confused person, especially when he came to determine whether the deceased was still alive *before* he went looking for a vehicle. To me it rather appears to have been another attempt to counter Ester's evidence about accused trying to stab her as well. As stated earlier, the accused did not impress as a witness and when the evidence given by Ester is considered against the backdrop of the events taking place that night, I am satisfied beyond reasonable doubt that Ester told the truth. I pause here to remark that neither does it appear, as stated in his plea explanation, that the accused was intoxicated, which "*extensively influenced (his)*

conduct." He did not give evidence to that effect but rather that he was *not* under the influence as he had only one and a half glasses of Marula to drink. I am therefore unable to find that the accused was under the influence at the time of committing these crimes.

[22] In the unreported case of *The State v Stanley Danster* Case No. CC 10/2005 Mainga, J (as he then was) quoted with approval the sentiments expressed by Fannin J in *S v Miya and Others* 1966 (4) SA 274 (N) at 277 where no actual physical violence took place, said:

> *"There must be a threat of immediate personal violence and the person threatened must have reason to believe that the other intends, and has the power immediately to carry out that threat."* See also *R v Gondo* 1970 (2) SA 306 (R) at 307D-E

In that case this Court found that striking a blow (with a panga) at the victim, hitting off his hat, constitutes assault; also, with regard to the weapon and the blow being directed at the head, that the accused intended to cause serious injury. The reasoning in my view, is sound and consistent with what was said in *S v Mtimunye* 1994 (2) SACR 482 (T) where the headnote reads, *"an assault constituted by a threat can form the basis for a conviction of assault with the intent to do grievous bodily harm."*

See also: *S v Madikane* 1990 (1) SACR 377 (N) where the accused were convicted of assault with intent to do grievous bodily harm, despite the absence of observable injury.

[23] When applying the aforestated principles to the facts *in casu* the Court takes into account that the accused had a knife in his hand raised above his head and then *struck* at Ester but missed, only because she took preventative steps by jumping away. The act therefore had been committed and that amounts to an assault. In the circumstances, it seems to me that, had she not done so then she would have been seriously injured as the blow was directed at her upper body. Accordingly, the accused stands to be convicted of assault with intent to do grievous bodily harm.

TRIAL WITHIN A TRIAL

[24] During the trial the State sought to hand in as evidence two statements purportedly made by the accused to the police shortly after his arrest namely, a warning statement (Pol. 17) recorded by sergeant Aihuki on 14 April 2008 and notes compiled by Chief Inspector Agas during an alleged pointing out made by the accused the next day. At the end of a trial-within-a-trial the Court ruled both statements admissible and said the reasons for its ruling would be incorporated in the judgement. What follows are the reasons:

[25] The grounds on which the defence opposed the handing in of the statements are twofold viz, (i) the accused's rights pertaining to legal aid were not explained to him prior to the making of either statement; and (ii) neither of the statements was read back to the accused after it had been recorded. The latter objection is not an issue related to admissibility of the statements but a factual issue and therefore need not be considered at this stage of the proceedings.

[26] The State relied on the evidence of the two police officers who reduced the statements to writing and that of one officer who was present during the recording of the warning statement; while the accused was the only witness for the defence. Sergeant Aihuki testified that she charged the accused on 14 April 2008 whereafter she enquired from him whether he was willing to make a statement, and when he indicated that he wanted to do so, she strictly followed the format set out in the *pro forma* generally referred to as a warning statement (Pol. 17). From this document it is required before the accused person is asked whether he or she wishes to make a statement, that the accused person be informed of the right to remain silent; that should anything be said it would be recorded and could be used as evidence against the person in a court of law; and the right to legal representation, which right includes the right to legal aid provided for by the State. Although the *pro forma* makes no provision for specific questioning pertaining to legal aid, sergeant Aihuki said she did explain to the accused that he was entitled to legal aid. This she said, followed after he had informed her that he could not afford a legal practitioner of his choice. The statement reflects that the accused opted for legal representation but is silent on the explanation given about legal aid. This notwithstanding, the accused, according to her, wanted to make a statement which was reduced to writing and which the State

sought to rely on as evidence against the accused. During her testimony sergeant Aihuki also said that she informed the accused that it would "assist" him by giving a statement and make a pointing out. This the accused interpreted to mean that it would "make his case easier."

[27] Constable Mokete was present at the stage when sergeant Aihuki charged the accused and completed the warning statement and his evidence corroborated that of the sergeant in all material respects. He was adamant that the rights set out in the warning statement were indeed explained to the accused – including his right to legal aid – whereafter the accused elected to make a statement which he signed after it was read back to him. According to him the accused said that he wanted legal representation, but only at a later stage. The statement itself does not reflect thát and neither did sergeant Aihuki give evidence to that effect. Constable Mokete said that he heard the accused mention that. Because of the conclusion reached in the end, the differences in the evidence of the two officers are, in my view, immaterial.

[28] I regress here to restate the accused's position on both statements namely, that his right to legal aid was *not* explained to him prior to him making a statement or pointing out. It was not alleged that the other rights were also not explained to him and neither were the State witnesses' evidence on that point challenged by the defence. Thus, the accused knew that he had the right to remain silent and whatever he had to say would be recorded and could be used as evidence against him in a court of law. Also that he had the right to legal representation.

[29] The accused however, during his testimony, changed his position several times and subsequently contradicted himself as regards the explaining of his rights by both police officers to the point where he admitted that the *only* rights explained to him were indeed those relating to legal representation, *including* legal aid. That is a far cry from his initial objection which only involved the right to be informed of legal aid. Had none of the rights been explained to the accused as he claimed during cross-examination, then defence counsel undoubtedly would have placed that in dispute and challenged the evidence of the State witnesses giving evidence to the contrary. In his testimony the accused said that he was not informed about legal aid and only came to hear about it in the magistrate's court. He made no mention of any of the other rights *not* explained to him. During cross-examination however, he clearly tried to cast the net as wide as possible by saying that none of the other rights

were in fact explained to him. I do not find the accused to have been credible on this aspect of his evidence; contrary to the State witnesses who testified in a confident and forthright manner; also giving evidence favourable to the accused. Not one of the State witnesses was shown to be unreliable and the evidence of sergeant Aihuki was corroborated by constable Mokete in material respects.

[30] From the evidence presented the Court was satisfied that the accused was duly informed of his rights and thus in a position to appreciate the consequences of any decision he wished to make pertaining to the making of a statement or otherwise. He therefore took an *informed decision.* Whereas the same explanations were given to the accused the following day by Chief Inspector Agas prior to any pointing out made by the accused, the Court was equally satisfied that the accused's decision to make a pointing out followed only after he was duly apprised of his rights.

[31] The facts of this case differ from that of *S v Kapika and Others (1)* 1997 NR 285 (HC) relied upon by the defence in that, *in casu*, unlike in the *Kapika* case, the accused's rights to legal representation were indeed explained to him during the pre-trial proceedings whereafter he was afforded the opportunity to exercise these rights. This he did by electing to make a statement and a pointing out. It was contended that the moment the accused stated that he wanted legal representation, the officer should not have proceeded with the recording of the statement until such time the accused's legal representation was in place. The witnesses were in agreement that, had the accused informed them that he was not willing to make a statement without him having consulted his lawyer, they would have respected his decision. However, they said the accused, notwithstanding, intimated that he wanted to give a statement and make a pointing out and if that is what he decided on, then they could not prevent him from doing that as it was his Constitutional right to make a statement if he wished to do so.

[32] In the present circumstances I find myself unable to fault sergeant Aihuki for proceeding in taking down the accused's statement after he had said that he wanted legal representation. When the accused so decided, he well knew that he still had the

right to remain silent. The very next question put to the accused after he indicated that he wanted legal representation was that he had a *choice* to make a statement or only answer questions after consultation with his legal practitioner or to remain *silent*, to wish he replied: *"I wish to give my statement <u>now</u> to the police."* (My emphasis) I do not think that the police officer recording the statement was under a legal duty to refuse recording the accused's statement *before* he had consulted a legal practitioner. The accused's rights were duly explained to him in simple terms in his vernacular and which he indicated that he understood. There is no evidence showing that he did not appreciate the consequences of his decision to make a statement and pointing out.

[33] Because sergeant Aihuki during her testimony said that she also told the accused that it would *assist* him by making a statement and pointing out, the defence contended that she exerted undue influence on the accused to follow her "advice". When asked what he understood from that, the accused said that he thought it would make his case easier. To what end he would have benefited from following the advice given to him, he was unable to tell. When objecting to the admissibility of the statements in question, it did not include any ground of undue influence and this was only raised during the testimony of sergeant Aihuki and not sooner. Clearly, this was an opportunity which presented itself to the defence quite unexpectedly. However, the Court still had to consider whether the accused when making the statement and pointing out, acted of his own volition and without undue influence.

[34] Hiemstra's Criminal Procedure at page [24-71] after comparing the requirements of admissibility of an admission (S.219A) to that of a confession (s.217) came to the conclusion that the admissibility of an admission (compared to a confession) is assessed relatively leniently, as it only requires *voluntariness* by the accused person. The onus is on the State to prove that the admission or pointing out was made voluntarily and without undue influence. Where there has been no threats of violence (as in this case) it is often difficult to determine the existence of undue influence; the extent thereof and in what way it swayed the accused to act differently from what he would have, had he not been "influenced". The mere *possibility* of influence on the accused person, in my view, does not automatically render the

admission or pointing out inadmissible as this will largely depend on the circumstances of each case. Because undue influence cannot exist *in vacuo* it must be reasonably possible that the accused was actually influenced to make the statement and pointing out on the supposition that it would assist him or "make his case easier", as he perceived.

[35] As stated, the accused was unable to explain in what way he expected his case to be easier as there were no promises of assistance on the part of the police made to him. Could it in the circumstances be said that the mere *ipso dixit* of sergeant Aihuki in her position as investigating officer *influenced* the accused to make a statement and pointing out as he did? I do not believe so. Having at this stage the benefit of hindsight, it is obvious that the statements made by the accused to the police are identical to his evidence, except where he denies that he followed the deceased and stabbed her for a second time. If that had been his version all along, why would it have been necessary to exert influence over him to state that to the police at the time? And what did he say or do differently from what he would have done had he not been "influenced" or what did he stand to gain from that? In my view, nothing, as the gist of the statements made by the accused at different stages remained the same and was materially confirmed during his testimony.

[36] I furthermore do not believe that, because sergeant Aihuki in her capacity as investigating officer informed the accused that it would assist him to make a statement and pointing out, that she *per se* stood in a position of authority over the accused. Nothing said by the police officer could have brought him to that conclusion and the proper explanation of his rights, especially his right to remain silent, gave him an *option* in exercising his rights. In this instance the accused *chose* to make a statement and pointing out.

[37] For the foregoing reasons the warning statement (Pol. 17) and the notes relating to the pointing out were found admissible in evidence.

[38] In the result, the Court's judgment is:

Count 1: Murder, read with the provisions of Act 4 of 2003 – Guilty
Count 2: Assault with intent to do grievous bodily harm – Guilty

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LIEBENBERG, J

ON BEHALF OF THE ACCUSED: **MS. F KISHI**

INSTRUCTED BY: **KISHI LEGAL PRACTITIONERS**

ON BEHALF OF THE STATE: **ADV. R SHILEKA**

INSTRUCTED BY: **THE PROSECUTOR-GENERAL**