REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 16/2010

In the matter between:

THE STATE

versus

1. JOSEPH GAVIN GARISEB
2. DEON GAROEB

Neutral citation: *The State v Gariseb and Another* (CC 16/2012) [2013] NAHCMD 25 (30 January 2013)

Coram: SHIVUTE, J

Heard: **27 June 2011, 29 June 2011, 04 – 08 July 2011, 11 – 14 July 2011, 25 – 26 July 2011, 12 – 13 March 2012, 15 March 2012, 19 – 20 March 2012, 22 – 30 March 2012, 03 April 2012, 08 May 2012; 24 – 31 October 2012.**

Delivered: **30 January 2013**

Flynote: **Criminal Procedure: - Evidence – Confessions and admissions – Admissibility – Police officers taking confession and admission, must be satisfied that the statement is made freely and voluntarily.**

Criminal Procedure: - Evidence – Confessions and admissions – Admissibility – Duties of Police officers when recording statements – explaining right to legal representation – such explanation should include informing the accused of the right to apply for legal aid – Failure of such explanation rendering statements inadmissible.

Summary: Both accused persons were charged with two counts namely: Murder and housebreaking with intent to rob and robbery with aggravating circumstances. Each accused made an admission of pointing out and a confession. The court held a trial-within-a-trial after the defence objected to the production of the statements on the grounds that the statements were not made freely and voluntarily.

Both Counsel contended further that the accused persons were not properly informed of their rights to legal representation including the right to apply for legal aid.

Held: The State bears the *onus* of proof to prove that the admissions or confessions made by the accused persons were made freely and voluntarily without undue influence. The standard of proof required is that of beyond a reasonable doubt. The state should also prove that the accused made those admissions when he was in his sober and sound senses. In addition, the court must be satisfied that the rights of the accused persons had been adequately explained, including the right of accused to apply for legal aid. A failure to do so may render the statement to be inadmissible.

Held: The admissibility of confessions should meet the requirements of section 217 of Act 51 of 1977 and admissibility of admissions should meet the requirements of section 218 of the same Act.

Held: Article 12 of the Namibian Constitution provides for rights concerning a fair trial – Article 12 (1) (f) in particular provides for the right against self-

incrimination and the right to have evidence obtained in violation of Article 8 (2) (b) to be excluded. A police officer who took a statement for an accused person proceeded to take a confession despite the fact that the accused was assaulted during his arrest. The accused gave a statement about five days from the time of his arrest. Assault marks were visible. The statement cannot be said to be free and voluntary, the possibility that accused was still instilled with fear cannot be excluded.

Held: Although the police officers who took statements explained the right to legal representation, they have failed to explain to the accused the right to apply for legal aid. Although the Constitution did not provide expressly or specifically for the right to apply for legal aid, Article 12 provides for a fair trial which includes the right to legal representation and the right against self incrimination. Failure to explain rights to apply for legal aid may render the statements to be inadmissible. The statements were taken in violation of Article 12 of the Constitution and the confessions and admissions are ruled to be inadmissible.

VERDICT

In the result, I have arrived at the following verdict:

1. 1st count, murder: Each accused persons is found not guilty and acquitted.

2. 2nd count, Housebreaking with intent to rob and robbery with aggravating circumstances: Each accused person is found not guilty and acquitted.

JUDGMENT

SHIVUTE J:

[1] The two accused persons are charged with one count of murder and one count of housebreaking with intent to rob and robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977.

[2] Particulars of offence being that:

1st Count: Murder

In that between 14 -15 September 2002 at Okahandja in the district of Okahandja the accused persons did unlawfully and intentionally kill Ludwig Frans Wojatsheck, an adult male.

2nd Count: Housebreaking with intent to rob and robbery with aggravating circumstances

In that between 14 – 15 September 2002 at Okahandja in the district of Okahandja the accused persons did unlawfully and intentionally break and enter the house and the workshop of the above mentioned deceased with intent to rob and did unlawfully and with intention of forcing him into submission, assault the deceased by hitting him over his body and his head with blunt objects and or pointing a firearm at him and/or firing shots in his direction and did unlawfully and with intent to steal take from him a firearm (.22 unique pistol with no. 461877); a sony video recorder; jewellery namely, seven gold rings and a silver pulsar men's watch; a bundle of keys; an unknown amount of cash; clothes such as a khaki jacket, a men's suit black in colour and one pair of men's shoes black in colour, the property of or in lawful possession of the above mentioned deceased and that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present in that the accused or an accomplice on the occasion when the offence was committed and whether before, during or after the commission of the offence did wield a firearm or any other dangerous weapon and/or inflicted grievous bodily harm to the deceased and or threatened to inflict grievous bodily harm to him.

[3] Each accused person pleaded not guilty to the charges. The trial in this matter had started before my late Brother Manyarara AJ who regrettably passed on before he could finalise it. It had to start *de novo* before me.

[4] Ms Ndlovu appears on behalf of the state while Mr Uirab appears on behalf of the 1st accused and Mr Tjituri appears on behalf of the 2nd accused. Both defence counsel are instructed by the Directorate of Legal Aid.

[5] When disclosing the basis of his defence, each accused denied having been in Okahandja between the 14th and the 15th September 2002. Each further denied to have killed the deceased or to have broken into his house or workshop and to have robbed him of his property or to have been in possession of the deceased's property as listed in the charge sheet. Each accused person indicated that at the time the alleged offence was committed he was in Windhoek.

[6] The state opened its case by producing, among others, the 'identification of the body' document identifying the deceased's body by Esther Ihuhua to Doctor Shangula and an identification of the deceased's body by his brother Wojatschek. Thereafter it called its first witness Warrant Officer Lukas Swartz who attended the scene of crime and compiled a photo plan of the points which were pointed out to him by Warrant Officer Maletzky. He explained the photo plan. According to the photo plan, the culprits entered the premises by passing over the roof. The safety barbed wire was cut. The door to the house was still intact. Foot tracks of suspects were traced on the roof at the gutter. The sand that was on the roof made it possible for the shoe prints to be visible.

[7] Furthermore the photo plan indicated the position where the deceased's body was found lying and the safe where the jewellery was allegedly removed from as well as a point where the video recorder was before it was taken. The photographs further indicated the broken door glass to the workshop. The photo plan was admitted in evidence and marked as Exhibit "G".

[8] The second witness called by the state was Mr William Fredericks who testified that during 2000, he used to perform some jobs at the deceased's house from Mondays to Fridays. The deceased was a goldsmith. Whilst he was fixing geysers and other items at the deceased's house he had access to the house except to the bedroom. Whilst he was working at the deceased's place the deceased showed him how to enlarge rings or to minimise them, and how to mould the jewellery. He further testified that he was aware of the rings which were shown to

him by the deceased and those which were on the deceased's bench and he would be in a position to identify them if he saw them. There were also two rings from customers one of which had a square engraved on it.

[9] After the witness received information regarding the deceased's death, he went to the deceased's premises. He noticed that a video recorder was missing from the deceased's premises. It was a unique Sony VCR which was very expensive, according to the witness. The VCR was black in colour. The deceased had also a pawn shop where other people could bring their goods including video recording machines. The witness was shown a video recorder which he recognised as that belonging to the deceased. He recognised it because it was not flat in construction but long. It has a similar build like the 'Royals' VCR. After he noticed that the place where the video machine was was empty, he did not inform the police at the scene or any other person who was at the scene of crime.

[10] The following week the witness was called by the police. The police asked him about the video machine that was in the deceased's house. The witness could not remember the make of the VCR. Police officers showed him the VCR and immediately the witness recognised it. The VCR was tendered in evidence and marked as Exhibit "1". The witness was shown some rings and he recognised them as those that had belonged to the deceased. He recognised one ring as having a curve or waves that the deceased was busy working on it. There was another ring he identified as that of the customer as it was polished. The ring that had a curve or waves was raw because it was being processed. He again recognised another ring which belonged to a customer because it had a missing diamond. The witness identified four rings which were marked as Exhibits 2 – 5. The ring with a clear stone was marked as Exhibit "2"; the ring with waves marked as Exhibit "3"; the one with three stones was marked as Exhibit "4" and the ring that was not finished was marked as Exhibit "5". Apart from the rings, the witness further identified a Pulsar watch for men as that of the deceased's, because it was partly gold plated and silver and the deceased used to wear it. The watch was marked as Exhibit "6". The witness further testified that he recognised the items as those of the deceased after they had been shown to him by the police.

[11] The third witness called by the state was Johannes Haimbodi who testified that during the beginning of October 2002, he was approached by both accused persons and Atab. They were selling a Sony VCR and rings. Atab is the one who showed him the rings which he took from his pocket and he did most of the talking. When the witness was asked for the second time as to who was doing the talking during the transaction, he responded that it was Atab and accused No. 2. Atab accused no.2's brother was the one who offered the video machine for sale at N$600.00. Accused no.2 and his brother were doing the talking concerning the sale. The rings were offered for sale at N$300.00. The witness and a person by the name of Laban Ekonda offered to buy the rings at N$100.00. However, they later sold them at N$120.00. The witness gave N$300.00 to Atab as payment for the Sony VCR.

[12] On 16 October 2002, both accused persons and Atab accompanied by the police officers came to his place and requested for the video machine and the rings they sold to him and Laban. The witness knew accused No. 2 very well before this incident. He had known accused No.1 by sight before they came to his house. The VCR and the four rings were handed over to the police officers. Among the police officers who came to collect the VCR were Booysen and Dionisius. The witness identified Exhibits 1 - 5 as the items that were in his possession and which he gave to the police. When it was put to the witness that accused No.1 never went to the witness's house with accused No.2 and Atab, the witness insisted that he was indeed in the company of accused no.2 and Atab when they came selling the VCR and the rings. They were also the people who came with the police to collect the said items. It was further put to the witness by counsel for accused No.2 that the person who was with Atab when the VCR was sold was accused No.2 and Nana and not accused No. 1. The witness replied that it was accused No.2 and No.1.

[13] The fourth witness called by the state was Doctor Simasiku Kavandje who explained the post-mortem examination report compiled by the late Doctor Shangula. According to the medical report, the death took place on 14 September 2002. The chief post-mortem findings made on the body were: bruises on the head and face; fractured nose; multiple lacerations and wounds on the head and face; blood in the stomach, and clothes soaked with blood. The cause of death was found to be blunt force trauma to the face and head, as well as haemorrhagic shock. The post-

mortem examination report together with an affidavit in terms of section 212 (4) Act 51 of 1977 were marked as Exhibit J.

[14] The state next called Michael Booysen who testified that he was a Detective Inspector in the Namibian Police stationed at Serious Crime Unit in Windhoek. On 16 October 2002, he went to Haimbodi's house where he recovered a Sony video recorder and four gold rings. The VCR was black with serial No. 5051268. The witness identified Exhibits 1 – 5 as the property that was given to him by Haimbodi. Apart from Exhibits 1 – 5, the witness testified that he recovered a Pulsar watch that was given to him by Wilbard Hangula.

[15] Warrant Officer Reinhard Christiaan Maletzky testified that he knew the deceased as a person who was running a pawn shop and a jeweller. He used to manufacture rings and other jewellery at his place. On 15 September 2002, he received a report concerning the deceased's death. Upon receiving the information, he together with other police officers went to the deceased's place. He observed that the main entrance to the premises was locked. He jumped over the gate and entered the premises. He observed that the door on the northern side was broken and pieces of glass from the door were scattered all over. As he entered he observed the body of the deceased whom he identified immediately lying on a floor close to a table. The deceased had head injuries and he was bleeding from the head. He investigated further and observed that some wires were loose at the wall unit. The TV wall unit was dusty and one could see that a VCR had been removed from there.

[16] With further investigations, he observed that the culprits gained entry to the premises by cutting the security barbed wire on top of the roof. Shoe prints were observed at the roof. The witness identified the photo plan Exhibit "G" compiled by Mr Swartz and confirmed that the photographs depict the correct position of how the deceased's premises were found. He further testified that Mr Fredericks was at the deceased's place. Immediately Mr Fredericks entered the room where the VCR was before it was stolen he pointed out that there was a video machine. However, this piece of evidence is contrary to the testimony of Mr Fredericks who said that after he noticed that the video machine was stolen, he did not tell the police or any person

who was present at that stage. It was further the testimony of Warrant Officer Maletzky that after he seized the property in this matter he showed the goods to Mr Fredericks and the latter identified the goods as those of the deceased.

[17] During October 2002, a certain Araeb was arrested for attempting to break into a certain bank. The *modus operandi* used to break into the bank was similar to the one used to break into the deceased's house and there were a lot of housebreaking incidents that took place in Windhoek and Okahandja. Araeb incriminated other suspects and places in Windhoek were raided by the police. Accused No. 1 was arrested at Okahandja Park in Windhoek during the operation. On 16 October 2002 the police received information that some of the stolen goods were sold. They went to Johannes Haimbodi's house and Haimbodi handed a black Sony VCR and four gold rings to Inspector Booysen in his presence. After the VCR was seized, Warrant Officer Maletzky recorded its serial number. The witness identified Exhibits 1 – 5 as the items recovered that day. He furthermore identified Exhibit "6", namely the Pulsar watch that he says was handed over to him by Inspector Booysen.

[18] According to Warrant Officer Maletzky, Mr Fredericks identified Exhibits 1 – 6 to him as property of the deceased. He could do so because he used to see the items when he had visited him. One of the rings with red stones was made in Mr Fredrick's presence by the deceased and that he saw other rings and the VCR at the deceased's premises. Mr Fredrick also stated to him that the deceased used to wear the Pulsar watch. This was in line with Mr Fredrick's testimony. Exhibits 1 – 6 were recovered when the police were investigating the deceased's murder. The two accused persons were present when Exhibits 1 – 5 were recovered from Haimbodi's house. Atab was interrogated in connection with this case but there was no evidence connecting him to the commission of the offence.

[19] It was again Warrant Officer Maletzky's evidence that in order to establish whose rings were seized by the police, they put an advertisement in different local newspapers but no one came forward to claim the rings. The deceased did not keep proper records in respect of the pawned items. No documents were found in connection with the recovered property at the deceased's premises.

[20] During the course of the trial the state applied to hand in two statements allegedly made by the two accused persons in terms of section 217 of the Criminal Procedure Act 51 of 1977. Counsel for the respective accused opposed the application on the grounds that the statements made were not freely and voluntarily made. Counsel argued that prior to the taking of the statements, the accused persons were subjected to physical force as well as threats to induce them to make statements.

[21] Both counsel argued that the two accused persons were tortured, induced and influenced to make statements. It was further argued on behalf of both accused persons that what was contained in the statements was dictated to them by the police officers who took the statements and it never came from the accused persons.

[22] Apart from the statements which were allegedly taken in terms of section 217 of the Act, the state made another application for the statements allegedly made in terms of section 218 of the Act, namely pointing outs by the accused persons. Evidence of pointing out was also opposed on the same grounds. The court held a trial-within-a-trial and the conclusion thereof, it made the following rulings:

(a) The alleged confessions in terms of section 217 of the Criminal Procedure Act made by accused 1 and 2, namely Exhibits "M" and "P" that were provisionally admitted into evidence were ruled inadmissible.

(b) The alleged pointing outs made by accused 1 and 2 in terms of section 218 of the Act, namely Exhibits "N" and "Q" that were provisionally admitted in evidence were ruled to be inadmissible.

I indicated that the reasons for the rulings will be given in the judgement at the conclusion of the trial. The following are now the reasons:

[23] Section 217 of the Criminal Procedure Act deals with admissibility of confessions whilst section 219A deals with admissibility of admissions. A pointing out in terms of section 218 may be regarded as an admission by conduct in appropriate circumstances and their admissibility should be governed by the provisions in the Criminal Procedure Act. The admissibility of confessions should meet the

requirements of section 217 and the admissibility of admissions should meet the requirements of section 219A.

[24] In deciding whether such statements are admissible the court must be satisfied *inter alia*, that the statements had been made freely and voluntarily and without undue influence. In addition, the court must be satisfied that the rights of the accused persons had been adequately explained, including the fact that the accused has the right to apply for legal aid. Failure to do so may render the statement to be inadmissible. *S v Malumo and Others* 2010 (1) NR 35 (HC).

[25] Both accused persons in this case gave statements allegedly confessing to the commission of the offences charged and made statements concerning pointing out. The statements were attacked on the grounds that they were not freely and voluntary obtained. Although it was not stated at the outset, both counsel put it to witnesses during cross-examination that the accused were not informed of their right to apply for legal aid.

[26] I will now deal with the alleged confession Exhibit “M” and a statement of pointing out Exhibit “N” provisionally admitted in respect of accused No. 1and a confession Exhibit "P" and an admission Exhibit "Q" allegedly made by accused No.2 which were also provisionally admitted. It is worth mentioning that I have not had sight of the alleged incriminatory parts of the alleged confessions and admissions since they were sealed.

[27] Inspector Booysen testified that he did not see any assault marks or injuries on any of the accused persons. None of them ever informed him that they were assaulted or threatened with assaults or influenced in any way. He again explained that before they gave statements or pointing outs, he warned them in terms of the judges' rules and that he informed them of their rights to legal representation including their rights to apply for legal aid.

[28] Warrant Officer Maletzky testified that the accused persons were not assaulted in his presence. However, accused No. 1 reported to him that he was assaulted at the time of his arrest. He had also observed fresh assault marks on 11 October 2002 on accused 1’s body whilst they were in Okahandja where accused

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No. 1 was taken after his arrest. Accused No. 2 was arrested on 15 October 2002 after his arrest he and accused No. 1 were taken to Booysen's office. Accused 1 showed Inspector Booysen the marks of the injuries he sustained during his arrest.

[29] Sergeant Deon Michael Gray testified that although he did not know whether accused No.1 was assaulted, there were people assaulted by the Special Field Force members at Okahandja Park including Sergeant Gray himself. He testified that between 10 and 11October 2002, the police together with the Special Field Force members went to Okahandja Park to search certain premises because of some housebreakings that were committed. Some of the police officers were wearing plain clothes and that could be the reason why he was assaulted. However, he stated further that although some assaults took place, he did not observe injuries on accused No.1.

[30] Chief Inspector Marius Johannes Louw testified that he took a confession in respect of accused No.1 whilst Sergeant Nowaseb was interpreting from Damara/Nama to English and vice versa. Before he took a statement from him he had informed him of his rights to remain silent and his rights to legal representation. He inquired from the accused whether he was assaulted or threatened or influenced and he stated that he was not assaulted or threatened. Accused No.1 indicated his willingness to give a statement without the presence of a legal representative. When he was asked whether he had injuries he confirmed it and Chief Inspector Louw observed sjambok marks on the back of the accused and on the right arm. Despite the assault marks observed by the Chief Inspector, he proceeded to take a statement from accused No.1 because accused No.1 stated that he was still prepared to make a statement. Furthermore Chief Inspector Louw testified that he had informed the accused of his rights to apply for legal aid, but this is not reflected in the pro-forma he used.

[31] Sergeant Jakobus Nowaseb testified that he interpreted for accused No.1 and Chief Inspector Louw when a confession was taken from accused No.1. He observed sjambok marks on accused No. 1's body when he was showing them to Chief Inspector Louw.

[32] Adam Stuurman testified that he was a sergeant in the Namibian Police based at Serious Crime Unit, Windhoek. During 2002, he saw the accused persons in Inspector Booysen's office because Booysen's Office was next to his. He was never involved in the investigation of this case or in any other manner. He did not assist Booysen in connection with this case. He never assaulted or tortured any of the accused.

[33] Chief Inspector Gerhard Cornelius Eiman testified that accused No. 1 was referred to him for a pointing out by Inspector Booysen. He took notes of a pointing out and he used a pro-forma on 16 October 2002. Constable Neidel was acting as an interpreter from Afrikaans to English and vice-versa. Before accused No.1 made admissions to him he explained to him his rights, among those rights were the right to a legal representative of his choice or a right to get a legal representative appointed by the State. Accused No. 1 opted not to have a legal representative present. When he was taking notes on a pointing out Exhibit "N", accused No.1 showed him healed wounds on his back, right arm and left knee which he said were sustained on 7 October 2002 when he was arrested in connection with a housebreaking case at Okahandja. He was assaulted by members of the Special Field Force. Photographs depicting accused No. 1 and the assault marks were taken. According to Chief Inspector Eiman, the accused gave a statement concerning a pointing out freely and voluntarily. Constable Neidel gave evidence confirming that he acted as an interpreter between Chief Inspector Louw and accused No. 1.

[34] Sergeant Willem Frederick Dax testified that he transported accused No.1 to Chief Inspector Louw and transported accused No. 2 to a place he went for a pointing out with Chief Inspector Viljoen at Okahandja but they never traced the place which he was supposed to point out. He further stated that he was not present when the accused persons were interrogated or placed in an uncomfortable position or being assaulted by the police.

[35] Chief Inspector Gerrit Viljoen testified that accused No.2 was brought to him for the purposes of pointing out a scene of crime. He completed a document concerning a pointing out on 16 October 2002. The interpreter was Mr Gaseb who

interpreted from Damara/Nama to English and vice-versa. Chief Inspector Viljoen completed a pro-forma titled "Notes on a pointing out". Before he did so, he had informed the accused of his rights, including the right to legal representation. Accused No. 2 gave a free and voluntary statement after his rights were explained to him. There were no injuries observed on his body and he never mentioned that he was assaulted when he was questioned. Accused no. 2 stated that he was not influenced or threatened to make a pointing out. The evidence of Chief Inspector Viljoen was corroborated by Constable Gaseb that he acted as an interpreter. He did not observe injuries on accused No. 2 and the accused never said that he was assaulted or threatened or influenced to make a statement. He further testified that the accused was informed of his rights to get a legal representative.

[36] Chief Inspector Derek Brune testified that he took a confession from accused No. 2 on 17 October 2002 Exhibit “O”. Constable Shaduka acted as the interpreter from Damara/Nama to English and vice versa. He used a pro-forma which contained certain questions to be answered before the person gives his statement. He also advised the accused of his constitutional rights which included a legal representative of his choice. He testified that he went beyond what was contained in the pro-forma and explained to him that if he did not get a legal representative of his choice he would put him in contact with legal assistance and make sure that he was properly represented at that point in time. Accused No. 2 opted to give a statement. He was asked whether he was assaulted or threatened or influenced to make a statement and he said "No". Accused No. 2 had no visible injuries and appeared to be at ease. Constable Shaduka corroborated Chief Inspector Brune by confirming that he interpreted what was contained in the pro-forma used.

[37] On the other hand accused persons also testified in a trial-within-a-trial. Their evidence may be summarised as follows:

Accused No. 1 testified that between 10 and 11 October 2002 he was sleeping at his uncle’s house in Okahandja Park, Windhoek, when the police arrived at the house during mid night. Warrant Officer Maletzky was among police officers who came there. Warrant Officer Maletzky kicked him, punched him and hit him with his knee on the stomach. Thereafter he was assaulted by police officers from the Task Force

with “sjamboks” or police batons. There were also police officers who wore civilian clothes. He was also assaulted with fists and with a butt of the rifle. The assaults did not end at the place where he was arrested. They continued in Okahandja and at the Serious Crime Unit in Windhoek. He suffered a swollen head, injuries on his body and ribs. Other police officers who allegedly assaulted him were Dionisius, Klukowski, Booysen, Stuurman and many others.

[38] He stated that the confession he made as well as notes on a pointing out were not freely and voluntarily made. He was assaulted, influenced and the contents of the statement were dictated to him by the police. Furthermore, he stated that he was not properly informed of his constitutional rights regarding the right to remain silent or to legal representation. He again stated that he incriminated himself because of the promises made to him and he was left for days without eating.

[39] He called his mother who testified that accused No.1 was assaulted by members of the Task Force or Special Field Force. He again called one Swart who testified that he witnessed accused No.1 being pressed on a pimple that was under his armpit by Warrant Officer Maletzky at Okahandja Police station.

[40] Accused no. 1’s third witness, Fillemon Garoeb claimed that he witnessed the Warrant Officer pressing accused No.1 on the pimple. Apart from a pimple being pressed, he claimed that he saw accused No. 1 being assaulted by Warrant Officer Maletzky with a fist.

[41] Accused No. 2 testified that he was arrested between 15 and 16 October 2002 at Okahandja Park. He was assaulted by some police officers, namely Maletzky, Booysen, Dax, Dionisius and Stuurman. He was kicked and hit with fists and he fell down. The ordeal proceeded at the Serious Crime Unit where he was assaulted again. Thereafter he was taken to Okahandja Police station where he was assaulted by Maletzky and Stuurman on the chest and stomach. Stuurman on the instructions of Booysen took something like pliers which was used to pull accused No. 2's private parts. They went back to the Serious Crime Unit, Windhoek where the assault allegedly continued. Accused No. 2 stated that he was tortured and subjected to cruel and inhumane treatment. He further testified that he made the statement alleged to be a confession and notes on pointing out because of the

assault and undue influence. He again said what was contained in the statements did not come from him. It was further accused's testimony that he was not informed properly of his rights to legal representation.

[42] Accused No.2 called one Mannetjie who testified that he was shown injuries on accused No.2 on his private parts and that he also heard accused No.1 screaming at the police station. Mannetjie was at the police station because he was a suspect in another matter.

[43] That was briefly the evidence of a trial-within-a-trial.

[44] The state bears the *onus* of proof to prove that the admissions or confessions made by the accused persons were made freely and voluntarily without undue influence and the standard of proof required is that of beyond a reasonable doubt. The state should also prove that the accused made those admissions when he was in his sound and sober senses. All state witnesses disputed that they assaulted the accused persons at their arrest or during their investigations. However, there is evidence on record that accused No. 1 had injuries observed after his arrest. The police officer who took the alleged confession took a photograph depicting accused No.1 and the assault marks on his body. Accused No. 1was arrested between 10 and 11 October 2002. The confession and notes of pointing out were taken on 16 and 17 October 2002 about four days after he had suffered those injuries.

[45] Article 12 of the Namibian Constitution provides for rights concerning a fair trial. Article 12 (1) (f) in particular provides for the right against self-incrimination and the right to have evidence obtained in violation of Article 8 (2) (b) excluded.

[46] I am not satisfied beyond all reasonable doubt that when accused No. 1 gave a confession and admission of pointing out it was free and voluntary, because accused No. 1 was assaulted at the time of his arrest and after about five days he gave a confession or made admissions. The possibility that accused No.1 was still instilled with fear cannot be excluded. In those circumstances, it cannot be said that the confession and pointing out were given freely and voluntarily. Accused No. 1 was not only slapped but it appears that he was assaulted seriously if marks of injuries depicted in photographs are anything to go by.

[47] As to the alleged assaults concerning accused No 2, I am not satisfied that he was indeed assaulted. However, I excluded the alleged confession and pointing out because the state did not meet one of the requirements necessary to satisfy the court to admit the evidence of an admission or a confession. The Chief Inspectors who took down the confessions and admissions did not properly explain the rights to legal representation, including the right to apply for legal aid.

[48] All officers who took the confessions and admissions although they had explained the right to legal representation there is no indication that they had also explained that the accused persons had a right to apply for legal aid. Although some of them claimed to have gone beyond the pro-forma they used and explained the rights to apply for Legal Aid, this is not borne out by the documentary evidence before me. The constitution did not specifically provide for a right to legal aid. It provides for a fair trial in Article 12 which includes the right to legal representation and the right for one not to incriminate himself or herself. The confessions and admissions were obtained in violation of Article 12 of the Constitution because accused 1 was effectively compelled to incriminate himself due to the assaults he had endured. Again both accused were not properly informed of their rights to legal representation and the failure to explain the right to apply for legal aid rendered the confessions and admissions made by the accused inadmissible. These were the reasons why the confessions and admissions made by both accused persons were ruled inadmissible.

[49] Having dealt with the evidence of a trial-within-a-trial, I will now proceed with evidence in the main trial which I had already summarised. After the State closed its case the two accused persons exercised their constitutional rights to remain silent. They called no witnesses.

[50] As earlier stated, the two accused persons are charged with one count of murder and one count of robbery with aggravating circumstances with intent to rob and robbery. It is evident from the evidence adduced by the state that the deceased died an unnatural death whilst he was at his house between 14 and 15 September 2002. His house was broken into and his assailants gained entry to the premises through the roof. The deceased was found dead with injuries on his body according

to the post-mortem examination report. There is further evidence that goods were stolen from the deceased's premises. The court is satisfied that the deceased died a violent death, his house was broken into and the goods were taken from there.

[51] The State having proved the cause of the deceased's death and housebreaking with intent to rob and robbery it further needs to prove beyond a reasonable doubt that it is the accused persons who committed these crimes.

[52] It was argued by counsel for the State that the two accused persons together with one Atab sold a Sony VCR and four gold rings to Mr Haimbodi and Laban. These items were recovered by the police after both accused came with the police to collect the goods from Mr Haimbodi's house. The goods were identified by Mr Fredricks as goods that had belonged to the deceased. The goods were recovered by the police because of information provided by the accused persons. The two accused persons could only have had the knowledge that the goods belonged to the deceased if they had something to do with the death and robbery of the deceased.

[53] Counsel for the state argued further that the accused persons sold the goods to Mr Haimbodi about two to three weeks after the deceased was killed. The deceased was killed between the night of 14 and 15 September 2002. Mr Haimbodi kept the Sony VCR in his possession for about two to five days before they were recovered by the police about 16-17 October 2002 according to the evidence from state witnesses. Counsel for the State further submitted that these goods were the property identified by Mr Fredricks and on the basis that they were sold by the accused persons two to three weeks after the deceased's death the court should apply the doctrine of recent possession because two to three weeks would still bring the period within the ambit of the recent possession doctrine.

[54] Counsel for accused No. 1 argued that there is no evidence linking the accused persons to the robbery and the murder of the deceased. The only evidence which is linking the accused persons to the commission of these offences is circumstantial evidence that the accused persons sold the VCR and four rings to Mr Haimbodi which were not properly identified as belonging to the deceased. Haimbodi testified that it was the two accused persons and Atab who sold the items to him and Laban. Atab was doing most of the talking and he was the one who

produced the rings from his pocket. He was also the receiver of the money. Atab was not arrested; he is the one who was selling the goods and not the accused persons.

[55] Counsel for accused No. 1 argued further that accused No. 1 was not properly identified as the person who went with accused No. 2 and Atab to sell the goods alleged to be that of the deceased to Mr Haimbodi. According to Mr Haimbodi, it was his first time to see accused No. 1. It is worth mentioning that it is not correct that Mr Haimbodi testified that it was his first time to see accused No. 1. His evidence was that he knew accused No. 1 by sight.

[56] Counsel further argued that although accused No. 2 admitted that he was present when the goods were sold, his version as put to witnesses in cross examination was that he went to Mr Haimbodi's house with Atab and one Nana and not with accused No. 1. No evidence has been led that accused No. 1 sold the goods to Mr Haimbodi or that he possessed those goods. Counsel further contended that there is no sufficient proof that those goods belonged to the deceased. Although Mr Fredricks testified that the goods belonged to the deceased, he is a single witness and his evidence should be treated with caution. Counsel for accused No. 1 criticised the manner in which those goods were identified by Mr Fredricks. No evidence was adduced regarding the serial number of the VCR, receipts or registers concerning the property to substantiate Mr Fredricks claim that those goods belonged to the deceased. Although Mr Fredricks testified that he knew the VCR, he was unable to state the make before it was shown to him by the police. Concerning the rings, he did not give the description of the rings before the rings were shown to him. Finally, counsel for accused No.1 argued that an inference could not be drawn from the evidence led by the state that the accused persons broke into the deceased's house, robbed him and murdered him.

[57] On the other hand counsel for accused No. 2 associated himself with the submissions made by counsel for accused No. 1. He argued that the doctrine of recent possession could not be applied to the two accused persons because they are not the ones who sold the goods, but Atab. Therefore the state did not establish a *prima facie* case against the accused persons.

[58] Having heard evidence adduced before me and arguments from the state as well as the defence, I am called upon to decide whether it is indeed the accused persons who committed the crimes they stand charged with. At the pain of being repetitive, the only piece of evidence linking the two accused persons is the allegation that they sold the Sony VCR and gold rings to Mr Haimbodi and Laban the property which is alleged to belong to the deceased. It was on the basis of these allegations that the state had asked the court to apply the doctrine of recent possession and to find that it was the accused persons who committed the crimes. Counsel for the state argued that the two accused persons sold the goods belonging to the deceased within two to three weeks from the time the deceased was murdered. Therefore, so the argument goes, the court should apply the doctrine of recent possession and draw an inference that the accused persons broke into the deceased's premises, robbed him of his goods and murdered him.

[59] Before the court applies the doctrine of recent possession, there is a crucial question which needs to be answered first namely: Were the two accused found in recent possession of the goods belonging to the deceased? There is evidence from Mr Haimdodi that accused persons were in the company of Atab when the goods were sold to him and Mr Haimbodi testified that it was not the first time to see accused No.1; he had known him by sight before this incident. Although counsel for the accused persons put it to the witness that accused No 1 was not present, but that it was accused No. 2, Atab and Nana who went to Mr Haimbodi's house, the witness was adamant that it was the two accused persons and Atab who went there. This piece of evidence was never repeated under oath by the accused persons to enable the state to test the accused's credibility through cross-examination. I am only left with the version of the State and I am satisfied that Mr Haimbodi was not mistaken about accused No.1's identity. I therefore find that it was indeed accused No. 1 and accused No.2 who were in the company of Atab when Mr Haimbodi and Laban bought the goods. Furthermore, there is evidence before me that during the transaction, Atab was the one who offered to sell the goods. He took the rings out of his pocket and he showed them to Mr Haimbodi and Laban. Atab was the person who received the money. After it was put to Mr Haimbodi for the second time as to who was doing the talking, the witness testified that it was Atab and accused No. 2.

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This appears to be an afterthought. There is no evidence clearly establishing that accused No. 1 also took part in the selling of these goods or he was merely a spectator. Although there is evidence that Atab was the person who conducted the transaction, strangely enough he was not charged by the police. The explanation offered was that there was no evidence linking him to the commission of the crimes. Yet the evidence implicating Atab is the same evidence upon which the State now seeks to rely in the prosecution of the two accused persons.

[60] The Court having accepted that the accused persons and Atab went together to sell the goods, there is still one issue to be resolved concerning the goods alleged to be sold by the accused persons whether they indeed belonged to the deceased.

[61] Mr Fredricks the key witness for the state concerning the identification of the goods for the state is a single witness therefore his evidence should be treated with caution. He testified that immediately he went to the deceased’s premises he noticed that the space where the Sony VCR was placed was empty. He did not, however, inform the police officers present that the VCR was missing. On the other hand, Warrant Officer Maletzky testified that immediately Mr Fredricks entered he informed the police that the VCR was missing. The two state witnesses are contradicting each other in this respect. However, although the witnesses contradicted each other, it does not mean that the court should reject their evidence in its totality. I have no doubt that a VCR was stolen from the deceased’s premises. The doubt lies with its identification.

[62] Mr Fredricks testified that although he noticed that the VCR was missing from its place, when he was approached by the police concerning the VCR, he could not remember its make. He only came to remember it after the police showed the Sony VCR and identified it to be the property of the deceased. In court, he explained that he had identified the Sony VCR because of its unique nature and it had "a recording button." A legitimate question may be asked: If the VCR was so unique why did the witness not give its description to the police before it was shown to him? Again, concerning four gold rings the witness never gave their description before they were shown to him by the police. The manner of identification used by the police leaves much to be desired. Consequently, I am not satisfied that the goods sold to Mr

Haimbodi and Mr Laban were properly identified as the goods belonging to the deceased.

[63] For the above reasons the court is not satisfied that state had proved beyond a reasonable doubt that the accused persons were found in recent possession of stolen property belonging to the deceased in order for it to apply the doctrine of recent possession and draw an inference that it was indeed the accused persons who broke into the deceased's house, killed the deceased and took his goods. I therefore decline to apply the doctrine of recent possession as urged by counsel for the state.

[64] I have given consideration to the possibility of a conviction on competent verdict of failure to give account to possession of goods suspected to be stolen in contravention of section 6 of Ordinance 12 of 1956. The two accused persons were not found in possession of the goods suspected to have been stolen, because possession of the goods had already been passed over to the buyers. One of the elements of this offence is that the accused must be found in possession at the time they were arrested by the police. It is not sufficient to say that accused had possessed the goods earlier. The State failed to meet this essential element of the offence. Therefore I cannot convict the accused persons on this competent verdict. The court cannot also convict the two accused persons of contravening section 7 of Ordinance 12 of 1956, because it has not been proved that the two accused persons received stolen property without reasonable cause for believing at the time of their receipt that the property belonged to the person from whom they received the goods or that the person was authorised to dispose of such goods.

[65] In the result, I have arrived at the following verdict:

1. 1st count, murder: Each accused person is found not guilty and acquitted.

2. 2nd count, Housebreaking with intent to rob and robbery with aggravating circumstances: Each accused person is found not guilty and acquitted.

N N Shivute

Judge

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APPEARANCES

STATE :	Ms Ndlovu Office of the Prosecutor-General
ACCUSED 1:	Mr Uirab Instructed by Directorate of Legal Aid
ACCUSED 2:	Mr Tjituri Instructed by Directorate of Legal Aid