

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 7/2013

In the matter between:

THE STATE

v

MOSES NDIIWEDA PULENI

ACCUSED

Neutral citation: *S v Puleni* (CC 7/2013) [2018] NAHCMD 30 (14 February 2018)

CORAM: NDAUENDAPO J

Heard: 16 November 2017

Delivered: 14 February 2018

Flynote: Criminal Law – murder – Rape – robbery with aggravating circumstances – plea – not guilty – circumstantial evidence – Pointing out – Confession – Admissibility – Rights explained – Freely and voluntarily – Sound and sober senses – Not unduly influence – Admissible – Guilty.

Summary: The accused was arraigned in this court on charges of murder, rape and robbery with aggravating circumstances. He denied guilt. The evidence by the state was that on 30 – 31 December 2011 the accused was at the bar at erf No. 4078, Conradie Street, Damara location where he was employed as a security guard. The deceased was a bartender at the same bar. She was at the bar on the said dates. The next

morning, 31 December 2011 her dead body was discovered at that venue. She was tied with a wire around her neck and covered with a towel. The cause of death was ligature strangulation. The safe of the bar was cut open and money was stolen. The accused was missing from the bar. On 31 December 2011 around 10:00am he was found at another bar, in Okuryangava location drinking with friends. He was loaded with cash. On 2 January 2012, he was arrested in Ondangwa at a service station. The evidence was that his rights were explained to him when he was arrested, even though he denied it. He agreed to go and point out where the bag of money was. The evidence was that he was not forced or assaulted to point out the money. He took the police to Okauva village where he pointed out the bag of money. An amount of N\$18 000 was found in the bag from there he was taken to Windhoek. In Windhoek he was taken to a magistrate where he made a confession. Magistrate Shuuvani testified that he explained the rights of the accused. He made the confession freely and voluntarily, in his sound and sober senses and without undue influence. The accused denied that. The accused testified and told the court that he left his employment on 28 December 2011 and that he travelled to the North on 29 December 2011. That evidence is clearly false as he was seen in Windhoek on 30 – 31 December 2011. He testified that he had a secret sexual relationship with the deceased and that he had sex with her on 23 December 2011. He testified that he was assaulted and forced to make the pointing out and rights were not explained. He testified that the police forced him to make a confession and that he told the magistrate that he wanted a lawyer to be present, when making a confession, but that was denied to him. He testified that the money that he pointed out was his own money that he received from GIPF as a beneficiary of his father's pension payout.

Held, that, the rights of the accused were explained before making the pointing out and that he was not assaulted or forced to do so.

Held, further that, the magistrate explained the rights of the accused when he made the confession. He did not inform him that he was assaulted or forced to make a confession.

Held, that, the confession was made freely and voluntarily, he was in his sound and sober senses and without undue influence and therefore the confession was admissible.

Held, further that, the evidence of the state was based on circumstantial evidence and that if every piece of evidence like that he was the last to be seen with the deceased, that there was blood on the floor of his room and on his uniform, that he was found with cash on 31 December 2011 and that he had a bite wound on the finger is pulled together, the only reasonable inference to be drawn is that it was the accused who murdered and raped the deceased.

Held, further that, in the confession the accused confessed to murder, raping and taking the money from the safe.

Held, further that, the state proved beyond a reasonable doubt that the accused is guilty of murder, rape and theft.

ORDER

In the result, the accused is found guilty of murder, rape in contravention of s 2(1) (a) of the Combating of Rape Act, Act 8 of 2000 and theft.

JUDGMENT

NDAUENDAPO, J

[1] The accused was arraigned in this Court on a charge of murder, rape in contravention of section 2(1)(a) of the Combating of Rape Act, Act No. 8 of 2000 (Rape) and robbery with aggravating circumstances.

[2] The short facts of this case are that on or about 30-31 December 2011, the accused was employed as a security guard at a shebeen at erf 4078, Albert Conradie Street, Damara location, Katutura where a bar tender, Paulina Nghidinitango, aged 18 was murdered and raped and money and other items were stolen. The state alleges that it was the accused who murdered, raped and robbed the money and other items.

[3] The accused pleaded not guilty to all the charges preferred against him and did not disclose the basis of his defence.

[4] The accused was represented by Mr Siyomunji and the state by Mr Lisulo.

The state called the following witnesses:

[5] Ello Hamukwaya, a scene of crime officer, testified that on 31 December 2011 around 10am he attended to the murder scene at erf 4078, Albert Conradie Street, Damara location and took photographs. He also drew up the sketch plan. The photo plan showed that all the doors to the residence and bar were found open. Point K on the photo plan indicated the suspect's bed where some blood spots were found. His uniform was found on the bed and there were blood spots on the uniform and pillow. The photo and sketch plans were admitted into evidence as exhibits A1 and A2 respectively.

[6] Inspector Ignatius Kathena attached to the Scene of Crime Unit testified that on 10 January 2012 he received exhibits from Detective Chief Inspector Amakali of the Serious Crime Unit. The exhibits were forwarded to the National Forensic Science Institute on the same day. A lab number 83/2012 was allocated to the exhibits. The exhibits were transported by car and handed over to the lab in the presence of Chief Inspector Amakali. The exhibits were not tampered with in any way. The exhibits were accompanied by an application for forensic examination with the Cr Number. The reference numbers of the exhibits were as follows: Exhibit 1 - Rape kit - Serial No 11NAAA2133; Exhibit 2 - clear plastic bag containing exhibit bag with Swabs marked XHBJ/N, sealed with a red evidence seal; Exhibit 3 - clear white plastic bag containing a white mini skirt (marked exhibit O) with blood stain, exhibit 4 - clear plastic bag contains

light red coloured towel sealed with red evidence seal marked exhibit Q; Exhibit 5 - forensic bag Serial No NFX02069; Exhibit 6 - Rape kit Serial No. 11NAAA1529XX.

[7] Chief Inspector Amakali testified that he attended the scene of crime on the 31st of December 2011 at Erf 4078, Conradie Street, Katutura where he met other police officers and the owner of the place, Mr Siwombe. He observed possible blood stains in one of the rooms where the accused was sleeping. The safe in the house had a hole in it with possible blood stains. The security guard who was supposed to guard the place was missing. Experts from the Forensic Science Institute were summoned to the scene who collected exhibits, which they sealed and handed over to him.

[8] He further testified that an application for a forensic examination was completed and the exhibits were handed over to Inspector Kathena. They drove with Inspector Kathena and handed over the exhibits to the Laboratory. The exhibits were not tampered with because he (Chief Inspector Amakali) was the only one who had the key to the room where the exhibits were stored. He testified that he got information that the suspect left Windhoek with a certain Eliaser to the North. On 2 January 2012, he dispatched 3 members, namely Nghinamundova, Sergeant Ngilinganye and Sergeant Nakangombe to the North.

[9] Kalipus Sam testified that he works as a forensic scientist at the National Forensic Science Institute. He testified that he was summoned to the scene of crime and collected the exhibits in this matter. After the exhibits were booked in at the Institute he analyzed them and compiled a report, the report was handed into evidence as exhibit C.

[10] Eliaser Hailume testified that he knows the accused as they were both residing at his uncle's house until 2011. On 31 December 2011 at around 10am he was in town (Windhoek) when he received a call from the accused who told him to go to Okuryangava location as a matter of urgency. He proceeded as told and met the accused at Dollis bar in Okuryangava. He found the accused in the company of unknown persons and they were drinking and the accused bought him 2 benini ciders.

Later they proceeded to another bar, Toivo's bar. At Toivo's bar, whilst the accused was seated on a chair, he fell down. He searched the accused and found him with N\$10 700.50. He wrote down the amount found on him on a piece of paper. They placed the accused in a room and placed the money between the bed and the mattresses where he (the accused) was sleeping. Later on the accused woke up and they proceeded to Havana location where they stayed until New Year's Eve. The accused had a laptop bag and from there they proceeded to Monte Christo location. At Monte Christo location the accused went into the riverbed and returned with a small sports bag. From there they went to Golgota location where people were celebrating New Year's Eve. From there accused asked him to accompany him to the North (Ovamboland). They got into the bus and went to Ovamboland. When they reached Ondangwa, the accused gave him N\$1 000 for his return to Windhoek. On 2 January 2012 he returned back to Windhoek and when he reached home the police were waiting for him. They asked him where the accused was and he told them that he left him at Ondangwa. They asked him to call the accused and to pretend as if he (Eliaser Hailume) was in Ondangwa at Mad Dog's shebeen. The accused told him to meet him at a service station. Eliaser also testified that when he met the accused on 31 December 2011, he had marks on his neck and his finger had an Elastoplast on it.

[11] Lavinia Mbindama testified that she knows the accused as her nephew. On 2 January 2012 at around 17h00, she was at Okauwa village when she met the accused in her mother's house. The accused told them that he was coming from Windhoek. He had a briefcase which he handed to her mother. At around 01h00 the accused came with the police and her mother handed the briefcase to the police. The police opened the briefcase in her presence and they found money in a bag. The money was counted and it was N\$18 000. The police then went with the accused.

[12] Merryn Swart is a scientist who is employed by the National Forensic Institute. She testified that she compiled a report about the analysis of exhibits collected at the scene of crime. The report was read into the record and marked as exhibit E.

[13] Leonard Antonio testified that on 2 January 2012 he was with the accused at Onguta location (Ovamboland) from which they proceeded to a bar where the accused bought beers and bells whisky. The accused had 2 bags – one big and one small.

[14] Martha Indongo also testified that she knows the accused and that on 1 January 2012 she was at Onguta location where she met the accused who had money and who bought alcohol.

[15] Detective Sergeant Shomongula testified that she attended to a pointing out of money at Okauva village and took photographs. She compiled a photo plan and was admitted into evidence as exhibit F.

[16] Aron Nghidimbua testified that he knows the accused. On 2 January 2012 he was at Okauva village where he met the accused. The accused invited them to a bar and bought drinks for them. He had 2 bags with him.

[17] Dr. Kabanje conducted the postmortem examination on the deceased and compiled the post mortem report. The cause of death was 'ligature strangulation'. He also found white fluid in the vaginal canal. The rapid test for sperm was suggestive of sexual penetration. The report was handed in as exhibit F2. A J88 in respect of the accused was also compiled and the clinical findings were abrasions over dorsum of both hands corresponding to wire abrasions, a bite wound measuring 20 – 25mm in length over the middle right arm, a bite wound on the middle finger of the right hand, consistent with a human bite wound, because of bacteria in the mouth, (bite may become gangrenous quickly.) the J88 was admitted as exhibit G.

[18] Martine Siwombe testified that she knows the accused as he was employed at her father's bar as a security guard. The accused had a room at the bar and she shared a room with the deceased. The deceased was a bartender. She testified that the money they made was put in a safe. On 30 December 2011 the bar closed at 12h00am. Before they closed the bar, they counted the money and in total it was approximately N\$70 000 (it was money for 3 months). On 30 December 2011 she went to sleep out at her

boyfriend's place. The deceased had the keys to the bar and the accused to the gate. She left them both at the house/bar. She returned the next morning around 7am and found the small gate open. She entered and saw the deceased's body on the floor with a towel over her head. She called her dad and the police. When she returned, the accused was nowhere to be found. The safe was half open and there was a cut in the safe and blood on the safe. Her eye glasses, airtime voucher, wallet and passport photo were missing. She also testified that there was blood on the floor in the room of the accused. She further testified that she did not know that the accused and deceased had a secret love relationship.

[19] Josef Siwombe testified that he was the owner of the bar where the accused was employed as a security guard. The accused, the deceased and Martine were staying at the house when he left to Rundu in December 2011. By then the accused had worked for a week. At around 7am on 31 December 2011, he received a call from Martine who informed him that the deceased was murdered. He drove back to Windhoek and when he arrived the body of the deceased had already been removed. He opened the bar and the safe and there was a hole in the safe and it was bloodstained. The money taken was N\$75 000. He recovered N\$19 000 from the police.

TRIAL-WITHIN-ATRIAL

[20] During the trial, the state sought to lead evidence about a pointing out of items (money) by the accused and a purported confession by the accused. The defence raised objections and the basis for the objections were (a) The accused's rights were not explained before making the confession; (b) The accused was forced by the Investigating Officer to make the confession and pointing out and (c) The accused was forced to say what is contained in the confession and pointing.

The State called the following witnesses:

[21] Deputy Commissioner Agas testified that on 2 January 2012 Sergeant Nghinomundova called him and told him that the accused was involved in crimes and

that he was on his way to Ohangwena region for pointing out and that he will be required to take charge of the pointing out. It was agreed that they would meet at the T-junction of the main road from Ongcha and Eenhana. He met Sergeant Nghinomundova at a T-junction road. He was with 2 police officers and the suspect. Sergeant Shilongo and Shomongula were with him. He explained to him that the accused wanted to point out the money. He introduced himself to the accused and asked him whether he was willing to point out the money. The accused confirmed that. He informed the accused of his rights to remain silent, not to point out anything and whatever he pointed out will be written down and photographed and may be used against him in a court of law. He also informed him of his right to legal representation and legal aid. The accused then informed him that he was going to point out without the assistance of a lawyer.

[22] The accused then got into his vehicle and they drove up to Okauva village, and arrived at the homestead of the accused's grandmother. They found Tuyenikelao Mbidamo and asked her to wake up the grandmother to whom he gave the briefcase. They proceeded to the room of the grandmother and he asked for the suitcase and she handed the briefcase and the accused gave the number to him, Number 000 to open the briefcase. He opened it and there were notes and coins. The money was counted and the notes amounted to N\$18 000 and coins. There were also recharge vouchers, starter packs and a bunch of keys etc. The accused told him that in the house of Asser Jonas there was a black bag, keys, khaki jacket and N\$54.50. All these items were taken and handed over to Sergeant Nghinomundova. No threats or force were used against the accused. He was also asked before departure whether he was threatened, forced or assaulted, to go and do the pointing out and he answered 'No'. The accused had injuries on his finger which appeared to be a bite injury.

[23] Sergeant Shimuningeni testified that on 2 January 2012, he was on standby duty at Ohangwena. He received a call from Deputy Commissioner Agas to assist them at Okahao roadblock. He proceeded to the roadblock where he met them. They were driving a sedan car, he met Sergeants Nghinomundova and Nakangombe, he got in his vehicle. They drove to Okauva village and they arrived at a certain homestead. They entered the homestead and Deputy Commissioner Agas introduced himself to a young

lady who informed them that the old lady was the owner. He introduced himself and told her the purpose of the visit. The old lady asked the accused why he was handcuffed and he said he was involved in rape and murder cases. The briefcase was brought and it was opened and there was money in the bag. The money was counted and it was N\$18 300. He testified that he was not present when the accused was questioned by Deputy Commissioner Agas.

[24] Johannes Shuuvani testified that he is a Magistrate at the Katutura Magistrate's court. He testified that on 5 January 2012 he took a confession from the accused person. He read the pro forma part of the confession into the record. He testified that notwithstanding the accused's application for legal aid, the accused indicated that he still wanted to make a confession. He testified that the accused's rights were explained to him. He further testified that he was never informed that the accused was forced to make a statement by the police officer. He testified that had the accused informed him that he was forced to make a statement, he would have stopped the whole process of taking a confession. The accused spoke Oshiwambo and he is conversant in Oshiwambo. He further testified that the accused told him that he was not assaulted, threatened, bribed or promised any benefits or privileges by any person in order to influence him to make a statement. He testified that after the statement was taken, it was read back to him and the accused was satisfied with it.

[25] During cross-examination he maintained that the accused's rights were fully explained. He further testified that although the right to self-incrimination is not indicated on the pro forma form, he did explain that to the accused. It was put to him that the accused was forced and threatened that if he does not give a statement he will be beaten. The witness maintained that was not conveyed to him nor did the accused give him an impression that he was forced. He also testified that if the accused had indicated that he is awaiting legal aid, he would have stopped taking a confession. His right to remain silent and that if he said something it will be taken down and used against him during the trial, was also explained to him.

[26] Olga Mbako testified that she is an interpreter for the past 13 years. She testified that she interpreted before Magistrate Shuuveni when the accused appeared before him. She communicated with the accused in Oshiwambo and interpreted to him what Magistrate Shuuveni was asking him and vice versa. There was no misunderstanding and the accused fully understood what was being said and explained to him. She was adamant that the accused was warned of his rights and that he fully understood them.

[27] Sergeant Nakangombe testified that on 1 January 2012, they were instructed to go to the North (Ovambo land). He, Nghinomundova and Nghilinganye departed to the North. On the 2nd of January 2012 they arrived in the North. They met the accused at a Shell service station. They approached him and he identified himself. He explained to him that they were looking for him as a suspect in a rape and murder and robbery case. He explained his rights to him, the right that he may get a private lawyer to pay with his own money and if he cannot afford, he can apply to legal aid or he can conduct his own defence. He was also informed of the right to remain silent and that he is not obliged to say anything and if he said anything it will be recorded and may be used against him in court proceedings. By then Sergeant Nghinomundova had gotten out of the car. After the rights were explained, he said he understood and he will conduct his own defence. Sergeant Nghinomundova also explained the rights of the accused to him, the right to remain silent, what he says may be taken down. In his presence the accused admitted that he raped and killed the lady and that he took money to Okauva village. The accused was arrested. Sergeant Nghinomundova arranged with Deputy Commissioner Agas to take charge of the pointing out. When they met with Agas, he asked the accused whether he was forced to make a statement and he said no, whether he was threatened, he answered 'no'.

[28] They then drove to Okauva village and the accused was in a bakkie with Deputy Commissioner Agas. They arrived at the village and they met an old lady. Commissioner Agas and Sergeant Nghinomundova spoke to the old lady. A black briefcase was brought and opened in their presence and money amounting to N\$19 000 was found and counted in their presence. Photographs of the money were taken. After that they went to another house where keys were found. The next day they drove back

to Windhoek. He testified that the accused was never forced or threatened to point out by Sergeant Nghinomundova. He was also not threatened with assault nor assaulted.

[29] Detective Warrant Officer Nghinomundova testified that he was called to a crime scene that happened at Dolam location on erf 4078, Conradie Street. At the scene, he interviewed the daughter of the owner of the shebeen who told him that she left the deceased and the accused at the shebeen the previous night when she left to overnight at her boyfriend's place. When she returned, she found the deceased's body and the accused nowhere to be found. They later got information that the accused was in the North. On the 1st of January 2012 during the night they drove together with Sergeants Nakangombe and Nghilinganye to the North to trace the accused. They arrested the accused at a Shell service station in Ondangwa. He was in a different car and his colleagues were in another one when the accused was arrested. He came out of the car and joined his colleagues. They handcuffed the accused in his presence. He testified that Sergeant Nakangombe informed the accused of his right to remain silent and his right to legal representation including legal aid. The accused opted to inform them of what had happened. He admitted that he took money from the shebeen in Windhoek and other properties which he took to his grandmother's village. He contacted Commissioner Agas and asked him to take charge of a pointing out and they agreed to meet at a certain junction. They drove up to the T-junction road and at the T-junction road he handed over the accused to Commissioner Agas who spoke to the accused in private and that was around 20h00.

[30] After the conversation with Deputy Commissioner Agas, they drove to a certain homestead where the accused left the money he took from the shebeen. Upon arrival at the house of the granny, they introduced themselves and the granny was awoken by her daughter. The granny went inside the room and brought a bag. The bag was opened and there was money in it. The money was counted and there was N\$19 000 in it. They then drove back to Windhoek with the accused and they arrived on 3 January 2012 in Windhoek. In Windhoek he testified that he took the accused to a doctor to examine him because he had an injury on his finger and for DNA testing. He then

charged the accused and he, again, explained the rights of the accused to him. He explained to him his rights to legal representation, to engage a private lawyer at his own cost or that he had the option of applying for legal aid. The right to remain silent and that whatever he says will be written down and may be used against him in a court of law, was explained to him, but he decided to come clean and he took down a warning statement. He then arranged for a confession to be taken down and he handed him to Namboha who then took him to the Magistrate Shuuveni.

[31] He further testified upon being asked by the prosecutor about his explanation of accused's rights. He testified that since 'I was having the operation, I had to explain that he was a suspect in rape, murder and robbery. I told him he was not obliged to say anything and it may be written down, 'private lawyer and legal aid'.

[32] He denied having forced the accused to take part in any pointing out. He further denied having threatened the accused with assault should he not confess. He also denied having told the accused what to confess to. He did not make any promise to the accused. There was nothing for him to gain. He testified that he witnessed the accused's rights being explained to him on 4 occasions (a) when he was arrested, (b) when he approached the accused, (c) when he was charged and (d) when he was in court.

[33] Detective Sergeant Nghilinganye testified that he was present when the accused was arrested at Ondangwa service station. He testified that at the service station he was arrested by Nakangombe. When accused was arrested by Nakangombe, he informed him of his rights to remain silent, the right to legal representation and that of private or legal aid. He was told that whatever he says will be written down and may be used against him in a court of law. The accused understood, he further said at that moment he was undecided as to have a lawyer or not but was ready to tell the police what had happened. He then told them that he injured his finger when he put his hand in the safe to take money. From the service station they drove to a T-junction road where they met Deputy Commissioner Agas. He further testified that he did not hear the conversation between Agas and the accused. From there they drove to the village

where the money was found, he was present when the money was counted, but cannot say how much it was.

[34] Christopher Namboha testified that in January 2012, he was employed by Namibian police and was attached to Serious Crime Unit. On 5 January 2012 he was requested by Nghinomundova to transport the accused to Katutura magistrate's court for the purpose of taking down a confession. He transported the accused and arrived at 9:30 and handed the accused to Magistrate Shuuvani and explained to him that he brought the accused for a confession. He then waited outside until he was called to fetch the accused. He then transported the accused back to Nghinomundova and he handed the confession to him. During the transportation, the accused did not complain of anything to him.

Defence's case: Trial within a trial

[35] The accused testified that he was employed as a security guard at the bar of Mr Siwombe, in Katutura. He stopped working at the bar on 28 December 2011. He informed the bar lady on that date that he was going to Ovamboland. He never returned to the bar after he had left. He testified that he was arrested at Shell Service Station in Ondangwa. Sergeants Nghinomundova and Nakanghombe apprehended him, stormed at him, yelled at him and kicked him and put him on the ground and handcuffed him. They did not allow him to say anything and they beat him. They said, 'I was the one who killed that woman,' He further denied that Nakangombe explained his rights to him and he (the accused) never told him that he will defend himself. He also denied that Nghinomundova explained his rights to him. He further testified that after his arrest he was placed in a car and they drove to meet a colleague. He was then handed over to Deputy Commissioner Agas and they got onto a 4x4 vehicle and went to his homestead. He also denied that Deputy Commissioner Agas explained his rights to him. He testified that he did point out because he was assaulted. He further testified that indeed money was found in a bag that he pointed out at his grandmother's house, but told them that it was his own money that he got from GIPF as a beneficiary of his father's pension.

[36] He further testified that Magistrate Shuuvani asked him whether he wanted a lawyer and he said yes. When asked by his counsel whether he gave a confession he replied: 'I told him that it was alleged that I killed the bartender and that was the only thing I said'. He testified that Nghinomundova told him that he had to be taken to the magistrate at Katutura. He denied that Nghinomundova explained his rights to him before he was charged. He was also asked by his counsel whether Shuuvani explained his rights to legal representation and he said 'yes'.

Submissions by counsel for the state (trial-within-a trial)

[37] Counsel argued that Deputy Commissioner Agas was contacted by Sergeant Nghinamonondu to take charge of a pointing out by the accused because he was from Ohangwena region, whereas the crimes were committed in Windhoek. They met at a T-junction road where the accused was handed over to him. He submitted that Deputy Commissioner Agas explained his rights to him and he understood them. They then proceeded to Okauva village where the accused pointed out the bag containing money. The accused never informed Deputy Commissioner Agas that he was assaulted or forced to make a pointing out. The accused's rights were sufficiently explained before he made the pointing out. He was asked whether he was assaulted or forced to make the pointing out and he said 'no'. Counsel contended that the accused testified that he was assaulted at the service station where he was arrested, but that was never put to the witnesses. Counsel further submitted that the accused's rights were explained by magistrate Shuuvani as per the pro forma. His right to legal aid was also explained to him and he confirmed that. He further argued that the accused did not complain that he was threatened or assaulted. Magistrate Shuuvani testified that he was satisfied that the accused was in his sound and sober senses. He was not induced and made the confession voluntarily and freely and must be ruled admissible.

Submissions by counsel for the defence (trial-within-a trial)

[38] Counsel argued that the accused was not properly advised of his rights. He argued that the explanation of rights should have come first before asking the accused whether he wanted to point out. He further argued that Sergeants Nakangombe and Nghilinganye never explained the rights to the accused when they arrested him at the service station. Counsel further argued that the accused informed magistrate Shuuveni that he applied for legal aid and despite that, the magistrate proceeded to record the confession. The magistrate should have stopped taking the confession. He further argued that witness Mbako testified that the magistrate followed what was on the pro forma and the only right that the accused was informed of was legal representation, but there are other rights. He further contended that at Okauva village the accused's rights were not explained. He urged this court not to admit the pointing out and the confession.

[39] At the end of the trial within a trial, I made the following order:

1. The pointing out of the bag of money by the accused is ruled admissible.
2. The confession made by the accused to Magistrate Shuuveni is ruled admissible.

I intimated that my reasons for the admissibility of the pointing out and the confession will be provided later. The confession was read into the record.

'Confession in terms of section 217 of CPA, Act No. 51 of 1977 by Moses N. Puleni, the deponent.'

"It all started when a cell phone got lost where the deceased and myself was employed. We quarreled for two days. It was in the evening. Why I did what I did to her on that day I was drunk and also used drugs. So, I went and collected a wire and strangled her on her neck with it but at that time she was not dead as she was breathing and I decided to rape her. After that, she then died. I proceeded to tie her hands and legs with an electrical cable. I further tied a cloth on her head. From there I proceeded to the safe and removed the money which was around N\$55 000,00 (fifty five thousand Namibian dollars). I also took 3 Richelieu nippies and 2 nippies of white horse. I also took some cell phone recharges and some cigarettes. I also took 2 cell phones and after that I then ran away (my emphasis).

[40] I also took the keys for both the house and shebeen with me when I ran away. I got into a taxi to Okuryangava. From okuryayava I visited Havana and also travelled to the North. I travelled together with Deyote to the North but, I do not know where we met. We went together up to Ondangwa and we split. From Ondangwa I went to my grandmother in Oshakati. From Oshakati I travelled back to Ondangwa. From Ondangwa I travelled to the village called 'Okawa village.' From the village I went back to Ondangwa as Deyote wanted me to buy or give him money to buy food as he was travelling back to Windhoek. I was arrested at the service station where I was supposed to meet Deyote also known as 'lazy'. When the police arrested me they asked me where the money was. They counted the money but was not enough then they took me to Ohangwena Police Station. We arrived on 03 January 2012 here in Windhoek. I am detained at the Katutura Police Station in connection with this incident. 'That is all I want to declare or state in my statement.' Time finished: 11h15.'

Reasons for ruling the pointing out and confession admissible

[41] S 217 of the Criminal Procedure Act 51 of 1977 provides:

'Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without been duly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence.'

[42] In *S v Malumo & others*¹, the court held that: '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 had been adequately explained by the magistrate who recorded the statement.'

[43] Sergeant Nghinomundova testified that he contacted Deputy Commissioner Agas, a police officer from a different police unit to take charge of a pointing out of

¹ *S v Malumo & others* 2010 (1) NR 25.

money by the accused. On 2 January 2012 they met at a T-junction road where the accused was handed over to him. The accused confirmed that he was willing to point out the money. He informed the accused of his rights to remain silent, not to point out anything and whatever he points out will be written down and photographed and may be used against him in a court of law. He also informed him of his right to legal representation including legal aid. The accused informed him that he was going to point out without the assistance of a lawyer. They drove to Okauva village where the accused received the briefcase from the old lady. The accused gave the number 0000 to open the briefcase and he opened it. In it was money (notes) to the amount of N\$18 000 and coins. There was also air time vouchers and starter packs. Deputy Commissioner Agas also testified that during the recovery process the accused was not assaulted or threatened. Also before they drove to Okauva village, he asked the accused whether he was assaulted or threatened, and he said 'no'. The evidence of Deputy Commissioner Agas was corroborated in material respects by Sergeants Nghinomundova and Ngilinganye. During cross-examination, it was put to him that the rights were stated, but not explained. This corroborates the evidence of Deputy Commissioner Agas that the accused was informed of his rights. On the other hand the accused testified that the rights were not explained and if they were explained he did not hear them. That is contrary to what his counsel put to the witness.

[44] The accused testified that he agreed to the pointing out of the money without a lawyer because he was assaulted, but the evidence of all the police officers was that he was never assaulted. He never placed evidence before this court to say where on his body he was assaulted and which injuries he sustained. During cross-examination he told the court that he did not have injuries as a result of the assault. I have closely observed the accused when he testified and he was a poor witness who contradicted himself. The evidence of Deputy Commissioner Agas was more credible and I am satisfied that the rights of the accused were explained to him and that he was not assaulted or forced to point out the money, starter packs and airtime vouchers. For those reasons I ruled the pointing out admissible.

[45] Magistrate Shuuvani testified that he recorded the confession of the accused on 5 January 2012. He testified that he cautioned and explained the rights of the accused as per the pro forma (exhibit H). He informed the accused that he has a right to legal representation including legal aid. He was asked whether he understood the warning and he said 'yes', he further stated: 'I will give my statement and have already applied for legal aid. I want to give my statement *now* (my emphasis)' He was asked: 'Do you nevertheless still wish to make a statement?' and he answered 'yes' (my emphasis). He was asked 'were you assaulted, threatened, bribed or were you promised any benefits or privileges by any person in order to influence you to make a statement?' He then replied and the answer was 'no'.

[46] Magistrate Shuuvani made the following observations 'Deponent appears to be in his sober and sound sense. In other words, he is normal'. He maintained that the accused's rights were explained and that he was never informed that the accused was forced to make a statement by the police officer. He further told the court that, had the accused told him that he was forced to make a statement, he would have stopped the whole process of taking a confession. The accused spoke Oshiwambo and he is conversant in Oshiwambo. He testified that after the confession was taken, it was read back and interpreted to him and the accused was satisfied with it and he signed it. The accused admitted that Mr. Shuuvani informed him of his rights to legal representation and that he had applied to legal aid. Mr. Shuuvani made a good impression on me and I believed that he explained the rights of the accused to him and that the accused made the confession freely and voluntarily, in his sound and sober senses and without undue influence. For all those reasons I ruled the confession admissible.

[47] Fillemon Hamuteni testified that he is the owner of Mekondjo Security Company and that the accused was employed as a temporary security guard at the bar of Mr. Joseph Siwombe at Damara location. He also stayed at the residence of Mr. Siwombe. He was not paid a salary because of the incident. After the incident, he went to the house where the incident occurred and the accused was not there. He did not apply for leave nor did he communicate with him why he was not at work. During cross-

examination, it was put to the witness that the accused chose to go to Ovamboland on 28 December 2011 and he only informed the bar lady.

[48] Ms Mbako who is employed at GIPF confirmed that there were monies paid by GIPF to the Master of the High Court in respect of the accused as a beneficiary of his father's pension. He received a total amount of N\$43 423.09, the money was paid on 11 August 2011.

[49] Pietersen Gideon testified that he was the boyfriend of Ms Martine Siwombe. On 30 December 2011 during the evening, he went with Martine to his residence. They left the accused and the deceased at the bar. The next morning they returned to the residence of his girlfriend and saw the body of the deceased on the floor covered with a towel and wires. The accused was missing.

[50] Ms Mbidama confirmed that the accused gave a briefcase to his grandma and later he came with the police to collect it. Ben Shilongo confirmed that he was present when the accused took them to Okauva village where a briefcase was handed to him. The briefcase was opened in his presence and money was found in the briefcase. He also confirmed that the accused took them to Asser's house where the accused pointed out a black bag. In the bag there were a khaki jacket, an ID of Gideon and recharge vouchers. He further testified that the accused was not assaulted nor threatened.

[51] Tobias Shimuyengeni confirmed that the accused took them to Okauva village where he pointed out a briefcase which contained money, the money was counted and it was N\$18 300.00.

[52] Maria Hafyenanye testified that on 30 December 2011 she was at Dolly bar in Okuryangava when the accused arrived there. She testified that her phone fell in the water and the accused offered her another phone which he apparently bought because he got a bonus. She put her sim card in the phone, after 2 (two) days the police came to her and told her that the phone that she received was stolen from somebody who was killed.

[53] Deputy Commissioner Agas, Sergeants Nghinomundova and Nghilinganye also testified in the main trial. They repeated their testimonies as they testified in the trial-within- a trial. I will therefore not repeat it in the main trial, but is incorporated herein.

Defence's case (main trial)

[54] He testified that prior to his arrest, he was a security guard at Namekondja. He knew the deceased as they were working together at Mr. Siwombe's shebeen. He was a security guard there. He started working on the 3rd of December 2011. He testified that the deceased was his girlfriend and nobody else knew about it, except themselves. It was a secret sexual relationship. He testified that on 31 December 2011 he was in Ovamboland. The last day he worked for his boss was on 28 December 2011. On 29 December 2011 he went to Ovamboland. He denied Martine Siwombe's evidence that on 30 December 2011 she left him and the deceased at the shebeen. He testified that he had a sexual relationship with the deceased and the last time he had sex with her was on 23 December 2011. He also testified that when he was arrested he had N\$43 000 in his laptop bag and that was money that he inherited from his father's pension and the money he got from the Master of High Court. When asked by his counsel about the confession and details how the rape and murder occurred, he said: 'I only heard from police officers'. He was asked by his counsel to say something about the confession to magistrate Shuuveni and he said: 'A certain police officer known as Slow gave me threats and he threatened me that I must come and tell the court what I told him, but it was not my intention for me to tell him what I told him because he was threatening me that is why I said it'.

Submissions by counsel for the state (main trial)

[55] Counsel argued that the DNA evidence implicated the accused in the commission of the crimes. Exhibit B1 which contained the security guard uniform tested positive for human blood. Swartz testified that the sperm tested from the deceased, the accused could not be excluded that it was his sperm. Counsel argued that the *alibi* of

the accused that he left his employment on 28 December 2011 and left to Ovamboland on 29 December 2011 was clearly false because Martine Siwombe testified that she left the accused and the deceased at the bar (shebeen) on 30 December 2011 at around 12h00 when she went to overnight at her boyfriend's residence. He further argued that Eliaser Hailume, a friend of the accused, testified that he met with the accused on 31 December 2011 in Okuryangava location (Windhoek) and only went to the North on 1 January 2012. His alibi is therefore false beyond a reasonable doubt. Counsel further argued that the claim by the accused that he had a secret sexual relationship was an afterthought in the reply to the pretrial memo - nor did he disclose that he had sexual intercourse with the deceased on 23 December 2011. Counsel argued that the pointing out of the money and the other items and the confession was an unequivocal admission of guilt of murdering and raping the deceased. It also amounted to the unequivocal admission of robbery with aggravating circumstances and the accused must be convicted as charged.

Submissions by counsel for the accused (main trial)

[56] Counsel submitted that the standard of proof is that of beyond a reasonable doubt. The state must present reliable and admissible evidence showing that beyond a reasonable doubt the accused committed murder, rape and robbery. Counsel further argued in his written submission that "when evaluating the state's case it is clear that, save for the confession which accused person indicated was given under duress, there is no evidence that the accused person murdered the deceased. The DNA analysis proves that there was sexual intercourse between the accused and deceased, a fact that the accused person never denied and in fact said that they had a secret sexual relationship. On the count of robbery, there is no evidence that the accused person took the money of Mr. Joseph Siwombe from the bar. This honourable court should also bear in mind that it was confirmed that the accused person received a sum of N\$43 423.79 on 11 August 2011 from Master of the High Court. So it is not uncommon that he was found with almost N\$19 000.00 in January 2012.

[57] We submit that the only conclusion that one can reach when evaluating the evidence of the aforementioned witnesses the state has failed to prove beyond a reasonable doubt that the accused person committed the acts that he was charged off.

Evaluation of the evidence (main trial)

[58] On 31 December 2011 in the early hours of the morning, a young woman's body was discovered in a house at erf 4078, Albert Conradie Street, Damara location, Katutura. Martine Siwombe made the gruesome discovery. She testified that the deceased was lying naked, her face covered with a towel, her hands tied with a wire and there was a wire around her neck. Doctor Kabanje who conducted the post mortem examination described the cause of death as ligature strangulation. Martine Siwombe testified that she left the deceased and the accused, who was a security guard at their bar, the evening of 30 December 2011 at the bar when she left for her boyfriend's residence where she went to overnight. When she returned to her residence where she made the gruesome discovery, the accused was nowhere to be found. She phoned her father and the police arrived at the scene shortly. When she looked around, she discovered that the safe where they kept money was cut open and the money that they counted the previous night and placed in the safe was missing. The amount was N\$70 000, the place where the hole was cut in the safe was bloodstained. Her spectacles and air time vouchers were missing. She testified that there was blood on the floor in the room in which the accused slept. Martine Siwombe also told the court that she did not know that the accused and the deceased had a secret relationship when this was put to her by his counsel.

[59] The accused, through his counsel, put to the witnesses that he left to Ovambo land on the 28 December 2011 and was therefore not at the bar on 30 December 2011. He testified that the last day that he was at work was on 28 December 2011 and the 29 December he left to Ovambo land. That piece of evidence that his last working day was on 28 December 2011 and that he left to Ovambo land on 29 December 2011 is clearly false. Martine Siwombe testified that she left the accused at the bar on 30 December 2011 when she left to her boyfriend's place. Eliaser corroborated her evidence when he

testified that on 31 December 2011 between 9-10am he was in Windhoek (town) when he received a call from the accused who advised him to urgently meet with him at Okuryangava. He promptly got onto the taxi and proceeded to Okuryangava where he met the accused at a bar. Eliaser further testified that the accused asked him to accompany him to Ovamboland and they left for Ovamboland on 1 January 2012. The accused was untruthful when he testified that his last working day was on 28 December 2011. Martine Siwombe's evidence that she left the accused and the deceased on 30 December 2011 was also corroborated by her ex-boyfriend, Pietersen Gideon, who testified that on the evening of 30 December 2011 they left the accused and the deceased at the bar when they went to his residence where Martine overnight.

[60] Based on the evidence of Martine Siwombe and Pietersen Gideon, I am satisfied that the accused was the last person who was left with the deceased when they went to sleep at Pietersen Gideon's residence. Eliaser testified that when he found the accused at the bar in Okuryangava he was financially loaded and was splurging money on alcohol and buying drinks for those who were with him in the bar. From there they proceeded to another bar where the accused continued splurging on alcohol. He further testified that whilst the accused was seated on a chair, he was so drunk that he fell down from the chair. He searched his pockets and found an amount of N\$10 300 in his pockets. They helped him in a room and placed him on the bed. The money was placed between the mattresses. On 1 January 2012 he asked him to accompany him to Ovamboland. They proceeded to Ovamboland. He gave him N\$1000 and returned back to Windhoek on 2 January 2012. Mr. Fillemon Hamuteni the owner of the Security company that employed the accused testified that he was not paid when he worked at Mr. Siwombe's place because of the incident. Where then did the accused get the money from? He testified that it was money that he received from GIPF as a beneficiary of his father's pension in August 2011. It is highly probable that by December 2011 that money was used up because he was given a jail term of six months for a crime he committed or a fine of N\$800.00 but could not pay the fine and spent six months in prison. In my respectful view, the only reasonable inference to be drawn is that he broke the safe and stole the money from the safe on the evening of 30 December 2011.

[61] Eliaser also testified that when he saw the accused on 31 December 2011 he had marks on the neck and a finger with an Elastoplast on it. Dr Kabanje who conducted the post mortem examination found that the cause of death was ligature strangulation. The accused was also examined on 3 January 2012 and a J88 medical-legal report had been compiled. The clinical findings were: abrasions over *dorscum* of both hands corresponding to wire abrasions, over the middle right arm, a bite wound 20-23mm in length was observed. On the middle finger of the right hand was a bite wound which was gangrenous and which had a foul smell which was consistent with a human bite and the doctor explained that because of bacteria in the mouth a bite may become gangrenous quickly. The only reasonable inference is that he sustained the finger bite injury from the deceased when she was trying to defend herself from his assault. The injuries as described by doctor Kabanje were injuries from the deceased during self defence. Eliaser also testified that he saw an Elastoplast on the finger of the accused and marks on the neck on the 31 December 2011 when he met the accused at the bar in Okuryangava. The deceased's body was covered with a towel and tied with wires around the neck and that was consistent with the findings by Dr. Kabanje that he found abrasions over *dorscum* of both hands corresponding to wire abrasions.

[62] In addition, Martine Siwombe also testified that she saw blood on the floor in the room where the accused slept. Mr Fillemon Hamutheni who was the owner of the security company that employed him, testified that when he was informed of the incident they went to the bar where he was working and in his room where he was sleeping, they found his work uniform full of blood (the uniform was given to the accused by the company). The only reasonable inference to be drawn is that the blood could only have come from the deceased because she was the one found dead or the accused as a result of the injuries that he sustained.

[63] The accused testified that he had a secret sexual relationship with the deceased and the last time he had sex with the deceased was on 23 December 2011. However, when he was cross examined, he testified that he had sex with the deceased on 28 December 2011. His counsel also put it to Ms. Swartz that his instructions were that the accused had sexual intercourse with the deceased the day before the incident, the

incident would only have taken place on the evening of 30 December or early 31 December 2011. So, there are many contradictions in the testimony of the accused. The accused testified that the deceased was his girlfriend, but had a secret relationship. He did not explain why it was secret. Martine Siwombe who used to sleep in the same room with the deceased did not know about the secret relationship. The accused did also not disclose that at the beginning of his trial. Counsel for the state correctly submitted that the issue of secret sexual relationship was an afterthought. The version of the accused that he had a secret sexual relationship with the deceased was an afterthought and I will reject it as false and cannot be reasonably possibly be true.

[64] There is/are no eye witness(es) and the court has to rely on circumstantial evidence. According to *R v Blom*², when relying on circumstantial evidence, two rules need to be considered: 'that the inference sought to be drawn must be consistent with all the proved facts. The proven facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'³ When each little piece of evidence, like that the accused was the last one to be seen with the deceased on 30 – 31 December 2011, that when the body of the deceased was found, the accused was nowhere to be found, that the safe had a cut in it and the money was missing, that blood was found on the floor of the room of the accused and on his uniform, that he was financially loaded on 31 December 2011, that he had a bite wound on his finger and marks on his neck, is put in its place every other reasonable inference is excluded leaving only the inference that the deceased was murdered and raped by the accused.

[65] The accused when he was arrested in the North indicated that he was prepared to point out the money that he brought along from Windhoek. The pointing out was ruled admissible as his rights were explained and he was not assaulted when he made the pointing out. He took the police officers to Okauva village where he pointed out the briefcase in which the money was found. He gave numbers to open the briefcase and

² *R v Blom* 1939 Ad 288.

³ *Ibid.*

when it was opened an amount of N\$18 000 was found in the briefcase. This money was clearly money that he stole from the safe of Mr. Siwombe because that night of the 30 December 2011 the money was counted and placed in the safe and when Martine returned the next morning that safe was cut half open and the money was missing. It was only him and the deceased who were left there and there is no doubt that he is the one who took the money.

The confession

[66] In the confession, the accused said: *'I went and collected a wire and strangled her on her neck with it but at that time she was not dead as she was breathing and I decided to rape her. After that, she then died. I proceeded to tie her hands and legs with an electrical cable. I further tied a cloth on her head. From there I proceeded to the safe and removed the money which was around N\$55 000 (Fifty five thousand Namibian dollars). I also took 3 Richelieu nippies of white horse, I also took some cellphone recharges and some cigarettes, I also took 2 cell phones and after that I then ran away.'*(my emphasis)

[67] The above quoted part of the confession, is an unequivocal admission of guilt of murder, rape and theft. Dr Kabanje testified that the deceased died of ligature strangulation and that corroborates the confession by the accused that he strangled the deceased.

[68] The evidence against the accused was overwhelming and in my respectful view, the state proved beyond a reasonable doubt that the accused committed the murder and rape of the deceased. On the charge of robbery with aggravating circumstances, I am not satisfied that the state proved the guilt of the accused. The accused confessed that he took the money, the alcohol, cellphone recharges and 2 cellphones after he murdered the deceased and no force was used when he took the money and the other properties therefore he can only be convicted of theft.

[69] In the result, the accused is found guilty of murder, rape in contravention of s 2 (1) (a) of the Combating of Rape Act, Act 8 of 2000 and theft.

G N NDAUENDAPO
Judge

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